



THE EMPLOYMENT TRIBUNALS

Claimant : Miss J. Sakyi-Opare

Respondent: The Albert Kennedy Trust

Held at : London Central

On: : 1 March 2019

Before: Employment Judge Sharma

Appearances:

For the Claimant: Mr R. Kiska, of Counsel

For the Respondent: Ms B. Omotosho, Qualified Lawyer

JUDGMENT

The Claimant's claim was lodged out of time and it is not just and equitable to extend time. The Tribunal therefore has no jurisdiction to hear this claim. This claim is therefore dismissed.

REASONS

A: THE CLAIM

1. By issue of an ET1 claim form received by this Tribunal on 5th October 2018, the Claimant, a social work student, who was on a work placement from Brunel University (the "University") with the Respondent, brought a claim for :-

- (a) Harassment on the grounds of religion; and
- (b) Discrimination on the grounds of religion.

2. The purpose of this Open Preliminary Hearing (the “Hearing”) was to determine whether the claim was lodged out of time and if so, to consider whether an extension of time should be granted to validate it on the basis that it was just and equitable to do so.

3. At the Hearing, Mr Kiska, representing the Claimant, made an application to amend the Claimant’s particulars of claim to include details of events which took place on 15 January 2019 and 22 January 2019 by the University but involving the Respondent. The Claimant sought to rely on these events as continuing harassment by the Respondent.

4. Ms. Omotosho, representing the Respondent, made an application for a deposit order.

5. At the Hearing and in coming to my decision , I took account of the documents presented to me, namely the ET1, ET3, the written witness statement of the Claimant and her oral evidence given at the Hearing under oath, the summary of the meeting of 22nd January 2019, the Amended Particulars of Claim, the Respondent’s email of 24 May 2018 the Claimant response of that same date and the oral and written submissions of Mr Kiska and Ms Omotosho.

B: FINDINGS OF FACT

6. The Claimant was required to work for a period of 100 days with the Respondent. The Claimant explained (para 2, ET 1) that the placement was crucially important to her course at the University. A successful completion of a 100 day work placement was necessary for her to be able to qualify as a social worker.

7. The work placement commenced on 11 October 2017. The Claimant worked a period of approximately 62 days before her placement was terminated on 18 April 2018.

8. The Respondent is a well-known “LGBT youth homelessness charity.” The Claimant, in her ET1, (para 4) described herself as a Christian.

9. The University had the “power to afford access” to the Claimant’s work placement and did so through the Respondent (with the assistance of a practice educator Rebecca Walker), who has now left the Respondent’s employment.

10. The reason why the Claimant's placement was terminated on 18 April 2018 was due to the Claimant's practice educator leaving. In the Claimant's ET 1 (para 16), the Claimant stated that the placement terminated for "unrelated reasons". The Claimant went on to state that at this stage, the Respondent indicated that they were happy for the Claimant to resume the placement when a new practice educator had been found.

11. In her ET1, (para 5) and at the hearing when giving evidence, the Claimant stated that throughout her placement, there were numerous occasions when the office had had conversations about Jesus, the Bible and Christianity, never initiated by her. She stated that her faith was denigrated and ridiculed during those conversations. She stated that she found those conversations extremely uncomfortable and offensive.

12. The Claimant stated (ET1, para 6) that she was the only Christian and the only black person in the office. This point was not accepted by the Respondent in relation to both grounds of faith and ethnicity in that, the Respondent stated (ET3) that a few members of staff named in the claim identified as being black and others as Christians.

13. The Claimant described an incident which took place on 5 April 2018 which related to a conversation between the Respondent's staff, namely Leigh, Nathan and Helen, who were discussing the subject of "Christians saying homosexuals are going to hell." The precise nature of what was said during this conversation in the presence of Claimant was disputed between the parties. The Claimant stated (ET1, para 13) that as the only Christian in the office, she was offended and uncomfortable with the conversation. It was the Respondent's position (ET3) that the comment made by Helen was taken out of context and that in her ET1 and in her description of this event, the Claimant had not referred to her comment in relation to "all sin being equal and mentioned rape and murder."

