



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Dawson
Respondent: Archbishop Sentamu Academy
Heard at: Hull **On:** 5 June 2018
Before: Employment Judge Shulman

Representation

Claimant: In person
Respondent: Mr E Heppel, Solicitor

RESERVED JUDGMENT

1. The claims described at paragraph 6.3.1 this decision as the Disability Claims are in time.
2. The claims described at paragraphs 6.3.1 as the Religion or Belief Claims are out of time.
3. The claim described as the Unfair Dismissal Claim paragraph 6.3.1 is out of time.
4. The preliminary hearing is adjourned to 17 July 2018 at 10am at Hull Employment Tribunal to consider the issue of whether or not the Disability Claims or any of them should be struck out or be the subject of a deposit order.

REASONS

1. Introduction

- 1.1. This is a preliminary hearing to consider whether the complaints of the Claimant or any of them, were brought outside the applicable time limits and, if so, whether it would be, in the case of discrimination claims, be just and equitable to extend time and in the case of the

unfair dismissal claim, whether or not it was not reasonably practicable for that complaint to be presented in time, and if not, whether the complaints be extended for such further period or periods as the Tribunal considers reasonable.

1.2 There was also before this preliminary hearing questions relating to:

1.2.1 The religion or belief of the Claimant for the purposes of her bringing a claim on the grounds that she was discriminated against because of that religion or belief; and

1.2.2 Whether the Claims of the Claimant or any of them have no or little reasonable prospects of success.

1.3 The hearing of the claims referred to in paragraph 1.2 were adjourned to await the outcome of the questions referred to in paragraph 1.1.

2. The issues

The issues in this preliminary hearing are set out in paragraph 1.1 and additionally in relation to the discrimination claims whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures.

3. Claims

The claims are set out in the spreadsheet annexed to this decision.

4. The law

The Tribunal has to have regard to the following provisions of the law:

4.1. Discrimination claims

4.1.1. Section 123(1) Equality Act 2010 (EA)

“Subject to section ... 140B proceedings on a complaint within section 20 may not be brought after the end of –

(a) the period of three 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”

4.1.2. Section 123(3) EA “For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;”

The Tribunal has had regard to this section (and relevant case law relating to it), despite the fact that there was little argument on this section (section 123(3)) and the principle of continuity, but the Claimant mentions the principle in her written submissions on page 4, as does the Respondent on page 9 paragraph 23 of its written submissions and the Claimant gave limited evidence on the point.

4.1.3. The Tribunal will deal with the relevant case law in relation to the principle of continuity below, but first deals with the early

conciliation provisions. These are contained in section 140B EA. To paraphrase Day A is the day on which the Claimant provides information to ACAS and from which a conciliation officer endeavours to promote a settlement between the parties, with a view, if no settlement is reached, to the conciliation officer issuing a certificate to that effect. Day B is the date on which the Claimant receives that certificate. In working when the time limit set by section 123(1)(a) expires the period beginning with Day A and ending on Day B is not to be counted.

- 4.1.4. The Tribunal has also had regard to the principle in **Science Warehouse Limited v Mills** [2016] ICR 252 EAT (Mills), where a claimant seeks to add a claim by way of amendment to an existing claim it was decided that the claimant was not obliged to go through the early conciliation procedure with regard to the new claim. In that case it was held at section 18A Employment Tribunals Act 1996 (which contains the requirement to contact ACAS before instituting proceedings) shall be given a broad interpretation to avoid disputes and satellite litigation as to whether proper notification has been given to each and every possible claim subsequently made to a Tribunal.
- 4.1.5. Having regard to section 123(1)(b) EA the Tribunal has a discretion to allow out of time claims to proceed. **British Coal Corporation v Keeble & Others** [1997] IRLR 336 EAT (Keeble) permits tribunals to have regard to the personal injury checklist in section 33 Limitation Act 1980, but this does not constrain the discretion of the Tribunal to go outside the checklist. Relevant matters pursuant to Keeble may be:
- The length of and reasons for the delay;
 - The extent to which the cogency of the evidence is likely to be affected by the delay;
 - The extent to which the party sued has co-operated with any requests for information;
 - The promptness with which the plaintiff (in this case claimant) acted once he or she knew of the facts giving rise to the cause of action;
 - The steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
- 4.1.6. Returning now to the principle of continuity, the test applied in **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530 CA (Hendricks) was whether there was a continuing state of affairs – was it an act extending over a period or were there a succession of unconnected or isolated specific acts? In the former case time would begin to run from the date of the last act. In the latter case time would begin to run from the date of each specific act committed. This was clarified in **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548 CA (Lyfar) where the Court of Appeal said that tribunals must look

at the substance on the complaints in question and determine whether they can be said to be part of one continuing act.

