THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Cipollone**

Respondent: **Durham University**

Heard at: **North Shields Hearing Centre** **On:** **Monday 29th April 2019**

Before: **Employment Judge SA Shore**

Representation:

Claimant: **Mr M Winthrop (Solicitor)**
Respondent: **Miss H Tattersall (Solicitor)**

RESERVED JUDGMENT

1. The claimant's claim of sex discrimination was not presented to the employment tribunal within the period prescribed by section 123(1)(a) of the Equality Act 2010 (EqA). It would not be just and equitable to extend the period of time for the presentation of the claim pursuant to section 123(1)(b) EqA. The tribunal therefore does not have jurisdiction to hear the claim, which is struck out pursuant to rule 37(1)(a) of Schedule 1 of the Employment Tribunal Rules (Constitution & Rules of Procedure) Regulations 2013 (the 2013 Rules).

2. The claimant's claim of detriment because she made a protected disclosure contrary to section 47B(1) of the Employment Rights Act 1996 (ERA) was not presented to the employment tribunal within the period prescribed by section 48(3)(a) ERA. It was reasonably practicable for the claimant to have presented the claim within the prescribed time limit, so the provisions of section 48(3)(b) are not operative. The tribunal does not therefore have jurisdiction to hear the claim which is struck out pursuant to rule 37(1)(a) of Schedule 1 of the 2013 Rules.

3. The correct name of the respondent is Durham University and the tribunal records have been amended accordingly.

REASONS

The claim

4. By a claim form presented on 9 November 2018, the claimant made claims of detriment because she had made a protected disclosure and direct sex discrimination. The circumstances of the detriment and the direct sex discrimination arose out of the same set of facts.

5. The matter came before Employment Judge Shepherd on 30 January 2019, when it was decided that the time points on jurisdiction should be the subject of a public preliminary hearing at which the claimant should provide a witness statement with regard to the time points that were in issue.

6. Employment Judge Shepherd also listed the case for a substantive hearing of three days commencing on 2 September 2019.

The hearing

7. The case management order of Employment Judge Shepherd dated 30 January 2019 charged this public preliminary hearing with three tasks:-

    7.1 to determine that the claimant's claim of sex discrimination was brought out of time and, if it was, whether it would be just and equitable to extend time pursuant to section 123 of the EQA;

    7.2 to determine whether it was reasonably practicable for the claimant to have brought her public interest disclosure detriment claim within the time limit prescribed by section 48(3)(a) and (b) ERA as to whether it was reasonably practicable for the claimant to bring a claim within the time-limit and, if not, whether it was brought within such further period that the tribunal considers reasonable, and;

    7.3 to make case management orders in respect of any surviving claim leading to the substantive hearing.

8. As I have struck out the whole of the claimant's claim, the case management orders which were agreed between the parties for the trial on 2nd, 3rd and 4th September 2019 are otiose and the trial itself has been vacated.

9. The claimant had produced a witness statement for the purposes of the preliminary hearing and the parties had produced an agreed bundle of documents running to some one-hundred and ninety-five pages.

10. The claimant's witness statement dealt with some matters that were not in issue at the PPH.

11. Mr Winthrop produced a skeleton argument for me to consider.

Evidence and findings of fact

12. I began the hearing by confirming that the purpose for the public preliminary hearing was as set out above in paragraph 7.

13. I had noted that the claim was issued against University of Durham t/a Durham University and enquired whether this was the correct name of the respondent. The parties were agreed that the correct name of the respondent is Durham University and I therefore amended the tribunal's records accordingly.

14. I had been provided with a chronology by the respondent. Mr Winthrop's skeleton argument also contained a chronology. Both documents were useful. The facts and the chronology in the case were largely agreed so I make the following finds of fact that are relevant to the issues that I have to determine:-

    14.1 the claimant had a long academic career before being appointed by the respondent on 1 October 2010 as a lecturer;

    14.2 her appointment was made permanent on 1 May 2015;

    14.3 at all material times in this claim, the claimant has been employed by the respondent as Assistant Professor in Italian and Director of Studies in the School of Modern Languages and Culture;

    14.4 she remains employed by the respondent;

    14.5 on 19 September 2017, the claimant applied for promotion to the position of Associate Lecturer;

