



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Foster

Respondent: Cumbria County Council

Heard at: Carlisle

On: 26 March, 2019

Before: Employment Judge Nicol

Representation

Claimant: appeared in person

Respondent: Miss R Wedderspoon, Counsel

JUDGMENT

After hearing the parties, the judgment of the Tribunal is that the claimant's complaints should be dismissed in their entirety on the basis that

- 1 they have been the subject of previous litigation in which a final decision was reached to dismiss them on withdrawal by the claimant and/or
- 2 the presentation of the complaints is an abuse of process and/or
- 3 the complaints were presented outside the prescribed time limit and it is not just and equitable to extend time to the date when they were presented and/or
- 4 the complaints were presented outside the prescribed time limit and it would have been reasonable practicable for them to have been presented before the date on which they were presented

REASONS

1 At the end of the hearing, the Tribunal gave its Judgment and Reasons for the Judgment. The claimant indicated that she would consider appealing against the Tribunal's decision. As the claimant is not represented, the Tribunal construed that as a request that the Tribunal should set out its Reasons in writing. Accordingly, these Reasons set out the Tribunal's findings in support of its Judgment. Whilst the wording and order may differ from the announced version, this is with the benefit of more preparation time and is not the result of further deliberations by the Tribunal.

2 This is a complaint by Angela Foster, the claimant, against Cumbria County Council, the respondent, arising out of her employment by the respondent as a reablement worker. The claimant alleges that she was discriminated against on the ground of the protected characteristic of disability. She also contends that she has been subjected to bullying and harassment on the same ground. Finally, the claimant alleges that she suffered a detriment as a result of having made a public interest disclosure. The claimant's employment with the respondent commenced on 6 August, 1999, and is continuing.

3 The respondent now contends that the claimant is prevented from proceeding with these complaints because they were the subject of earlier proceedings ('the original proceedings') which were dismissed on withdrawal by the claimant, or if they were not, it is an abuse of process to bring them now when they could have been brought in original proceedings. Further or in the alternative, the claim was presented outside the prescribed time for presenting these claims and, subject to the nature of each claim, it was reasonably practicable for the claims to have been presented within the prescribed period and it is not just and equitable to extend the time for presenting the complaints. The claimant disputes this.

4 It is unfortunate that this issue was not raised at an earlier time, especially as the claimant remains an employee of the respondent and it is alleged that there are still problems in the employer/employee relationship. Nevertheless, these are issues that must be considered before it can be decided whether and/or to what extent the current proceedings should continue.

5 The Tribunal heard oral submissions by both parties, the respondent's by reference to a skeleton argument. The Tribunal had before it a bundle of documents submitted by the respondent, marked exhibit 'R1'. From the arguments that it heard and the documents that it has seen, the Tribunal finds the following facts.

6 These complaints were presented to the Tribunal on 27 December, 2016. In them, the claimant contends that she suffered discrimination on the protected ground of disability and that she suffered detriments after she made protected disclosures.

7 Previously, the claimant commenced proceedings against the respondent before the Tribunal on 1 June, 2016, under case number 2401691/2016. The claimant did not name a representative in her claim form and she did not suggest that she was represented at that time.

8 In the original proceedings, the claimant alleged that she suffered discrimination on the ground of the protected characteristic of disability. It also appeared to the respondent from the claim form that the claimant was alleging that she was unfairly dismissed and had suffered a detriment after making a protected disclosure. The respondent served a response denying all of these complaints.

9 On 7 September, 2016, an Employment Judge signed a Judgment stating that the original proceedings were dismissed on withdrawal by the claimant. This was sent to the parties on 13 September, 2016.

10 The Tribunal's file has now been destroyed. The respondent stated that it had only recently become aware of the situation because of changes in caseholders in the respondent's legal department.

11 The claimant states that she sought legal advice in respect of her original proceedings and was told that she would have difficulty in succeeding with her complaints. She also states that a solicitor then obtained the dismissal of the proceedings on the withdrawal by the claimant, without the claimant's instruction or consent. The respondent does not have any record of a solicitor being on the record in respect of the original proceedings. The claimant could not identify who the solicitor was and it did not appear that she had taken any action against anyone in respect of the matter. The claimant implied that she did not know what had happened but could not explain why in those circumstances she had then started the current proceedings if she thought that the original proceedings were still live. She suggested that she thought that it was all part of the same proceedings.

12 The claimant has provided further particulars of her complaints in the current proceedings which considerably expand them. However, the allegations appear to relate to events that occurred before the original proceedings were commenced. Although there are differences in detail, the allegations made in the two sets of proceedings appear to be broadly similar.