14. On 9 April 2018, Leigh had a meeting with the Claimant informing her that she had offended someone. The Claimant stated (para 15, ET1) that the Respondent had informed the University. In Leigh's version of what took place on 9th April 2018 (ET3), he stated that he had reminded the Claimant of the Respondent's code of conduct. He spoke to the Claimant about her comments regarding homosexuality as a sin and how these comments were unacceptable in the workplace and against the Respondent's code of conduct. According to Leigh, the Claimant was apologetic and said that she did not mean to cause offence.

15. The Respondent stated (ET3) that it did not inform the University at this point.

16. On 9th April 2018, the Claimant sent an email to the Respondent stating how anxious and upset she was. Leigh described in the ET3 that there was a conflict as to what was required of the daily logs as opposed to the formal pro forma reflective diaries, an ongoing contention, with the Claimant's practice educator. Leigh also stated that in this email, the Claimant commented upon how she very much enjoyed the placement. She felt very much part of the team and was getting on with all its members and enjoyed the work.

17. In the Respondent's ET 3, the Respondent stated how the Claimant was struggling with the placement due to her not completing work on time or to a sufficiently good standard. There were also issues in relation to sickness leave and lateness which did not comply with the Respondent's policies.

18. The Respondent stated (ET3) that a decision had been made to withdraw from practice educating the Claimant, which was not related to the comments made by the Claimant on 5th April 2018 but when considering these remarks with other subsequent remarks made by the Claimant regarding trans people, the Respondent decided that with the lack of progress being made by the Claimant combined with her inability to act professionally as expected of a social work student, it was no longer appropriate for her to remain on placement with the Respondent.

19. On 12 April 2018, a concerns meeting had been arranged between the University, the Claimant's practice educator and her placement supervisor. It was the Respondent's position that since the Claimant's midway meeting on 29th March 2018, the Claimant had not managed at several points on a midway action plan and had a breakdown with her practice educator.

20. Leigh described (ET3) how Ms Finch, the professional educator for the University met him after the meeting stating that the University had concerns. Leigh followed this conversation with a meeting stating that the Respondent were committed to seeing the Claimant's placement through. The University felt, however, that it needed to be explored further due to social work codes of practice.

21. On 13th April 2018, Leigh (ET3) received an email from Ms Finch suggesting professional suitability proceedings and requested statements from the Leigh's team.

22. On 24 May 2018, the Respondent wrote to the Claimant stating that her work placement could not continue. In her ET1 (para 17), when referring to this letter,

the Claimant stated that the Respondent had made a complaint to the University questioning her professional suitability.

23. In the Respondent's email of 24 May 2018 which I reviewed, the Respondent referred to the incident of 5th April 2018 and how on 9 April 2018, the Respondent's code of conduct was discussed with the Claimant. The Respondent explained in this e-mail how initially, it was happy to give a warning about her conduct, making it clear that a repeat breach of the code of conduct would mean that the Respondent would have to terminate the placement.

24. The Respondent described how the University had asked Leigh to file a report of the incident of 5th April 2018. This report was sent to the Claimant with the email of 24 May 2018 "for transparency". In the email, Leigh referred to a further incident which took place on 13 April 2018, where the Claimant had allegedly made comments in relation to somebody's gender confirmation surgery. Leigh's email continued as follows: -

"On multiple occasions you have misgendered or used incorrect pronouns whilst working with our young people, we have been patient with you and been supportive in correcting you when this happens. However given your comment on 13th April I have very serious concerns about your ability to safely work around Trans young people. "

Leigh concluded that therefore the Respondent could not allow the Claimant's work placement to continue.

25. The Claimant responded to this email less than 40 minutes later as follows. The contents of this email are worthy of setting out in full: –

"Once again I am deeply sorry for any hurt I have caused you all. I have learnt so much at my time at AKT. My heart aches as I truly care.

Please keep working hard. Seeing the young people smile after they have been listened to and supported is priceless. Please thank everyone for me, including the young people who shared the life story with me. Wishing you all the best for the future. "

26. The University's professional support proceedings are still ongoing. When giving evidence at the Hearing and also in her ET1 (para 21), the Claimant explained that the reason why she had not presented her claim earlier was because she was hoping that the issues would be resolved amicably by the University through the professional support proceedings. She was hoping to be promptly

vindicated by the University. When she realised that this was not going to happen, she then filed the claim.

