Case No: 2202790/2019

EMPLOYMENT TRIBUNALS

Claimant: **MS MELISSA RAMSEY**

First Respondent: **KWABANA AGYEI**

Second Respondent: **HODD, BARNES AND DICKINS (MASONS AVENUE) LIMITED**

In the: **London Central Employment Tribunal**

On: **11 August 2020**

Before: **Employment Judge Russell, Sitting Alone**

Representation: **Counsel for Respondent Mr T Kirk**

Counsel for Claimant Mr S Sanders

JUDGMENT

1. The Claimant was employed by Hodd Barnes & Dickens Ltd (HBD), not the First or Second Respondent.

2. As a result the Second Respondent, Hodd Barnes & Dickens (Masons Avenue) Ltd (HBDMA) should be removed as a party to the proceedings and the case against the Second Respondent dismissed.

3. The Claimant is out of time under section 123 of the Equality Act 2010 for presenting her claims. It is not just and equitable to extend time to allow those claims to continue.

4. As a result the Tribunal has no jurisdiction to hear the Claimant's claims which are dismissed.

5. There is therefore no requirement to determine the Claimant's application now to join HBD as a party to the proceedings and so no order is made in this respect.

REASONS

The Open Preliminary Hearing today was to consider 2 principal issues as follows:

1. Whether the claim as against the Second Respondent should be struck out under rule 37(1)(a) because it was never the Claimant's employer and therefore any claim against "an employer" under Part 5 of the Equality Act 2010 must have no reasonable prospects of success; and

2. Whether the Claimant's claim against either Respondent has been presented within time under section 123 of the Equality Act 2010 and whether it is just and equitable to extend time.

However, at the initial Preliminary Hearing of 17 December 2019 it was also anticipated that consideration would be given to the possibility of HBD, as the Claimant's possible employer, being joined into proceedings. That consideration had been paused by agreement between the parties and in anticipation of later mediation and settlement discussions (which did not resolve matters of course and hence this hearing). I agreed that the position of HBD would be a third issue for me to determine.

The Claimant's claim of unfair dismissal was withdrawn on 24 February 2020 and she had also withdrawn her complaint and reliance on pre 2017 allegations against the First Respondent. Her remaining claims of direct sex discrimination would however continue (whether against the First Respondent and Second Respondent, or the Second Respondent and HBD or all 3 as Respondents) subject to case management directions, to the extent

the Respondent's application to strike out the Claimant's claims was unsuccessful.

Having heard evidence from the First Respondent and the Claimant and thorough submissions from Counsel for the respective parties as well as considering the case authorities they provided, these are my findings:

1. HBD was the Claimant's employer. She accepts that she made a mistake on the ET1 form when she thought her employer was HBDMA. This mistake was continued by her solicitors who informed the Employment Tribunal on 15 November 2019 that the Claimant worked for the First Respondent, Second Respondent and did locum work for Linda Pope Opticians. It is only now that the clear picture has emerged according to the Claimant but, to her credit, the Claimant now accepts not only was her employer initially HBD this did not change when some employees moved over to work for HBDMA at its Masons Avenue office. She also accepts that she did not transfer her employment to the Second Respondent (first trading from 13 February 2019) and this is supported by the witness evidence and TUPE asset sale documentation within the bundle of documents which names the transferring staff and did not include reference to the Claimant. The Claimant worked at both the Holborn office and Masons Avenue office of (then) HBD at various times but did not work at Masons Avenue at any time after 10 August 2018, nor did she expect to do so, especially given her complaints against the First Respondent, who was the sole director of the Second Respondent based in Masons Avenue. So when she resigned claiming constructive dismissal on 4 May 2019 she was resigning from HBD which company had been her employer for the full 5 years or so of her employment. Further, only the staff working at the Masons Avenue office were employed by HBDMA the Second Respondent.

