EMPLOYMENT TRIBUNALS

Claimant: Ms Waya

Respondent: London Borough of Bromley

Heard at: London South **On: 25 November 2019**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr Davies, Counsel

For the respondent: Ms King, Counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

Decision

a) The Tribunal finds that the alleged acts of discrimination on 18 July 2018 and 2 August 2018 were discrete/isolated acts and were presented outside of the primary time limit.

b) However, the Tribunal extends time under its just and equitable discretion and thus these complaints and the alleged act of discrimination on 26 November 2018 can proceed.

c) The Tribunal permits the claimant's application to amend her claim to add direct sex discrimination and harassment (race and sex).

d) The complaint of indirect (race) discrimination is dismissed upon the claimant's withdrawal of that claim.

e) The case will be listed for a further preliminary (case management) hearing.

Claims & appearances

1. By a claim form presented on 18 April 2019, the claimant brought complaints of direct race discrimination, indirect race discrimination, victimisation and sex discrimination (victimisation). This followed a period of ACAS conciliation between 19th of February 2019 (day A) and 19 March 2019 (day B). The Tribunal listed an open preliminary hearing to determine jurisdiction in relation to these claims. This was based on the respondent's assertion that the claimant was complaining about a one-off alleged act of discrimination occurring on 2 August 2018 and thus was out of time.
2. The claimant was represented by Mr Davies of counsel and the respondent was represented by Ms King of counsel.
3. The Tribunal was given a small bundle of documents. Neither party offered evidence. The Tribunal heard submissions from both parties.

Relevant findings of fact

4. The Tribunal made the following findings of fact limited solely to the preliminary issue before it and not in relation to the substantive allegations. Only findings of fact relevant to the issues, and those necessary and proportionate for the Tribunal to determine, have been referred to in this judgment.
5. The claimant is a Solicitor working in the Planning department of the respondent. She has been employed since 1 July 2002. She remains employed.
6. On 8 July 2018, the claimant was involved in an altercation with two members of the public off-site. The incident was reported by a member of the public to the respondent. The claimant was invited to a fact-finding meeting in relation to this incident on 18 July.
7. In relation to this fact-finding meeting on 18 July, the claimant says that she was nudged in the back and frogmarched to HR. In her claim form, the claimant said that the respondent would not have treated a man in this way. She said she felt deeply embarrassed and felt like she had been stripped of her dignity.
8. The claimant disputed the version of events which had been reported. The respondent decided to issue the claimant with a standard setting letter and not implement the respondent's formal disciplinary procedure. The decision to issue a standard setting letter was made on 2 August 2018. The respondent's decision maker (Greg Ullman), went on leave shortly after making this decision and it was not until 24 August 2018 that a letter was actually provided to the claimant. The letter was at page 47 of the preliminary hearing bundle. It stated that the matter was considered closed, that he would not enter into any further discussion on the matter and a copy of the letter would be placed on the claimant's personnel file in line with HR procedure. The claimant says this was an act of direct race discrimination.
9. Following the outcome meeting on 2 August, there was a conversation between the claimant and Mr Ullman relating to the length of time before the standard setting letter could be removed from the claimant's file. What was said is a matter of dispute between the parties with the claimant saying that a letter had been placed on another employee's file (Bob McQuillan) file following an altercation with a member of the public on the respondent's premises and it was

removed after three months. The respondent's case was that the claimant was advised that Mr McQuillan had once given a standard setting letter to another officer which had been removed after a period of nine months but that he was not aware of the precise circumstances and gave no assurance to the claimant. The Tribunal did not consider it necessary to resolve this dispute for the purposes of the jurisdiction argument before it and neither did the Tribunal hear any evidence on this point from either party.