27. The ACAS conciliation took place on 4 October 2018. The Claimant's ET1 was submitted on 5 October 2018.

28. If time is to be calculated from the alleged last discriminatory act which the Claimant sought to rely upon (5 April 2018), then the last date for presenting the ET1 (without conciliation having been triggered) would have been 4 July 2018. This would mean that the ET1 had been submitted 13 weeks and 1 day out of time. If time is to be calculated from the date of the Claimant's termination of her placement, namely on 24 May 2018, then the last date for presenting the ET1 (without conciliation having been triggered) would be 23 August 2018. This would mean that the ET1 had been submitted 6 weeks and 1 day out of time.

29. At the Hearing, during cross examination, the Claimant stated that she was aware of the three month time frame for presenting a claim and that she was aware of ACAS.

30. At the Hearing, the Claimant stated that she had taken legal advice in July 2018.

31. I make the following findings, in my consideration of whether or not it is just and equitable to extend time, bearing in mind the Section 33 Limitation Act 1980 checklist (as modified by the EAT in **British Coal v Keeble (1997 IRLR 336, EAT)**): –

31.1: Regard to all the circumstances of the case: Merits of the Case. In my consideration of having regard to all the circumstances of the case, I considered the merits of this case based upon all the evidence presented to me at the Hearing.

31.1.1 In giving evidence at the Hearing, the Claimant stated that the professional suitability proceedings conducted by the University were not going her way. The University were not convinced that she was suitable to continue with the course. I find that on a balance of probability, the reason for commencing legal action against the Respondent was because of the University's professional suitability proceedings, which were not, as the Claimant admitted, going her way. I make this finding based upon the Claimant's email response of 24 May 2018 when she was informed that her placement would be terminated. She apologised for the hurt that she had caused everybody. In relation to her claims against the Respondent of it

allegedly harassing her and discriminating against her , it is difficult to understand why she did not refer to these in her e-mail of 24 May 2018.

In response to the Respondent's e-mail of 24 May 2018 where the Respondent (a) referred to its code of conduct required her to treat everyone she met with respect and in a manner that protected their dignity, values diversity and to promote inclusion (b) stated that she had made a trans-phobic comment which had breached the Respondent's code of conduct, the Claimant apologised for all the hurt she had caused. This response was not, on a balance of probability, consistent with somebody who had experienced harassment and discrimination.

The apology which the Claimant made in her email of 24 May 2018 was reflective of the apology which Leigh stated she had made at the meeting of 9 April 2018, when he spoke to her about her comments regarding homosexuality as a sin. The claimant's email of 24 May 2018 was also reflective of the email of 9th April to which Leigh referred to in the ET 3 where he stated that the Claimant was enjoying her placement and felt part of the team.

31.1.2 Regard to all the circumstances of the case: Continuous Act

It was the Claimant's position (ET1, para 17) that the Respondent had made a complaint to the University questioning the Claimant's professional suitability. Leigh, Nathan and Helen provided statements to substantiate that complaint. It was the Claimant's position that in such statements, the Respondent misrepresented the incidents to portray the Claimant as unprofessional and prejudiced against LGBT people. It is these complaints (ET1, para 19) that resulted in the professional suitability proceedings being carried out by the University. Thus, it was the Claimant's position that the professional suitability proceedings conducted by the University were a continuing act of the alleged discrimination and harassment carried out by the Respondent

I find that the professional suitability proceedings carried out by the University were separate and different to any alleged harassment and discrimination by the Respondent (which in any event, I find, based upon the evidence before me, to be unfounded, on a balance of probabilities) .

I find that in relation to the incident of 5 April 2018, the Respondent did not inform the University of this. After the concerns meeting of 12th April 2018, Miss Finch of the University approached Leigh expressing the University's concerns. Even at that point, the Respondent stated its commitment to seeing the Claimant's placement

through. It was the University itself that had decided to commence professional suitability proceedings.

Thus, the University's professional suitability proceedings were not, in my view, acts which could be described as continuing acts of the Respondent. The Respondent cooperated with the University when requested to do so by providing statements at the University's request (e.g the email of 24 May 2018 from the Respondent to the Claimant stated that "Your University asked me to file a report of the incident that took place on 5th April").

