Case Number: 2304141/2017

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms M Nicol Wilson	**v**	**South London & Maudsley NHS Foundation Trust**

PRELIMINARY HEARING

Heard at: **London South** **On: 7 May 2019**

Before: **Employment Judge Martin**

Appearances
For the Claimant: **Ms Shona Newmark - Solicitor**
For the Respondent: **Mr A Ross - Counsel**

RESERVED JUDGMENT
Respondent's application for strike out or deposit order

1. The Claimant's claims of harassment on the grounds of race are out of time and it is not just and equitable to extend time. The Respondent's application that the Claimant's claims of racial harassment are struck out is successful.

RESERVED REASONS

1. The basis of the application by the Respondent was that the Claimant's claims of racial harassment were made out of time and alternatively that these aspects of her claims have no reasonable prospect of success and should be struck out or alternatively little reasonable prospect of success and that a deposit order should be made as a pre-condition of continuing with these parts of her claim. The protected characteristic is race. The Claimant describes herself as Black African.

2. The applicable time limit is in s123(1)(a) Equality Act 2010 namely complaints of unlawful discrimination must be presented to an Employment Tribunal before the end of the period of three months beginning with the date of the act complained of (as modified to take account of early ACAS conciliation). The Respondent's application is that the harassment claims are out of time and there is no

reasonable prospect of time being extended or that the claims would be made out on their merits.

3. The relevant chronology is set out below:

2 November 2017	ACAS notification (day A)
21 November 2017	Early Conciliation Certificate issued
27 December 2017	ET1 presented (The Respondent submits that taking early conciliation into account, this means the Claimant can only complain of acts that occurred on or after 9 September 2017). Three incidents of racial harassment are particularised in the ET1 dated 2 February 2017, 25 July 2017 and 4 September 2017. The Respondent presents its ET3 which amongst other things says the Claimant's claims of racial harassment are out of time.
5 April 2018	Preliminary hearing (case management) where the Claimant is ordered to disclose to the Respondent her covert recording of the meeting held on 4 September 2017.
5 July 2018	The Claimant provides additional information referring to four further incidents of alleged racial harassment occurring between 5 January 2017 and 25 July 2017.

4. The harassment claims as set out in the ET1 relate to allegations that the Respondent mimicked the Claimant's accent on 2 February 2017 and on 25 July 2017, and said she was *"wailing in a manner similar to Caribbean or even Greek funeral"* on 4 September 2017.

5. The allegations added in the additional information were not part of the order made by the Tribunal which had asked only that the Claimant state when she says her accent was mimicked.

6. Unusually for this type of application I have the benefit of the Claimant's signed witness statement prepared for the full merits hearing which should have commenced on 3 October 2017. Although the Claimant said at the abortive hearing on 3 October 2018 that she had not read it when she signed it, I have found in my judgment on costs, that the Claimant gave her solicitors full instructions to prepare her statement which was then prepared on the basis of those instructions and she had the opportunity to read her statement before she signed it. At that time, I ordered that no witness statements (from either the

Claimant or the Respondent) could be amended for the adjourned hearing. I therefore have the benefit of knowing exactly what evidence the Claimant will be adducing at the hearing.

7. I have read the Claimant's witness statement and agree with the Respondent's submission that the Claimant does not deal at all with the alleged incidents of 2 February 2017 or 25 July 2017. I also can see that there are no details given of the alleged mimicry, only a bald assertion.

8. The Claimant covertly recorded the conversation that she alleges is racial harassment on 4 September 2017. I have read the transcript which put the comment into context. I have set out the transcript below:

   (MNW is the Claimant)

MNW	**I was just physically and emotionally drained now from the email from Sally, that's why I couldn't help myself, I just burst in to tears and I'm sorry**
MO	**But you didn't just burst into tears did you?**
MNW	**Yeah I burst into tears**
MO	**It wasn't just bursting into tears, I was told by a number of staff that you were wailing in a manner similar to Caribbean or even Greek funeral, I'm trying to describe the manner in which you were wailing.**
MNW	**Like a funeral?**
MO	**Yes. And that the whole team ended up getting involved, those that were there.**

9. **The Respondent submitted** that this was a descriptive comment and not a negative comment and pointed out that the Claimant is not Caribbean or Greek so the hurdle of seriousness is even higher than the ordinary high hurdle. The Respondent also submitted that there is no indication in the Claimant's witness statement of the effect the comment had on her, or that she felt her dignity had been violated and that she did not raise this in her grievance in September a copy of which was passed to me in the hearing.

10. The Claimant produced this recording as a result of an order of the Tribunal and the Respondent transcribed it. The Claimant accepts the transcript as being correct. As always, a transcript only tells half the story, what it cannot convey is the tone of the conversation which can have a strong bearing on the context in which things are said. I listened to the recording of this part of the conversation and observed that MO was very calm and measured. From this recording I can hear that the remark was made in a descriptive way to try to convey to the Clamant what her behavior was and the effect it had on others.

11. The Respondent submitted that the Claimant did not perceive herself to have been racially harassed as if she had, it would have been included in the grievance and that even if there was a perception it was not reasonable to hold such a view.

12. The Respondent accepts that Tribunal's should be slow to strike out discrimination claims at a preliminary hearing but submits that this is an unusual situation as there is a surreptitious recording produced by the Claimant and witness statements have been finalised. It argued that it is therefore permissible to strike out the Claimant's claims or in the alternative to make a deposit order.