10. To the extent that the claimant has complained about an alleged GDPR breach in relation to her medical data being released without her consent (paragraph 34 of the particulars of claim), referred to in the claimant's list of issues as occurring on 29th of October 2018, the Tribunal did not understand this to be an allegation of discrimination against the respondent.
11. The claimant was signed off sick from 28th of August to 3 December 2018.
12. Between 14th of November 2018 26 November 2018, there was an exchange of emails between the claimant's union representative and the respondent. This was in relation to the claimant's desire/quest for her standard setting letter to be removed from her file after three months (i.e. 24th November, on the basis that the letter was issued to her on 24th of August 2018). The Tribunal finds this to be a distinct and separate request from her dissatisfaction with the issuance of the standing standard setting letter in the first place. This email chain was in the preliminary hearing bundle pages 48 to 56. In an email from Kath Smith (the claimant's union representative) dated 14th of November 2018, she stated "I do understand that you cannot overturn the decision to issue the standard setting letter".
13. The effect of the respondent internal email chain in relation to whether the standard setting letter could be removed from the claimant's file and if so after what period of time, was that by analogy with formal disciplinary letters, a request could be made for removal of this informal standard setting letter after a period of one year. The claimant was thus advised by Mr Charles Obazuaye, that the respondent was not prepared to remove or erase the claimant's letter after three months as had been requested by the claimant. This email was dated 26 November and was at page 56 of the bundle. The email did not go on to state that a request could be made after one year. The claimant says this was an act of direct race discrimination.
14. On 27th of November 2018, the claimant took out a formal grievance against Greg Ullman.
15. The further particulars of the claimant's grievance were provided on 19th of December 2018.The claimant's grievance hearing took place on 26th February 2019 and the outcome of this meeting was conveyed to the claimant on 6 March 2019. The grievance was in relation to Greg Ullman and specifically about a duty of care, disciplinary procedures and processes, the standard setting letter dated 24th August 2018 and resolution. The grievance was heard by Colin Brand and was rejected. There was no mention of discrimination in the grievance and the Tribunal did not see any reference to discrimination following the outcome. The claimant was given the right to take the grievance to the next stage (to a panel of council members). She was given 14 days within which to do this.

The applicable law

16. By S.123 Equality Act 2010, a Tribunal will not have jurisdiction to consider a complaint of discrimination unless it has been brought before the end of the period of three months starting with the date of the act which the complaint relates to or, such other period as a Tribunal thinks just and equitable. This is a wide discretion.
17. By s.140B the time limit is extended by operation of the ACAS early conciliation period and S.140B (3) and/or S.140B (4) will operate to extend the time limit.
18. By section 123 (3) of the Equality Act 2010, conduct extending over a period of time is to be treated as done at the end of that period.
19. In ***Cast v Croydon 1998 ICR 500*** the Court of Appeal stated:

    "The position is that an act does not extend over time simply because the doing of the act has continuing consequences. A specific decision not to upgrade may be a specific act with continuing consequences. The continuing consequences do not make it a continuing act. On the other hand, an act does extend over a period of time if it takes the form of some policy, rule or practice in accordance with which decisions are taken from time to time"

20. In ***Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548***, the Court of Appeal clarified that the correct test in determining whether there is a continuing act of discrimination is the test as set out in ***Commissioner of police of the Metropolis the Hendricks 2003 ICR 530.*** That is, that a Tribunal is to look at the substance of the complaint in question as opposed to the existence of a policy or regime and determine whether they can be said to be part of one continuing act by the employer.
21. In relation to the Tribunal's just and equitable discretion, the Tribunal can also have regard to section 33 of the Limitation act 1980 which explains that in the exercise of discretion the Tribunal may consider prejudice to each party, 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 pursued has cooperated with any request for information, the promptness with which the claimant acted when he knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

