EMPLOYMENT TRIBUNALS

Claimant: Mrs R Tapster

Respondent: Isle of White NHS Trust

Heard at: **Southampton** **On: 10th June 2019**

Before: **Employment Judge Dawson**

Representation
Claimant: In person
Respondent: Ms Wolstenholme, counsel

JUDGMENT

1. The claimant's claims were presented out of time and it is not just and equitable to extend time, they are dismissed.

REASONS

1. At this hearing Mrs Tapster represented herself and the respondent was represented by Ms Wolstenholme of counsel.

2. The matter was listed by order of Employment Judge Livesey dated 25th of July 2019, to consider whether the claims should be struck out (all or in part) either on the basis of the principle of res judicata or because they are out of time. By email dated 7 March 2019, the parties were also informed that the ruling in *Henderson v Henderson* would be considered at this hearing.

3. To the extent that the claims were not struck out, Employment Judge Livesey also listed the matter for consideration of a deposit order and for the issues to be determined.

4. Prior to the hearing, Mrs Tapster had sent to the Employment Tribunal a skeleton argument, under cover of a letter dated 3rd of June 2019, and for the hearing she had prepared detailed written submissions which she read

to the tribunal. The respondent, through its counsel, also submitted a skeleton argument on the morning of the hearing, as well as various authorities to which I will refer. Mrs Tapster told me that she had had time to consider the skeleton argument, but I told her that more time was available if she needed it.

5. At the outset of the hearing we agreed a timetable whereby Ms Wolstenholme said she would wish to make submissions for around 30 minutes and Mrs Tapster for around 20 minutes. In fact, both Ms Wolstenholme and Mrs Tapster spoke for substantially longer than they had anticipated but I did not "guillotine" either party. Submissions were finished shortly before 1pm.

6. Before I refer to the issues and the law in this case, it is helpful to set out the background to the matter so that the issues can be properly understood.

Background

7. The claimant resigned from her employment with the respondent, as a paediatric nurse, on 14 August 2014.

8. She issued proceedings in the Employment Tribunal against the respondent on 18 August 2014 (number 3100671/2014) alleging that she had been subjected to constructive unfair dismissal, disability discrimination, detriment on the grounds of protected disclosures and breach of contract.

9. The matter was listed for a final hearing on 29 June 2015.

10. On 4 March 2015, the claimant applied to amend her claim. That application came before Employment Judge Kolanko on 29 May 2015. His judgment states that "with the agreement of the parties the claimant's application to amend her claim to allege further detriments following the lodging of these proceedings will be considered by the tribunal after it has given judgment in relation to the current claims". However, the 2nd paragraph of his judgment was that "the claimant's application to amend her claim to allege additional disclosures and attempted detriments as recited in the claimant's list of detriments linked to specific disclosures numbers… is refused."

11. The final hearing of the matter was heard by an Employment Tribunal chaired by Employment Judge Craft between 1 July 2015 and 29 July 2015 and a reserved decision was sent to the parties on 3 December 2015.

12. The judgment stated, in paragraph 5, that "The claimant's application to amend her claim to allege further detriments following the lodging of these proceedings will be listed by the Employment Tribunal for a case management preliminary hearing."

13. Matters then went to the Employment Appeal Tribunal and, I am told, the Court of Appeal, neither of which upheld the claimant's appeal. Following that, on 29th of November 2017, the acting Regional Employment Judge wrote to the parties stating "… It is appropriate to deal with the claimant's application to amend her claim to allege further detriments occurring after the claim had been presented… The claimant is directed to clarify whether

the application to amend includes only those additional matters referred to in the document "list of detriments linked to specific disclosures" sent the tribunal on 4th of March 2015. If any further matters are alleged, the claimant is to identify each… by 13 December 2017"

14. The matter came before Employment Judge Salter on 1st of June 2018. The claimant had submitted a 9 page document dated 22nd of December 2017 which, I understand, she relied upon before Employment Judge Salter. That document set out various complaints.