    14.6 on 20 September 2017 the Departmental Promotion Committee (DPC) met to consider the claimant's application;

    14.7 on 17 October 2017, the claimant was given feedback as to why her application had been rejected by Professor Stewart;

    14.8 on 2 November 2017, the claimant met the respondent's HR Business Partner, Joanne Davidson to discuss her rejection;

    14.9 on 30 November 2017, the claimant reapplied for an Associate Professor position in accordance with the respondent's procedures;

    14.10 on 11 April 2018, the Faculty Progression Committee (FPC) considered the claimant's application;

    14.11 on 30 May 2018, the FPC met again and decided to reject the claimant's application;

    14.12 by a letter dated 12 June 2018, which it was agreed was received by the claimant on 14 June 2018, the claimant was notified that her application had been rejected;

14.13 on 14 June 2018, the claimant attempted to contact her union representative and, separately, instructed solicitors;

14.14 the claimant's union representative was absent from work when she attempted to contact him and did not return to work until the commencement of the academic year 2018/19;

14.15 on 8 August 2018, the claimant's solicitors wrote to the respondent requesting information;

14.16 on 21 August 2018, the respondent wrote to the claimant's solicitors answering the questions that had been raised and provided some documents. The letter was received on 22 August 2018;

14.17 on 10 September 2018, the claimant commenced early conciliation against the respondent;

14.18 on 1 October 2018, the claimant's solicitors wrote again to the respondent requesting further information;

14.19 on 10 October 2018, ACAS issued the claimant with an ACAS early conciliation certificate;

14.20 on 19 October 2018, the respondent wrote to the claimant's solicitors with a number of documents, including the minutes of the FPC meeting on 30 May 2018 which were dated 19 September 2018;

14.21 the claimant issued her ET1 on 9 November 2018.

15. The claimant gave evidence from a witness statement consisting of eighteen paragraphs over four pages dated 17 April 2019. Much of the witness evidence concerned matters that would only be of interest to a substantive hearing of all the issues in the case, so I have only recorded the evidence that relates to the issues that I have to determine at this PPH. The claimant's evidence in chief was that she did not know the date of the FPC meeting that had rejected her application until the minutes of that meeting were disclosed to her solicitors on 19 October 2018 [145 – 193]. She had no idea when the meeting had taken place until those minutes were received. She did not know that her application had been rejected until she received the letter dated 12 June 2018 [120] on 14 June 2018. Because her union representative was on sick leave, she instructed her solicitors to write to the respondent, which they did on 8 August 2018 [125 – 126].

16. With regard to the issue of the time limit, she said that it had been suggested that the limitation in her case expired twelve days before she issued proceedings, but until the proceedings were started and defended, she had no means of knowing when the decision against her promotion had been taken. She would normally expect to have been informed more or less immediately that the decision had been taken, but the only knowledge of the decision that she had had was the respondent's letter of 12 June 2018. She said that despite requests for

information, no indication that the decision had been taken prior to 12 June 2018 was given until the respondent's letter to her solicitors of 19 October 2018.

17. In answer to cross-examination questions from Ms Tattersall, the claimant confirmed that it was not disputed that the decision to refuse her application was taken by the FPC on 30 May 2018. She confirmed that she had contacted her solicitors at the same time that she had tried to contact her union representative.

18. The claimant was taken to page 30 of the bundle, which was an eleven-page undated document produced by the respondent titled "Academic Progression Process". The claimant confirmed that she was aware of the contents of the document and thought she was aware of the document before the decision was made, although she could not be one-hundred percent sure. The document itself, at page 30, contained a summary flowchart of the expected timeline for promotions in the 2017/2018 academic year. The flowchart included a statement that the central APC would meet to endorse decisions and provide feedback to unsuccessful candidates via HR and the FPVC by May 2018. The claimant said that she understood by this that the committee would meet in May but asked when the document was written because all committees were delayed in that academic year because of industrial action. She repeated that she didn't receive her feedback until she received the letter on 14 June 2018 [120]. She rejected the proposition that May would be a starting point for any claim that she would make and said that as the feedback letter was received on 14 June 2018, she had assumed that the decision was made a few days earlier in June. She assumed that the feedback letter and the decision date were linked and said that her solicitor had asked the question as to when the decision was made.

