Case Number: 2500517/2019

EMPLOYMENT TRIBUNALS

Claimant **Ms G Mucklow**

Respondent **North Yorkshire County Council**

ORDERS OF THE EMPLOYMENT TRIBUNAL

Held at Middlesbrough **ON 16 December 2019**

EMPLOYMENT JUDGE GARNON

Appearances
For Claimant Mr D Robinson-Young of Counsel
For Respondent Mr D Bayne of Counsel

JUDGMENT DISMISSING A CLAIM AT A PUBLIC PRELIMINARY HEARING

The claim was presented outside the time limit prescribed for doing so in circumstances where it was reasonably practicable for it to be presented within time. The Tribunal cannot consider the claim which is hereby dismissed.

REASONS

1. This is a claim of subjection to detriment because the claimant made protected disclosures. The issues for today are
(a) Whether the tribunal is precluded from considering the claim because it was presented outside the time limit in circumstances where it was reasonably practicable for it to be presented in time ?
(b) whether the evidence in paragraphs 37-39 and 43 of the claimant's witness statement and the whole of her husband's statement is inadmissible by virtue of being without prejudice
Counsel agreed I should first address only the first issue Rule 53 of the Employment Tribunal Rules of Procedure 2013 (the Rules) empowers me to issue a final judgment even at a preliminary hearing if the issue I decide is determinative of the whole case.

2. The claimant has provided a supplemental statement confirming the subjections to detriment by reason of making a protected disclosure under s48 of the Act which she will allege consist of
(a) the making of malicious and untrue allegations against her by fellow workers
(b) Ms Saunby pursuing a disciplinary investigation knowing the allegations were untrue
(c) that investigation being needlessly prolonged

(d) the presentation to her on or after 1 November 2018 of an offer to terminate her employment and, as she sees it, **deprive** her of a disciplinary hearing at which she could, in her words. "*clear my name*".

3. Section 48(3) of the Employment Rights Act 1996 (the Act) says the Tribunal shall not consider a complaint unless it is presented to the Tribunal: -
(a) before the end of the period of three months the date of the act or failure to act to which the complaint relates or ***where, or the act or failure is part of a series of similar acts or failures, the last of them***
(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

4. Section 207B provides for extension of time limits for Early Conciliation(EC), thus:
(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires, the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

5. The claimant did not contact ACAS until 6 February. The last detriment has to be on or after 7 November 2018 for the claim to be in time. ACAS sent the EC Certificate on 27 February. Her claim was presented on 20 March . If her contact with ACAS was out of time, there is ample case law to the effect time limits are just that—limits. I cannot say a few days is not long and waive the requirement.

6. Reasonably practicable means reasonably "feasible or do-able ". The burden of proving it was not reasonably do-able rests on the claimant, see Porter-v- Bandridge 1978 ICR 943. In orders I sent after the last hearing with members which I conducted on 25 November 2019 , based on the claimant saying detriment 2(d) above happened when it did , I anticipated that would be the argument.

7 In Palmer v Southend on Sea Borough Council 1984 IRLR 119 the Court of Appeal held the best approach is to ask "Was it reasonably feasible to present the complaint within three months?" The question is one of fact for the Tribunal taking all the circumstances into account. It will consider the substantial cause of the failure to comply with the time limit. It may be relevant to investigate whether and when, the claimant knew she had the right to complain, whether she was being advised at any material time

and, if so, by whom, and whether there was any substantial fault on the part of the claimant or advisor which led to the failure to comply with the time limit.

8. Dedman-v-British Building 1973 IRLR 379 , held that where either the claimant or his advisers were at fault in allowing the time limit to pass without presenting the complaint in time, it was reasonably practicable to present in time. As with other mistaken beliefs of law they will only render it not reasonably practicable to have presented in time if the mistaken belief is in itself reasonable Wall's Meat-v- Khan 1978 IRLR 499. If the mistaken belief results from the fault of her advisers in not giving her all the information the claimant will not be able to rely upon it. Similar points were made in Riley -v-Tesco Stores1980 IRLR 103 .