15. Before Judge Salter the claimant, as recorded in paragraph 20 of the Reasons for his Judgment, stated that the application was "never about a whistleblowing claim" and stated that she was not "bringing a post determination detriment claimant based on whistleblowing." Employment Judge Salter stated that "for the sake of completeness… if the claimant had not made her concession… I would have been bound by the principles of issue estoppel and would have refused her application as the Employment Tribunal at the final hearing in 2015 found that three of the disclosures the claimant now relies upon to support her claims of post determination detriment… did not amount to protected disclosures… With regards to the [other] disclosure… the tribunal found there was no causation" (paragraphs 23 to 24).

16. The Employment Judge then went on to allow an amendment to plead victimisation in respect of 2 alleged detriments, on 6th of September 2017 and 14 December 2017 (paragraph 35). There was no appeal against that decision.

17. The respondent submitted particulars of response to the amended claim but, on 13 July 2018, the claimant wrote to the Employment Tribunal stating "Judge Salter's order, only allowing a single incident of the ongoing post-employment harassment particularised within my 18 May 2018 submissions, calculatedly undermined the success prospects of my amendments." In an accompanying application the claimant wrote "In order to prevent wasting resources on arguing amendments taken out of legal context, I hereby request that the allowed amendment is also struck out, following the prejudicial order of Employment Judge Salter… Since the respondent's unlawful conduct is ongoing since I issued my claim under the Equality Act 2010, I am at liberty to file an independent claim of the ET within 3 months of the respondent last unlawful act." I was not taken to the claimants submissions of 18 May 2018.

18. By order dated 17th July 2018 a judgment recorded that the claimant's claims were withdrawn.

19. On 3 December 2018, the claimant presented the present proceedings to the tribunal. Box 8, in which the claimant set out her grounds of claim, opens with the statement "Post–employment harassment and victimisation – ongoing – in breach of the Equality Act 2010". The claimant then set out a considerable amount of background, much of which the respondent says was dealt with within the earlier proceedings and on 21st of December 2018, Regional Employment Judge Pirani ordered that the claimant should set out the protected acts upon which she relies and the detriments which are said

to have occurred because of the complaint, as well as the alleged harassment.

20. The claimant submitted a document headed "Claimant's Submission" in answer to Judge Pirani's order and, subsequently, the order of Employment Judge Livesey which I have referred above was made.

Matters arising from the Hearing

21. Initially, in answer to my question, Mrs Tapster confirmed that all the matters which she sought to bring before the tribunal were summarised within the document headed "Claimant's Submission".

22. Within her skeleton argument, counsel for the respondent had summarised the allegations of detriment or harassment that apprear within the "Claimant's Submission" document in 8 items (paragraph 7 of her skeleton argument). Mrs Tapster confirmed that that summary accurately summarised the allegations she was seeking to rely upon.

23. Subsequently, when she commenced making submissions in response to the respondent's submissions, Mrs Tapster appeared, to me, to be moving away from the "Claimant's Submission". She stated that she would like to develop the allegations within the "Claimant's Submission" but only in relation to events which had happened thereafter. She stated that she had set out those events in her (different) written submission which she went on to read to me. It is apparent from that submission and what Mrs Tapster said to me, that the way in which she would seek to develop that document is contained within paragraph 7 of her written submission which she read, where she states "since the R continues to make vexatious allegations and knowingly false submissions in court, I'm forced to update my list of complaints in relation to their conduct as they arise." Mrs Tapster referred to no other alleged acts of detriment or harassment but submitted that this was a continuing act by the respondent.

24. It is clear that Mrs Tapster feels very aggrieved about the way in which the respondent present its case in this tribunal. She did not seek to add any other acts of detriment or harassment.

25. I had been unsure from my reading of the claim form whether Mrs Tapster was also seeking to argue that the respondent had given references, in respect of her employment with it, which amounted to victimisation. She agreed, however, with the respondent's counsel that no references had been provided by the respondent.

26. Mrs Tapster also helpfully explained that in respect of her pleaded harassment claim, the claim was of harassment arising because of the protected acts that she alleges she made. It is, therefore, in reality, a victimisation claim. She was not relying upon any protected characteristic in respect of her harassment claim.

