



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss D Rawat

v

1. Davinder Hare
2. Heathrow Express Operating Company Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford

On: 12 July 2019

Before: Employment Judge Henry

Appearances

For the Claimant: Mr Anis Ali - Ex-colleague

For the Respondent: Mr Tom Kirk - Counsel

JUDGMENT

1. The matter comes before the tribunal on a preliminary issue whether the claimant's claim for sex discrimination was presented in time and if not, whether it is just and equitable to extend time pursuant to section 123 of the Equality Act 2010.
2. On the claimant's claim being clarified at hearing, it is here recorded that her claim is that, she complains of discrimination on the protected characteristic of sex in respect of; the first respondent, Mr Hare, changing her name on her name badge from Rawat, to Ali, on or around 20 August 2016, and spreading or otherwise contributing to the spreading of malicious rumors that she was in a relationship with Mr Ali; and that Mr Hare had referred to the claimant as 'trouble' on punching/hitting her on her arm, in or around September 2016, where Mr Hare subsequently stated that he calls "lots of women 'trouble'".
3. It is the claimant's claim that, following documents being furnished on a subject access request, for the first time, she learned of Mr Hare changing

her name on the name badge, and spreading/contributing to the spreading of malicious rumors against her, and of Mr Hare stating that he “calls lots of women ‘trouble’”.

4. By a claim form presented to the tribunal on 22 August 2018, following a period of early conciliation between the 8 July 2018 and 23 July 2018, the claimant presented her complaint for discrimination.
5. It is not in dispute that the period within which the claimant was to present her claims, pursuant to section 123 of the Equality Act, were 3 months starting with the dates of the acts complained of occurring; that being 11 November 2016 on Mr Hare recording the statement in his e-mail, and his hitting the claimant in the arm and making reference to her being ‘trouble’ in September 2016. The claimant’s claim was to have been presented to the tribunal no later than 4 February 2017 and 19 November 2016, respectively, and has accordingly been presented outside of the requisite time period on the claims being presented on 22 August 2018, some 18 months late.
6. On the claimant’s claim being that she had not been aware of the e-mail of Mr Hare, dated 5 November 2016, and of the change to her name badge until receiving the documents following her SAR’s request on 30 May 2018, it is not challenged that the claimant would not before that date, have been in a position to present her claim to the tribunal. The issue therefore arising is whether, on the complaint being presented to the tribunal on 22 August 2018, it is appropriate for the tribunal to exercise its discretion in considering the claim, on the claimant’s delay between 30 May 2018 on receiving the documents and 22 August 2018, when the claimant presented her complaint to the tribunal; a period of just under 3 months.

The Law

7. On an application of discrimination, having determined that the complaint has been presented to the tribunal outside of the requisite time frame, the bar to the tribunal’s jurisdiction is not absolute; the tribunal has the discretion to extend time in circumstances where in all the circumstances of the case, it considers that it is just and equitable to do so.
8. The tribunal’s exercise of this discretion has been directed by the Court of Appeal in Robertson v Bexley Community Centre [203] IRLR343 per Auld LJ, that;

“25. It is also of importance to note that the time limits are exercised strictly in the 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. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule”.
9. On guidance from the Employment Appeal Tribunal, in British Coal Corporation v Keeble [1979] IRLR336. What is considered just and equitable in the circumstances of the case will encompass the list contained

in section 33 of the Limitations Act 1980. Although not limited to, and not all factors therein mentioned may be relevant in each case, consideration will be given to: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requirements for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. It is also a relevant consideration to consider the detriment in question.

Submissions

10. The tribunal was furnished with written submissions on behalf of the respondent which was augmented by oral submissions. The claimant presented oral submissions. The parties' submissions have been duly considered.
11. The tribunal particularly notes the respondent's submission at paragraph 15 to 26 of the respondent's submission addressing the criteria for the tribunal's guidance.

