Case Number: 1305902/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D O'Connor	**v**	**Bar Standards Board**

Heard at: Birmingham

On: 2,and 3 March 2020 and (in chambers) 18 May 2020 and 26 August 2020

Before: Employment Judge Broughton

Appearances:
For Claimant: in person
Respondent: Ms A Padfield QC

PRELIMINARY HEARING

JUDGMENT

The Claimant's claims of race discrimination were all presented out of time and it is not just and equitable to extend time. As a result they are all dismissed.

Employment Judge Broughton

Date: 26 August 2020

Sent to the parties on:

For the Tribunal Office

REASONS

Applications and evidence

1. Both parties complained of material non-compliance with directions by the other. Whilst there had been failings on both sides they fell well short of grounds for striking out some or all of the claim or response.

2. In short, the respondent was late in producing the bundle for this hearing. That said, they produced evidence that appeared to show that it was sent to the claimant in October 2019, albeit the claimant said that it wasn't received.

3. Once it was re-sent, however, the claimant said that, once then received, she didn't have time to produce her witness statement and submissions focussed on the issues before me today.

4. I was satisfied that both sides were able to proceed and that there was no undue prejudice to either and certainly less than would have been occasioned by further delay. Partly as a result, however, I accepted and considered lengthy previous correspondence from the claimant in addition to her witness statement and oral submissions to ensure her full case was heard.

5. That said, the claimant's statement contained a number of very serious allegations about a number of barristers and judges that were not directly relevant to my deliberations today. In the absence of the individuals having an opportunity to respond, I did not require cross examination on those matters because, for the purposes of the hearing today, I have considered the claimant's case at its highest.

Background, facts and the claims

6. I had the opportunity of a reading day due to the extensive documentation in this case going back many years to at least 2010.

7. This history included tracking court proceedings that commenced in the High Court in 2013 which I needed to review thoroughly again after hearing the evidence and submissions.

8. Those proceedings included claims of race discrimination under the Race Relations Act 1976 and the Equality Act 2010 akin to those before me today. These elements of the High Court claims were struck out for want of jurisdiction.

9. At the time, the claimant had the benefit of advice from leading counsel and the jurisdiction point was not appealed. The claimant was aware, therefore, that the employment tribunal has exclusive jurisdiction for such claims.

10. The High Court claims, however, also included claims of race discrimination under the Human Rights Act 1998. Part of that claim was deemed arguable but, initially, was held to be time barred.

11. That issue culminated in a decision of the Supreme Court in October 2017 [UKSC 78]. The claimant was successful on the limitation point. The matter was remitted to the High Court and those proceedings are ongoing.

12. The claimant submitted her claim form in these tribunal proceedings on 12 December 2018.

13. Whilst there were some disagreements between the parties about how the claimant put her case, in essence it boiled down to the following points:

    a. The fact, conduct and outcome of the investigation into her conduct arising from what has become known as the Cunliffe complaint. This complaint was initially upheld before being quashed by the visitors on 17 August 2012 ("the appeal").

    b. The handling of two further complaints (Mushtaq and Vaughan-Birch) which the claimant believed were made because of the successful first complaint. These complaints were ultimately dismissed a few weeks after the Cunliffe complaint was overturned.

    c. The publication of the outcome of the Cunliffe complaint but, more specifically, the claimant wanted there to be no reference in public circulation that she had been charged with disreputable conduct or, at least, to ensure that internet searches for her name resulted in more balanced reporting and did not unduly prejudice her.

    The claimant's case was that all of the above were, at least, tainted with race discrimination and that they amounted to conduct extending over a period to this day.

14. The respondent had initially, albeit inexplicably, understood the claimant's last compliant to be limited to the publication of the visitor's judgment on her appeal. They had sought to strike that part of the claim out on the basis that there was clear documentary evidence that the claimant, or those acting on her behalf, had asked for it to be published.

15. The claimant's complaint was, effectively, that she wanted the respondent to take appropriate steps to fully exonerate her such that the fact that the Cunliffe compliant was initially upheld did not damage her reputation or future work prospects.

16. The claimant did want the appeal judgment to be published on the respondent's website but with hyperlinks to other judgments to provide a fuller picture. She also wanted an apology to be published and an inquiry to take place.

17. The claimant referenced a letter from her counsel, Mark Beaumont, dated 19 August 2012, shortly after her appeal was upheld, in support of those complaints regarding the publication of the outcome.

18. In a response dated 17 January 2019, the claimant suggested that she had also asked, on 20 August 2012, for any reference to her having been found guilty of discreditable conduct to be removed from the internet.

19. It was unclear if the judgment was immediately published but it appears unlikely because the claimant's solicitors wrote to the respondent on 5 December 2012 requesting publication of the full judgment on the respondent's website. She did not require any redactions. No other matters were raised in that correspondence.

20. Once the judgment was published, however, the claimant noticed that when she searched for her name on google, the judgment link came up on the first page. Alongside the link google publish the first line which, in her case, said

    "Miss O'Connor was convicted on 5 counts alleged against her conduct… "

21. The claimant was, understandably, concerned that this gave a completely false impression which may have been left with people who did not open the link itself.

