EMPLOYMENT TRIBUNALS

Claimant: Lorraine Parkinson

Respondents: (1) Lee Filters (a division of Panavision Europe Limited)
(2) Panavision Europe Limited
(3) Jeff Allen
(4) Mark Furssedown

Heard at: Southampton **On:** 17 May 2019

Before: Employment Judge Jones QC

Representation:
Claimant: Mr Martins, Counsel

Respondent: Dr Kerr, Counsel

DECISION

1. Such part of the Claimant's claim as relates to the alleged detriments identified in the first category in the Claimant's Scott Schedule (and set out in Paragraph 4 of the Reasons below) was not commenced timeously, fall outside the Tribunal's jurisdiction and are dismissed.

REASONS

Requests for Reasonable Adjustments

1. At the start of the hearing the Claimant handed me a letter dated 16 May 2019 from her GP. The letter indicated that the Claimant is suffering from depression and anxiety. Although the letter does not say, in terms, that the Claimant has a disability in consequence of her illness, I was invited to accept that she does. The letter asked that the Tribunal should make "reasonable adjustments" but without identifying what those adjustments were.

2. On the Claimant's behalf, Mr Martins asked for four adjustments:

   (1) That anyone who had attended as a witness for the Respondent should be excluded from the hearing other than when they were giving evidence: I was not prepared to make the adjustment. Two of the witnesses were parties to the proceedings and I did not consider it would fair or proportionate to exclude them. Dr Kerr, on the Respondents' behalf, told me that she would need to have the other witnesses present to give her instructions. I accepted that that need existed and, in the circumstances, concluded that an adjustment that impeded that process of instruction substantially was not a reasonable one.

   (2) That cross-examination be limited to 30 minutes: Again, I considered that the adjustment sought was not a reasonable one. That period of time was not a realistic estimate of the time necessary for cross-examination to be completed. However, I proposed (and the Claimant's representative agreed) that we would break after 30 minutes and see if the Claimant felt able to continue. By taking regular breaks, we were able to complete cross-examination.

   (3) That if cross-examination was not so limited, questions should be provided in writing: In the light of the adjustment described immediately above, this adjustment was unnecessary but would have been unreasonable in any event as it would have required the hearing to be adjourned to another day.

   (4) That there should be appropriate comfort breaks: This adjustment was made with the consent of all parties.

Issues for Determination

3. At the outset of the hearing I clarified with the parties what issues were to be determined. There were six:

   (1) Are the Claims in time;

   (2) Are the right respondents identified;

   (3) Should judgment be entered on the counterclaim;

   (4) Should the claims be struck out for want of proper particularisation;

   (5) Should the claims be struck out on the basis that they have no reasonable prospects of success; and

   (6) If not, should the claims be the subject of deposit orders?

   In the event, there was insufficient time available to resolve all of the issues. This was in part due to the breaks arising from the reasonable adjustment made for the

Claimant and in part from the fact that there were 5 witnesses to be heard within a single day listing. In practice, therefore, issues (1) to (3) were considered with the balance being deferred to a further Preliminary Hearing listed for 20 July 2019.

(1) Are the Claims in Time?

4. The claim in issue is the Claimant's allegation that she was subjected to detriments because she made protected disclosures. The detriments have been set out in a Scott Schedule. They are divided into three groups or categories. The first category of detriments are recorded in the Scott Schedule as beginning on 31 August 2017 and concluding on 2 October 2017. There are a number of specific detriments identified:

(1) "The perpetrators failed to inform [the Claimant] of matters relating to the legacy issues relating to fraud, financial mismanagement, and errors with HMRC supplemental disclosures chiefly due to the communication initiated by [Jeff Allen (the Chief Executive of Panavision Europe Limited)] to [Jasminder Kalsey (the Finance Director for the EMEA/Panavision group of companies)] and others prior to her resignation during her notice period and when her grievance hearing was heard";

