Case: 1811370/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mrs V Cairns**
Respondents: **(1) Oasis Community Learning Limited**
(2) Mark Wrangles

AT A PRELIMINARY HEARING

Heard at: **Leeds** **On: 2ND April 2019**
Before: **Employment Judge Lancaster**

Representation
Claimant: In person, assisted by her brother Mr R Dero
Respondents: Mr T Wood, counsel

JUDGMENT

1. The Claim was presented out of time, it is not just and equitable to extend time and it is struck out.

WRITTEN REASONS

1. An oral decision was given immediately upon the conclusion of the case but written reasons are provided at the request of the Claimant.

2. Following the judgment of Employment Judge Bright on 6th March 2019 the only remaining claim in this case is one of post-employment victimisation. Employment Judge Bright further directed that there should be this preliminary hearing to determined whether that complaint was brought in time and if not whether it would be just and equitable to extend time: **section 1123 (1) Equality Act 2010** *"Proceedings on a complaint under 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. The act to which this complaint relates is the provision by the Second Respondent of a reference dated 20th April 2018. Mr Wrangles is the Assistant Principal of one of the First Respondent's schools, The Oasis Academy at Lister Park in Bradford where the Claimant used to teach.

4. The relevant act is not the disclosure to the Claimant of her personnel file, pursuant to a subject access request, and which took place on 8th September 2018. That is not the date when time began to run in this case. Rather, as was clarified in discussion with the Claimant at the start of this hearing, it is put forward as the date when she, having now appreciated the extent of the "mismatch" between the information that the First

Respondent held, or ought to have held about her and the content of Mr Wrangles' "bad" reference, decided to prosecute her complaint. It is therefore part of her argument that it would be just and equitable to extend time.

5. The 3 month time limit from the date of the act complained of expired therefore on 19th July 2018.

6. Because the Claimant did not commence ACAS Early Conciliation in respect of the Respondents until 14th and 19th September 2018 respectively there is no automatic extension of the limitation period by reason of the clock having stopped whilst ACAS sought to conciliate. Time had already run out. The Claimant would have needed to contact ACAS by no later than 19th July 2018, within the primary 3 month period, in order to avail herself of these provisions: **section 140B Equality Act 2010**

7. The Claim Form (ET1) was presented on 30th November 2018. It is therefore 19 weeks and 1 day out of time, over 4 months late That means, given that the ordinary time limit is 3 months, that the Claimant took more than twice as long as she should have done to present her claim.

8. The only issue to be decided at this hearing is, therefore, whether I should exercise my discretion to allow the claim to continue on the grounds that it would be just and equitable to do so.

9. There is no presumption that I should exercise this discretion in favour of the Claimant. It is up to her to convince the Tribunal that it is just and equitable to extend time: **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434**

10. I remind myself, in accordance with the decision in **British Coal v Keeble [1997] IRLR 336,** of the factors to be taken into consideration under **section 33 of the Limitation Act 1980.**

11. Mr Wrangles was approached for a reference on the Claimant's behalf by Mr Daley Hebberd the divisional director of Master Class Education, an agency which had put the Claimant forward for interview at Beckfoot Thornton Academy. The Claimant had given Mr Wrangles name to Mr Hebberd as a possible contact at her former employer to help provide a reference.

12. Although it is right to observe that previous communications from Mr Hebberd, and indeed from a previous agency with which the Claimant had registered, had not secured any response, there is no suggestion that in putting Mr Wrangles' name forward at this stage the Claimant gave any indication whatsoever that she, in fact, would have considered him an inappropriate person to supply a reference. As I understand it Mr Wrangles was not himself the subject of any complaint within the earlier set of proceedings, he was certainly not a named Respondent, but was cited as an actual comparator in the discrimination complaints. It was because her was not involved in the Claimant's complaints at that time that he was assigned to manage her sickness absence, rather than her then line-manager. It seems clear however that he had knowledge at least of the fact the Claimant had brought a Tribunal claim. However these matters are not directly relevant to the issues for determination today and I do not make any actual findings.

13. The reference that was supplied almost immediately was in the format provided by Beckfoot Thornton Academy. I have not seen the reference. I am aware however that the Claimant takes exception to a large number of the answers to questions that are provided by Mr Wrangles. In particular she objects to his having ticked the box to say that he would not re-employ the Claimant.

