Case Nos: 1302101/2019 and 1302291/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Mr J Bishweka **AND** **Lifeway Community Care Limited**

Claimant **Respondent**

ORDER ON PRELIMINARY HEARING

HELD AT **Birmingham** **ON** **28 July 2020**

EMPLOYMENT JUDGE Self

Representation

For the Claimant: Dr R Ibakakombo – Lay Representative

For the Respondent: Mr T Gilbart - Counsel

REASONS

1. The Claimant lodged his first Claim on 24 April 2019. That matter has come before me three times previously and was listed today for an Open Preliminary Hearing in order to consider whether or not any heads of claim in that Claim had been lodged outside of the statutory time limits and if so whether time should be extended because it would be just and equitable to do so. There was also an application to strike out that claim or for a deposit order to be made.

2. During the Preliminary Hearing in January 2020 it was indicated that the Claimant was to bring a second claim dealing with matters that post-dated the first claim form and that Claim was received on 7 February 2020. No Response had been received to that second claim within the appropriate time limit. At the April Preliminary Hearing the Respondent explained that they did wish to defend the Claim and wished to put in an application for a Response to be considered out of time or to put it another way to have time extended so that their Response could be considered under Rule 18 of the Employment Tribunal (Constitution and Rules of Procedure) 2012.

3. Today, therefore, the matters which I had to consider at the outset was to:

   a) Finalise a list of issues for the Second Claim. The issues on the first Claim have already been done at a lengthy hearing and most of the issues in the second claim have also been identified.

   b) Consider whether the Respondent should be permitted to lodge a Response to the Second Claim;

   c) Consider the jurisdictional issue of whether or not any of the first Claim's Heads of Claim have been lodged outside the statutory time limit and if so whether it would be just and equitable to permit time to be extended.

   d) Consider the Respondent's application for strike out / deposit order.

   e) Timetable the matter through to a final hearing.

4. These Reasons deal with my decisions in respect of the b) and c) above. It also deals with an application by the Claimant to reconsider an issue that had been determined at an earlier hearing. It does not deal with the application to strike out / for a deposit order as those were ultimately withdrawn by the Respondent.

5. In addition to this Judgment there is a separate order in which I deal with the case management aspects of today's hearing and in which I set out the final determinative List of Issues to be considered at a final hearing.

6. **Response**

   On 7 February 2020, the Claimant brought his second Claim against the Respondent. It was addressed as follows: 144 West Bromwich Coventry West Midlands B70 6JJ.

7. The First Claim had been sent to the Respondent at 144, West Plaza, 144 High Street, West Bromwich, West Midlands B70 6JJ. That was the correct address for the Respondent and was known by the Claimant to be the correct address as it also appears on a witness statement he served for this hearing.

8. I note that the postcode was correct but the address the Second Claim was sent to by the Claimant was incorrect. No explanation was given to me as to why there was such an error.

9. I have seen an email from the Claimant's representative to the Tribunal and into which the Respondent's solicitor was copied and the Claim was attached to that document. I am satisfied that the Respondent's solicitors knew that a Claim had been lodged from 7 February 2020.

10. It is not the case, especially in more recent times, for there to be an immediate response from the Tribunal to a Claim. Whilst it is to be hoped that the Claim can be processed swiftly there is from time to time and depending on the region a delay before the necessary papers are sent out to the Respondent indicating the date by which a response needs to be returned.

11. In this case, as it happens, the delay was not great and on 12 February the following was sent out:

  a) A letter to the Claimant acknowledging the Claim and indicating that it had been sent on to the Respondent;

  b) A letter to both parties (using the Respondent's incorrect address) that EJ Johnson was considering joining both Claims together and asking for written representations on that matter by 19 February 2020;

  c) A letter notifying the parties that there would be a Preliminary Hearing to discuss the issues on the case on 3 April 2020 (using the Respondent's incorrect address). This date had already been listed for a PH on Claim 1 and so EJ Johnson was anticipating no objections to joining the cases and indeed the Claimant had rightly alerted the Judge to Claim 1 and the listing date on the Claim Form, which is no doubt where the Judge got the information to do this.