27. Both Mrs Tapster and the respondent told me that all of the 8 items of detriment or harassment summarised within the respondent's skeleton argument had been put before Employment Judge Salter; indeed Mrs

Tapster was emphatic in this respect. That included the 8th allegation summarised at paragraph 7 (8) of the respondent's skeleton argument- that in her skeleton argument prepared for the hearing on 1 June 2018, the respondent's counsel had made reference to the claimant having disclosed confidential information.

28. In summary, the acts of detriment relied upon by the claimant, as set out in paragraph 7 of the respondent's skeleton argument, are as follows;

    a. on 20 August 2014, agents of the respondent making a fraudulent report to ICO,

    b. between November 2014 and February 2015, Mr Moody, undertaking belated disciplinary proceedings which resulted in findings of gross misconduct and confidentiality breaches in February 2015,

    c. in July 2015, during the employment tribunal hearing, disclosing the claimant's medical records and omitting a relevant document from the hearing bundle and its witnesses "submitted knowingly false testimonies",

    d. between February 2015 and April 2016 harassing the claimant with vexatious allegations at the NMC, leading to the claimant being struck off the register on 6 April 2016,

    e. in June 2016, Mr Moody submitting new allegations to the NMC which were dismissed on 8 June 2017,

    f. on 6 of September 2017, the respondent refused to provide the claimant with mental health services, unlawfully restrained the claimant, and called the police ,

    g. on 14 December 2017 the respondent refused to provide the claimant with medical care in its maxillo–facial x-ray department, refused to deal with the claimant's complaint and called the police,

    h. on 18 May 2018, in the respondent's counsel's skeleton argument, prepared for the hearing on 1 June 2018, reference was made to the claimant having disclosed confidential information.

The Issues

29. In respect of the question of whether the allegations are within time or not, the question for me is whether they were presented within 3 months starting with the date of the act to which the complaint relates or such other period as I think just and equitable. In respect of conduct extending over a period, that is to be treated as done at the end of the period.

30. In respect of the assertion of cause of action estoppel, estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action (*Arnold v National Westminster Bank* [1991] 2 AC 93).

31. In respect of *Henderson v Henderson* abuse, the question is whether the claim should have been raised in earlier proceedings if it was to be raised at all and I am to take a broad, merits based judgment, taking into account the public and private interests involved and all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it issues which could have been raised before. (As explained in *Johnson v Gore Wood* [2002] 2 AC 1).

The Law

32. Section 123 Equality Act 2010 provides

> 123 (1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of—
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> (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) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as 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.

33. Harvey on Industrial Relations and Employment Law helpfully summarises the position in relation to the principles governing the extension of time as follows

> "The discretion to grant an extension of time under the 'just and equitable' formula has been held to be as wide as that given to the civil courts by s 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions (*British Coal Corpn v Keeble, DPP v Marshall*, above). Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (*a*) the length of and reasons for the delay; (*b*) the extent to which the cogency of the evidence is likely to be affected by the delay; (*c*) the extent to which the party sued had co-operated with any requests for information; (*d*) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (see *British Coal Corpn v Keeble [1997] IRLR 336, at para 8*). However, although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal

> requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (*Southwark London Borough v Afolabi [2003] EWCA Civ 15*, *[2003] IRLR 220 at para 33*, per Peter Gibson LJ)[1].

34. In respect of whether there is conduct extending over a period, it is important to distinguish between the continuance of the discriminatory act itself, and the continuance of the consequences of a discriminatory act, it is only in the former case that the act will be treated as extending over a period (*Barclays Bank plc v Kapur [1989] IRLR 387 at 392*).

