EMPLOYMENT TRIBUNALS

Claimant: **Ms S Beg**

Respondent: **HSBC Global Services (UK) Limited**

Heard at: **East London Hearing Centre**

On: **22 September 2020**

Before: **Employment Judge Russell**

Representation
Claimant: **Mr D Matovu (Counsel)**
Respondent: **Mr S Purnell (Counsel)**

JUDGMENT

The judgment of the Tribunal is that:

1. **The claims of sex discrimination were presented out of time.**

2. **It is just and equitable to extend time in all the circumstances of the case.**

REASONS

1 By a claim form presented on 6 August 2020, the Claimant brings complaints of sex discrimination and in respect of pay inequality. This claim was a re-presentation of an identical claim presented on 6 November 2018 but rejected pursuant to rule 12(1)(d) at a Preliminary Hearing on 6 August 2020 as it failed to comply with ACAS ECC requirements. As I was giving Judgment and discussing the possibility of the Claimant remedying the defect, she submitted this third claim on-line.

2 I refer to the history leading to the rejection of claim 2 as set out in my Judgment on 6 August 2020. In essence, claim 2 (as it was, hereafter referred to claim 3 as it now is) deals with conduct which occurred up to and including the end of September 2018. I accept Mr Matovu's submission that insofar as the claim relies upon unequal pay as an act of discrimination, time continued to run until the end of the assignment. The primary time limit for the claim would have expired on 27 December 2018; there was a one-day ACAS conciliation period on 29 November the effect of which was to extend time to 27 January 2019. The claim presented on 6 August 2020 was considerably out of time.

3 The circumstances for the presentation of the third claim are relevant to whether or not time should be extended. In summary, the Claimant tried to introduce the facts of claim 3 by way of amendment to claim 1 at a Preliminary Hearing before Employment Judge Hyde on 18 October 2018. In refusing the application, Employment Judge Hyde said that it appeared to the Tribunal to be the best way forward, to avoid possible technical difficulties, for the Claimant to present any complaints about recent matters in a fresh claim form. I do not accept Mr Matovu's submission that Mr Purnell mislead Employment Judge Hyde about the possible identity of the Respondents in the claims in order to procure this decision. This is a very serious allegation to make against a member of the Bar and one which I am satisfied is entirely unfounded. The Claimant was acting in person and only told Mr Purnell that she intended to apply to amend her claim about an hour before the hearing began. On instruction at short notice, Mr Purnell's position was that the Respondent could not concede that the employer was the same in each claim. In the language of legal pleading, he was doing no more than taking the neutral "not admit" position. There was nothing misleading in his stance it was entirely proper given the number of different legal entitled within the broader HSBC group. Moreover, Employment Judge Hyde rejected the application to amend because she was concerned that it was not appropriate having regard to the subject matter of the complaints.

4 The Claimant acted promptly and diligently in submitting a second claim very soon after receiving the written summary from the Preliminary Hearing. The Claimant did not provide a second EC certificate, instead she ticked an exemption box that her employer had already been in touch with ACAS. Employment Judge Gilbert told the Claimant to provide evidence to prove the exemption or to get a further early conciliation certificate. The same day, the Claimant sent the Tribunal a copy of the ACAS EC certificate used in claim 1. Following a further referral to Employment Judge Gilbert, on 29 November 2018 the Claimant was told that she may need to obtain a second certificate. The Claimant again contacted ACAS immediately, obtained a further certificate and sent it to the Tribunal. The Claimant did not amend her claim form or submit a rectified form.

5 The procedure set out within Rule 12 requires the Tribunal to send a notice to the Claimant, giving the Judge's reasons for rejecting the claim (or part of it) and provide information about how to apply for reconsideration of the rejection. Such a notice was not sent to the Claimant as the claim was not rejected. Mr Matovu appeared to suggest that Employment Judge Gilbert should have advised the Claimant of the need to submit a rectified form. I disagree. An Employment Judge does not give advice to any party in a claim, not least at a stage in proceedings where a Respondent is not even aware of the contact and correspondence. The relevant failing was that the Tribunal treated receipt of a copy of the second ACAS EC certificate as rectification and proceeded to serve the claim on the Respondent.

