EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Parkin**
Respondent: **Mr M Fieldhouse**
Heard at: **Leeds** **On: 17 May 2019**

Before: **Employment Judge Little**

Representation

Claimant: In person (accompanied by her husband)
Respondent: Miss R Kight of Counsel (instructed by Ms A Cunningham)

RESERVED JUDGMENT FOLLOWING AN OPEN PRELIMINARY HEARING

My Judgment is that:-

1. It is just and equitable to extend the limitation period to the date of actual presentation, 12 September 2018, and so the Tribunal has jurisdiction to determine the complaint brought under the provisions of the Equality Act 2010 section 57 (discrimination by trade organisations).
2. The claimant's application to join Unite the Union to these proceedings is granted.
3. A hearing for further management of this case will now be arranged. Unite the Union should present their Response within 14 days of receiving this judgment or write to confirm that they adopt the Response of Mr Fieldhouse.

REASONS

Procedural history

1. The claimant presented the claim which is the subject matter of this preliminary hearing on 12 September 2018. This was the fourth claim which the claimant presented in 2018 although she was to present a further and fifth claim at the end of November 2018. All the claims relate to the claimant's employment with Leeds City Council but the claim with which I am dealing is unique in that when presented Mr Fieldhouse, who is a regional officer with Unite the Union (hereinafter 'Unite') was also a respondent. Mr Fieldhouse was therefore not an employee of Leeds City Council.
2. In the claim with which I am dealing, on presentation five respondents had been named. However Employment Judge Davies decided that it would be appropriate to separate the discrete complaints which were made against Mr Fieldhouse in that claim. The intention was that the claim under case number 1810450/2018 would proceed independently whereas the claim against the other four respondents would be consolidated with the first, second, third, and now presumably fifth claims.
3. At a preliminary hearing for case management on 11 March 2019 Employment Judge Davies ordered that there would be this public preliminary hearing to determine whether the claim against Mr Fieldhouse had been presented in time and if not whether it would be just and equitable to extend time for bringing the claim. The Judge made various case management orders in preparation for the preliminary hearing.
4. Employment Judge Davies made a further order on 25 April 2019 in response to letters and applications which the claimant had made in the meantime. Salient to the preliminary hearing which I have conducted, the claimant's application to amend her claim so as to add Unite as a respondent was added as a further matter for me to consider.

Preliminary issues raised by the claimant at the beginning of this hearing

5. The claimant's first concern was that the respondent had not brought any witnesses to this hearing. The claimant had understood that Employment Judge Davies had made an order that they should do this. I explained to the claimant that that was not what had been ordered. It was for each party to decide what evidence it would call, or not as the case may be. The respondent had not been told that he must bring witnesses. The only instruction was that any party who brought witnesses must have obtained written witness statements from those witnesses in advance and provided copies to the other side. In the event the respondent was not calling any evidence and bearing in mind the subject matter that this hearing was dealing with that did not surprise me.

6. The claimant's next concern was in relation to disclosure of documents by the respondent. The claimant said that this had been done later than Employment Judge Davies had ordered – that is to say not on 25 March 2019. It transpired that, as Ms Kight acknowledged, the respondent had been one day late in disclosing it's documents to the claimant. The reason for that was that

   Ms Cunningham, the respondent's solicitor, had diarised the wrong date. However, it transpired that the claimant had not disclosed all her documents to the respondent. Instead she had brought to my hearing two lever arch files and a lever arch file containing authorities. One of the lever arch files also contained the 28 page witness statement which the claimant had prepared for my hearing (pages 768 to 795). It seemed likely that that witness statement had not been served on the respondent.

7. Whilst the claimant had brought sufficient copies of her bundles for myself and the witness table, she had not brought a copy for the respondent. In fact the claimant was refusing to provide the respondent with her bundles. Her rationale was that the bundles contained other evidence which she did not want the respondent to know about at this stage. I explained to the claimant that if she was not willing to let the respondent have sight of the bundles she had brought, I would not be able to look at them either. I could not reach a decision based on documents which the respondent was unaware of. That being said, I explained to the claimant that, bearing in mind the subject matter of the hearing, I doubted whether there would be that many relevant documents. Eventually the claimant agreed that Ms Kight could see her bundles. We used the witness table bundles for this purpose.