Conclusions and analysis

22. Having regard to the findings of fact above and the applicable law, the Tribunal concludes that the decision to issue the claimant with a standard setting letter on 2 August 2018 and the subsequent decision not to remove the letter from the claimant's file after a period of three months were separate and distinct acts of the employer and was not conduct extending over a period of time which concluded on 26 November 2018.
23. The Tribunal considers that the claimant's challenge and dissatisfaction with the respondent on 2 August 2018 and 26 November are separate matters. The former was the claimant's dissatisfaction with the fact of issuance of a standard

setting letter. The latter was a discreet dissatisfaction with the decision not to remove it from the claimant's file after the period of three months. Put differently even if the claimant had been able to accept, reluctantly albeit, that she had been issued with a standard setting letter, she had a separate issue regarding her wish for this to be disregarded from her file after three months. The Tribunal concludes that whilst there may be a policy issue in relation to the respondent's decision on 26th of November which would have connectivity to the claimant subsequent grievance outcome on 6 March 2019 on the basis of an ongoing situation/ongoing state of affairs, the Tribunal concludes that the same cannot be said about the earlier decision to issue the letter.

24. Accordingly, the Tribunal concludes that the decision to issue 2 August 2018 is, prima facie, out of time. ACAS early conciliation commenced on 19 February 2019 which was after the primary limitation period which expired on 1 November 2018.
25. Even if the alternative date of the letter being issued is used (24th of August) the primary limitation period expired on 23 November 2018. The Tribunal reaches the same conclusion in relation to the alleged act of discrimination on 18 July (being nudged in the back and frogmarched to HR). This allegation was more closely linked to the respondent's decision to issue the claimant with a standard setting letter and not to the respondent's decision not to remove standing setting letter after three months reached on 26 November 2018.
26. In relation to the decision of the respondent not to remove the standard setting letter from the claimant's file after a period of three months, that decision was reached on 26 November 2018. In relation to that, the ACAS extension of time provisions contained in section 140B Equality Act 2010 do apply and specifically S.140B (4) and the time-limit to present a complaint to the Tribunal was extended to one month after day i.e. 19 April 2019. The claim was presented on 18 April 2019 and thus this complaint is in time. The Tribunal reaches the same conclusion in relation to any complaint about the grievance outcome on 6 March 2019 but notes that the particulars of claim do not expressly rely upon this grievance outcome as an act of discrimination. The Tribunal also notes that this grievance did not cite, as an allegation, that the respondent had discriminated against the claimant.
27. In relation to the Tribunal's discretion to extend time, the Tribunal notes that extensions to the primary limitation period is the exception not the norm.
28. Considering the question of prejudice, the Tribunal notes that the respondent was engaged in ongoing matters of dispute with the claimant from July 2018 to March 2019. The Tribunal notes that the respondent will already be facing a claim in relation to the alleged act on 26 November 2018. Having regard to the length of the delay, whilst this period is not insignificant, the Tribunal has regard to the claimant's sickness absence from the end of August until the beginning of December. The Tribunal also had regard to the claimant's resurrection of the dispute from 14 November 2018 onwards. Notwithstanding the Tribunal's conclusions above, the Tribunal considers that based on the documentation seen by the Tribunal and the submissions heard, the claimant had not herself drawn a material distinction between the events and considered it all to be part of the same process. The Tribunal does not consider that the cogency of the

evidence will be impacted in any material way as the passage of time is not that lengthy since the alleged act (s) of discrimination and the existence of sufficient contemporaneous documentation. The Tribunal did not have any information before it in relation to a lack of cooperation on part of the respondent which might have some relevance in the exercise of the Tribunal's discretion. The Tribunal has already found that the claimant was off sick from the end of August to the beginning of December 2018. The Tribunal considers that the claimant was attempting to resolve matters internally and sought the assistance of her union representative and thereafter raised a formal grievance. The claimant initiated ACAS early conciliation on 19th February which was before her grievance hearing. The Tribunal has deliberated whether the claimant ought to have acted sooner (from 26th of November 2018 at least) having regard to her access to advice from the union and because she is a Solicitor. However, she is not an employment lawyer and it appears that the claimant was trying to exhaust internal resolution without needing to escalate the matter.

29. Having regard to all of the matters considered above, the Tribunal concludes that it is just and equitable to allow the claimant's complaints of alleged discrimination on 18th July and 2 August 2018 to be heard.