(2) "[The Claimant] was excluded from the new updated expense policy";

(3) "[The Claimant]'s disclosure about financial impropriety was not addressed by the named perpetrators or [Human Resources] …";

(4) "[The Claimant] was isolated and not offered group support to carry out her duties efficiently";

(5) "[The Claimant] was humiliated when [Mr Allen] waved a file in her face in the presence of [Mr Kalsey] in the course of her meeting with him";

(6) "[The Claimant] was excluded from carrying out her duties in support of the second HMRC submission following meeting 301017";

(7) "[The Claimant] was not given her agreed pre-employment pay rise in accordance with the term of her probationary period within the February 2018 payroll …"; and

(8) "[The Claimant] has suffered a financial loss together with the loss of her senior financial management career".

5. The second category of detriment in the Scott Schedule is difficult to follow. Under the heading "date of act of detriment complained of", the Claimant has written"

"[The Claimant] confirmed the disclosures previously made (as above) and provided 'information' to the Grievance Hearing meeting and made further

> disclosures at her grievance hearing relating to the items described in the Grievance letter 19.2.18".

Under the heading "brief details of the act which is said to be an act of detriment" she has written:

> "[The Claimant] suffered ill health – depression/anxiety arising from the Respondent conduct, resulting in her resignation with notice followed by her absence from work in February 2018 until her EDT – 27 April 2018 and beyond to the Current Date due to non-conclusion of the dispute and grievance."

The description is rather confusing since, for instance, the protected disclosures relied upon are made at the grievance hearing whereas the detriment description makes reference to resignation. However, the Claimant resigned before putting in her grievance.

6. The third category of detriment in the Scott Schedule, similarly, is unclear. In the column that should identify the date of the detriment, the Claimant has written:

> "Failure by the Company to observe the Company policies on Grievance, Health and Safety, Absence Management and Positive work environment to the detriment of [the Claimant]. Dates from 14.2.18 to Current Date".

The description of the detriment is identical to that given in respect of category 2 save that instead of complaining about the "non-conclusion of the dispute and grievance" it complains of the "non-conclusion of her appeal".

7. During the course of her evidence and in response to questions from me, the Claimant clarified that the three categories are supposed, broadly, to deal respectively with events prior to her grievance; how the grievance was handled; and how the grievance appeal was handled. The Respondents accepted that the second and third categories of detriment were in time. I must concentrate, therefore, on the first category.

8. So far as the first category is concerned there are contrary indications as to the period in issue. The Scott Schedule suggests that the relevant period concluded on 2 October 2017. However, Mr Martins suggested that that last date was wrong. He pointed to detriment 6. That contains the string of numbers (301017) which, he told me, was a reference to 30 October 2017. That reference showed the date in the first column was wrong and that the pleaded detriments occurred until at least 30 October 2017. The Claimant herself went further. She said that the detriment continued to be suffered until 19 February 2018. The significance of that date is that it was on that day that the Claimant submitted her grievance. She had by that point already submitted her resignation – on 25 January 2018 – and was working her notice. My note records that she was "content to treat 19 February 2018 as the definitive end of the first group of detriments". That is notwithstanding the fact that, for instance, the first alleged detriment set out at Paragraph 4 above is, on its face, suggested to have lasted through the notice period, which expired on 27 April 2018.

9. The Tribunal's jurisdiction to hear complaints of this kind is governed by **Employment Rights Act 1996**, **ss. 48 (3)** and **(4)**, which provide:

> "(3) An employment tribunal shall not consider a complaint under this section unless it is presented –
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> (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
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> (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.
>
> (4) For the purposes of subsection (3) –
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> (a) where an act extends over a period, the "date of the act" means the last day of that period, and
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> (b) a deliberate failure to act shall be treated as done when it is decided on;
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> and, in the absence of evidence establishing the contrary, an employer … shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

10. The time limit is, of course, modified by the operation of the early conciliation scheme. In the present case the Claimant notified ACAS of the claims made in relation to the First and Second Respondents on 30 May 2018. If, therefore, the first category of detriments came to an end by 19 February 2018, time to commence the claim had expired by 18 May 2018 – 12 days before ACAS was notified and that part of the claim is, *prima facie*, out of time.

