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THE EMPLOYMENT TRIBUNALS

Claimant: Miss W Golding
Respondent: London Borough of Havering
Heard at: East London Hearing Centre
On: 14 March 2019
Before: Employment Judge M Warren

Representation

Claimant: In person
Respondent: Ms S Claire (Solicitor)

OPEN PRELIMINARY HEARING JUDGMENT

1 The Claimant's complaint of harassment is out of time. It is just and equitable to extend time. The Tribunal has jurisdiction to consider her claim.

2 Whether or not the Claimant's claims of direct discrimination and victimisation are in time shall be reserved to the Employment Tribunal at the final main hearing.

REASONS

Background

1. In this case Miss Golding brings complaints of harassment relating to sex, direct sex discrimination and victimisation. The case had been case managed by Employment Judge Russell at a Closed Preliminary Hearing on 14 January 2019, when she identified the issues and made Case Management Orders, arranged for the case listed for a three day final hearing on 24 – 26 September 2019 and directed today's Open Preliminary Hearing to determine whether or not the Claimant's complaints were presented out of time and if so, whether it is just and equitable to extend time.

Papers and evidence before me today

2. For today, I have had before me an excellent skeleton argument from Ms

Claire of the Respondent and with that, is a collection of the relevant legal authorities for which I am most grateful.

3. I heard evidence today from Miss Golding.

The Claims

4. In respect of the harassment complaint, Miss Golding alleges that an individual I will refer to is Daniel, subjected her to a series of offensive actions between the summer of 2017 and 30 November 2017.

5. In respect of the complaint of direct sex discrimination, Ms Golding makes a series of complaints about a number of individuals between 30 November 2017 and 2 July 2018, the latter being the allegation relating to being told that she could not use the CCTV car. I am grateful to Ms Claire for clarifying that for me.

6. With regard to the victimisation claim, the detriments relied upon, as clarified by Employment Judge Russell, span between February 2018 and 2 July 2018, that is the CCTV car matter.

7. From my discussions with Miss Golding today, it became apparent that the list of issues as identified by Employment Judge Russell would need to be amended, not only in respect of the CCTV car matter and its date, but also that the protected acts relied upon by Miss Golding should include her grievance about Daniel submitted on 4 December 2017.

Law

8. Section 123 of the Equality Act requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

9. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the EAT has said in the case of Cohan v Derby Law Centre [2004] IRLR 685 that a Tribunal should have regard to the Limitation Act checklist as modified in the case of British Coal Corporation v Keeble [1997] IRLR 336 which is as follows:

- (1) The Tribunal should have regard to the prejudice to each party.
- (2) The Tribunal should have regard to all the circumstances of the case which would include:
 - (a) Length and reason for any delay
 - (b) The extent to which cogency of evidence is likely to be affected
 - (c) The cooperation of the Respondent in the provision of information requested
 - (d) The promptness with which the Claimant acted once he knew of

facts giving rise to the cause of action

- (e) Steps taken by the Claimant to obtain advice once he knew of the possibility of taking action.

10. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded tribunals by s123(1), but that it was often useful to do so. The only requirement is not to leave a significant factor out of account, (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account, (paragraph 25).

11. In the case of Robertson v Bexley Community Services [2003] IRLR 434 the Court of Appeal stated that time limits are exercised strictly in Employment Law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

12. That has to be tempered with the comments of the Court of Appeal in Chief Constable of Lincolnshire v Caston [2010] IRLR 327 where it was observed that although Lord Justice Auld in Robertson had noted that time limits are to be enforced strictly, his judgment had also emphasised the wide discretion afforded to Employment Tribunals. Lord Justice Sedley had noted that in certain fields such as the lodging of notices of appeal in the EAT, policy has led to a consistently sparing use of the power to extend time limits. However, this has not happened and ought not to happen in relation to the discretion to extend time in which to bring Tribunal proceedings which had remained a question of fact and judgment for the individual Tribunals.

13. Section 123(3) reads:

“For the purposes of this section –

- (a) *conduct extending over a period is to be treated as being 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”.*

14. In the case of Hendricks v Metropolitan Police Commissioners [2003] IRLR 96 the Court of Appeal on the question of what amounted to a continuing act, cautioned Tribunals against looking too literally for a policy, rule, practice, scheme or regime, but rather to look for incidents which are linked to each other and which are evidence of a *“continuing discriminatory state of affairs”*. As Mummery LJ put it at paragraph 52 of that Judgment:

“The question is whether that is an act extending over a period as distinct from a succession of unconnected or isolated or specific acts, for which time would begin to run from the date when each specific act was committed”.

15. Since 6 May 2014, anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the

Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the claimant. Further, (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the claimant receives, (or is deemed to receive) the certificate. See s140B of the Equality Act 2010 and Luton Borough Council v Haque [2018] UKEAT/0180/17.

Key Facts

16. The grievance about Daniel was on 4 December 2017. His alleged actions date between the summer of 2017 and 30 November 2017. The matters complained of were referred to the police who embarked on a criminal investigation. The Respondent was unable to progress its investigation into Miss Golding's complaint until the police investigation was completed. The Respondent and Miss Golding were informed on 4 February 2019 by the police that no further action was to be taken on the complaint about Daniel and that their investigation was completed.