The University was taking its own action against the Claimant. I find that whilst the professional suitability proceedings were being conducted by the University, there was nothing to stop the Claimant bringing an action against the Respondent for the alleged acts of discrimination and harassment. The Claimant alleged that the Respondent had carried out acts of discrimination and harassment yet she took no action against the Respondent until 4 October 2018.

Therefore, I find that based upon the merits of the Claimant's case and my finding that the University's action did not comprise a continuous act of the Respondent's, it is not just and equitable to extend time on this basis.

It is not in my view just and equitable to put the Respondent to the trouble of defending a claim, the merits of which I believe to be weak, based upon the information which has been presented to me at the Hearing.

31.2: Length and Reason for the delay

If the 3 month statutory period set out in section 123 (1) (a), Equality Act 2010 is calculated from the last alleged discriminatory act (5 April 2018), then there has been a delay of 13 weeks and 1 day. If the 3 month statutory period is calculated from the date when the Claimant was informed that the placement would not be renewed (24th May 2018), then there has been a delay of 6 weeks and 1 day. Both periods of delay are significant.

Both in giving evidence at the Hearing and in her ET1 (para 21), the reason given by the Claimant for the delay was because the professional suitability proceedings by the University were ongoing. Bearing in mind that the Claimant had confirmed in giving evidence at the Hearing that she was aware both of the 3 month statutory time period and of ACAS, I find that the reason for the delay and its length was such that it would not be just and equitable to extend time in this case. It was difficult to understand how the Claimant believed that professional suitability

proceedings conducted by the University would resolve incidents of harassment and discrimination, which she alleged had been carried out by the Respondent.

31.3 The prejudice each party will suffer as a result of my decision not to extend time

As explained by the Claimant (ET1 para 2), the work placement is crucially important for her course at the University. A successful completion of a 100 day work placement is necessary for her ability to qualify as a social worker. I accept that the Claimant will suffer serious prejudice by not having a work placement.

By me extending time, however, cannot affect the University's professional suitability proceedings where they are assessing their concerns based on the social work code of practice. The University's professional suitability proceedings are outside the Respondent's control and not related to the claims made by the Claimant against the Respondent. I find that the Claimant is directing her complaint towards the Respondent having failed to convince the University that she is suitable to continue with her course.

The Respondent, on the other hand, will suffer severe prejudice. One of the Respondent's key witnesses, the Claimant's former practice educator, Rebecca Walker, has now left the employment of the Respondent. She will be a key witness and the Respondent will be prejudiced in its inability to obtain a statement from Ms Walker.

The Respondent will further suffer prejudice due to the passage of time. As is clear from both the ET1 and the ET3, the Claimant did not raise the allegations at the time she alleged they occurred. The Respondent did not, therefore, investigate such matters at the time. The Respondent would have to investigate such matters which took place more than one year ago. This is prejudicial to the Respondent and will affect the cogency of the evidence.

For this reason it is not just and equitable to extend time.

31.4: Steps taken by the Claimant to take legal advice

At the Hearing, the Claimant stated that she took legal advice in July 2018. She thereafter submitted her ET1. In cross-examination, the Claimant stated that she was aware of the statutory 3 month time limit and also that she knew about ACAS.

On the basis that she was aware of the 3 month statutory time limit, yet still issued her ET 1 outside the requisite statutory period, it is not just and equitable to extend time.

C: SUBMISSIONS

32. Ms Omotosho's submissions on behalf of the Respondent

I summarise some (but not all) of Ms Omotosho's key submissions made on behalf of the Respondent :-

32.1 This case is distinguishable from the case of **Blackwood vs Birmingham and Solihull Mental Health NHS Foundation Trust [2006] EWCA Civ 607,CA;** the student in the Blackwood case was able to bring a claim for which the tribunal had jurisdiction under Section 55, Equality Act 2010.

The issue before the Court of Appeal in Blackwood was whether the Tribunal had jurisdiction to entertain the claim or whether the claimant should have proceeded in the County Court depended on whether the claim fell under Part 5 of the Equality Act 2010, which is concerned with discrimination at work or under Part 6, which is concerned with discrimination in education. The Court of Appeal held that if the claim is about access then it can only be brought under Part 6, Section 91, Equality Act 2010 which involves proceedings in the County Court. The primary claim will be against the education provider, who had the responsibility for the provision of access.