Conclusions

12. On the claimant informing the tribunal that, on receiving the documents following her SARs request, and on her being confused, and on it taking some time for her to familiarise herself with the information furnished, she accepts that by the 8 June 2018, she was then fully conversant with the information and for which, she had presented a grievance against Mr Hare, I am satisfied that the claimant, as at the 8 June 2018, was then aware of the circumstance giving rise to a cause of action for sex discrimination, and on which, it was then incumbent on the claimant to seek advice. Also, in these circumstances, I do not find the delay from the claimant receiving the SARs report circa 30 May 2018 to the 8 June 2018, to be a period of significant delay or otherwise of material significance, and indeed, the respondent has not raised issue thereon.
13. On the claimant entering early conciliation on 8 July 2018, and on the claimant presenting that she had made enquiries on line, by which she became aware of ACAS, and on then approaching ACAS, I find that this was a reasonable course of action for someone who was not aware of the action they were to take, her approaching ACAS in the first instance was then reasonable. This is not to say, as advanced by the respondent, that there were no other avenues for advice which may have been more appropriate to advise the claimant, one must remember that at this juncture, we are dealing with an individual who had not previously engaged in the tribunal process, and operating on her own, as she enters the legal process; approaching ACAS was a reasonable avenue to obtain some direction.
14. I accept the claimant's evidence that she was informed of her having three months within which to present her claim, and that to a lay person it was

reasonable to assume that the three-month period ran from the date she became aware of the issue, this being the date she received the disclosure following her SARs request. This is particularly so, in circumstances where, on the events having taken place significantly outside the three month period from when she became aware of the event, which, to understand the time for presenting a claim to run from the event would then necessarily exclude her from being able to make a claim, that it would rationally, make sense that the time limit would run from the date of knowledge and her being in a position to act thereon, albeit a mistaken belief.

15. On the claimant approaching ACAS and entering early conciliation in accordance with procedure, and subsequently submitting her claim to the tribunal within a time frame, that would then have been within the requisite time period, had it been the position that the time ran from the date she learned of the relevant facts, I do not find the actions of the claimant to have been unreasonable or otherwise in disregard to the issues of her potential claim to warrant a finding otherwise than that, the claimant had acted in a reasonable manner.
16. In considering the length of delay, the respondent's submissions are very persuasive, in that, I readily accept that on the matters complained of occurring now almost three years previous, the historic nature of the acts where the factual matrix will be of relevance, the passing of time will impact on the cogency of evidence. However, this in itself is not a reason not to exercise the tribunal's discretion.
17. I therefore turn to the question of the balance of prejudice, and again note that the respondent's submission are again very persuasive following Miller & Others v Ministry of Justice and Others UKEAT/000/34/15, of the respondent having to meet a claim which would otherwise be out of time, facing the cost and inconvenience of defending such a claim at trial, together with the "forensic prejudice" of the respondent and their witnesses being subject to questioning of historic allegations namely; fading memories, loss of documents and access to witnesses.
18. Against this, I have to balance the prejudice to the claimant that should her claim not be permitted to proceed, the claimant will lose her opportunity for remedy in circumstances where she may have been discriminated against, and in circumstances where the tribunal cannot say that the claimant has no reasonable prospect of success. Should the claimant not be permitted to proceed with her claim, she will then have no recourse for a remedy.
19. On balance, on the claimant not being aware of the material facts giving rise to her complaint until almost two years after the event, and on the claimant acting within such time, as I cannot say was unreasonable, and on the claimant taking reasonable steps to inform herself of the necessary actions to take to bring her complaint to the tribunal, I find that the greater prejudice would befall the claimant in not then having recourse to a remedy for potential discrimination against her, as against the financial cost in defending the claim, and the effluxion of time acting on memory, and access to documents.

20. I accordingly exercise the tribunal's discretion to extend time. The tribunal accordingly has jurisdiction to entertain the claimant's claims.

Employment Judge

Date:25.07.19.....

Sent to the parties on: ...07.08.19.....

.....
For the Tribunal Office