   It was agreed that the respondent's lawyers would not take away from today's hearing the claimant's bundles, but instead would return them to the claimant.

8. The next matter which I had to consider with the claimant was her request that she should be permitted to ask the respondent's barrister and solicitor questions. The claimant's rationale for this was that as I had explained that Ms Kight would be asking the claimant questions (cross-examination) the claimant thought that it would only be fair if she had the opportunity to do the same. I have explained to the claimant that this is not so because neither the respondent's barrister nor solicitor would be giving evidence at this hearing (or at all). I sought to explain to the claimant that there were really two phases to this hearing. There would be evidence, in the event from the claimant only and primarily about the time issue and then there would be an opportunity for both sides to address me on the two preliminary issues.

9. A further difficulty which cropped up during the course of this hearing was that during the claimant's evidence and after she had answered my questions the claimant said that she would not answer any questions asked of her by Ms Kight until I made a decision as to whether Unite could be added to the claim. I think the claimant's rationale for this may have been that she now thought that a complaint under the Equality Act 2010 section 57 could only be brought against a trade association – for these purposes a trade union. However that in turn seemed to stem from the claimant's belief that she would also have a claim against Mr Fieldhouse individually and separate from a section 57 complaint. I tried to explain to the claimant that when section 57 provides that a trade

organisation must not discriminate against a member, "discriminate" was shorthand for the various types of discrimination which the Equality Act outlaws in respect of the various protected characteristics. That would include therefore the claimant's protected characteristics of race, sex and disability (although I am uncertain whether it has yet been established that she is a disabled person within the meaning of the Equality Act). I sought to reassure the claimant that my Judgment from today's hearing would deal with both the time issue and the Unite issue, but there was utterly no reason that I should first make a ruling on the Unite issue that is prior to the claimant's evidence being completed. By this stage we were about to adjourn for lunch and I asked the claimant and her husband to reflect on this question over lunch. On resumption the claimant agreed to answer Ms Kight's questions.

10. I should also mention that during her cross-examination by Ms Kight the claimant alleged that Ms Kight was badgering her. In particular the claimant was concerned when Ms Kight prefaced her questions with "you accept that …". I endeavoured to reassure the claimant that this was a perfectly acceptable way of putting a question – and it was a question, because if the claimant did not accept whatever proposition was being put to her she could of course say so. On the other hand I also had to ask the claimant on occasion not to shout and jab her finger in the direction of Ms Kight. I had earlier in the day decided that it would help the claimant if she could remain seated next to her husband when giving evidence rather than do this from the witness table.

11. **Evidence**

As indicated above, the claimant has given evidence by reference to her witness statement and by answering questions from the Tribunal and questions from the respondent's barrister. The claimant has called no other witnesses. The respondent has called no witnesses.

12. **Documents**

I have noted the position above with regard to the documents which the claimant has put before me. In addition, the respondent had prepared a bundle which I have also considered and that ran to 612 pages.

13. **The relevant facts**

13.1. On 9 April 2018 the claimant had contacted Mr Fieldhouse seeking advice about a dispute with her employer, Leeds City Council. It will be recalled that the claimant presented her first claim to the Employment Tribunal shortly after this, on 18 April 2018.

13.2. On 12 April 2018 Mr Fieldhouse telephoned the claimant and informed her that the union could not provide discretionary legal representation to her and the reasons for this were given.

13.3. On 25 April 2018 Mr Fieldhouse wrote to the claimant. A copy of that letter is at page 193A in the respondent's bundle. In that letter Mr Fieldhouse explained that the union's legal officer did not believe that what was then the claimant's proposed Employment Tribunal claim would have reasonable prospects of success. It was for that reason that the union would not provide the claimant with legal assistance to pursue a claim.

The letter went on to explain to the claimant what the time limits were in the Employment Tribunal.

13.4. The claimant received this letter on 27 April 2018 as is apparent from her email of 28 April 2018, which is at page 19 in the claimant's "core bundle". In that email the claimant challenged the decision which had been made and asked for further information as to the reason for the decision.

