Case No: 3335450/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs T Penicela	**v**	**HC One Limited**

Heard at: Watford **On:** 26 September 2019

Before: Employment Judge Bloch QC

Appearances:

For the Claimant: In person
For the Respondent: Ms V Young, Solicitor

JUDGMENT having been sent to the parties on 18 October 2019 and reasons not having been requested in time in accordance with Rule 62(3) of the Rules of Procedure 2013, but which were ordered by the Employment Appeal Tribunal by order sealed on 11 August 2020 (communicated to me in circumstances of the current pandemic on 23 September 2020) the following reasons are provided:

REASONS

1. On 23 April 2019, Employment Judge Henry directed that the case management preliminary hearing listed on 26 September 2019 be converted to a preliminary hearing to determine the following issue:

> "1. Whether the tribunal has jurisdiction.
>
> 2. Whether the claimant's claims have been presented within the requisite time and Rule 37 and 39."

3. Rules 37 concerns striking out all or part of a claim on grounds which include that it has no reasonable prospect of success and Rule 39 concerns the making of an deposit order (on grounds that it has little reasonable grounds of success). It may be that something had gone wrong in the typing, but paragraph 2 seems to elide two different concepts: (a) whether the claims or any part thereof had been brought within time and (b) whether the claim or part thereof should be struck out or a deposit order made under Rules 37 or 39. No objection was taken in this regard by the parties about proceeding on both bases but in any event the principal point for decision was the timing point, with the strike out application being subsidiary.

4. The claimant claimed automatically unfair dismissal due to protected

disclosures, wrongful dismissal, breach of contract, failure to pay sick pay and detriment suffered as a result of protected disclosures as well as race discrimination

The background

5. The background to this case can be briefly stated as follows:

5.1 The claimant was employed by the respondent as an Area Quality Director from 12 or 13 March 2018, subject to the usual probationary period, in this case six months.

5.2 On 10 August 2018 she was invited to a probationary review.

5.3 There is then a (minor) conflict as to whether on 16 August 2018 the claimant was orally summarily dismissed (the respondent's version of events) or whether dismissal occurred when she received (on 21 August 2018) the respondent's communication dated 20 August 2018 confirming her dismissal. The latter is what the claimant contends (but in her ET1 the end date is given as 12 September 2020, which appears to be a date supported by nobody).

5.4 On 26 August 2018 the claimant appealed against her dismissal.

5.5 The respondent dismissed her appeal by letter dated 10 September and received by the claimant on about 12 September 2018.

5.6 On 17 September 2018 the claimant notified ACAS in respect of this claim.

5.7 On 18 September 2018 the ACAS certificate was issued.

5.8 On 21 September 2018 the claimant sent an email to the tribunal regarding a telephone conversation which she says she had with a tribunal staff member. The heading of the letter was case number 3304195-18 Mrs T Penicela v Sanctuary Care Limited. In the email she said that she wished to amend her claim to add another respondent. She said that, as outlined in her ET1, (in the Sanctuary Care case) the respondent, Sanctuary Care Limited, had issued a detrimental reference which had had an initial and continued impact on her recruitment and subsequent employment with the new employer, HC One, the respondent in the present case. She believed that after the reference, there had been continued contact between Sanctuary Care and the respondent.

5.9 She concluded the email by stating that she attached the ACAS certificate to assure the court (sic) that she had complied with the requirements for contacting Acas prior to instituting proceedings in the employment tribunal.

5.10 Apparently, after that, some correspondence (which I have not seen) ensued in which Sanctuary Care objected to the addition of HC One as a respondent to that claim.

5.11 In the meantime, on about 16 November 2018 (as claimed by the respondent) or 20 November 2018 (as claimed by the claimant) depending on which dismissal date is accepted by the tribunal, the deadline for issuing of the claim against HC One expired.

5.12 However, it was not until 17 December 2018 that the claimant filed her ET1 in this case. That followed communication from the tribunal dated 15 December 2018 (in the Sanctuary claim), in which Employment Judge Manley ruled:

> "The claimant's application to add a second respondent to this claim is refused. Witness evidence can be given about any reference to HC One. The claimant does not suggest a claim against HC One that can be joined with the present one against Sanctuary Care Limited."