11. Mr Martin produced a written skeleton argument. On the question of jurisdiction, his argument was:

> "b. The issue before the Employment Tribunal chiefly relates to time/limitation matters and the material point of whether you have jurisdiction to hear and determine all or part of the claimants pleaded case.

c. That the EJ will/should determine whether to extend time based on both the Claimant's pleaded case and her oral evidence in respect of the not reasonably practicable test, which should be found in favour of the claimant."

His oral submissions were similar. Significantly, his position was not that the acts complained about in the first category were part of a "series of similar acts or failures" within the meaning of **ERA 1996, s 48(3)(a)**. Instead, he put his case on the basis that it was not reasonably practicable for the Claimant to have commenced her claim earlier than she did.

12. There is nothing specific in the Claimant's pleaded case which deals with the question of reasonable practicability. However, two passages in her witness statement touch on the matters which are relevant:

> "26. Having given the company multiple opportunities to resolve my dispute through the formal grievance procedure I had no option but to engage early conciliation with ACAS at the end of May 2018.
>
> …
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> 29. My mental health has been a debilitating factor in the delay in contacting ACAS, notwithstanding, the continuous but deliberate actions of the Respondents an management as a result of the ongoing deplorable company treatment to me during this period had further declined and the medication I was prescribed affects my cognitive ability and therefore I was not in a position to action the claim earlier. I accept that the time limitation may have been pushed to the wire as a result and that is with regret but unavoidable from my perspective."

13. The passages cited above identify two factors. First, the Claimant was seeing whether the grievance would result in her concerns being addressed before commencing proceedings and second, she was affected by poor mental health. Both factors featured in her oral evidence before me.

14. The first of the two matters relied upon faces a difficulty. In **Palmer v Southend-on-Sea Borough Council** [1984] IRLR 114 (which I drew to the attention of the parties so that they could address me on it), the Court of Appeal determined that the fact that an internal appeal was pending it not mean that it was not reasonably practicable to present the complaint in time. Although that guidance was in doubt during the period in which the Dispute Resolution Regulations were in force, I agree with the *obiter* statement of Underhill P, as he then was, that the repeal of the Regulations means that **Palmer** is now binding authority once again (**John Lewis Partnership v Charman** UKEAT/0079/11). In the light of that difficulty, Mr Martins relied heavily on the second matter; the Claimant's ill health.

15. There was no medical evidence available that dealt specifically with the question of the Claimant's ability to commence proceedings on time. She described herself as having had a "foggy brain" and being on anti-depressant medication. The letter from her doctor confirms that she attended an appointment on 19 February 2018 complaining of stress at work; was prescribed "Amitriptyline" (which is an anti-depressant); and was subsequently diagnosed with "Depression and Anxiety".

16. Under cross-examination, the Claimant's evidence evolved somewhat. She described having taken a conscious decision not to commence proceedings in October 2017 when she felt she was already subject to detriment. She took that decision because she was "the main earner". What ultimately prompted her to approach ACAS was not a period of better health but that she had lost trust and confidence in the grievance procedure. She said that a Citizens Advice website made it clear she could not wait for the grievance outcome but had to get on (which suggests she was aware, at least by that point, of the time limit). When it was put to her that she was capable of commencing the claim she said she could not have done so because she was pursuing her grievance. However, she also maintained that too ill to commence any earlier and that, in any event, she was in time, whilst also accepting that, with hindsight, she should have commenced earlier. It was difficult in the light of the oral evidence to get a firm grip on quite how the Claimant was putting her case. As a result, I asked some questions, recorded a summary of evidence which the Claimant then agreed:

> "- Health made commencing more difficult though not impossible
> - Overriding reason was waiting for Co to deal with grievance
> - So when commenced not because feeling better but because lost trust and confidence in the business"

The evidence would tend to suggest that ill health was a material factor but not the principal reason for not commencing in time. That suggestion is confirmed by an analysis of the documents.