13.5. On 18 May 2018 the claimant resigned her membership of Unite.

13.6. On 10 August 2018 Tas Sangha, Deputy Regional Secretary of Unite, wrote to the claimant. A copy of that letter is at pages 3 to 6 in the claimant's core bundle. It is the outcome of a formal complaint which the claimant had in the meantime made against Unite. The complaint was not upheld.

13.7. Whilst it is not my task to determine at this hearing whether the claimant is a person with a disability (as defined by the Equality Act 2010) I do find, on the basis of the medical evidence which has been presented, that the claimant has had mental health issues. A summary of the claimant's health record with particular reference to stress and mental health problems is set out in a letter from Dr E C Turner, the claimant's GP (Grenoside Surgery). That report is dated 20 July 2018 and appears in both the claimant's bundle (at page 378) and the respondent's bundle (at 392). The doctor mentions an episode of low mood in September 2013; work stress in March 2014; a further episode of stress at work in June 2016; a further presentation with work related stress in November 2017 and anti-depressant medication prescribed in January 2018. The claimant reached a crisis point on 1 May 2018 when she attended her GP who recorded that she was very distressed and had significant thoughts of selfharm (see Dr Jackson's letter of 1 May 2018 at page 338 to 339 in the respondent's bundle). The claimant was referred by her GP to the Sheffield Health and Social Care Single Point of Access team.

13.8. On 10 July 2018 Rhian Barnabas, a member of the single point of access team wrote to Dr Panniker, one of the doctors at Grenoside surgery. She reported that the claimant felt that her mental health was starting to get better. She no longer felt she needed the support of that team and so she was being discharged (see page 346 of the respondent's bundle).

13.9. The claimant contacted ACAS on 17 July 2018 in respect of early conciliation. A certificate of early conciliation was issued by ACAS on 1 August 2018. The prospective respondent in that certificate was named as:

"Mark Fieldhouse

Unite the Union"

13.10. The claim form was then presented to the Tribunal on 12 September 2018.

14. **The parties' submissions**

Whilst one day had been allocated to this hearing, the evidence was not concluded until 4.20pm and submissions began at 4.33pm. I had indicated to both parties that their oral submissions should be limited to 15 minutes.

14.1. Claimant's submissions

Mrs Parkin said that she would be prejudiced if she were not permitted to pursue this claim. She relied upon the provisions of the Equality Act 2010 section 109 and the case of **Leeds City Council** v **Woodhouse**. The claimant contended that the respondent had discriminated against her and so his employer, the union, should be added.

The claimant went on to explain that her mental health had affected her when preparing the claim. It had not been the way that she would normally reason. It had taken her a long time to prepare the claim form. At this point the claimant told me that she was getting confused and began to cry. As she had five of her 15 minutes left I suggested that she take a moment but it was agreed that her husband should take over. Mr Parkin pointed out that the medical evidence referred to depression and it should be accepted that that would affect the claimant's cognitive function without that needing to be spelt out.

14.2. Respondent's submissions

Ms Kight reminded me that there were essentially two issues to determine; the time issue and whether Unite should be added. There was no other application before me and therefore no other amendment to consider.

The respondent's case was that the effect of sections 123 and 140B of the Equality Act 2010 to the circumstances of the claimant's case meant that the last date for presenting the claim in time had been 1 September 2018 and so presenting on 12 September was 11 days late. The claimant had not hitherto pleaded her case to the effect that there had been discrimination of a continuing nature, culminating in the 10 August 2018 complaint outcome letter. Ms Kight acknowledged that the claimant had referred to the 10 August letter within her particulars of claim (page 66 of that document) but there had been no contention that the writing of that letter was a discriminatory act.

One of the authorities in the claimant's authority's bundle was **Cast v Croydon College** but that had a different scenario as it was about flexible working.

In any event, the claim had been brought against the respondent, not Unite and the respondent had not been involved in the decision which the 10 August 2018 letter communicated to the claimant. The claimant's membership of Unite had ceased in May 2018.

I was reminded that in the case of **Robertson v Bexley Community Centre** [2003] IRLR 434 it was stated there was no presumption that a Tribunal should exercise its discretion to extend time and in fact the exercise of the discretion would be the exception rather than the rule.

