



EMPLOYMENT TRIBUNALS

Claimant

Miss MJ Martins Pereira

v

Respondent

Spectris plc

Heard at: Norwich (by CVP)

On: 3 July 2020

Before: Employment Judge Postle

Appearances

For the Claimant: Mr Korn, Counsel.

For the Respondent: Mr Hart, Counsel.

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant's application to add an additional respondent, Mr Serfozo is refused.

REASONS

1. This is an application by the claimant to add an additional respondent, Mr Serfozo as a respondent to the proceedings.
2. In this Tribunal I have had the benefit of a bundle of documents consisting of 103 pages. The claimant gave evidence via a prepared witness statement. The Tribunal have also had the benefit of outline written submissions on behalf of the claimant.

3. The facts show that the ET1 was presented on 13 June 2019 (pages 33-48) and that complaint is against the first respondent. There is an oblique reference to the second respondent at paragraph 14 (page 46) of the ET1.
4. The claimant states in her witness statement at paragraph 13 at the time of presenting her complaint she did not realise she could bring a claim against the second respondent who at the material time was the respondent's General Counsel and Company Secretary of the respondent. The claimant does not state however what enquiries she made at the time when preparing her complaint against the first respondent as to who could be named as a respondent.
5. It is clear that the claimant's effective date of termination was 25 February 2019. Therefore, the latest date she could have lodged her discrimination claim was 27 May 2019. The period of ACAS early conciliation commenced on 13 June 2019 with the second respondent which is after the deadline for which the claim should have been lodged. The claimant lodged her ET1 on 14 June 2019 some 18 days after the 27 May 2019 deadline.
6. It is noted that the claimant has not set out why her dismissal itself is a discriminatory act by the second respondent, merely stating in her ET1 that she believes the second respondent discriminated against her for selecting her for redundancy. I note the actual selection for redundancy occurred prior to 21 January 2019.
7. The claimant's claim is therefore 18 days out of time, even allowing the effective date of termination as the latter date.
8. The claimant was employed as an Ethics and Compliance Manager and was able to prepare and make a number of claims against the first respondent when issuing her claims. She is undoubtedly an intelligent lady who would have carried out research when preparing and issuing her claim as to whom the claims could be filed against.
9. Counsel for the claimant's first argument is that the claimant simply amends the first ET complaint to add the second respondent as an individual respondent in accordance with the Selkent principles and the second respondent would not suffer any prejudice by reason of such an amendment. Furthermore, the respondent (first) would be responsible for the actions of the second respondent in any event under s.109(1) of the Equality Act 2010 thus any issue of alleged prejudice raised by the second respondent would not be relevant.
10. Counsel for the claimant accepts that the ACAS certificate in relation to the first claim was issued on 6 June and it is further accepted by that time the 3 month time limit under s.123(1) of the Equality Act had expired, but the effect of s.140B(4) to extend the time limit by presenting the claim by 1 month. There is therefore no dispute that the first claim was presented in time.

11. However, the second and third claims presented on 14 June 2019, counsel submits that the reason why the claimant re-presented the claim and obtained a second certificate in respect of the claim against the second respondent is that the claimant believed this was necessary in order to submit a valid claim against the second respondent. Counsel for the claimant suggests that the statutory provisions do not expressly deal with a situation where the early conciliation is activated after the primary time limit has expired and submits that the case of Brophy v Lowri Beck Services Limited EAT/0277/18 suggested that a claimant nonetheless has 28 days to bring a claim from the date of expiration in which case the claim presented on 14 June 2019 would still be in time.
12. If that argument is not accepted, counsel suggests it would be open to the Employment Tribunal to extend time under s.123(1)(b) of the Equality Act 2010 it being just and equitable to extend time. In considering whether or not it is just and equitable to extend time, counsel for the claimant has referred to a number of authorities in support of his argument that the Tribunal should exercise its discretion, namely:-
 - 12.1 Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327.
 - 12.2 Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283.
 - 12.3 Abertawe Bro Morgannwg University Health Board v Morgan [2018] ICR 1194.
13. Furthermore, it is suggested the claimant in her statement has given a reasonable explanation for the delay, namely that she did not know that she could bring a claim against a second respondent until she was so advised.
14. Finally, counsel accepts that the balance of prejudice is a relevant factor in exercising the discretion and submits that the second respondent does not in fact say why he is highly prejudiced by an 18 day delay in presenting the claim against him. The second respondent is a relevant witness to the first claim. The claimant will suffer prejudice if she is not able to exercise her statutory right to bring a claim against the second respondent and the delay was very short. On the evidence the second respondent was involved in the decision-making process. That the claimant was suffering from depression at the time the claim was presented. The fact that the claimant had sought to appeal against her dismissal and had raised her complaint against the second respondent in her grievance of 10 May 2019.
15. Counsel for the respondents suggest that the chronology is straight forward and not in dispute. The effective date of termination is the 28 February 2019 – the time limit is therefore the 27 May 2019 and ACAS were not notified until 13 June and the certificate issued on 14 June. The claim against the second respondent was not filed until 14 June 2019 and it is not a case of simply amending the claim to include a second respondent.

