EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Hartley**

Respondents: **HM Courts and Tribunal Service**

Heard at: **Bristol** **On: 14 November 2018**

Before: Employment Judge Maxwell

Representation
Claimant: in person
Respondent: Ms Williams, Counsel

JUDGMENT

1. The Tribunal has no jurisdiction to determine the claimant's non-dismissal discrimination claims and these are dismissed.

REASONS

Preliminary Issue

2. The hearing today was listed by order of REJ Pirani on 13 August 2018, to determine:

    2.1. whether it is just and equitable to extend time for the non-dismissal related complaints of direct race discrimination against the respondent.

Background

3. By a claim form received at the Tribunal on 7 July 2014, the claimant made claims of race discrimination and unfair dismissal against the respondent. With respect to discrimination, the claimant complained of:

   3.1. being excluded from meetings;

   3.2. not being promoted;

   3.3. not being supported in training;

   3.4. being dismissed.

4. The claimant's employment terminated on 28 February 2014 (the "EDT"). She contacted ACAS to commence early conciliation ("EC") on 8 May 2014 ("Day A") and received a certificate on 8 June 2014 ("Day B"). Accordingly, taking into account the extension provided by EC, her complaint about dismissal was in-time, having been presented within 3 months of the EDT.

5. When the claimant's claim was made, the Employment Tribunal fees regime operated. The claimant applied for and was refused fee-fee-remission. Her claim was then dismissed on 14 August 2018, following her non-payment of a £250 fee.

6. By a letter of 24 November 2017, the Tribunal wrote to the claimant advising that in light of the Supreme Court's decision in **R (on the Application of Unison) v Lord Chancellor [2017] UKSC 51** she might apply for her claim to be reinstated.

7. On or about 3 January 2018, the claimant responded to indicate she did wish to have her claim reinstated.

8. By a letter of 16 January 2018, the Tribunal wrote to the claimant thanking her for confirming that she wished to apply for her case to be reinstated, stating that her original claim form could not be found and asking her to complete a new one.

9. On 26 February 2018, the Tribunal received the claimant's reinstatement request and her new claim form, in which she named various additional individual respondents who had not been respondents to the original claim; a copy of which had subsequently been obtained.

10. A preliminary hearing for case management by telephone took place before REJ Pirani on 13 August 2018. In the course of this, the claimant agreed to withdraw her claims as against the new respondents and these were dismissed. The non-dismissal race discrimination claims were also clarified as direct discrimination, namely:

10.1. failing to promote her in April 2011 and November 2012, the perpetrator being Ms Louise Bull;

10.2. Being left out of staff meetings relating to health and safety training between 2012 and 2013, the perpetrator of being Mr Ian Haygarth;

10.3. Not being supported in training, not being given time to prepare, no feedback or adequate support, between 2011 and the end of 2013, the perpetrator being Mr Haygarth.

11. Given the non-dismissal complaints were, at latest, concerning matters in 2013, the claimant's claims in this regard were presented outside the 3-month time limit. Furthermore, the decision to dismiss the claimant was not made by either Ms Bull of Mr Haygarth, and as such there was no basis for a counting act. The question of jurisdiction, therefore, would depend upon whether it was just and equitable to extend time.

Facts

12. I heard evidence from:

12.1. Tracey Hartley, the claimant;

12.2. Hardip Sira, an employee within the respondent's Human Resources department:

13. I was provided with an agreed bundle of documents. During the course of giving evidence the claimant said she had additional documents to disclose and these were added before page 1, paginated a-f.

14. The claimant had been employed by the respondent as a Tribunal clerk, working in Social Security.

15. The claimant explained that she did not present a claim sooner because she did not want to "look bad" or be seen as a "trouble-maker" in her employment.

16. The claimant also referred to feeling "depressed", "isolated" and having a "breakdown. The claimant disclosed medical records, starting in January 2014 when she was referred by her GP for counselling. There were no medical records for the period prior to 2014 and no evidence that the claimant required to be absent from work in connection with a mental health problem. The claimant also said "I enjoyed my job" and "at the time it was my life". Her employment was terminated by the respondent dismissing her. I do not find that any health problem prevented the claimant from presenting an earlier claim about the non-dismissal matters.

17. Asked whether she had complained at the time to her employer about the matters she now wishes to pursue, the claimant's answers were somewhat unclear; although she appeared to say that she had done so in writing to Mr John Carline (a manager) and Ms Linda Payler (HR). Asked whether she had

copies of this and intended to disclose them, the claimant said she yes and today. The claimant retrieved correspondence form her folder and gave out copies [added to the bundle at a-f]. On reading the new documents, it was clear these did not refer to any of the matters she is now seeking to pursue as race discrimination, but instead concerned a warning she was given in 2011 for excessive mobile phone usage.

18. The claimant said she had kept copies of other correspondence with Mr Carlin about the non-dismissal matters, but had been unable to find this. The claimant could not explain her inability to produce this material, beyond offering that she had changed laptops. A change of laptops would not, however, obviously account for why C had copies of correspondence from late 2011 but not later correspondence, say in 2012 or 2013.

19. The mechanism for raising a grievance under the respondent's procedure was explained to the claimant by Ms Payler in response to the claimant's email about excessive mobile phone usage. The claimant did not take those steps, either in relation to the mobile phone usage or the matters she now wishes to pursue in the Tribunal.