Ms Kight accepted that the claim was only 11 days late but contended that the respondent would still be prejudiced if it were to proceed. That was not because of delay but because of the way in which the proceedings were being conducted.

It was accepted that the claimant had had a serious mental health episode at the beginning of May 2018 and had been hospitalised on 9 May but nevertheless the medical evidence indicated that she was feeling better by July. It was also worthy of note that whilst the limitation period was running for this claim, the claimant had been able to present her third claim to the Tribunal in July 2018. Further she had been able to attend a preliminary hearing in one of her other claims and a further hearing on 28 August 2018. On the very day when the respondent contended the limitation period expired, 1 September 2018, it could be seen that the claimant had been able to prepare a lengthy grounds of appeal in respect of a decision by Employment Judge Lancaster at the 28 August hearing and on the same day had made an application for reconsideration of that Judgment (see pages 285 to 312 of the respondent's bundle).

The claimant had not needed any documentation from the respondent (for instance the union rule book) in order to be in a position to bring the proceedings.

As far as joining Unite was concerned, Ms Kight took the view that that was unnecessary because the claimant was able to rely upon section 109.

15. **My conclusions**

15.1. <u>The time issue</u>

<u>Was the claim presented out of time?</u>

As I understand that the claimant still disputes that the claim was presented late, I need to deal with this matter. The first question is when does time run from? In my judgment the latest date for that must be 27 April 2018, that being the date when the claimant received the 25 April 2018 letter from the respondent. On that basis the primary limitation period would have expired on 26 July 2018. However, as that date falls within the period which the Equality Act 2010 section 140B describes as Day A and Day B, the effect of subsection 4 is that the time limit is deemed to expire one month after Day B. Day B is the date when the ACAS certificate was issued and that was 1 August 2018. Accordingly time is extended to 1 September 2018. As the claim was not presented until 12 September 2018 it is therefore out of time by 11 days.

15.2. <u>The "conduct extending over a period" argument</u>

Whilst I acknowledge that the claimant did make reference to the 10 August 2018 letter in her particulars of claim, which run to some 136 pages, the claimant has not until this hearing suggested that she was complaining about anything after the 25 April 2018 letter. Raising that issue now is clearly an attempt to circumvent the clear ruling made by Employment Judge Davies (see her 26 April 2019 order) that this claim relates solely to the refusal of legal advice by Mr Fieldhouse on 25 April 2018. That issue cannot now be re-opened before me.

15.3. <u>Would it be just and equitable to extend time?</u>

The factors which I am permitted to take into account when deciding whether to exercise my discretion to extend time include the factors which

are set out in the Limitation Act 1980, section 33(3). That approach was endorsed by the Employment Appeal Tribunal in the case of **British Coal Corporation v Keeble and Others** [1997] IRLR 336. The ultimate consideration is the balance of prejudice, but other relevant matters include the length of the delay and the reasons for it; whether the delay is likely to affect the cogency of the evidence and the extent to which the other party has co-operated with any requests for information.

In what is otherwise, with respect, a rather unwieldly document, the claimant has in paragraph 35 of her witness statement set out eight grounds to explain why the claim was presented when it was.

The first two grounds are that Unite did not make the claimant aware of her rights as a member and secondly that they refused to give her the rule book. I do not consider that in themselves those are good grounds. The claimant knew that she had been refused legal representation, ostensibly because the union did not consider that the claim had reasonable prospects of success, although the claimant says that the real reason was discriminatory because of her protected characteristics of sex, race and/or disability. I cannot see that the claimant needed any further information than she already had in order to pursue the claim.

Two of the other grounds are that the claimant says that she was confused as to the relationship between Leeds City Council and the respondent, such that she believed that the respondent could have been an employee of Leeds City Council. That ground appears implausible bearing in mind that before the claim against the respondent was hived off, it was part of the claimant's fourth claim where the first respondent had been Leeds City Council. It is not as if, in any of her three previous claims she had raised the subject matter of the fourth claim by seeking to lay it at the door of Leeds City Council.

The claimant's eighth ground is that she had been loathe to commence further Tribunal proceedings because as she puts it "I already had a few in" and accordingly her first recourse was to the union's complaints procedure rather than litigation. Whilst seeking to avoid litigation unless it is absolutely necessary would be commendable, the difficulty for the claimant is that the complaints procedure had concluded by 10 August 2018 which still left four weeks within which a claim could have been presented in time.