9. The question of acts " extending over a period" under the Equality Act 2010 and previous anti-discrimination legislation has been considered in a number of cases such as Cast-v-Croydon College 1998 IRLR 318 and Hendricks-v-Commissioner of Police for the Metropolis 2003 IRLR 96. A common cause of error on the point stems from the substitution for the statutory words of the phrase "continuing act ".As made clear in Cast, there is a distinction between a continuing act and a one-off act which has continuing consequences. In Sougrin v Haringey Health Authority [1992] IRLR 416, the Court of Appeal held an employer's refusal to upgrade a black nurse was a once and for all event. The resulting, ongoing payment of a lower salary was not a continuing act, but the continuing consequence of the one-off decision. The same principle was confirmed in Tyagi-v-BBC World Service. The wording of s48(3) requires me to identify an act or failure to act by the respondent or a fellow worker of the claimant . A detriment is something which places the claimant at a disadvantage, and although her perception of what is to her disadvantage is important , I must still look to the date of the last act or failure to act , not the date when she felt disadvantaged

10. The claimant gave evidence today. She was a member of the trade union Unison and a shop steward. Mr Mark Harrison a full-time official of Unison who had held such a position for 14 years gave evidence and was called by the respondent.

11. The claimant satisfied me she feels deeply aggrieved at having been accused, as she sees it wrongly, of disciplinary offences. The respondent's decision to take her to a disciplinary hearing was reached by August 2018 . She was called to a disciplinary hearing fixed for the date of her daughter's wedding so at her request it was postponed. Even if which the respondent's officers who fixed the date knew it clashed with the wedding that detriment was concluded. Even if it was a detriment not to relist the hearing until 5 November, that act was done on 11 September 2018.

12. Thereafter the claimant was heading for a hearing. At all material times she was represented by Mr Harrison. He notified the respondent quite shortly before she wanted a number of witnesses at the hearing. The respondent could not get them all there. It was that request which caused the hearing for 5 November to be postponed.

13. The claimant had a previous disciplinary warning. In discussions partially evidenced in emails, Mr Harrison, having formed the view the respondent believed it had a strong case Initially of his own initiative , he decided to explore with the respondent's HR department the possibility of a settlement . I have no doubt he did so in the best interests of his member, as he saw it. The respondent was prepared to negotiate and made an

initial offer of £2000. Mr Harrison visited the claimant at her home on 1 November and in the presence of her husband said there was an offer on the table. I accept the claimant's evidence she perceived the respondent did not want her back, which upset her greatly. However, on any objective analysis giving somebody the option of settlement as opposed to taking the risk of a disciplinary hearing cannot be placing that person at a disadvantage . On the contrary as Mr Harrison confirmed it conferred upon her a choice. He also confirmed in evidence that at no time did he say to her that the outcome of a disciplinary hearing was a foregone conclusion, though I accept her evidence he probably did tell her there was a risk in proceeding to such a hearing.

14. What he told her on 1 November cannot be an act or failure to act by the respondent which subjected her to a detriment. On the following day, he managed to negotiate an increase in the offer to £3900, or thereabouts. He sought instructions from his member who wanted him to accept though she asked for a favourable reference which she herself drafted. The respondent was not prepared to give her such a reference. Not only does the claimant not plead this as an additional detriment, such an argument would be doomed to failure . All the respondent did was to give a factual reference of a kind which it would have given whether or not she had made a protected disclosure. The reference she asked for would have been so glowing it would undermine their position if she decided not to accept the offer. Again by analogy with a discrimination case, Chief Constable of West Yorkshire -v- Khan, it is not subjecting her to a detriment.

15. Before the settlement agreement was entered into she had a telephone conversation with solicitors instructed by her union. A document at page 141 clearly shows the respondent telling her she was under no obligation to accept. Because she was weary of the whole matter she did. A settlement agreement was signed by her on 16 November

16. My conclusions are there was no act or failure to act by the respondent after at latest 2 November which could be said to be done on the ground the claimant had made a protected disclosure. I have some sympathy for her in that if she was wrongly accused that is certainly a detriment. However,she entered into a settlement agreement on the basis of union advice and listening to Mr Harrison I think that the advice was probably sound. The fact she later found out from her present solicitors the terms of the settlement agreement did not encompass a claim other than the unfair dismissal claim, does not amount, as Mr Robinson-Young rightly conceded to anything which would make it not reasonably practicable for the claim to have been presented in time.

_____

EMPLOYMENT JUDGE GARNON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 16 DECEMBER 2019