5.13 It was apparently that order which gave rise to the filing of the ET1 against HC One on 17 December 2018.

5.14 While the claimant ticked the "race" box in paragraph 8 of the ET1, the narrative part of the claim form is very scant in relation to claims of discrimination against the respondent. It states that at a certain meeting with the Managing Director, the claimant had had a dispute with her previous employer (Sanctuary) regarding whistleblowing and a discriminatory comment which she had received. According to the claimant's ET1, she was employed by HC One after had told HC One of the dispute around whistleblowing and the discriminatory comment. She states that after she had commenced her employment with HC One in March 2018, she filed further particulars of detriment in August 2018 regarding the alleged negative reference provided by Sanctuary to HC One. She states her belief that around that time there was contact between Sanctuary and HC One (which is denied by HC One) which triggered her dismissal. This belief regarding a conversation is nowhere supported and nor is there anything to support her allegation that HC One, who had employed her knowing about the whistleblowing and the alleged discriminatory comment, now decided to dismiss her on that basis. However, she goes on to allege that her issues with Sanctuary, the previous employer, included whistleblowing and racial discrimination for which she believed HC One had victimised her for by automatically dismissing her. The exact meaning of this allegation is unclear. Taken at its highest, it means that the claimant was being victimised by HC One for her complaint to Sanctuary about a discriminatory comment which had been made to her when employed by Sanctuary.

5.15 Before me today, the claimant said she had been subject to no incidents of direct race discrimination during her employment by HC One and added, that but for the relaying of the whistleblowing by Sanctuary to HC One, (which, as set out above, she had herself communicated to HC One before employment by them) she would still be working with HC One today.

5.16 The claimant however also referred me to an email dated 18

December 2018, sent at 12.20, which is sub headed, "Statement in addition to original statement on ET1". This was not on the tribunal file and after enquiries were made of the tribunal staff during the hearing, no such email could be found on the system. In that statement the claimant identified herself for the first time as a Black African, employed in a senior role and she made generalized points of unfair treatment in comparison to two others who she said had been treated more fairly than herself. However, the race of these two others is not identified and the circumstances she describes do not seem comparable with hers:

5.16.1 her MD acted unfairly when she herself had been unfairly treated by a previous employer; and

5.16.2 an Area Quality director who resigned and was invited back into her role);

5.17 the claimant also claimed that she was not put on a capability performance plan or given support like another Area Director (whose race is not given) but was discriminated against by not being given such support. Again this is put forward in such vague terms as not to advance the discrimination case properly or at all.

5.18 Even if I were to take the additional document into account as a part of her claim, it does not (either alone or together with the ET1) provide the most basic particulars of a race discrimination claim or even the clear allegation that she had been unfairly treated in comparison to the identified comparators (or at all) on grounds of race.

5.19 As indicated above, the primary period for putting in the claimant's claims was, taking things at best for the claimant, 20 November 2018. Her ET1 was filed three to four weeks late.

5.20 The claimant gave evidence as to the reasons for her claim form being lodged late and, in summary, these were:

5.20.1 She believed the time limit of three months for lodging a claim form runs from the end of exhaustion of internal remedies in an employer organisation; and

5.20.2 The delay from September 2018 was due to her belief encouraged as she believed, by a member of tribunal staff) that there was no need to file a separate ET1 against HC One as she was applying for it to be added to her claim against her previous employer. In particular, she told me that the member of staff said that all she needed to do was to file an email with the tribunal.

5.21 Dealing first with the Employments Right Act claims, s.111 of the Employment Rights Act 1996 ("ERA"):

"1. A claim may be presented to an Employment Tribunal against an

employer by any person that he was unfairly dismissed by the employer.

2. … an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal -

(a) before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

5.22 There is a similar provision in relation to contractual claims under Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

5.23 In relation to time limits under the Equality Act 2010, s.123, provides that proceedings may not be brought after the end of:

(a) The period of three 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".

5.24 It is well known the time limits set out in the statutes are significant time limits and it is for the claimant to persuade the tribunal to extend those primary periods in an appropriate case.

5.25 It is also well known that the reasonably practicable test under the Employment Rights Act 1996 (and the Extension of Jurisdiction Order) is a harder test to satisfy than the test of "just and equitable" under the Equality Act 2010.