Three of the claimant's grounds refer to her mental health. She says she was not mentally capable and not mentally fit. I consider that this ground must be given considerable weight. In my Judgment it explains the slight delay in presenting the claim. On the medical evidence before me the claimant's mental health was not good for substantial parts of the limitation period. It was particularly serious in May when at the beginning of that month the claimant was referred to the crisis team and was subsequently hospitalised. I acknowledge that there appears to have been an improvement in her mental health by July. The claimant was able to begin preparatory steps for this claim by approaching ACAS and she was able to engage in two preliminary hearings about other claims she had brought

in the Employment Tribunal. Clearly therefore the claimant was not incapacitated and as Ms Kight points out was able to produce a lengthy grounds of appeal document and a somewhat shorter reconsideration application on the very day that was the last for presenting this claim in time.

Although the claimant does not specifically raise it as a ground herself, it is clear that the ability to focus on the claim against the respondent was diminished because the claimant was distracted by attending to aspects of her other claims.

It could be questioned whether it was necessary for the claimant to bring multiple claims, or whether it was necessary for her to express herself at such length within those claims. Whatever the rights or wrongs of that approach, I conclude that attending to her other claims was a further significant reason for the instant claim being presented slightly out of time.

15.4. Prejudice

Ms Kight candidly accepts that the 11 days delay does not in itself prejudice the respondent. Certainly such a minimal delay could not have any bearing on the cogency of evidence. Instead Ms Kight alludes to the prejudice being "the way the proceedings are being conducted". I assume that is a reference to what could perhaps be described as the challenging way in which Mrs Parkin, as a litigant in person, has formulated her claims and what could be described as the rather argumentative and overly suspicious way in which the claimant presents her case in person. I have some personal experience of this as a result of this hearing. It is unusual to have to almost negotiate with a party before they are prepared to allow the other side to see documents and before they are prepared to answer cross-examination questions. However due allowance must be made and if the respondent is in effect saying that it is prejudiced because the claimant is being "difficult", I do not accept that that is a valid consideration. In all the circumstances I consider that it would be just and equitable to give the further extension of 11 days so that this claim is to be treated as one which the Tribunal has jurisdiction to determine.

15.5. The application to add Unite the Union as a respondent

I have noted that the ACAS certificate was issued in the joint names of Mr Fieldhouse and Unite. Of greater significance is the wording within the relevant ET1 claim form. Although in section 13 only Mr Fieldhouse's name appears in the box for name, "Unite the Union" appears directly under that name albeit in the section of the form which is supposed to set out the respondent's address. Mr Fieldhouse is of course a regional officer with the union and so there is a direct relationship. It is not as if the claimant's application is to bring in an unconnected further party. It seems to me to be more a question of re-labelling the claim, or at least distinguishing the labels which the claimant has already applied, although possibly put in the wrong box on the form. Whilst in principle Mr Fieldhouse could have personal liability for any discriminatory act of his

own done during the course of his employment with Unite and, in principle Unite would, under the provisions of the Equality Act 2010 section 109 have secondary liability for any such discriminatory acts, what the claimant is complaining about is the decision notified by the 25 April 2018 letter. That letter refers to input from the union's legal officer in reaching the decision and the letter explains that it is the union who will not be providing legal assistance, rather than that being the personal decision of Mr Fieldhouse. The claimant's application to join the union must be understood in that context.

Having regard to the reference to Unite the Union within the claim form as presented I do not consider that any additional time issues arise in respect of the amendment application. However if it were to have been contended (in fact it has not been) that there was further delay because the claimant did not make her amendment application until April 2019, I would remain of the view that no prejudice to Unite is caused.

I am therefore prepared to allow the application so that Unite the Union are joined as second respondent. I must stress however that that is in relation to the existing subject matter – the refusal of legal advice/representation and not in relation to anything which concerns the complaint which the claimant subsequently lodged with the union or its outcome.

Employment Judge Little

Date 31st May 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3 June 2019

FOR EMPLOYMENT TRIBUNALS