12. All of these letters were contained within the bundle that was produced for the hearing and all of those letters would have been held by the Claimant. It is noteworthy in my view and supportive of the submission by the Respondent that they did not receive these documents that:

  a) The Respondent did not respond to the request for confirmation the claims could be heard together.

  b) That the ET2 Form that is sent out to the Respondent alone is not within the bundle.

13. The Respondent in their application for more time explained that they contacted the Tribunal on a number of occasions to ask about the progress of the Claim and whether it had been processed yet. They indicate that they did so on 21 February, 6 March and 31 March and were informed by members of Tribunal staff that there was nothing to indicate that Claim 2 had been processed.

14. I did not hear oral evidence from the solicitor on this point but the information she provided was reasonably detailed and there are clerks by the names she mentioned in the Birmingham Tribunal office. There are no notes on the file regarding these conversations but if the file were thought not to have been processed and not to hand then that would explain this absence.

15. I am satisfied that the Respondent's solicitors did make these efforts to see what was going on with the Claim. I am also satisfied on the balance of probabilities that the Respondent did not receive the Response and in particular the Form ET2 which would have told them that they had to lodge a response by 11 March 2020.

16. All parties attended the hearing on 3 April 2020 for Claim 1 and I was told that Claim 2 had not been received at that time. At 4.30 pm on that same day the Respondent sent in a holding Response effectively following what had been discussed at the hearing earlier that day and setting out their application for why time should be extended for their Response.

17. On 15 April 2020, the Claimant responded in writing to that application and opposed an extension on the following grounds:

a) The Claimant had emailed a copy of the Claim Form to the Respondent's solicitor on 7 February, so the solicitors knew of the Claim;

b) Pointed to various other pieces of correspondence that came from the Tribunal as detailed above;

c) That the address was not incorrect as it had the correct number if not the street in which the Respondent was based, and it also had the correct postcode. It was suggested that this would be enough.

18. On 20 July 2020, the Respondent applied to amend their Response by providing a full defence to the matters that had been raised in Claim 2. In essence it was the sort of document that would have been ordered in any event so as to allow the Claimant to understand the nature of the defence to his Claim. This was opposed in the same terms as per the original Response.

19. The relevant Rule of the Employment Tribunal Rules is Rule 18 which reads as follows:

18 (1) A response shall be rejected by the Tribunal if it is received outside the time limit in rule 16 (or any extension of that limit granted within the original limit) unless an application for extension has already been made under rule 20 or the response includes or is accompanied by such an application (in which case the response shall not be rejected pending the outcome of the application).
(2) The response shall be returned to the respondent together with a notice of rejection explaining that the response has been presented late. The notice shall explain how the respondent can apply for an extension of time and how to apply for a reconsideration.

20. In this case the Response was lodged out of time by around 23 days. Rule 18 itself provides no guidance as any test that should be applied in considering such applications, but I take the view that my discretion is governed by the overriding objective to deal with cases fairly and justly.

21. In a previous decision ***Kwik Save Stores v Swain and Others (1997) ICR 49*** the EAT indicated that the process of exercising a discretion involved taking into account all the relevant factors, weighing and balancing them against each other and reaching an objectively justified conclusion.

22. I accept the Respondent's explanation that the ET2 upon which the date for a Response of 11 March was conveyed was not received by them. I note that whilst the address given to the Tribunal for service could have allowed for a delivery to be made with some thought by the Post Office there is sufficient

doubt there for me to accept the Respondents contention on this point. That is supported by the lack of an ET2 in the bundle and the lack of a Response to the issue over consolidating the proceedings. I also note the prompt attention given by the Respondent within Claim 1.