2. The last act of alleged discrimination against either the First or Second Respondent was 26 September 2018, and her claim, presented on 23 July 2019 (well after her internal grievance had been resolved by her employer) should have been commenced through ACAS and then an ET1 by 22 October 2018 against the First Respondent, and by 25 December 2018 at the latest against the Second Respondent . She is therefore at least some 5 and a half months out of time when she commenced her claim by contacting ACAS on 10 June 2019. Even the Claimant's representative accepts her ET claims were presented more than 3 months after any of the alleged incidents of discrimination. To the extent relevant there were

individual complaints of discrimination which did not include the claimed dismissal (the Claimant resigned on 4 May 2019 having decided to do so in September 2018) and there was no continuing act of discrimination.

3. The Claimant has been given a full opportunity before and at today's hearing to explain why she delayed the commencement of proceedings and why it would be just and equitable to extend time due to her delay. She has known from, at least the Preliminary Hearing Order of 17 December 2019, that the issue of time limits was an important consideration. She also knew that the Respondents were seeking to have her claims struck out for being out of time, unless her argument in support of the delay was persuasive. I do not find the delay in presenting the Claimant's claim has unduly prejudiced the Respondents or undermined the cogency of the evidence by the resultant delay given these Covid times which are delaying most claims anyway , but I find that her excuses for delaying her Employment Tribunal claim are unpersuasive for these reasons:

    a) She first made a police complaint (which went no further than that) against the First Respondent based on historic events (as she was entitled to do) but there is no reason why she could not have instigated an Employment Tribunal claim then too. It required limited effort to do so and she had had clear advice from her union representatives from August 2018 as to her rights and options and admitted in evidence that she was fully aware of the time limits and consequences of not complying with them.

    b) She also made a complaint to her governing body the GOC ahead of making an Employment Tribunal complaint and I make a similar finding, namely that she was quite entitled to so complain, but it need not have prevented her from pursuing her Employment Tribunal case which would then have been in time. She knew that she could , and in order to comply with the necessary time limits should , make a discrimination claim whilst still employed.

    c) She says she was concerned about losing her visa and right to work and remain in the UK, if she was to make an Employment Tribunal claim. This is a stronger point as it is an understandable concern, but it was her choice and there were consequences in making that choice . I also find there is no evidence that she was a risk of losing her job by making a complaint, no one had threatened her with a loss of employment (as she admits) and even if she

was so worried about her visa that she had waited until she resigned on 4 May 2019 (when she had new employment to go to) she still waited for over a month after that before making her claim. I find this further period of some 5 weeks of particular concern as at that point, even on the Claimant's own evidence, there was no reason to delay beyond 4 May.

d) There was no reason why the Claimant needed to complete any internal grievance procedure before presenting this claim to the Tribunal and she could also have pursued (a since withdrawn) unfair dismissal claim after her discrimination claim if she had still wanted to claim constructive and unfair dismissal on or after 4 May 2019.

e) The Claimant's delay was based not on ignorance of her rights and obligations, but on a conscious decision to delay the claim and prioritise her other concerns.

Applying the law

1. I accept the whole part of this section of the First Respondent's submission:

"C's claim must be a claim under Part 5 of the EA 2010. Section 39(2) provides that "an employer (A) must not discriminate against an employee of A's (B) - …(d) by subjecting B to any other detriment".

Section 40(1) provides that "an employer (A) must not, in relation to employment by A, harass a person (B) – (a) who is an employee of A's".

Section 83(2) defines "employment" as meaning, for present purposes, "employments under a contract of employment, a contract of apprenticeship or a contract personally to do work". Section 83(4) confirms that a reference to "an employer" is to be read with subsection (2).

The liability of employees and agents is dealt with by section 110 and provides: (1) "A person (A) contravenes this section if – (a) A is an employee or agent, (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and (c) The doing of that

thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

Accordingly, in order to be a proper Respondent to this claim, the company R2 would need to be either: 1) C's "employer", in the sense of being party to a contract with C which was either "a contract of employment, a contract of apprenticeship or a contract personally to do work" or 2) an employee of agent under section 110."