16. One has to look at what is just and equitable, and what is fair to the second respondent. The claimant has remedies all available against the first respondent and there is nothing special about the second respondent and he was not a signatory to the dismissal letter.
17. The second respondent is buried somewhere in the factual matrix, he is not the dismissing officer and it would not be equitable to have a claim against him. There were clear remedies available against the first respondent, there is no prejudice to the claimant in refusing this application to add the second respondent. The claim against the second respondent is unnecessary. The second respondent will inevitably suffer as being a named respondent and it is quite simply unnecessary to add this second respondent. If the application is refused the claimant still has a claim against the first respondent on exactly the same facts. If the claimant were to succeed against the first respondent she will have the ability to claim the same level of compensation.

The Tribunal's conclusions

18. It is clear that the claimant's effective date of termination was 25 February 2019. It is also the case she has lodged her discrimination claim on 27 May 2019. A period of ACAS early conciliation commenced on 13 June 2019 with the second respondent which is after the deadline for which the claim should have been lodged. The claimant lodged her ET1 on 14 June 2019 some 18 days after the 27 May 2019 deadline.
19. Clearly the claim against the second respondent is out of time.
20. The next question the Tribunal has to determine is whether it would be just and equitable to extend time. Whilst Employment Tribunals have a wide discretion to allow an extension of time under the just and equitable test in s.123, does not necessarily follow that exercise of the discretion is a foregone conclusion in discrimination cases. The Court of Appeal have made it clear in Robertson v Bexley Community Centre T/A Leisure Link [2003] IRLR 434 CA, that when Employment Tribunals consider exercising the discretion under what is now s.123(1)(b) of the Equality Act 2010:

“There is no presumption that they should do so unless they can justify failure to exercise the discretion, quite the reverse the Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.”
21. The onus is therefore quite clearly on the claimant to convince the Tribunal that it is just and equitable to extend time.

22. In this case little has been advanced to suggest that the discretion should be exercised, the claimant simply said she did not know she could bring a claim against the second respondent. Ignorance does not in itself activate the just and equitable discretion. The claimant clearly knew that she could bring a claim against the first respondent, but she appears to have made no further enquiry as to making a claim against an individual in discrimination cases. The claimant is now saying the second respondent did act in a discriminatory way towards her. If that were so and the claimant was clearly convinced of that at the time she would have made reasonable and prudent enquiries when issuing her claim whether she could do so against the proposed second respondent.
23. The Tribunal is also not convinced that the claimant was prevented from making a claim against the proposed second respondent for any mental health reasons as there is no concrete evidence to suggest that prevented her in any way.
24. The Tribunal would not allow a second respondent to be added to the claim because it is out of time and it not being just and equitable to extend time.
25. In any event, the claimant is not prejudiced as she still has her claim against the first respondent.
26. In relation to Counsel's first argument that it was simply a case of amending the first employment tribunal claim by adding a second respondent, again considering the principles set out in Selkent, the Tribunal are satisfied that the proposed second respondent would suffer prejudice by such an amendment, whereas the claimant would not as she still has her claim against the first respondent and the addition of a second respondent is not in the Tribunal's view a minor amendment.
27. For all those reasons the claimant's application to add a second respondent, Mr Serfozo is refused.

Employment Judge Postle

Date: 7 October 20

Sent to the parties on: 13 October 20

For the Tribunal Office