19. The claimant was then taken to her solicitor's first letter to the respondent of 8 August 2018 [125 -126] and conceded that the letter contained no question about when the date of the FPC meeting was or when the decision had been made. She therefore had to concede that there was no request for information as alleged in paragraph 18 of her witness statement in that letter, but added that she had assumed the letter of 12 June 2018 related to the date on which the decision had been taken. I should note that that this was not in her witness statement.

20. The claimant was then taken to the decision letter of 12 June 2018 [120] and confirmed that there was nothing in the letter suggesting when the meeting of the FPC had taken place or when the decision had been made. She was then taken back to her solicitor's letter of 8 August 2018 [125 – 126] and confirmed again that no date for the meeting or the decision had been requested in that letter.

21. Ms Tattersall then took the claimant to the respondent's response dated 21 August 2018 [127 – 142], which had been stamped by the claimant's solicitors as received on 22 August 2018. The letter enclosed a number of documents and (at page 127), confirmed that one of the documents was the Academic Progression Process [30 – 41]. The claimant was again asked if, at that point, she knew for certain that the decision to refuse her application for a promotion had been made at the meeting on 30th May 2018, to which the claimant responded that she was not certain at that point in time, although she now accepts that the decision was made on that date.

22. The claimant confirmed that the claim was issued on 9 November 2018 and that her ACAS early conciliation certificate had been issued on 10 October 2018 [1]. The reason for delay had been because it had not been an easy decision to make and she had tried to contact her union again.

23. In answer to a re-examination question, the claimant confirmed that an e-mail at page 121 showed that the letter of 12 June 2018 had been amended in June 2018 and reminded me that minutes of the meeting of 30 May 2018 were themselves dated 19 September 2018.

24. I had no questions for the claimant.

Claimant's submissions

25. Mr Winthrop relied on his skeleton argument which was submitted to me electronically.

26. It was conceded that the respondent's submission that time began to run from 30 May 2018 was one which he could not contradict. An alternative proposition had been made in Aniagwu v London Borough of Hackney and Owens [1999] IRLR 33, but the judgment of Elias P in Virdi v Commissioner of the Metropolis [2007] IRLR 24 would appear to be the correct position that is relied upon by the respondent.

27. It was submitted that, applying Virdi, the claimant was ten days late in commencing the proceedings requests that the tribunal extend time because:-

    27.1 the claimant had no knowledge of the decision until 14 June 2018;

    27.2 the claimant had acted promptly in seeking advice;

    27.3 no actual evidence to the date of the decision was sent by the respondent until 19 October 2018 after the expiry of the primary limitation period;

    27.4 a fair trial of the issues is clearly possible. The issues concern a decision-making process that was set out in documentary evidence and although actual witness testimony may well be needed, this is not a case where it can be said that such evidence will have been weakened by the passage of time;

    27.5 the balance of prejudice – between a pre-emptive strike now as opposed to a consideration of the merits further favours an extension of time, and;

    27.6 applying the factors set out in the Limitation Act 1980 favours the position of the claimant.

28. Section 33(3) of the Limitation Act 1980 sets out the circumstances of the case to which the tribunal has to have regard are:

    28.1 the length of, and the reasons for, the delay on the part of the [claimant];

28.2 the extent to which, having regard to the delay, the evidence likely to be adduced by the [claimant] or the [respondent] is or is likely to be less cogent than if the action had been brought within the time limit allowed;

28.3 the conduct of the [respondent] after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the [claimant] for information or inspection for the purpose of ascertaining facts which were or might be relevant to the [claimant's] course of action against the [respondent];

28.4 the duration of any disability of the [claimant] arising after the date of the limitation of the course of action;

28.5 the extent to which the [claimant] acted promptly and reasonably once she knew whether or not the act or omission of the [respondent] to which the action was attributable, might be capable at that time of giving rise to an action for damages;

28.6 the steps, if any, taken by the [claimant] to obtain medical legal or other expert advice in the nature of such advice he may have received.

29. The evidence of the claimant set out the chronology, the most relevant aspect of which was the fact that a decision was made on 30 May 2018, but was only communicated to her on 14 June 2018.