22. The claimant said that she raised one or more of the above points with the respondent on three or more occasions from the date of the appeal outcome to, potentially, the end of 2013, or even early 2014. Other than the letter from Mr Beaumont, however, the claimant could not direct me to any evidence of such subsequent or repeated requests.

23. That said, it seems to me likely that, once aware of the contents of the google search page, the claimant would have sought to address this with the respondent. As a result, albeit for the purposes of this hearing only, I accept her evidence that she did. I am also willing to accept, on the same basis, that she may have repeated some or all of the previous requests over the following months.

24. It is not appropriate for me to make binding findings on those matters without hearing all of the evidence from both sides. However, again, I am taking the claimant's case at its highest.

Section 123 Equality Act 2010
Conduct extending over a period

25. It was common ground, following the decision of the Supreme Court, that each of the complaints, investigations and outcomes amounted to conduct extending over a period.

26. In addition, it was not materially in dispute that the three processes could amount collectively to conduct extending over a period.

27. The respondent sought to argue that because the Supreme Court had determined that the period only extended to the date of the final outcome of those investigations and /or processes then I was required to reach the same conclusion.

28. That is a submission I do not accept. The Supreme Court decision was not in relation to the test under s123 Equality Act 2010 which I must consider. That said, the similar statutory language would make that decision, at least, highly persuasive if I accepted the basic premise of the respondent's submission.

29. However, it seems to me that all that was in issue in the court proceedings was whether the conduct extended over a period to bring the alleged discrimination within the relevant time limit for those claims. There was no determination regarding whether that conduct extended yet further, or was capable of doing so. This, therefore, is one of the principal issues before me.

30. For the purposes of this hearing I am prepared to accept that the publication of the judgment of the visitors, the period until the other complaints were dismissed and the claimant's complaints about how the appeal judgment was published and her requests for surrounding actions were capable of amounting to conduct extending over a period.

31. All of those additional matters, however, were omissions rather than acts themselves. For example, the failures to publish an apology, hyperlinks or to amend the way in which the appeal judgment appeared on google searches.

32. Under s123 (3) (b) Equality Act 2010 a failure to do something is treated as being done on the date of the decision not to do it. In the absence of any evidence of such dates, the relevant date is when the respondent might reasonably have been expected to have acted (s123 (4) (b).

33. In those circumstances, it seems likely that the claimant would have complained about the manner of publication of the appeal judgment early in 2013, as she claimed, and it would reasonably have been expected that she would have received a response within a period of around a month.

34. I acknowledge that the claimant said that she raised the same matters over subsequent months but the mere repetition of requests does not, of itself, create a policy, practice or rule.

35. There was no supporting evidence that such further requests were made, or responded to. In any event, there was no evidence that they were

materially different from the earlier requests, nor that they gave rise to any fresh consideration on the part of the respondent.

36. As such, it seems to me that time must start running from around the end of March 2013 over five and a half years before the complaint was actually presented.

37. Even if I were wrong on that, there was no evidence that any requests were made after early 2014 and so the claim would still have been presented over four and a half years late.

38. The mere fact that the alleged omissions on the part of the respondent may have had continuing *consequences* for the claimant is not enough to suggest that they amounted to *conduct* extending over a period (my emphasis) under s123 (3) (a).

Just and equitable extension

39. As a result, I then move on to consider whether it is just and equitable to extend time in all the circumstances of this case (s123 (1) (b))

40. The basic position is that even relatively short extensions should be the exception rather than the rule. Time limits are there for a reason.

41. That said, the claimant had a number of reasons why she had not pursued her tribunal claims sooner which included:

    a. Her first child being born around the time of the appeal judgment
    b. A subsequent marital breakdown
    c. The appeal in her court proceedings
    d. Trying to manage her workload, albeit significantly reduced, including being the principal of her own firm
    e. Mental health difficulties, evidenced by medical reports, albeit this had improved in the months leading up to the issuing of this claim

42. Those all went at least some way to explaining the delay. It was also clear, however, that the claimant could have brought these proceedings sooner, given that she was able to pursue her appeal in the court proceedings and represent her clients in other cases, even with a restricted caseload, so it was a matter of priorities.

43. There would be significant prejudice to the respondent in having to defend these proceedings so long after the events in question.

44. Whilst it is true that the respondent should, at least, have retained relevant documents by virtue of the court proceedings that only goes some way to mitigating the prejudice caused by such a long a delay with regard, for example, to witnesses' recollections.

45. There is, inherently, prejudice to the claimant if her claims are held to be time barred. However, that is mitigated by the existence of the court proceedings which provide both a possible remedy and the opportunity to have her case heard in public.

Conclusion

46. In all of those circumstances, therefore, I do not consider that it would be appropriate to extend time in this case.

47. The very lengthy delay, whilst partially explained, coupled with the greater prejudice to the respondent if the claim were allowed to proceed mean that it would not be just and equitable to do so.

48. As a result, all of the claimant's claims of race discrimination are dismissed.

Employment Judge Broughton

Date: 26 August 2020

Sent to the parties on:

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