20. Ms Sira gave evidence as to the enquiries she had made:

    20.1. Ms Caroline Dowler:

        20.1.1. attached emails where C was invited to health and safety meetings;

        20.1.2. said it was difficult to respond on training because of the lack of dates;

    20.2. Ms Bull:

        20.2.1. said she did not recall the claimant applying for a promotion in the period and would expect that any paperwork created had now been destroyed;

        20.2.2. said she had been able to find one email relating to a health and safety meeting on 8 October 2013;

    20.3. Mr Haygarth:

        20.3.1. said he had left the department and had no documentation;

        20.3.2. said he helped the claimant make applications for roles, which were successful;

    20.4. Ms Sharon Studholme / Mr David Pearce:

        20.4.1. had found minutes of health and safety meetings on 26 June 2013 and 22 September / October 2013.

Law

21. The relevant legal principles applying to the exercise of discretion, which may allow for claims presented under the **Equality Act 2010** ("EqA") outside the usual 3-month time limit, were set out in the order of REJ Pirani and are summarised below.

22. EqA section 123 provides:

> **(1) Subject to sections 140A and 104B proceedings on a complaint within section 120 may not be brought after the end of—**
>
> > **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> > **(b) such other period as the employment tribunal thinks just and equitable.**
> >
> > **[…]**
>
> **(3) For the purposes of this section—**
>
> > **(a) conduct extending over a period is to be treated as done at the end of the period;**
> > **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> > **(a) when P does an act inconsistent with doing it, or**
> > **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

23. An Employment Tribunal applying section 123 has a broad discretion and, pursuant to the decision in **British Coal Corporation v Keeble [1997] IRLR 336 EAT**, the factors relevant to its exercise may include those under section 33 of the **Limitation Act 1980**, in particular:

    23.1. the length of and reasons for the delay;

    23.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

    23.3. the extent to which the party sued had cooperated with any requests for information;

    23.4. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.

24. The balance of prejudice between the parties will always be an important factor.

25. There is, however, no presumption that time will be extended; see **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 343 CA**, per Auld LJ:

> **25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. […]**

26. Most recently, the Court of Appeal considered the exercise of this discretion in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, per Leggatt LJ:

> **18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72, para 75.**
>
> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).**

Discussion

Late Claims

27. The claimant's claim was presented on 7 July 2014. The non-dismissal claims she now seeks to pursue relate to events which occurred between 2011 and late 2013. The claimant does not give precise dates for these complaints, which must, therefore, range from being several months to several years late.

Reason

28. The claimant has failed to provide any good reason for her claims being late. The claimant said that she didn't want to look bad and didn't want to be a trouble-maker; such concerns will always be present whenever an employee considers bringing a Tribunal claim against their current employer and do not, generally, operate to excuse late claims. As set-out above, I have not found any health impediment to an in-time claim.

Prejudice

29. For the reasons set out below, the balance of prejudice weighs firmly against the respondent.

30. Because the claimant did not raise a grievance in connection with the non-dismissal matters, there was no opportunity for the respondent to investigate them at the time and record the product of such a process in writing.

31. Some relevant documents are likely to have been destroyed.

32. Memories (on both sides) are likely to have faded.

33. Given the vague nature of the claims pursued, lacking precise dates or other relevant detail, the respondent's potential witnesses have little with which to prompt or revive their recollection.

34. Whilst the claimant will be prejudiced if she is not allowed to pursue the non-dismissal claims, such prejudice will be limited:

    34.1. her claims in that regard may be difficult to prove:

        34.1.1. they are vague;

        34.1.2. some relevant documents are likely to have been destroyed;

        34.1.3. witness evidence (including that from the claimant) is likely to be adversely affected by fading memories);

    34.2. she will be able to pursue her unfair dismissal and direct race discrimination claim with respect to dismissal in any event;

    34.3. any significant financial award is likely to attach to the complaint about dismissal, rather than to earlier events.

Conclusion

35. For the reasons set out above, namely the absence of any good reason for the late claims and the prejudice to the respondent, it is not just and equitable to allow the claimant to pursue the late non-dismissal claims.

36. I have taken into account the delay in progressing the matter occasioned by the unlawful fees regime and the need for the claimant to apply to reinstate her claim, which will likely have adversely affected the availability of documentary evidence and the cogency of witness evidence. Whilst this was not the claimant's fault and ought not to be held against her, neither can it, fairly, operate against the respondent so as to override the difficulty it would now face in responding to these old claims.

37. I am reinforced in my conclusion by the consideration that, hypothetically, had the claimant's claim not been dismissed and a preliminary hearing taken place to determine jurisdiction in late 2014 or early 2015, the same conclusion, that it is not just and equitable to extend time, is likely to have been reached:

    37.1. the claims would still have been several months or several years late;

    37.2. the claimant would still have lacked a good reason for her late clams;

    37.3. the respondent would likely still have been prejudiced by the passage of time (albeit to a lesser extent) in circumstances where no grievance had been raised to cause a crystallisation of the relevant evidence.

38. The Tribunal has no jurisdiction to hear the non-dismissal discrimination claims and these are dismissed.

Case Management

39. A 1-hour telephone preliminary hearing for case management will be listed to address the future conduct of the claims relating to dismissal.

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Employment Judge Maxwell

Date: 14 November 2018