4.2. Unfair dismissal claim

4.2.1. Section 111(2) Employment Rights Act (ERA) provides:

“Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the Tribunal –

- (a) before the end of the period of three months beginning with the effective date of termination, or
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months”.

The early conciliation provisions apply in a similar way to those that relate to discrimination (see section 111(2A) ERA and section 207B ERA).

4.2.2. In **Palmer and Another v Southend-on-Sea Borough Council** [1984] ICR 372 (Palmer) the Court of Appeal conducted a general review of the authorities on the meaning of “reasonably practicable” and concluded that it did not mean reasonable, which would be too favourable to employees, and did not mean physically possible, which would be too favourable to employers, but means something like “reasonably feasible”. As Lady Smith said in **Asda Stores Limited v Kauser** EAT 0165/07 “the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done”.

5. **Facts**

The Tribunal, having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities) but limited to issues of time:

- 5.1. The Claimant was employed as a teacher by the Respondent.
- 5.2. Apart from paragraph 5.1 these findings are fact are limited to time issues and they will be expressed in the order in which the Claimant, who was the only witness, gave her evidence.
- 5.3. From March 2016 the Claimant was aware that she had rights under the EA.
- 5.4. Until the Claimant made her claim, which was on 29 January 2018 (which followed an earlier unsuccessful attempt) she said she had never considered making a claim, as she hoped the Respondent would deal with matters, in particular her grievance, and she said that she would not have brought a claim had she not been dismissed, which she was on 31 August 2017.
- 5.5. In an email dated 30 November 2017 from the Claimant to Laura Robinson of the Respondent, the Claimant wrote “I have

received an Early Conciliation Certificate from ACAS which means I am now able to proceed to Employment Tribunal. In view of this I have sought legal advice ...” In a further email dated 8 December 2017 to Ms Robinson the Claimant followed a similar theme.

- 5.6. The Claimant told the Tribunal that she did not proceed because she was waiting for the outcome of her “Grievance” which was lodged in May 2017.
- 5.7. The Claimant told the Tribunal that she the Claimant discussed time issues with a solicitor and she was advised that the last date for her to issue proceedings was 14 January 2018, being three months from 31 August 2017 to 30 November 2017 plus the uncounted 45 days of conciliation. The Tribunal finds this calculation to be correct. The Claimant was aware of the time limits for both unfair dismissal and acts of discrimination.
- 5.8. The Claimant told the Tribunal that she submitted her claim (late) on 15 January 2018, but that the Tribunal rejected it, as the parties did not match those on the Early Conciliation Certificate and the Claimant amended her claim, which was accepted on 29 January 2018.
- 5.9. The Claimant says the reason the claim was late was because she had been very ill. She said she had the flu which started on 28 December 2017 and finished at the end of February/early March 2018, although she had gone back to work at the end of January 2018. She also said that she had slipped on the ice on 9 January 2018.
- 5.10. There was before the Tribunal an extract from the Claimant’s GP records. There were consultations with the GP on 9 and 12 January 2018 but there was no mention of flu. The first mention was of a viral illness on 14 February 2018 in which the Claimant complained she had been unwell with flu since well before Christmas, for which medication appears to have been administered on 14 February 2018.
- 5.11. The Claimant said she was in and out of bed during the period of her flu and she knew when she filed her claim, which was during that period, that she was out of time.
- 5.12. The Claimant told the Tribunal that she consulted with Gosschalks Solicitors for 30 minutes some time before October 2017 and then with another solicitor, who was her husband’s friend’s daughter, in mid-November 2017, who reiterated the advice she had been given by Gosschalks. The Claimant believed she had not been given wrong advice on either occasion. The Claimant also said she was receiving ongoing advice from a solicitor.
- 5.13. In an email dated 5 January 2018 to Ms Robinson the Claimant acknowledged the outcome of her Grievance, which she received on or about 20 December 2017 by email. The Claimant said that she had taken legal advice in this email, would not be appealing and that she had set the wheels in motion to take her case forward to the Employment Tribunal.
- 5.14. The Claimant accepted that she had no explanation for not taking action on the claims which pre-dated 2016.