13. **The Claimant submitted** that the last event took place on 4 September 2017 and the Claimant commenced the early conciliation process on 2 November 2017 which was within two months of the event taking place. The ACAS early conciliation certificate was issued on 21 September 2017 which the Claimant submitted brought the claim in time as she presented her claim on 27 December 2017.

14. The Claimant submitted that the acts were continuing acts done by the same individual on 2 February 2017 and 25 July 2017.

15. In the alternative it was submitted that if the 4 September 2017 incident is out of time, then it is just and equitable to allow the claim to be brought as the Claimant tried to bring her claim within what she thought was the correct time frame. She was being moved by the Respondent so she would not come into contact with Ms Oakman to remedy the situation and possibly hoped the matter would be resolved internally.

16. It was submitted that although we have the witness statements and the extract from the recording all of this is subject to cross examination and the full bundle which comprises about 400 pages. It was submitted that there is a lot more evidence for the Tribunal to hear. It was submitted that the test for harassment is high but that the test to strike out a claim is higher and that the test to strike out has not been made out.

17. Finally, the Claimant submitted that although the Tribunal has heard about the what, when and who, regarding the September comment the pertinent fact is why it was said. It was submitted that the Claimant's dignity was violated by the comments in this meeting and the context and how she reacted is relevant. The Claimant's case should not be struck out and should be heard on the basis that the claim is in time, and if it is not then.it is just and equitable to hear it out of time and the context of the cross examination and documents not examined by this tribunal could be considered to determine success or otherwise.

18. In reply, the Respondent submitted the claim was out of time. It submitted that but for the ACAS early conciliation process the claim should have been brought by 3 December 2017. The parties agree that the effect of the ACAS early conciliation process was to give 19 days extra time. This give until 22 December for the claim to have been presented. It was presented on 27 December 2017 and is therefore five days out of time.

19. The Respondent refuted the suggestion that further exploration of the bundle and in cross examination about the context of the statements and the effect it had on the Claimant was necessary. The submission was that the Claimant has had her opportunity to explain the effect of the words. She wrote her statement with the aid of solicitors and signed her witness statement. The Claimant will not now be

able to add what effect these matters had on her as it will not come up in cross examination as she does not say anything about it in her witness statement or put it in her September 2017 grievance. It was submitted that the reason the bundle is long is because there are many transcripts of surreptitious recordings made by the Claimant most of which were not relevant.

My conclusions:

Were the Claimant's claims brought in time?

20. I accept the submissions made by the Respondent which are set out above. The Claimant's claim is 5 days out of time. I have discretion to extend time where it is just and equitable to do so. However, this is still the exception to the rule and the Claimant must give reasons to persuade me that it is just and equitable to extend time. I referred myself to the cases of Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 which held that factors such as the length of and reasons for the delay, in addition to the prejudice caused to the respondent, would be relevant.

21. In considering this, I have read the Claimant's witness statement and her claim to the Tribunal to see what she says about why she did not bring her claim in time. The explanation that I can see is from the submissions given on her behalf by her representative which are set out above. Even these are equivocal. The Claimant's representative said that the Claimant was being moved by the Respondent so she would not come into contact with Ms Oakman to remedy the situation and "**possibly**" hoped the matter would be resolved internally. The word "**possibly**" does not tell me this is what the Claimant thought, this is just conjecture. There is nothing in the Claimant's witness statement to tell me that she hoped things would be resolved to support the submission made. There is no explanation as to why the Claimant felt she wanted to wait to seek resolution on the 22 December 2017 (the last day for presentation within the primary time limit), but why by 27 December 2017 she felt resolution was not possible so presented her claim. This is especially so as the Christmas period covered this period and it is unlikely much would happen in those five days. This makes this suggestion by the Claimant's representative implausible.

22. I reminded myself of the relevant law:

    a. **Section 123 Equality Act 2010** provides for a 3-month limitation period from the date that the act complained of was done. This can be extended if there are just and equitable grounds to do so.

    b. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434 CA**, it was noted that, while Tribunals have a wide discretion to extend time in discrimination cases, it should only be exercised in exceptional circumstances. '**time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion**.'

    c. In **O'Brien v Department for Constitutional Affairs [2009] IRLR 294**, the Court of Appeal held that the burden of proof is on the Claimant to

convince the Tribunal that it is just and equitable to extend time. In most cases there are strong reasons for a strict approach to time limits.

23. The Claimant's claim is clearly out of time and the Claimant has not put forward any sustainable or credible reason why I should exercise my discretion to extend time on the basis that it is just and equitable to do so. I therefore find that the Claimant's claims are out of time and the Tribunal does not have jurisdiction to hear them.

24. Even if I had extended time for the Claimant to present her claim, I would still have struck the Claimant's claim out on the basis it had no reasonable prospect of success.

25. I am mindful that a tribunal should be slow to strike claims out at a preliminary stage. However, this is one of the exceptional cases where this is justified. Unusually, I have the witness statements from all parties which have been exchanged and cannot now be changed. I also have heard the recording of the conversation of September 2017 and read the transcript. I have read the pleadings and the Claimant's grievance made after the conversation in September and which does not reference this conversation at all. For the Claimant's claim to succeed this conversation must be found to be racially discriminatory to bring the other allegations in time.

26. Based on the Claimant's evidence I can see no reasonable prospect of the Claimant's claims succeeding and had time been extended I would have dismissed her claims of race discrimination on the basis that they have no reasonable prospect of success.

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Employment Judge Martin
Date: 17 June 2019