2. Neither the First or Second Respondents were the Claimant's employer. HBD was. As a result the proceedings against HBDMA are dismissed. The Claimant's representative asked me to consider keeping in HBDMA as a party by reference to regulation 4(2) of TUPE 2006, but his last minute argument for so doing (that the liability of the First Respondent could pass over to the Second Respondent (which company could be vicariously liable to the Claimant as a result) is not persuasive or supported by case authority. I have found HBDMA was not the employer and so legally, applying the law to my findings, this means that company cannot be liable to the Claimant in respect of any of her outstanding claims.

3. On the question of time limits there are two issues to consider. Is the case in time and if not, can time be extended. Section 123 provides that: *"proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable".*

4. The Commissioner of Police of the Metropolis v Hendricks case [2003] ICR 530 highlights that the Claimant has the burden of proving that there was a continuing discriminatory state of affairs that extends the relevant date (from which time runs) to a last act of discrimination which is in time. She has not discharged this burden. There was no continuing discrimination beyond the last acts complained of.

5. And so as the last act of discrimination complained about has been found to be 23 July 2018 for the First Respondent and 25 September 2018 for the Second Respondent the Claimant is out of time. Even if the Claimant could show against the First Respondent, Second Respondent or HBD that the last act of discrimination (as the Claimant's representative claims) was the end of January 2019 (and there is no evidence to that effect nor does it accord with my findings) the Claimant is out

of time. Significantly out of time.

6. In then assessing the key determination of whether to extend time on a "just and equitable basis", I recognise that the length of the delay, the reason for the delay and the potential prejudice to the Respondents are some of the factors to be taken into account (Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050). Both counsel referred me to the guidance of the EAT in British Coal Corporation v Keeble [1997] IRLR 336, which I have applied in considering the balance of prejudice and the Claimant's delay in the context of applying (or not) a just and equitable extension of time in respect of her late filing of the claim. In view of my findings of fact however it is clear that the Claimant could and should have filed her claim earlier, significantly so. Her excuses for not doing so are unpersuasive and in particular the delay after May 4 2019 , when she was already many months out of time and her employment had ceased , was wholly unjustified.

7. In looking at the balance of prejudice, I have also been directed to the case of Miller and others v The Ministry of Justice and others, and note that although I have found the Respondent has not been unduly prejudiced by the delay in the claim that even if there is no forensic prejudice to the Respondent that is (a) not decisive in favour of an extension, and (b), depending on the Tribunal's assessment of the facts, may not well be relevant at all. And on my assessment it has , at best, limited relevance here.

8. I accept all those involved have been, to some degree, been prejudiced by the historic nature of these allegations and the delay in the litigation. Even if the claim had been made on time. A more relevant factor here is why there was such a delay . And whilst the Claimant suffers obvious prejudice by not getting an extension of time, in this case it is, unfortunately, her own fault. She should and could have presented the claims in time or at least a lot sooner. But did not . As a result of this and my other findings , and having applied the legal authorities referred to above and notwithstanding the prejudice to the Claimant in not having her claims heard , I cannot grant an extension of time on just and equitable grounds.

9. For completeness, although the Claimant does not focus on her filed grievance as an excuse for waiting to file her claim, I apply Robinson v The Post Office [2000] EAT/1209/99 which holds that an unexhausted internal procedure will not furnish a

Claimant with an acceptable reason for delaying the presentation of an ET1 and it was not an acceptable excuse here either. In any event the internal procedure had been finalised well before her claim was presented.

10. Pursuant to rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, the Tribunal has the power to strike out all or part of a claim on the grounds that it "has no reasonable prospects of success". I therefore make the following orders based on my findings and applying the law to these findings:

    a) An order striking out the claim as against the Second Respondent under rule 37(1)(a);

    b) An order declining jurisdiction to hear the claim (or alternatively parts of the claim) on the basis that it was presented out of time and it would not be just and equitable to extend time.

11. Although HBD would have been joined as a party to these proceedings if the case was to continue I do not make such an order here because of the judgment that the Tribunal has no jurisdiction to hear the claim . For the same reason there is no necessity to make any further directions in this case and the Claimant's claims are dismissed.

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Employment Judge Timothy Russell

Date 21 August 2020

JUDGMENT SENT TO THE PARTIES ON

22/08/2020.

FOR THE TRIBUNAL OFFICE