23. Whilst I note the Respondent's solicitors had been served with a copy of the Claim Form that does not amount to adequate service under the Rules as proceedings must be sent to the Respondent themselves (Rule 15). I accept that the Respondent's solicitors acted reasonably in chasing the Claim up but were not given correct information from the Tribunal office for reasons that I am unable to discern. Hypothesising it may be that the two cases did not get linked as quickly as they ought to have been.

24. There are fully contested proceedings on foot that have had a lengthy gestation period on account of the time it has taken to properly identify the actual individual Heads of Claim. It would be absurd if the Respondent were only able to defend the first Claim when both claims are agreed by the parties as being best heard together. Only limited delay has been caused and the balance of prejudice would weigh heavily against the Respondent in denying them the opportunity of putting forward what is on the papers a comprehensive defence to the claim, especially when arguably had the Claimant put the full correct address on the Form none of these problems would have arisen.

25. Having considered all of these matters I am satisfied that time should be extended for the Response to be lodged and further that permission should be granted to the Respondent to amend their Response so that the Claimant fully understands their position. The 20 July Response shall stand as the Response in this case.

Time Limits

26. Once the issue of the Response had been dealt with the Tribunal moved on to deal with the jurisdictional issue of whether or not all claims had been lodged within the statutory time limit and if not whether or not it would be just and equitable for time to be extended. First of all, it confirmed and finalised the List of issues in relation to Claim 2. Some work had been already done on them at the April hearing.

27. The Claimant's First Claim which was received by the Tribunal on 24 April 2019. Early Conciliation had taken place between 11 February and 25 March 2019. It would appear that acts that would prima facie be in time are those

dated on or after 12 November 2018 subject to any issue that may arise of conduct extending over a period.

28. The original Claim Form ran to some eleven pages and the precise issues for determination were by no means clear. On 7 June 2019, the Respondent lodged their response in which they raised a number of issues as to why the Claim lacked merit and also raised some issues in relation to some matters from 2014/2015 being out of time. No application was made by any party nor did the Tribunal of its own motion add to the issues to be determined at this hearing any points on time limits.

29. On 16 September, at the Preliminary Hearing on that day, the Respondent sought to have the time limit issue decided. The Claimant countered by indicating he had had no notice that the same was going to be dealt with and wished to prepare witness evidence in support. The notification requirements at Rule 54 had not been met in that the time limit issue had not been notified as being a specific preliminary issue to be determined at that hearing and so, absent the consent of the Claimant, that matter would need to heard on a future occasion. The Respondent agreed that it made sense to hear all of the preliminary applications together.

30. The Claimant had provided a Scott Schedule for that hearing in which he set out more details of his complaints. It transpired in the course of discussion that the Claimant had more to add and I permitted him time to finalise the list. There was then produced a document headed "Claimant's Final Particulars of Claim" which identifies the acts complained of, refers back to the Claim Form and provides particulars of them. The Respondent indicated that it wished to have time to consider the document in full and they would then draft a request for further particulars with a view to the issues becoming finally clear.

31. The next Preliminary Hearing was listed for January 2020. There was a request for further and better particulars drafted which were answered all be it not in the track change format that was requested. A schedule of deficiencies was also lodged by the Respondent in relation to the further particulars offered.

32. The net result of all of the above was that is that there was a proliferation of paperwork in which the Claimant was seeking to enunciate his claim. The primary task at the January PH was to ensure that the issues in respect of the claim that had been lodged already were agreed and fully understood. The methodology for that was to go through a Scott Schedule of the Claimant headed "Claimant's final Particulars of Claim" dated 16 September 2019 with both parties in order to check that the matters raised therein had been properly raised within the original claim form or was a further particularisation of what had been drafted and if the matters therein were considered to require an amendment to the Claim Form then that application would be dealt with.

33. That task was exceptionally time consuming as there was a need to ensure that the issues in the case (as originally pleaded) were understood and agreed by the parties so that a line could be drawn under them and the matter could progress. That task was achieved, and a List of Issues produced as a result of discussion with the parties and agreement by them in the vast majority of areas. Where required I made decisions in relation to applications to amend, some of which went in favour of the Claimant and some of which went in favour of the Respondent.