30. The claimant accepted that her claim was presented out of time. I have to determine the time issue in respect of the sex discrimination claim on the basis of whether or not it is just and equitable to extend time. It was submitted that it was relevant that the claimant was not and did not have knowledge of the decision until 14 June 2018. The respondent had suggested that the Academic Progression Process [30 – 41] means that the claimant would have known that a decision would have been made in May. At all material times there was an industrial dispute in the university and it was common knowledge that all matters were delayed. No blame can be attached to the claimant for her lack of knowledge between the 30 May 2018 and 14 June 2018.

31. The claimant had taken legal advice on 14 June 2018, although her union representative was not available until the autumn term convened. If there is any fault, it lies with the claimant's representative. However, the fault of the solicitor is not a complete answer to the denial of the claimant's claims.

32. Certain information was provided in the decision letter dated 12 June 2018. It is suggested by the respondent that if the claimant didn't ask for a specific information, then she couldn't expect to get it. Mr Winthrop suggested that it was the respondent's responsibility to state why reliance could not be placed on the letter received on 14 June 2018 as to ascertaining the date of decision. The actual date of the decision (30 May 2018) was only provided in mid September.

33. It was submitted that the case of Verdi was one where the claimant had knowledge of when the decision had been made but on appeal, the EAT had set aside the original employment judge's original decision.

34. The second test I have to apply is that on the public interest disclosure detriment claim which, it was accepted, is a harsher test in which the claimant has to show that it was not reasonably practicable for the claim to have been submitted on time. It was submitted the practicability is based on knowledge and the claimant's lack of knowledge relates to practicability.

35. Mr Winthrop confirmed that I am dealing with the same chronology in respect of both cases and there are no factual or chronological issues unique to either of the two claims.

Respondent's submissions

36. Ms Tattersall started with the sex discrimination claim and the just and equitable test. She noted that it had not been suggested that the claim was a series of continuing acts post-dated at 30 May 2018. I indicated that that was the basis upon which I thought the claim was predicated and Mr Winthrop confirmed that this was correct.

37. It was submitted that the check list contained in section 33(3) of the Limitation Act 1980 had been modified by the EAT in British Coal Corporation v Keeble and others [1997] IRLR 336, but that this was an issue that the tribunal may have regard to.

38. It was submitted that the time limit on both claims expired on 20 August 2018 so ACAS early conciliation which began on 10 September 2018 and ended 10 October 2018 had no impact on extending the time limit. The claim was submitted on 9 November 2018, so was approximately ten weeks out of time.

39. This case is all about the reasons for delay, although it is conceded that the lack of a good reason is not necessarily fatal for time to be extended, but it is a relevant factor.

40. The claimant has said today that she had lack of knowledge as to when the decision had been taken. It was submitted that it was not reasonable for the claimant to say that the onus was all upon the respondent to volunteer the date of the meeting and decision. She had accepted she was familiar with the career progression timetables [30 – 41] and it had been shown that it was sent to the claimant's solicitors on 21 August 2018 which should have put the claimant on notice that the decision was earlier than 12 June 2018.

41. There were no attempts by the claimant or her solicitors to confirm the date of the meeting or decision. The claimant appears to have progressed on the erroneous assumption that the committee may have been delayed.

42. It was submitted that even if I accepted that the claimant believed that time had started running from 12 June 2018, she was disabused of that notion by the

respondent's letter to her solicitors of 19 October 2018, which was received on 22 October 2018.

43. Ms Tattersall submitted that the claimant had not given a proper explanation of the further delay between 20 October 2018 and 9 November 2018 when she submitted her claim. It was therefore submitted that there was no proper reason given for the delay in submitting the claim.

44. In respect of the issues listed in section 33(3) of the Limitation Act, it was accepted that the claimant acted promptly in taking legal advice, as her unchallenged evidence was that she had instructed solicitors on 14 June 2018.

45. The respondent had co-operated with the request from the claimant for information and documents within good time. It also had to be accepted that the claimant's argument that memories will not have been affected and that there was no significant delay in issuing proceedings that meant that a fair trial was still possible were not challengeable. At this point, I indicated that I didn't regard that as an issue that I would attach much, if any, weight to.

46. On the public interest disclosure detriment claim, Ms Tattersall said that it was harder for the claimant to prove her case. She repeated her arguments about knowledge that she'd made in respect of the claimant's sex discrimination claim. She submitted that it was reasonably practicable for the claim to have been brought in time. There was no argument she wasn't aware of the claim and she took advice immediately and had been given the exact date of respondent's letter of 19 October 2018. She'd delayed issuing her proceedings until 9th November 2018.