35. In respect of the law on conduct extending over a period, again Harvey provides a useful summary[2]:

> An act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant (*Barclays Bank plc v Kapur [1989] IRLR 387*, *[1989] ICR 753, CA*; affd. *[1991] IRLR 136*, *[1991] ICR 208, HL*). … [I]n order to constitute a continuing act, the incidents complained of must be unlawful; if they are not, they cannot be relied on to keep time running, which may result in the claim being time-barred (*Oxfordshire County Council v Meade UKEAT/0410/14 (18 June 2015, unreported)*)

36. In *Hendricks v Metropolitan Police Comr [2003] IRLR 96,* Mummery LJ stated that the focus of the Employment Tribunal should have been on "'the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed"

37. Counsel for the respondent referred me to *Singh v The Governing Body of Moorlands Primary School* [2013] IRLR 820 which, quoting from the head note holds, "the core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court. The core immunity also comprises statements of case and other documents placed before the court."

38. In respect of the law on cause of action estoppel and abuse of process, I have set out above, in the issues section, some of the governing principles. I was not taken to any additional authorities in respect of res judicata. The respondent's skeleton argument puts the matter this way "the claim is an attempt to relitigate issues which have already been decided (res judicata)".

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[1] Division P1/G/[279]
[2] Division P1/F/[115]

39. In *Johnson v Gore Wood*, slightly earlier than the section which I have referred to already, Lord Bingham states "the underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."

40. Counsel for the respondent also referred me to various extracts of the relevant IDS Employment Law Handbooks and, within volume 5, to paragraph 2.143 which states "… *The fact that the initial proceedings occurred in a tribunal, where parties are encouraged not be legally represented, could not constitute a special circumstance under which the ruling Henderson v Henderson should not apply*".

41. The same publication also refers to summaries of EAT authorities, and in particular counsel took me to *Owolabi v Bondcare,* where summarising the EAT decision the authors write "given that O could have raised the question of his suspension at the hearing of his 1st claim – by which time his suspension had been in place for around 16 months – the question arose as to whether he should have done so. O could provide no good reason for not raising the issue earlier, and particularly given the fact that he had not responded to a specific request to provide further particulars…"

Conclusions

Time

42. There is no continuing act by the respondent in this case. To the extent that the claimant cannot practise as a nurse because of the actions taken by the respondent or she suffers from the enduring consequences of its decision as to her conduct, those are the continuing consequences of concluded acts. Further to the extent that the claimant relies upon the allegations made by the respondent in these proceedings and the proceedings last before the tribunal in June 2018, I do not consider that is a continuing act. The respondent is setting out its case as it is obliged to do. There is no ongoing situation or continuing state of affairs in this respect. In any event for the reasons set out below those actions are covered by judicial proceedings immunity.

43. *Singh v Moorlands* makes clear that acts done within legal proceedings are covered by judicial proceedings immunity. In my judgment that includes the submission of a skeleton argument by counsel and would also include making allegations and false submissions in court as alleged in paragraph 7 of the claimant's written submissions. However, in respect of the latter point, beyond the way in which the respondent has presented its case before me today, no other specific allegations were made. The allegations in respect of the respondent's counsel's skeleton argument or its witnesses in court could not give rise to a claim of victimisation.

44. In respect of whether the claim was presented in time, applying *Oxfordshire County Council v Meade* referred to above, in my judgment it is not appropriate to take account of actions which are clearly not unlawful in deciding whether there is a continuing state of affairs. That includes the

allegation in respect of counsel's skeleton argument. If that is right, then the most recent allegation against the respondent which the claimant can rely upon is that of 14th December 2017. That is almost one year before the present proceedings were issued.

45. The claimant has provided no explanation as to why the present proceedings were not presented sooner than they were. She withdrew her claims in the earlier proceedings on 13 July 2018. Having done that, there is no reason why she could not have presented further proceedings immediately.

46. It is clear that the claimant was aware of the allegations since, on her own case today, she sought to advance them in front of Employment Judge Salter. She made an application to amend the, then, extant proceedings to include those allegations of detriment. In respect of the allegations of 6 September 2017 and 14 December 2017 she was given permission to amend her claim.

47. If the claimant's concern was that Employment Judge Salter did not give permission to amend in respect of all of the allegations with which she wished to proceed, her remedy was to appeal against his decision. Even leaving aside questions of abuse of process, a failure to appeal a decision with which one is not satisfied is not, in my judgment, good grounds for presenting claims outside of the 3 month time limit.