34. There was one area of the document that was not clarified at that hearing and that was the matters raised in box 4 of the Scott Schedule which stated that between 2014 and 22.11.18 the Claimant had "***inappropriate work assigned and the Respondent failed to provide adequate support to the Claimant, gave him unsatisfactory appraisals, made unjustified criticisms of him and excluded him from projects"***. That is reflected at paragraph 9 of the Claimant's claim form. The Claimant was unable to provide any specific particulars to support what is a very broad allegation both factually and temporally and I determined in January that whether this part of the claim proceeded and if so what the particulars of it were would need to be considered at the April Preliminary Hearing in a similar fashion to what had taken place on that day in January. I expressed the view that both parties should focus upon what their positions were for this part of the Claim.

35. In addition, there was an application to amend by the Claimant so as to include matters that have post-dated the submission of the original Claim Form and I decided that matters would be best served by the Claimant issuing a second claim which could then be joined.

36. The Open Preliminary Hearing in April was converted to a Telephone Hearing on account of the restrictions imposed by the pandemic. That meant that the time limit issue could not be determined on that day. There was still progress that could be made, and I determined that it would still be appropriate for an Open PH to be held in the future and that is today's hearing.

37. Within the Order from the last hearing is the following extract from the Background section:

    "From the last hearing a List of Issues had been produced which is set out in that Order. There was one part of that Claim which remained to be considered today which was a suggestion that between 2014 and 22.11.18 the Claimant had certain detriments to which he was subjected and that was reflected at paragraph 9 of the Claimant's claim form. I raised that matter today and the Claimant's representative indicated that there were no more issues to identify and that the List of Issues set out in the previous Order could be deemed to be the definitive list for that first claim".

38. I then went on to determine the vast majority of the issues from the second Claim and relisted for this Open Preliminary Hearing.

39. I have recounted that background in some detail as an issue arose during the time limit application. Dr Ibabakombo, during the course of his submissions,

sought to utilise the matters that were the subject of that discussed at paragraph 37 above to try and assist his submissions that there was a continuing course of conduct which meant that all claims could be brought. I pointed out to him the part of my previous order in which I recorded his concession that he did not wish to particularise those claims and that accordingly they were not going to be dealt with on this claim.

40. Dr Ibabakombo denied that he had undertaken that course of action. Counsel for the Respondent reviewed their note and confirmed my recollection of it. I was quite satisfied that the Order which I had drafted adequately reflected what had been said on that last hearing as I had a clear recollection of the same.

41. Dr Ibabakombo asked that I reconsider that position. What is the position that I am being asked to reconsider? It seems to me that the matters under debate were withdrawn by the Claimant at the April hearing as defined in Rule 51. Under Rule 52 I should have dismissed that part of the Claim as neither of the two exceptions apply. I did not do so at the time.

42. The fact that I have not done so to date makes no practical difference because the wording of Rule 51 makes it clear that the part of the Claim withdrawn comes to an end. The Claimant through his representative effectively asked me to revive this part of the Claim. I declined as I did not consider it in the interests of justice to do so nor did I consider that it was in keeping with the overriding objective.

43. This is an old claim, and the Claimant has had numerous opportunities to precisely identify the heads of claim he wishes to rely upon. That has taken much time and many hearings. Indeed, as we started this application we had a full and definitive list of issue from both claims which, assuming that the first occasion when they could have been set out was when the Claim Form was sent in, has taken approximately 16 months and four hearings to do. That List of Issues is a substantial one and covers a wide range of allegations over a substantial period of time.

44. The Claimant did not today have a list of the specific acts that he wished to complain about between 2014 and 2018 identifying the date of each act and also the alleged perpetrator. Indeed, the Claimant's representative indicated to me that he would not be able to produce such a document.