Decision and reasons

47. As Mr Winthrop had reminded me, the guidance and checklist contained in section 33(3) of the Limitation Act 1980 was formulated to deal with personal injury cases. The tests are not all applicable to employment tribunal cases and whilst I have had regard to the tests, I do not find them determinative in this case. In making that decision I rely on the decision in Department of Constitutional Affairs v Jones [2008] IRLR 128 in which the Court of Appeal emphasised that the factors in section 33(3) are a valuable reminder of what may be taken into account, but their relevance depends on the facts of the individual cases and tribunals do not need to consider all the facts in each and every case.

48. I find that although the claimant did not receive confirmation of the refusal of her application until 14 June 2018, when she received the letter of 12 June 2018, she was aware that decision may have been made in June 2018. I do not find it reasonable that she made an assumption that industrial action at the respondent would have automatically delayed the decision-making process. I find that there is no burden of reasonable expectation that can be placed on the respondent in this case to have advised the claimant when the decision had been made in its letter of 12 June 2018 or in answer to the letter from the claimant's solicitor of 8 August 2018. The claimant's solicitors will have been aware of the trigger for starting the clock of limitation and were instructed on the same day that the claimant received

the letter of 12 June 2018. Neither the claimant nor her solicitor asked the respondent what the date of the FPC meeting was or the date that the decision had been taken in any correspondence before limitation expired.

49. I find that the respondent made reasonable and timeous responses to the questions that were asked by the claimant and her solicitors and no blame can be attached to the respondent in respect of the documents and information it provided.

50. Limitation on both claims expired on 29 August 2018 and early conciliation was not commenced until 10 September 2018. I find ACAS conciliation had no effect in pausing the limitation clock and that the claimant's claim was therefore approximately ten weeks late when it was eventually submitted.

51. Given that the claimant was professionally represented, I find that the length of the delay in submitting the proceedings was substantial and that the reasons for delay were not adequately explained by the claimant.

52. The delay itself would be unlikely to have any effect on the claimant and respondent receiving a fair trial, as much of the evidence is agreed, much is preserved in documents and there appears to be little factual dispute. Further, memories are unlikely to fade in the period of time covered by the delay.

53. I find the conduct of the respondent, after the course of action was communicated to it in the claimant's solicitor's letter of 8 August 2018, to have been reasonable and timeous and contained full answers to the questions that were raised in correspondence, together with documentary evidence. In a perfect world, the respondent may have supplied the minutes of the meeting of 30 May 2018 earlier, but I have found that these minutes were not requested by the claimant's solicitor, for which I can attach no blame to the respondent.

54. There is no disability of the claimant which affected the delay. The claimant acted promptly and reasonably once she knew that she had a course of action. She contacted her solicitors on 14 June 2018 and attempted to contact her union representative on the same day.

55. Time limits are there for a reason. I considered that fact in making the decision that it would not be just and equitable for the claimant's claim of sex discrimination to be allowed to continue, I have denied her the opportunity of litigating the facts before a full tribunal, but I do not find it just and equitable to extend the time limit to allow her claim of sex discrimination to proceed. If I allowed her claim to proceed, I would be requiring the respondent to defend a claim that was presented out of time. I find the balance of the contrary interests of the claimant and respondent tips in favour of the respondent, who I find would suffer the greater injustice.

56. On the same facts and following the same reasoning, I find that it was reasonably practicable for the claimant to have brought a claim of detriment because of a protected disclosure within the prescribed time limit, so that claim must fail. If I am wrong on that, then I find that the claimant's delay between receiving the minutes of the decision on 22 October 2018 and issuing proceedings on 9 November 2018

was not such a short period that it would be reasonable to have allowed her claim to proceed.

57. I therefore strike out both claims as having no reasonable prospect of success because of a lack of jurisdiction.

58. I discussed case management with the parties should I have made a decision in favour of the claimant on one or both points in issue, but in view of my judgment above, I find that there is no need for any further case management. I have asked the administration to vacate the substantive hearing listed for 2, 3 and 4 September 2019.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

14 May 2019

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