48. Moreover, even if I should take into account the allegation made in respect of the hearing on 1st June 2018, these proceedings were still issued 6 months after the hearing with no explanation as to why they were not issued sooner.

49. There is clear prejudice to the respondent in this case if the claimant is allowed to present these allegations out of time. The respondent has already been put to the time and expense of defending 2 of the allegations in the earlier proceedings, only to be met with the claimant's withdrawal. It will be put to further inconvenience and expense if, now, it is forced to defend the allegations again. Moreover, in my judgment it would contravene the principle of finality of litigation, in circumstances where the claimant has made a deliberate decision to withdraw the proceedings, for that to be used as a reason to extend time for her to present subsequent proceedings.

50. The claims which the claimant now seeks to make go back to 20 August 2014, almost 5 years ago. It is inevitable that there will be a dimming of recollections over that period and even the more recent allegations are now over a year old (with the exception of the final one).

51. This is not a case where the claimant is being driven from the judgment seat or deprived of the opportunity of having her allegations heard. She had the opportunity to make the application to amend in earlier proceedings, she made that application, she did not appeal against the order of Employment Judge Salter and then she withdrew the allegations which he had permitted to be pleaded, of her own accord. Having done that, I do not consider that it is just and equitable to extend time in respect of any of the allegations.

Abuse of Process

52. It is not necessary for me to consider this argument having regard to my decision on time, I will therefore set out my conclusions relatively briefly.

53. Given that the claimant not only accepts, but expressly asserts, that all of the detriments which she now has relies upon were placed before Employment Judge Salter in the earlier application to amend these proceedings it is difficult to see how this claim is not either res judicata or an abuse of process. To the extent that Employment Judge Salter did not give permission for the claimant to amend her claim to rely upon the detriments she now asserts (and I note that he gave permission only in relation to the allegations arising on 6 September 2017 on 14 December 2017), the claimant's remedy was to appeal. The claimant cannot seek to circumvent the order of Employment Judge Salter by simply issuing fresh proceedings.

54. In respect of the allegations arising on 6 September 2017 and 14 December 2017, having regard to the principles set down in *Johnson v Gore Wood*, once the claimant had withdrawn her proceedings in that respect, I do not consider that the respondent should be "twice vexed" in the same manner. Having regard to the public interest in efficiency and economy in the conduct of litigation and the need for the respondent to be able to get on with conducting its business as a health authority, I have concluded that the claimant should have continued with her claims in the earlier proceedings, if she was to pursue them.

55. It is an abuse of process for the claimant to attempt to relitigate those matters now.

56. Given that it is not the claimant's case that she did not present all of the detriments to Employment Judge Salter in her application to amend, I also do not need to consider the respondent's argument that she should have done so. However, in that respect, again I accept the arguments set out in the respondent's counsel's skeleton argument that the claimant was given a formal opportunity to apply to amend her claim (at the hearing on 1 June 2018) and she could have included the matters which she complains of in that application. She should have done so and, having not done so, it would, again, be an abuse of process to present them now.

Summary of Conclusions

57. The claims presented to this tribunal are out of time. Even if the claimant could rely upon the allegation that on 18 May 2018 the respondent's skeleton argument was wrong and misleading, it was a further 6 ½ months before the claimant issued proceedings. No explanation has been given for that delay and in the circumstances of this case, set out above, I do not consider that it is just and equitable to extend time.

58. Moreover the claims presented are an abuse of the process of the tribunal. The claimant has already presented all of the allegations to which this claim relates to Employment Judge Salter. He permitted amendment of the then existing claim to allow some of the claims to go forward. To the extent that

he did not permit amendment in respect of the claims that are now presented, the claimant's remedy was to appeal his decision, not to issue a fresh set of proceedings. To the extent that he did permit some of the allegations to proceed but the claimant then withdrew her claim, it is an abuse of process for the same claims to be presented again. The respondent is entitled to rely upon the principle of finality in litigation and it should not be subject to the same set of proceedings again.

59. In the premises I strike out the claims in this case.

Employment Judge Dawson

Date: 11th June 2019

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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