45. There is a time when, in my view, enough is enough. The Claimant has been extended a substantial amount of latitude and has a claim that should establish quite clearly whether those with whom he works and who manage him are liable for acts of race discrimination. To permit the Claimant to go behind a clear and unequivocal indication to the Tribunal that certain matters were not going to be particularised and not relied upon as acts of discrimination would not be just and equitable or fair on the Respondent and

the prejudice and cost for them of having yet another hearing to detail the issues cannot in my view be justified.

46. Whilst a lay representative Dr Ibabakombo has regularly represented Claimants in cases such as these including in front of myself and I am satisfied that he knows how things work and that he made a conscious decision at the previous hearing not to provide the details of those claims requested and that he did so on instruction. Further expense and delay would follow the request to reinstate that which had been withdrawn and I reject the application.

47. Moving on to the issue of time limits in Claim 1 the issues to be determined were as follows. The Claim was lodged on 24 April 2019 and Early Conciliation had taken place between 11 February 2019 and 25 March 2019. It follows that any claim prior to 12 November 2018 would need to be considered in the context of the statutory time limits.

48. Under the Equality Act the issue of time limits is contained within section 123. That provision so far as is relevant is as follows:

(1) …. 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.

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

49) In the January 2020 Order thirty-four separate acts of detriment were identified. Some of those (xviii, xix and xxiv – xxxiv) took place after 12 November 2018 and so have been lodged in time and can be heard on their merits. The issue for me to consider is whether or not I am able to determine that the other matters that predate 12 November constitutes “conduct extending over a period” when considered with those matters that have been lodged in time. There are some cases where that can only be properly determined at the final hearing.

50) Often the consideration of continuing acts is a difficult one, particularly on a Preliminary Hearing. In this case that is not the case because of the very clear differences between early allegations and those later on. Allegations (i) to (ix) inclusive and (xvii) relate to allegations against Mr Mulugeta between April 2014 and December 2015. Allegations (xx) to (xxii) relates to the alleged inadequate conduct of grievances at that time. These allegations are quite clearly self-contained in respect of allegations of mistreatment and then grievances raised in respect of the same between a time period that ends around three years before claims within the time limit are made. Those claims are historical, and I can see no link with those claims made later on. These claims have been lodged out of time and I will consider whether they should be permitted to proceed in due course on the just and equitable ground.

51) Claims (xv and xvi) are said to have taken place in 2015 according to the Respondent or July 2017 according to the Claimant. Although I have heard no evidence on the point I will err on the Claimant's dates for the purposes of this hearing. Again, these allegations are over a year before the claims that commence in 2018 and run into the in-time period. I do not consider that they can act as a bridge for the earlier claims or that they can themselves properly be said to be part of an act extending over a period. There are no allegations that otherwise commence until August 2018.

52) So far as the other claims that may be out of time (x) to (xiv) and (xxiii) I see that they are far closer temporally and I am prepared to allow these claims be considered as to whether they are in time or not at the final hearing.

53) I have considered whether it would be just and equitable for time to be extended on the matters deemed out of time at paragraphs 50 and 51 above. In evidence the Claimant asserted that he did not bring a claim because he did not wish to ruin his career. The Claimant was prepared to raise internal grievances about his treatment and indeed asserts that he made a complaint that constituted a protected act back as far as 2014. I do not accept that he did not bring a claim because of concern and that does not provide an explanation. The matters which have been deemed out of time are very old complaints and I am of the view that the Respondent would be unduly prejudiced if they were allowed to be pursued. The Claimant still has a substantial claim against the Respondent and on balance I do not consider that it would be just and equitable for time to be extended and indeed the Claimant has given me little material from which I could conclude that it would be just and equitable for time to be extended.

54) Accordingly, I will redraft the issues removing those matters that have been ruled as being out of time, but I will keep the numbering of claims the same for the sake of consistency.

Employment Judge Self

27 October 2020