Application to amend

30. The claimant also made an application to amend the claim to add complaints of direct sex discrimination and harassment (sex & race). In addition, the claimant withdrew her complaint of indirect race discrimination.
31. The appropriate test to be applied is now well established and set out in ***Selkent Bus Company Ltd v Moore 1996 ICR 836*** and has since been set out in the presidential guidance on case management.
32. The factors which a Tribunal can take into consideration in assessing the balance of hardship/injustice to the parties includes the nature of the amendment, the applicability of time limits and the timing and manner of the application.
33. In relation to the nature of the amendment sought by the claimant, (direct sex discrimination and harassment (sex and race)), the Tribunal notes and takes into consideration the following references in the narrative in the original particulars of claim in the claim form.
34. Regarding, the allegation about being nudged in the back and frogmarched to HR on 18 July 2018, the claimant had stated "the respondent would not have treated a man in the way I was treated. I felt deeply embarrassed, like I had been stripped of her dignity". In addition, at paragraph 31 of her particulars of claim "if I was a man, I would not have been taken out of someone's office in such a humiliating way."
35. In relation to the conversation following the issuance of the standard setting letter on 2 August 2018, the claimant stated the description of her alleged comparator as a white male senior officer who worked for the respondent.
36. Further, on the issue of keeping the standard setting letter on the claimant's file and the email exchange on 26 November, the claimant stated " the claimant

also believes that the respondent would not have treated a hypothetical white male less favourably in the same or similar situation"

37. Also, on the decision not to remove the letter from the claimant's file she stated" this would not have happened to the white male comparator or even a hypothetical male comparator" and in paragraph 37 the claimant stated "the respondent was fully aware of the information she received about a white male comparator November 2018".
38. The Tribunal has underlined for emphasis the references to gender in the above extract from the claimant's particulars of claim as it is of the opinion that the amendment is merely putting a different legal label on the facts already pleaded. Although the claimant has not gone on in relation to every allegation, to summarise her discrimination complaint explicitly/expressly as she has done for the race claim (save in relation to 18 July incident), by virtue of the comparator she relies upon and has referred to repeatedly, the Tribunal concludes that the claim for direct sex discrimination is already pleaded. Dual discrimination has an enabling provision in the Equality Act, but it has not been enacted thus, the claimant's claim is for sex discrimination in the alternative to race.
39. Regarding the complaint of harassment (sex and race), with the exception of the allegation about 18 July 2018 incident (related to sex), this is, on a labelling basis, less clear. The Tribunal reads this as a more than a labelling exercise and possibly a new cause of action. However, the claimant is not relying upon any new or additional facts. The Tribunal observes that the definition of harassment will still need to be met. Insofar as this amendment is out of time, the Tribunal considers there will be little or no prejudice to the respondent, the claim has been sought to be amended upon the claimant being professionally represented and it is been made at a stage in the proceedings where the substantive hearing has not yet been listed. Accordingly, it is just and equitable to allow this claim out of time. For reasons just advanced, the Tribunal does not consider the balance of prejudice to lie against the respondent in relation to the timing and manner of the application.
40. However, the claimant's assertion that the alleged breach of the GDPP is a further act of race and/or sex discrimination is a new allegation of discrimination. It is not a relabelling exercise and neither is it adding a new complaint of discrimination to a pre-existing complaint of discrimination. The claimant has applied to amend his claim on 25 November 2019 it would appear a year after the alleged incident. The Tribunal does not consider it to be just and equitable to permit this claim out of time and the Tribunal considers there would be some prejudice to the respondent in allowing this amendment as it would require an additional issue to be resolved which would require additional evidence when it has always been pleaded as a GDPR issue only.
41. The Tribunal notes and observes that the complaint of victimisation (sex and race) was already pleaded in the original claim though there does not appear to be any detail about the alleged protected act. The Tribunal has already observed above that the grievance outcome on 6 March is not pleaded as a discrimination complaint; neither does the detail of the grievance itself read as a protected act.

NOTE:

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Employment Judge Khalil
18 December 2019