5.26 In relation to the latter statute it is wrong simply to look at the reason for the delay in isolation; it is appropriate to look at competing prejudices, in an appropriate case taking into account the factors applied in personal injury cases, in particular the length of and reason 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 sued has cooperated with any request for information; the promptness with which the claimant acted once he/she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he/she knew of the possibility of taking action.

5.27 In **Department of Constitutional Affairs v Jones** [2008] IRLR128, the Court of Appeal emphasised that these factors are a "valuable reminder of what may be taken into account but their relevant depends on the facts of the individual cases and the tribunals do not need to consider all of the factors in each and every case". That qualification is pertinent to the current application.

5.28 In her submissions Mrs Young first dealt with the Employment Rights Act and Contractual (Extension of Jurisdiction) claims.

5.29 In relation to the first of the claimant's reasons, ie her belief that the three months ran not from the date of dismissal but from the time that the internal procedures had been exhausted) Mrs Young reminded me that mere ignorance of a time limit does not mean in itself men that it is not reasonably practicable for the claim to be brought at the appropriate time. Here, the belief was simply not reasonable. She pointed out that the claimant had already brought, quite recently, two claims against previous employers, first, against Jewish Care and then Sanctuary.

5.30 In relation to the Sanctuary claim, there had been two preliminary hearings. At the first there was (according to the claimant) a decision that the claimant's claim was not out of time. At the second preliminary hearing the Judge referred back to that finding. It is also clear that the claimant sought union advice at different times. She had been assisted in relation to Jewish Care claim by the union and, until at least for a certain time, in relation to the claim against Sanctuary.

5.31 In the current case the trades union assisted in the drafting of one of her letters. The claimant had also spoken, in the course of the current claim, to a CAB and to ACAS and had consulted the Employment Tribunal website. That website shows clearly that the three-month period runs from the date of dismissal. Mrs Young contended that the claimant presented as an intelligent and articulate person. I agree with that. In other words, the claimant had had every opportunity to take advice in relation to the start date of the three-month period and had recent experience regarding other tribunal claims and in particular time limits. It was simply not reasonable not to take any further advice but to persist in what was a wholly wrong understanding of the relevant period for bringing claims.

5.32 I found Mrs Young's submissions persuasive and I accepted them.

5.33 As regards the second period of delay from 21 September until the lodging of the ET1, the following points were made by Mrs Young:

5.33.1 The claimant could have taken advice at this stage too. She had accepted in cross-examination that she understood that the employment tribunal's staff were not giving legal advice (they were simply helping her with the procedure). She also knew that the question of time limits was a serious matter. That much had been plain to her from her earlier claim against Sanctuary. I would add that in my judgment, even accepting that a conversation took place with a tribunal employee along the lines suggested by the claimant, the claimant is unlikely to have provided the employment tribunal employee with the full picture, namely that she was wishing to bring a claim

against a separate employer, albeit linked to certain facts in the existing claim; it would be a bold and highly mistaken employment tribunal staff member apprised of these facts, who would tell the claimant that it was not necessary for her to file a claim against HC One.

5.33.2 The email the claimant sent to the tribunal on 21 September 2018, did not really set out her claims. There was no reference to the notice claim or the claim for sick pay and nothing about race discrimination. Therefore, insofar as the claimant believed that this email was a substitute for a claim form, that belief was wholly unreasonable. That unreasonableness was exacerbated when Sanctuary resisted the addition of HC One to the claim. The claimant's response that she was expecting that resistance to fail, was not a reasonable basis for delaying instituting separate proceedings against HC One. She maintained that if her application to add another respondent had not been a good one, it would have been rejected at the outset. That seems to assume a lot and, again, the claimant seems not to have taken the trouble to obtain advice, if not from lawyers, who may, one can understand, be expensive and not something that the claimant could afford, but at least from one of the resources referred to above. It would not have taken much time to explain that a claim against a new employer which had some facts in common with a claim against another employer would require a separate claim form, so that, at the least protectively, the claimant should file a second claim form.

5.34 In all the circumstances, in my judgment at both stages the claimant's beliefs were not reasonable. Accordingly, in my judgment, it cannot be said that it was not reasonable practicable for her to file her claim against HC One within the time limits laid out by statute.