6 In its Response, the Respondent raised the jurisdictional point. This was entirely appropriate; jurisdiction cannot be conferred by consent and without jurisdiction the Tribunal has no legal power to hear the claim at all. Mr Purnell sought to resolve the issue at the second Preliminary Hearing before Employment Judge Hyde but she concluded that the Claimant, again in person, was not adequately forewarned. Mr Purnell submits that the Respondent advised the Claimant that she should rectify the breach and that she failed to act. I prefer Mr Matovu's submission: the Tribunal had not rejected the claim and it was reasonable for the Claimant to rely upon that fact rather than follow the advice given by the other party to litigation. Whilst the Claimant was put on notice that this may be an issue, the taking of a jurisdiction defence does not create a reasonable expectation that

the Claimant should have presented a further, protective claim. Indeed, one can see in the circumstances of this case already, the way in which filing a multiplicity of claims can add to rather than resolve confusion.

7 The unfortunate fact is that through no fault of either party, the Preliminary Hearings have taken up a remarkable amount of time and been the subject of some considerable delay. The effect is that the jurisdictional issue was only decided on 6 August 2020. It is relevant that throughout the period of the delay, the Claimant was proceeding on the not unreasonable understanding that her claim was validly presented and had been accepted by the Tribunal.

Law

8 Section 123 of the Equality Act 2010 provides that no complaint may be brought after a period of three months starting with the date of the final act. I found that to be the termination of the assignment due to the pay claim. The effect of the time in ACAS Early conciliation is to extend the primary time limit to 27 January 2019.

9 If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;

- The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;

- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble.** Each of these principles was reconsidered and re-affirmed by the Court of Appeal sitting in **Chief Constable of Lincolnshire Police V Caston [2009] EWCA Civ 1298**.

Conclusions

10 Turning first to the **Keeble** factors of length and reason for delay. A 19-month delay such as this would ordinarily will pose a very significant hurdle for a Claimant. However, in this case the reason for the delay and in particular the length of the delay is attributable to the ongoing procedural discussions in this case and the Tribunal's failure to

reject the claim as it should have done in November 2018. Had a notice of rejection been sent at that point, it is absolutely clear that the Claimant would have immediately resubmitted a rectified claim form in the same way that she has immediately acted upon every other instruction of the Tribunal. This is not a case where the Claimant has sat on her hands, as Mr Purnell suggested. It is a case where the Claimant has sought to do all she can to comply with what can appear rather complicated procedural requirements in an early conciliation scheme which is intended to assist parties but which, as others have noted, at times runs the risk of creating satellite litigation. I am satisfied therefore that there is good reason for the delay throughout the entirety of the 19 months period.

11 The second is the extent to which the cogency of the evidence is likely to be affected by the delay. Mr Matovu submitted that I should disregard Mr Purnell's submission about cogency as the Respondent had put in no written evidence. Whilst Mr Purnell is not entitled to give evidence, I satisfied that it is entirely normal and appropriate to take into account the submission of an experienced member of the Bar on matters affecting cogency of evidence. Mr Purnell accepted that delay does not affect the cogency of the documentary evidence that is available and that the extent of any potential prejudice was limited only to the effect of the passage of time upon oral evidence. Although the Claimant's comparator is no longer employed by the Respondent, the claim is whether he was selected as her replacement and/or paid more because of sex. These are issues which can fairly be considered with the documentary evidence about the rate of pay and the evidence of the decision-making manager, not the comparator. Whilst there will be some prejudice caused by the passage of time, it is minor as relevant contemporaneous documents will be available to refresh minds. The final hearing is listed for January 2021, a little over two years since the contract ended. Regrettably in current circumstances, a two-year delay between the matters complained about and a final hearing is not unusual. Finally, the claim has arisen unexpectedly; the Respondent was aware of it when first served and has been able to take instructions and file a detailed Response. I am satisfied that the extent to which the cogency of the evidence is likely to be affected by the delay is minimal.