17. Miss Golding confirmed me to me today and I accept, that she was in touch with ACAS during January 2018. She did not know about the time limit at that time. She sought legal advice from solicitors; none would take her case or give her advice without payment of money. She spoke to the CAB in January 2018. She spoke to ACAS and the CAB again in July 2018, when she resigned her employment. She understood the 3 month time limit ran from the date she resigned. She did not understand that it ran from each act of discrimination. She consulted ACAS for the purposes of early conciliation on 3 September and the date of completion of early conciliation was 20 September 2018. The Claim Form was submitted on 26 September 2018.

Conclusions

18. Turning then to my decision, I will deal with each of head of claim in turn starting with the complaints of harassment by Daniel.

Harassment

19. The harassment complaints are clearly out of time. They clearly amount to an allegation of continuing conduct that is sexual harassment by the individual known as Daniel. The question for me it is whether it is just and equitable to extend time.

20. The length of delay was 28 February, (3 months after the last alleged act of harassment) to 26 September 2018, that is seven months. The reason for the delay was that Miss Golding wanted the Respondent to deal with her complaint and she was waiting for it to do so. The Respondent was waiting for the police to complete its investigation. As to the cogency of evidence; there is a hearing in September 2019, which will be nearly two years since the last of the incidents in question. Doubtless cogency of evidence will have been affected to some extent by the delay. That loss of cogency may be ameliorated to some extent by the fact that the police have been investigating thereby perhaps, keeping things fresh in the minds of those concerned. There is no suggestion of the Respondent not having been cooperative in the provision of any information. Miss Golding could not be said to have acted promptly when she

knew of the facts and issue. Miss Golding tried to take advice, she sought advice from lawyers who would not give advice without payment. She obtained advice from the CAB and one might expect the CAB to have given advice about the three months rule, but they did not.

21. As to the balance of prejudice it seems to me that in light of the police investigation, even if Miss Golding had issued proceedings in time, those proceedings would have had to have been stayed, pending the outcome of the police investigation. The Respondent's hands would have been tied as they were anyway and so arguably, there has been no prejudice, in that the situation faced now is no different than it would have been had the proceedings been issued in time. Even if the claim is struck out for being out of time, the Respondent will still be obliged to investigate the allegations made by Miss Golding against Daniel, because it could not possibly ignore allegations that an existing employee has behaved towards a female employee in the manner as alleged by Miss Golding.

22. As to the prejudice to Miss Golding if I were to find that it is not just and equitable to extend time, she would be denied the opportunity of seeking justice for some appalling behaviour towards her, if true.

23. Weighing all these matters in the balance, I find that it is just and equitable to extend time. I think that it will still be possible to hold a fair hearing, notwithstanding two year passage of time. Therefore, Miss Golding's complaint of harassment can proceed.

Direct Discrimination

24. The most recent allegation is that relating to the use of the CCTV car on 2 July 2018, which is in time. Miss Golding's case is that because of the grievance that she raised against Daniel, the Respondent's staff and management took against her, particularly the Nigerian employees. She says that one of her supervisors known as Andrew, shouted at her and was aggressive towards her. She says that he and another supervisor, Ms Mahoney, as she puts it, "took the hump" because of her grievance. Those matters might be characterised as less favourable treatment, in that had she been a man, that reaction would not have taken place. She complains that one of the managers, Ms Delahunty, did not deal with Miss Golding's complaints about Ms Mahoney and Andrew. She complains that Ms Mahoney did not deal with her complaint to Ms Mahoney about Andrew. She says that it was Andrew who told her that she could no longer work on the CCTV car. It seems to me that plainly, there is the potential for the older potentially out of time allegations to be connected acts and whether they are or not, is a question best answered by the Tribunal hearing this case, having heard all of the evidence. I therefore leave the question of whether or not Miss Golding's complaint of direct discrimination is out of time to the Tribunal hearing this case.

Victimisation

25. The alleged protected acts are the grievance about Daniel on 4 December 2017 and the complaints to Ms Mahoney and Ms Delahunty. The detriments are in addition to those listed by Employment Judge Russell, also Ms Delahunty not dealing with the complaint about Andrew and Ms Mahoney, and Ms Mahoney not dealing with

the complaint to her about Andrew.

26. The other allegations are:

- 26.1. That Ms Mahoney spoke to the shopkeeper because she did not approve of the fact that Miss Golding complained about Daniel;
- 26.2. Ian's comment on facebook about Miss Golding's witness, that is her witness in respect of the complaint about Daniel, which was, Miss Golding says, because he did not approve of the fact that she had complained about Daniel;
- 26.3. The reduction in shifts, allegedly a decision made by Mr John Everett because he did not approve of the three complaints that Miss Golding made;
- 26.4. The individuals known as Abbey and Mitchell who refused to work with the Claimant, who are Nigerian and sided with Daniel, and lastly
- 26.5. The decision about not being allowed to use the CCTV car anymore was made, says Miss Golding, by Andrew.

27. Once again, there is the potential for these acts to be linked as a corporate or cultural or collective reaction against Miss Golding for complaining and again, whether that is the case or not is a decision best made by the Tribunal hearing this case after it has heard all of the evidence and therefore, I leave the decision as to whether or not the complaints of victimisation or any of them, are out of time to the Tribunal that hears this case.

Employment Judge M Warren

12 April 2019