5.35 Turning to the race discrimination claims: unsurprisingly, Ms Young contended that these claims had not been properly pleaded. She accepted provisionally that an employee could be automatically unfairly dismissed because of a protected disclosure to another but made no concessions in relation to the race discrimination claim.

5.36 In my judgment, given that there is no record in the tribunal file of the additional statement sheet having been received by it, and no proof that it was sent, I should make this judgment based simply on the original ET1. However, even if I were to take into account the additional sheet, it does not properly clarify the basis of any race claim. Fundamentally, there is nothing to indicate that any differential treatment was on grounds of the claimant's race. Indeed, the claimant herself insisted that but for the protected disclosures she

would have continued to be employed by the respondent to this day. She told me that she did not complain of race discrimination in the appeal process and that there was no direct race discrimination by her employer - only an inference of race discrimination when her employer did not persuade her that there was poor conduct on her behalf (justifying dismissing here at the end of her probation). This in my judgment is (in the circumstances alleged) conjecture rather than inference and insufficient to reverse the burden of proof.

5.37 I am of course conscious of the many case decisions at the highest level indicating judicial reluctance towards striking out a race discrimination, or any other discrimination case, at a preliminary hearing. Reasonable latitude should be given in particular to a litigant in person and particular regard given to the reversal of the burden of proof in an appropriate case. However there are limits and I am persuaded that even if time were extended, this would be a proper case for striking out that claim as having no reasonable prospects of success. I say this in particular having heard from the claimant at length and my impression of her as an articulate and intelligent person, who if there were a proper discrimination claim would have been able to identify the basis of it properly in the lengthy particulars (and further document) filed in support of her claim as well as her oral evidence before me. The race claim is plainly an afterthought without any proper pleadable basis for it.

5.38 However, the key point I must consider is whether time should be extended in relation to this claim on the just and equitable basis. In my judgment it should not be extended. I have already indicated the insufficiency of the reasons provided for what is a fairly substantial delay. As a matter of competing prejudices, I judge that it would be wholly unfair at this stage for the respondent to face a claim which is so under-particularised. It is obvious that if not struck out the claim would require to be formulated and in my judgment, based upon what the claimant told me today, this would be a dredging up, speculative exercise on the part of the claimant. It is as plain as a pikestaff that the claimant believes her real claim, the real reason for her dismissal was because of the protected disclosures. She did not seek to explain how the nature of those disclosures (ie that they related to discriminatory comments) added anything to her whistleblowing claim Indeed, in a refreshingly candid way, she told me that the race discrimination claim had not been properly formulated because it was very much a secondary claim. Having accepted that she had never been the subject of direct race discrimination by HC One, she struggled to explain on what basis HC One could be said to have dismissed her on grounds of her race, advancing her case on the tenuous and insufficiently pleaded basis of the (alleged) comparative behaviour referred to above.

5.39 It does not seem to me to be appropriate or fair for the respondent to face, at this stage, such a speculative and unthought out claim which has been brought outside of the primary statutory period for such claims.

5.40 Ms Young urged upon me various other points. In particular, the additional costs which the respondent would now have to undertake to respond to this new case and that seems to me to be a factor to which is tied up with the point which I have just made.

5.41 For all these reasons, I conclude that the race discrimination claim should not proceed. First of all, it is out of time and I do not regard it as just and equitable to extend time. And, in any event, in my judgment it falls to be struck out as having no reasonable prospect of success. Alternatively, I would have held that the claim has so little prospect of success that it would have been appropriate to order the making of a deposit in order to be able to proceed with it to a hearing.

5.42 Ms Young urged upon me to strike out the other claims (in addition to being out of time) on grounds of these claims having no reasonable prospects of success. While I can see these claims appear to be weak, I must take into account the fact that the claimant has not yet been allowed to produce evidence in support of her claim and it would be wrong of me at this stage to conclude that they had no reasonable prospects of success. Nor am I in a position to say that they had little prospects of success and that the making of a deposit order is appropriate.

5.43 Accordingly, despite the articulate way in which the claimant argued her case today, I concluded that I must strike out these claims on the basis set out above.

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Employment Judge Bloch QC

Date:30 September 2020

Judgment sent to the parties on

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For the Tribunal office