12 There were no requests for information and so I turn to promptness of action once aware of the ability to bring a claim. I am satisfied that the Claimant has acted promptly, for the reasons which I have set out above. The third claim was presented before the conclusion of the hearing at which the second claim was rejected. I am satisfied that the Claimant has acted promptly throughout.

13 Whilst a prudent legal adviser may have suggested filing a protective claim when raised in the Response, this is not a "reasonably practicable" extension case where a claimant may be fixed by any errors of an adviser. Further, although the Claimant has benefitted from some representation by Mr Matovu at hearings she has otherwise been acting in person. In the circumstances, I am not satisfied that any failure to get legal advice about a rectified claim renders it not just and equitable to extend time.

14 Looking at matters in the round, I am satisfied that the Claimant has established sufficient grounds persuade me that it is just and equitable to extend time. It was an unfortunate feature of this hearing that submissions made on behalf of the Claimant sought to place blame upon the Respondent. I do not accept that any of those submissions are well founded and allegations that Mr Purnell had sought to mislead the Tribunal were frankly ill-advised. In extending time, I have not found that the Respondent or its representatives has behaved in other improper manner.

The Extent of the Claims – Claimant's applications to amend

15 Having extended time to accept claim 3, I went on to consider the issues in the claims which are now consolidated.

16 Part of the confusion in this case was caused by the ET1 claim form which refers at box 8.1 to "a claim for discrimination on the grounds of sex including equal pay", without distinguishing between the different statutory provisions which apply. A woman who believes herself to have been paid less than a man may bring a claim under the equal pay provisions of the Equality Act 2010 if she is an employee and if the sum in question is "pay" within the definitions of the Act. If those conditions are not met, the woman may nevertheless bring claim of direct discrimination under section 13 of the Equality Act 2010. This confusion has been apparent throughout the history of the claim to date. In her claim form, the Claimant complained that she was an IT contract worker paid significantly less than her male IT contract workers of similar experience merit and expertise. This has been referred to as an equal pay claim. Employment Judge Brook found that the Claimant was not an employee but could bring a direct discrimination s.13 claim. He said to do so, the Claimant would have to make an application to amend and required her to list each of the comparators relied upon.

17 In further information provided earlier in the proceedings at the request of the Respondent, the Claimant had expressly referred to a direct sex discrimination pay claim and named 12 male comparators. The claim has been subject to substantial clarification over a series of Preliminary Hearing and as a result of draft Lists of Issues agreed between the parties. The most recent list of issues was agreed after the Brook Judgment and identified a direct sex discrimination pay claim with Mr Philip Miller the named comparator. Prior to the August 2020 Preliminary Hearing, the Claimant indicated a wish to revisit that list of issues and expand the list of comparators. Mr Matovu submitted today that the Claimant made an error in agreeing to that list and that the full list of comparators was always before the Tribunal. Mr Purnell's primary position is that there is not and never has been a discriminatory pay claim. In the alternative, he submitted that pleadings are important in the Tribunal even if we do not apply the rigorous standards of the CPR and they are not required to be works of art. It is not sufficient simply to say: "I was discriminated against". The outline of the claim must be set out with sufficient clarity and, ultimately, relied upon the importance of an agreed list of issues.

18 I do not accept that the Claimant required leave to amend to include a discriminatory pay claim. The claim was set out in box 8.1 of the claim form, although not clearly expressed as an equal pay claim or direct discrimination claim. That claim has never been withdrawn or dismissed. The comparator(s) is not named in box 8.1. Although the Claimant did give an expanded list in further information early in the claim, she had refined her claim and agreed to a list of issues in which her claim was formulated as a direct sex discrimination claim in respect of pay with Mr Miller as the sole comparator. I do not accept that the Claimant made a mistake and did not realise that she was limiting her claim in this way.