13 The respondent contends that in so far as the two sets of proceedings relate to the same allegations, the claimant is prevented from proceeding with them as they have previously been litigated upon and were dismissed in a final decision. Further, that in so far as there may be differences, it was an abuse of proceedings to bring them in the current proceedings as they could and should have been brought in the original proceedings. Finally, that all of the complaints in the current proceedings were brought outside the prescribed time limits and so should not be allowed to proceed. Accordingly, the current proceedings should be dismissed in their entirety. The claimant contends that the original proceedings were withdrawn without her instructions or consent and that she had assumed that the current proceedings were part of the original proceedings. Further, that she has been badly treated by the respondent and ought to be able to proceed against it.

14 Section 123(1) of the Equality Act, 2010, which is relevant to the complaints relating to disability, states that

...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 to which the complaint relates or
- (b) such other period as the Employment Tribunal thinks just and equitable.

15 Section 48 of the Employment Rights Act, 1996, as amended, which is relevant to the complaints related to a protected disclosure, states that

(1A) A worker may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of Section 47B

(3) An Employment Tribunal shall not consider a complaint under this Section unless it is presented

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.

16 The Tribunal also had regard to Rules 37, 51 and 52 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2013, which deal with striking out proceedings and the effect of a claim being dismissed on withdrawal.

17 Finally, the Tribunal had regard to the authorities referred to by the respondent

Khan v Heywood & Middleton Primary Care Trust (2006) EWCA Civ 1087

Barber v Staffordshire CC (1996) IRLR 209

18 The Tribunal finds that the original proceedings were concluded when they were dismissed on withdrawal by the claimant. This decision has never been challenged and that Judgment must stand. There was nothing before the Tribunal to suggest that the claimant had in any way attempted to preserve her right to commence fresh proceedings at the time of withdrawal. The Tribunal was not satisfied that the claimant had not been party to the withdrawal or that she did not know that it had happened. It is most unlikely that the proceedings would have been withdrawn on the application of someone not involved in the proceedings and who did not produce any authority to act in them. The respondent did not have any record of anyone acting on behalf of the claimant and she could not provide an acceptable explanation as to why she had started the current proceedings. It was not credible that she would have thought that she was just continuing the original proceedings. Accordingly the claimant is barred from pursuing the allegations in the original proceedings in the current proceedings.

19 The claimant did not explain why she was prevented from pursuing her complaints in the current proceedings at an earlier time. Whilst evidence might still

have been available when the current proceedings were commenced, the respondent was entitled to believe that matters had been concluded so that required evidence and memories may not have been preserved. There was nothing to suggest that the conduct of the respondent had in any way contributed to the delay in commencing the current proceedings. The claimant did not contend that she was prevented by a disability or any other cause from commencing the current proceedings at an earlier time. The claimant did not act promptly in commencing the current proceedings as she obviously knew of her rights to do so when the original proceedings were commenced. She had sought legal advice, which, on her admission, was that she would have difficulties in succeeding in her claims.

20 With regard to any allegations that relate to a time before the original proceedings were commenced, they potentially fall into two parts – those relating to the alleged protected disclosure and those that relate to disability. In so far as they relate to the alleged public interest disclosure, they were submitted out of time when the current proceedings were commenced. The claimant has not put forward any reason why it would not have been reasonably practicable to have included them in the original proceedings. The Tribunal finds that it would have been reasonably practicable for them to have been included in the original proceedings so that time should not be extended to when the current proceedings were commenced. In so far as the allegations relate to disability, they were also submitted out of time. It would have been perfectly possible for them to have been included in the original proceedings and the claimant did not provide an explanation as to why they had not been. The respondent was entitled to believe that the claimant had raised all relevant matters in the original proceedings and that the withdrawal of those proceedings dealt with all of the complaints relating to disability. The claimant had her opportunity to proceed with all of her complaints in the original proceedings but chose not to and then had the original proceedings dismissed on withdrawal. The Tribunal finds that it is not just and equitable to extend the time for commencing the current proceedings to the date when they were commenced. Accordingly, the claimant is not entitled to pursue these allegations.

21 Finally, the Tribunal finds that it would be an abuse of process to allow the claimant to resubmit the original allegations in their extended form in the current proceedings when the original proceedings were dismissed on withdrawal by the claimant. The additional allegations in the current proceedings could have been included in the original proceedings and the claimant did not explain why she had been prevented from including them.

22 The Tribunal announced its decision in relation to those allegations that predated the commencement of the original proceedings. However, in case it had missed any of them, it indicated that it was prepared to give the claimant an opportunity to show some allegations related to the period between the commencement of the original proceedings and the commencement of the current proceedings so that the Tribunal could give them further consideration. However, the claimant did not wish to attempt to demonstrate that any of her allegations did arise from that period. The respondent confirmed that it had not identified any such allegations. The Tribunal therefore concluded that there were not any allegations related to the period between the commencement of the original proceedings and the commencement of the current proceedings so that further consideration was not required.

23 Having regard to all of the above, the Tribunal finds that all of the current proceedings should be dismissed in their entirety.

Employment Judge Nicol

Date 5 April, 2019

JUDGMENT SENT TO THE PARTIES ON

18 April 2019

FOR THE TRIBUNAL

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