14. It is that unfavourable reference which is said to constitutes the detrimental treatment for the purpose of the claim under **section 27 Equality Act 2010.**

15. That reference was forwarded by Mr Hebberd to the Claimant when he received it from Mr Wrangles, which was on 20th April 2010. It was then, of course, forwarded to the prospective employer (though the Claimant had in fact already been interviewed and had started work at Beckfoot Thornton Academy from 12th March 2018 – which was before Mr Wrangles was in fact first approached for a reference, which was on 18th April 2018). It is not known precisely when the reference was sent on to Beckfoot Thornton Academy, it was certainly confirmed to the Claimant in the later part of June 2018 that it had been. However, the Claimant had already been informed on 26th May 2018 that her post at Beckfoot Thornton Academy was only a temporary position and not the more senior permanent post for which she had originally applied and been interviewed and which she had been offered subject to the taking up of references.

16. From 20th April 2018, or very shortly thereafter, the Claimant was therefore fully aware of the content of the reference provided for her. She was also, as from 26th May 2018, aware of the potential professional and financial disadvantage that she had suffered as a consequence of the way that reference was phrased. It was not necessary for the Claimant to await the outcome of her later subject access request to establish the material facts. As from April or May she had all the necessary information to establish a potential claim to the Tribunal, and she knew that the date of the detrimental act complained of was 20th April 2018.

17. On 19th June the Claimant wrote to the First Respondent stating in the clearest terms that she saw the reference provided as a “detriment” and that she was prepared to pursue an Employment Tribunal claim for “victimisation”. Even though the Claimant did not in fact then commence “legal action” after 2 weeks as she had threatened to do, I cannot believe her evidence that she was not in fact even contemplating the bringing of Tribunal proceedings at this point, but that all she was interested in was the obtaining of full time, permanent employment. Whilst I accept that her employment status was her primary concern at this time, to suggest that she was not even thinking about a possible tribunal claim is to fly in the face of the very clear language in her email.

18. The Claimant had, of course, previously brought Tribunal proceedings against the First Respondent and others, under claim number 1801211/2015. The bringing of that claim is, in fact, the protected act relied upon in this victimisation complaint – it, of course matters not that all those claims were in fact dismissed after a final hearing in June 2016. That earlier claim had also included complaints of victimisation under the Equality Act. The Claimant was therefore perfectly well aware, as she had indicated in her19th June email, that the Employment Tribunal was the appropriate forum in which to bring a claim of this nature. The Claimant by reason of her previous experience was also therefore familiar with the Employment Tribunal procedures. She certainly will

have known that she would have had to obtain an ACAS Early Conciliation certificate before presenting any claim.

19. I also observe from even a cursory perusal of the judgments in case 1801211/2015 – which have now been provided to me by the Tribunal staff in the course of my deliberations in this case - that the issue of time limits had also arisen in that case. I am satisfied therefore that the Claimant was perfectly aware of the ordinary 3 month time limit that applies in Employment Tribunal cases. At the very least she will have been on notice that she ought to have checked the relevant time limits at the earliest opportunity, if there was any doubt in her mind as to how they in fact applied.

20. On 19th July 2018 the Claimant, writing to Mr John Airnes of the First Respondent, reiterated that she was complaining about the alleged inaccuracy of the reference (which she attached to the email) , and that she was "feeling victimised".

21. On 3rd August 2018 the Claimant contacted the Information Commissioner's Office with respect to the allegedly inaccurate reference.

22. On 9th August 2018 the Claimant in a further email to Mr Airnes repeated her complaints about Mr Wrangles' "conflict of interest" and his "writing an inaccurate reference". She then requested a copy of her personnel file, which was provided on 8th September 2018.

23. ACAS Early Conciliation was from 14th September to 14th October and 19th September to 19th October 2018. The claim was not presented until 6 weeks or more later.

24. From these facts I conclude that the Claimant was always well aware of the factual and legal basis for her potential claim, that she was aware that strict time limits applied to Employment Tribunal proceedings, that she was at all times capable of pursuing her complaints as she did both privately and through the external ICO, and that she would have had reasonable access to sources of advice (in particular ACAS) had she chosen to avail herself of it. Nonetheless she did not act promptly in presenting her claim.

25. Whilst I accept that there is no obvious impediment to a fair trial by reason of the lapse of time and the possible effect upon the memories of witnesses, as I have observed, a 4 month delay in the context of Tribunal proceedings is not insignificant.

26. I find that the Claimant both could and should have presented her claim earlier and in time. She has not therefore persuaded me that it would be just and equitable to allow this claim to proceed. The prejudice which now ensues to the Claimant in not being able to pursue her potential claim is entirely as a result of her own inaction. It is therefore, in my view, outweighed by the prejudice that would be caused to the Respondents if they had to defend a claim to which they have perfectly properly raised a jurisdictional bar.

EMPLOYMENT JUDGE LANCASTER

DATE 2nd April 2019

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