19 The original list of issues identified three detriments at paragraph 3.1.1 and 12 comparators at paragraph 3.1.2. Following the Brook Judgment, the Claimant proposed the insertion of the discriminatory pay claim as a fourth detriment in the following way:

6 July 2017	**Claimant becomes aware that her contract rate is considerably lower than her male contract peer Phillip Miller who originally propose the Claimant to HSBC as an appropriate skilled and experienced person to take work from them as he himself is overwhelmed with too much work.**

20 The Respondent did not require the Claimant to make a formal application to amend and accepted the inclusion of this further detriment in the list of issues, which it understood to apply only in respect of Mr Miller. The solicitor for the Respondent then re-phrased paragraph 3.1.2 by subdividing it into 3.1.2(a) which listed all 12 comparators for the first three detriments and 3.1.2(b) stated that in relation to the fourth detriment (identified by paragraph number), the Claimant relies on Mr Miller as her comparator. The amendment to the list of issues was shown in track changes and even as a litigant in person, the Claimant could reasonably be expected to identify that her pay claim had only one comparator. The Claimant confirmed agreement to the changes and the final, agreed list of issues was sent to the Tribunal on 11 October 2019.

21 In deciding the Claimant's application to amend to include Mr Uppal, Mr Hamshaw, Mr Barnes, Mr Toller, Mr Wells, Mr Perusinghe, Mr Donegan, Mr Manders, Mr Goff and Mr Sra as comparators, I reminded myself that a list of issues is an important tool to ensure a fair and proportionate hearing. It is not a "straight jacket" which cannot be revisited and care must be taken to decide the claim that the Claimant has brought. I took into account the Judgment of Underhill LJ in **Scicluna v Zippy Stitch Ltd** [2018] EWCA Civ 1320 that there are exceptional cases where it may be legitimate for a tribunal not to be bound by the precise terms of an agreed list of issues.

22 As set out above, the claim was originally presented in 2017 and did not name the comparators for the discriminatory pay claim. The comparators were named in the further information. The list of issues agreed in October 2019 arose as a result of the Judgment of Employment Judge Brook and his indication that if the Claimant wanted to claim for discriminatory pay, she should set out full list of all comparators. The list of issues was agreed following the Claimant's insertion of detriment 3.1.1(d) in respect of pay and with the amendment to the comparator paragraph clearly flagged. It was not until 5 August 2020 that the Claimant asserted that there was an error in the list of issues, the full list of comparators should be included and she sought specific disclosure in respect of the terms and conditions of each of the alleged comparators.

23 In deciding the amendment application, I applied the guidelines set down in the familiar cases of **Selkent Bus Company Ltd v Moore** [1996] IRLR 661 and also **Cocking v Sandhurst Stationers Limited** [1974] ICR 650 NIRC. Whilst the overarching consideration is the balance of justice and hardship to the parties in refusing or granting the amendments, I should also consider:

(1) whether or not the application proposed is minor or substantial;

(2) the application of time limits and whether there should be any extensions; where the claimant proposes to include a new claim by way of amendment, the tribunal must have regard to the relevant time limits and, if the claim is out of time, to consider whether the time should be extended under the appropriate statutory provision (reasonable practicability or on the just and equitable ground, as the case may be).

(3) the timing and manner of the application, including why an application was not made earlier and why it is being made at this stage. However, delay in itself should not be the sole reason for refusing an application.

24 In **Kuznetsov v Royal Bank of Scotland** [2017] EWCA Civ 43, at paragraphs 18 to 22 Elias LJ again summarised the principles to be applied by the Tribunal when exercising its discretion on an amendment application.

25 The Claimant's proposed amendment is substantial. Whilst I have accepted that a direct sex discrimination pay claim is already pleaded, the amendment seeks to expand the comparison to 12 comparators. This is not a claim brought under the specific equal pay provisions as the Claimant is not an employee. If it had been, then she would have required leaved to amend for each individual comparator named. The identification of comparators in a pay claim is particularly important as it recognises need to consider the particular circumstances and the reason for any pay differential of each comparator. I do not consider that I am bound to approach a section 13 claim in the same formalistic way as a true equal pay claim, but I consider the scope of the enquiry caused by the amendment to be a relevant factor as it will materially affect the amount of evidence required and the time estimate of the final hearing.