17. On the same day that the Claimant visited her GP (19 February 2018) she submitted her grievance letter. She drafted it herself. It is striking as it sets out legal authority (there is reference to **Morrow v Safeway Stores** complete with IRLR citation). The Claimant told me that she has some knowledge of Company and Employment Law and access to professional websites where she was able to perform research. That enabled her to cite authority and she accepted in cross-examination that she was aware of that there was a time limit for bringing a claim. The letter is well-constructed. It does not suggest a "foggy brain". Rather it suggests someone who was very clear about what she wanted, was aware that she had legal rights and able to set out her case succinctly and clearly. It seems to me that she was capable of researching the specific time limit herself. Indeed, her evidence that she understood her substantive rights; understood there was a time limit; knew that she had to approach ACAS in the first instance; but did not know the time limit was three months, was very difficult to accept. In any event, I consider that her correspondence makes it clear that she could, had she chosen to do so, have approached ACAS earlier than she did, alternatively, that she was capable of instructing a lawyer to assist her in doing so. Her grievance letter would

itself have been an excellent starting point for instruction. In the circumstances, I am not persuaded that her ill-health had the effect that it was not reasonably practicable for her to have commenced her claim in time and the allegations of detriment contained in the first category on the Scott Schedule are not within the Tribunal's jurisdiction.

(2) Are the right respondents identified?

18. The Claimant has commenced proceedings against four Respondents:

(1) Lee Filters (A Division of Panavision Europe Limited);

(2) Panavision Europe Limited;

(3) Mr Jeff Allen; and

(4) Mr Mark Furssedown.

During the hearing, Dr Kerr gave the Tribunal assurances that Messrs Allen and Furssedown both work for Panavision Europe Limited ("Panavision); that they would attend to give evidence; and that the Panavision would not seek to run the so-called employer's defence (i.e. the defence found at **ERA 1996, s. 47B(1D)**. In reliance on those assurances, the Claimant consented to the Respondents' application that Messrs Allen and Furssedown be removed as parties. If Panavision were later to seek to change its position it would be open to the Claimant to seek to add Messrs Allen and Furssedown to the proceedings again. It would likely also be necessary to consider whether an award of costs in favour of the Claimant was appropriate.

19. An application was also made to remove the first of the four respondents, Lee Filters. The basis of the application was that Lee Filters is the trading name of a division of Panavision Europe Limited. It is not a discrete legal entity. Mr Martins accepted that that might well be the case and, it followed, Lee Filters was no longer to be a respondent.

(3) Should judgment be entered on the counterclaim?

20. There are two elements to the counterclaim. The first concerned the delivery up of property. I would have had considerable doubts as to whether that matter fell within the Tribunal's jurisdiction, but the parties told me that the matter had, in any event, been resolved.

21. The second aspect concerns car allowance. Panavision alleges that the Claimant improperly increased her own car allowance. Dr Kerr made told me that Panavision no longer sought to have judgment on that issue at this stage. It will be dealt with in the main hearing.

ORDERS

1. A one day PH is listed at Southampton Employment Tribunal on 20 July 2019 to consider the following issues:

   (1) Should the claims be struck out for want of proper particularisation;

   (2) Should the claims be struck out on the basis that they have no reasonable prospects of success; and

   (3) If not, should the claims be the subject of deposit orders?

   The hearing is reserved to EJ Jones QC;

2. Lee Filters, Mr Allen and Mr Furssedown are removed as parties.

Employment Judge Jones QC
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Dated: 2 June 2019
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