If the claim is about discrimination by the provider in the course of the work placement, the provider will typically have done the act complained of as a principal and will thus be primarily liable for that discrimination under Section 55 ,Equality Act 2010 with the forum for any proceedings being the employment tribunal.

Ms Omotosho distinguished between Blackwood which related to the termination of the placement. In this case, the Claimant had indicated that her placement terminated for unconnected reasons. Therefore, Ms Omotosho submitted that "none of the Claimant's allegations fell under the points provided by statute and on this basis , the Tribunal does not have jurisdiction to deal with the matter."

I did not accept this submission. This case was about alleged discrimination occurring during the placement by the Respondent and not about discriminatory access to a work placement. Therefore, Section 55 Equality Act 2010 was engaged.

Had I extended time on the basis that it was just and equitable to do so, then the correct forum for this claim would have been the employment tribunal.

32.2 Continuing Act

In relation to whether the various matters were linked so as to be continuing acts to constitute an ongoing state of affairs, Ms Omotosho submitted that the Claimant had failed to establish this. The professional suitability proceedings are being carried out by the University and to suggest that this is a continuation of harassment by the Respondent is, Ms Omotosho submitted “nothing short of perverse.” Ms Omotosho referred to the case of **Hale vs Brighton and Sussex University Hospital NHS Trust [2017] 12 WLUK 215** where it was held that a disciplinary process created a state of affairs that continued until the conclusion of the disciplinary process. Ms Omotosho submitted that it was incorrect to suggest that issues arising from the professional suitability proceedings in relation to a student’s work place is similar to the ongoing effects of a disciplinary procedure in the work place.

I accept that the alleged acts of harassment referred to in the Claimant ET1 and the Respondent providing feedback to the University at the University’s request for the purposes of the University’s professional suitability proceedings was not an ongoing harassment.

33. Mr Kiska’s submissions on behalf of the Claimant

I summarise some (but not all) Mr Kiska’s submissions made on behalf of the Claimant

33.1: Continuing Act

Mr Kiska submitted that by analogy with disciplinary proceedings at the workplace, the Respondent’s complaint to the University and the ensuing professional suitability proceedings are parts of the same continuing act of an ongoing state of affairs which continues to this day. The campaign of harassment during the placement and malicious complaints triggering professional suitability proceedings are also part of the same continuing act.

I do not accept this submission. The University’s professional suitability proceedings commenced independently from the Respondent but the Respondent was asked to provide statements. I do not accept that these are so closely interlinked as to be part of the same continuing act. .

D: THE LAW

34 . The onus is always on the Claimant to convince the Tribunal that it is just and equitable to extend time. Ms Omotosho reminded me of the principle and I have

reminded myself that “the exercise of discretion is the exception rather than the rule”: **Robertson v Bexley Community Centre: [2003] IRLR 34.**

S55 (1), Equality Act 2010: A person (“employment service –provider”) concerned with the provision of an employment service must not discriminate against a person.

Section 56 (2), Equality Act 2010: The provision of an employment service includes (a) the provision of vocational training.

Section 56 (6) Equality Act 2010: “Vocational training” means (a) training for employment.

S123 (1) Equality Act 2010: Proceedings on a complaint within section 120 may not be brought after the end of: –

- (a) the period of three months starting with the date of the act which the complaint relates ;or
- (b) such other period as the employment tribunal thinks just and equitable.

E: CONCLUSIONS

The applications presented by both the Claimant and the Respondent were denied.

Bearing in mind the consequences to the Claimant as a result of my decision, namely not being able to pursue her claim, my decision to not extend time was given after very careful deliberation.

The Claimant gave no reason for not presenting her claim in time against the Respondent. The professional suitability proceedings were carried out by a separate organisation to the Respondent, namely the University. The two are separate entities.

Claims under the Equality Act 2010 are to be presented promptly. The Claimant and/or those representing her did not do so.

For the reasons I have set out above, I determined that the Claimant has not shown that it is just and equitable to extend time.

Employment Judge Sharma

Date 6 March 2019

Sent to the Parties On

18 March 2019

For the Secretary of the Tribunals