26 The application to amend is made very late in proceedings which have a long history and have had several Preliminary Hearings. If the Claimant wished to include 12 comparators, the time to have done so would have been in response to Employment Judge Brooks' clear Order to list all comparators. The Claimant did not do so and chose not to raise the matter until August 2020. Whilst delay should not be the sole reason for refusing an application, it is relevant as the parties are now contemplating a final hearing in three months' time which would require significant further preparatory work if the comparators are included by amendment. I accept Mr Purnell's submission that the final hearing would have to be postponed. It could not then be relisted until the end of 2021. The pressure on Tribunal resources, the need to do justice to the parties in this case and to all parties seeking resolution of a dispute in this region, the delay in hearing a claim concerning actions in 2017 all render it disproportionate to permit the amendments.

27 Not only will the cogency of the evidence have diminished over time, the delay would cause real and significant prejudice to the Respondent if I were to allow this amendment. The comparators are IT contract workers, not employees. Many of them are no longer providing services to the Respondent. I accept Mr Purnell's submission that despite the Respondent's best endeavours since August 2020 to identify the relevant hiring managers, as yet only one can be identified. Contract workers are engaged through the use of a resourcing company not engaged directly by the Respondent. The resourcing company cannot access relevant paperwork as it has demised its software platform. I took into account Mr Matovu's submission, on instruction, that Mr Miller was the hiring manager for Messrs Hamshaw, Wells, Sra and Goff and could be cross-examined about those decisions. Mr Purnell maintained that this was not correct. On balance, I do not feel that I can be confident in the Claimant's assertions today. If the Claimant is right, and Mr Miller was the recruiting manager, then the Tribunal may decide to draw an adverse inference or prejudicial view of the Respondent's case that this was not accepted. However, even if the Claimant is right on this point, the amendment is still late, it would materially expand the case, require a postponement and put the Respondent in the position of defending a claim without access to relevant documents due to the delay.

Although it would be relatively easy to find out whether the actual pay was different, the Respondent could not fairly defend the claim by reference to the circumstances of the Claimant and her comparators including their jobs, their relative experience, qualifications, benefit on the open market and pay negotiations.

28 The prejudice to the Claimant is minimal by comparison. In refusing the amendment, she is potentially deprived of a claim which may otherwise succeed but she has other claims which will be heard and which will provide an effective remedy if they succeed. The periods of her engagement during which discriminatory pay is said to have taken place is of relatively duration and the Claimant had the opportunity to set out her claim clearly from the start.

29 For all of these reasons and balancing the prejudice between the parties, I am satisfied that it is in the interests of justice and the overriding objective to refuse the application to amend.

30 By contrast, the Claimant has leave to amend to include Mr Mohneesh Paranjpe as a comparator on claim 3. This application was made at an early stage of the proceedings, without undue delay and there was no suggestion that the Respondent would be prejudiced by the amendment. The Claimant also relies upon Mr Sridhar Somasundaram and a hypothetical comparator in this claim.

Case Management

31 The parties have very kindly provided an agreed List of Issues. A copy must be included in the bundle for use at the final hearing. This includes the three detriments identified in claim 3.

32 The following directions apply to claim 3:

(1) On or before **20 October 2020,** the Claimant and the Respondent shall send each other a list and copies of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case.

(2) On or before **10 November 2020,** the Respondent shall produce a single, joint bundle in electronic format indexed, paginated draft copy of the bundle, assembled in chronological order (save in respect of formal policies or procedures, which may be placed together) and containing all the relevant documents which any party wishes to be included.

(3) The Claimant and the Respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **8 December 2020.**

(4) On or before **8 December 2020**, the Claimant will send to the Respondent an updated Schedule of Loss, including her mitigation.

33 The final hearing will decide liability only. The time estimate is extended by two additional days to consider the further claims now identified. The Tribunal and the parties are all available on **11 January 2021 and 18 January 2021.** The first day of the hearing

will be conducted by cloud-video platform. The remainder of the hearing will be conducted in person, assuming that the Tribunal is able safely to do so in a manner compliant with any Government guidance then in force.

Employment Judge Russell
Date: 19 October 2020