5.15. The Claimant said that all the claims (by which the Tribunal finds she meant discrimination claims) were connected because they constituted an ongoing process by the Respondent to procure the resignation of the Claimant, following the promotion of the vice-principal and the English teacher, the result being that anyone associated with the ex-wife of the vice-principal, including the Claimant, were marked out to leave. This was in summer 2014.

6. Determination of the issues (after listening to and reading the factual and legal submissions by and on behalf of the respective parties):

6.1. All the Claims, save the one relating to the delay in resolving the Grievance (December 2017) are out of time.

6.2. Even though that Claim (December 2017) was not covered by the early conciliation process, the Tribunal hereby admits the Claim because of the principle in Mills (see paragraph 4.1.4).

6.3. To consider whether to extend time the Tribunal is of the view that the Claims should be divided into three:

6.3.1. All the Claims of failure to make reasonable adjustments, discrimination arising from disability and direct discrimination – disability (the Disability Claims);

6.3.2. Direct discrimination – religion or belief and harassment - religion or belief (the Religion or Belief Claims), and

6.3.3. Unfair dismissal (the Unfair Dismissal Claim).

6.4. The Disability Claims

6.4.1. The December 2017 Claim, being in time, the question is whether the Disability Claims are covered by the continuity principle as expounded in Hendricks and clarified in Lyfar and, if they are will they all be in time, so the need to consider extending time on the just and equitable principal will not arise?

6.4.2. Were the Disability Claims a continuing state of affairs from what was an act extending over a period or were there a succession of unconnected or isolated specific acts? Looking at the substance of the Disability Claims, they all seem to be part of a continuing theme, that is the alleged treatment of the Claimant, in some way connected to her disability and in the circumstances, having regard to the principle in Hendricks, as clarified by Lyfar, the Tribunal finds that the Disability Claims constitute a continuing state of affairs and as the December 2017 Claim is in time all the Disability Claims are in time and are therefore admitted.

6.5. The Religion or Belief Claims

6.5.1. These cases are out of time. The Tribunal finds that the one is not connected to the other and neither are connected to the Disability Claims (applying Hendricks and Lyfar) and the Tribunal has to consider whether or not to extend time.

6.5.2. Here the Tribunal has a discretion but finds it useful to consider the checklist in Keeble:

- The delay in the Harassment Claim was long and the Dismissal Claim relatively short.
- The cogency of the evidence is unlikely to be affected by the delay, assuming all witnesses are still available.
- There was no evidence called of a lack of co-operation with any request for information by the Claimant to the Respondent.
- As to the Claimant's promptness of acting, once she knew of the facts giving rise to the cause of action there is no evidence at all as to why the Claimant did not act promptly on the Harassment Claim, which was well before the Grievance being lodged and in any case was unconnected to the Grievance. In relation to the Dismissal Claim, whilst it is clear that the Claimant was unwell in January 2018, there is plenty of evidence that she was pursuing her claim and on her own admission was in and out of bed and it is clear that she knew the facts giving rise to her Claims.
- The Claimant took steps to obtain legal advice well in advance of the cut off date for the Dismissal Claim and knew her EA rights in advance of the Harassment Claim.

6.5.3. In all the circumstances the Tribunal decides that it would not be just and equitable to extend time in respect of the Religion or Belief Claims and those claims are hereby dismissed.

6.6. The Unfair Dismissal Claim

6.6.1. This is a stand alone Claim and is out of time.

6.6.2. Was it reasonably feasible for the Claimant to make her claim in time as per Palmer? Was it reasonable to expect on the facts that which was possible to be done?

6.6.3. For the reasons given in bullets four and five of paragraph 6.5.2 the Tribunal decides that it would have been reasonably practicable for the Claimant to issue the Unfair Dismissal Claim in time. Despite her illness, because of her knowledge and the advice she had received, it would have been reasonably feasible for her to make her claim in time and it was reasonable on the facts to expect that it was possible for her to issue her claim in time.

6.6.4. In all the circumstances the Unfair Dismissal Claim is hereby dismissed.

Employment Judge Shulman

Date: 22/07/2018

