



EMPLOYMENT TRIBUNALS

Claimant: Miss A Sklan

Respondent: L'Oreal UK

Heard at: by CVP

On: 1 October 2020

Before: Employment Judge Lang (sitting alone)

Appearances

For the claimant: In person

For the respondent: Laura Bell (Counsel)

JUDGMENT

The claim is struck out on the basis that it is time barred and the Tribunal has no jurisdiction to hear it.

REASONS

1. This claim came before me on 1 October 2020 for an open preliminary hearing to deal with the respondent's application of 12 March 2020.
2. It was the respondent's assertion that the Employment Tribunal does not have jurisdiction to hear the claimant's claim as it is time-barred.
3. The respondent requested that the Tribunal make a judgment at the preliminary hearing that the claim be struck out on the grounds that it had no reasonable prospects of success and/or that the Tribunal had no jurisdiction to hear the claim and in the alternative, it made an application for a deposit order.

The hearing

4. I heard oral evidence from the claimant. The claimant had sent two e-mails to the Employment Tribunal dated 23 September 2020. It was agreed that these would constitute her witness statement. She was subject to cross-examination by the respondent's counsel.

5. In addition, I had a bundle before me that consisted of 40 pages.

The issues

6. Was the complaint brought within the period of three months starting with the date of the act to which the complaint relates? If not, was the complaint brought within such other period that the Employment Tribunal thinks just and equitable?

The Law

7. The relevant statutory provisions are at section 123 of the Equality Act 2010

123 Time limits

- (1) Subject to sections 140A and 140B 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.

8. The date by which a discrimination claim must be presented to the Tribunal is normally by end of the period of three months starting with the date of the act to which the complaint relates.

9. However, acts occurring more than three months' before the claim was brought may still form the basis of the claim if they are part of "conduct extending over a period" and the claim is brought within three months of the end of that period.

10. The Tribunal has discretion to extend the time limit for a discrimination claim to be presented by such a period as it considers just and equitable.

11. The Tribunal is entitled to take into account anything that it deems to be relevant in deciding whether it is just and equitable to extend time to permit an out of time discrimination claim to proceed. (Hutchinson v Westward Television Limited [1977] IRLR 69)

12. The Tribunal's discretion is as wide as that of the civil courts under Section 33 of The Limitation Act 1980. Courts are required to consider factors relevant to the prejudice that each party would suffer if an extension were refused including (i) the length of and reasons for the delay (ii) the extent to which the cogency of the evidence is likely to be effected by the delay (iii) the extent to which the party sued had co-operated with any request for information (iv) the promptness with which the claimant acted once they knew the possibility of taking action (v) the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action. (British Coal Corporation v Keeble [1997] IRLR 336)
13. Time limits are applied strictly in employment cases and there is no presumption in favour of extending time. Tribunals should not extend time unless the claimant convinces them it is just and equitable to do so. The burden is on the claimant and the exercise of discretion to extend time should be the exception and not the rule (Bexley Community Centre v Robertson [2003] EWCA Civ 576).

Findings of Fact

14. The claimant was employed as a Deputy Accounts Manager from 9th October 2016 until her resignation on 28 February 2020. She was based at the Lancome counter in the John Lewis store at Brent Cross.
15. She went to see her doctor about her mental health at the end of June 2019.
16. She continued to work even though she was on medication for depression and anxiety as she didn't want to let her team down.
17. The claimant was then signed off work with a stress-related illness on 10th July 2019 and did not return to work.
18. On 10 January 2020 the respondent obtained an occupational health report which concluded that her absence from work was due to stress, anxiety and depression but this gave no prognosis for a return to work.
19. On 28 January 2020 the claimant resigned from work by email giving one months' notice. Her email was detailed and ran to 3 pages. She raised allegations of discrimination for the very first time including an alleged incident on 26 March 2019 when her area manager allegedly stated that she would fit in better to another store because the other two consultants there were both Jewish. It is likely that the claimant was aware of the possibility of taking action shortly after that incident.
20. The claimant notified ACAS of her claim on 4th February 2020 and an early conciliation certificate was issued on 6th February 2020. The claimant then issued her Tribunal proceedings on the same day.
21. The ET1 stated that the claimant was subjected to bullying and anti-semitic comments from December 2018 until she was signed off work in July 2019. The claimant confirmed that she only had evidence of one instance of alleged discrimination on 26 March 2019 (being the incident referred to above).

22. The claimant said that she did not submit a claim until February 2020 because she became a recluse. She was often not getting out of bed at all but by February 2020 she was not spending so much time sleeping.
23. She was however able to go to medical appointments each week throughout her sick leave. She saw her private GP about twice per week and a private Psychologist once a week.
24. She did not speak to ACAS before her resignation. Her resignation was prompted by medical advice. She had wanted to return to work but her medical advisers advised her that she was not going to be well enough to return.
25. She contacted ACAS in early February in response to something that she had seen on TV which convinced her that she should stand up for herself. When she spoke to ACAS she was told that she should put in her claim that day.
26. The claimant confirmed that she had access to the internet at all relevant times.
27. I find that the claimant was aware of the possibility of taking action in late March 2019.

Conclusions

28. Was the complaint brought within the period of three months starting with the date of the act to which the complaint relates? The answer to this question is plainly no. The only act that the claimant complains of expressly in her ET1 is the incident on 26 March 2019. A complaint in respect of that act should have been brought by 25 June 2019. On that basis the complaint was brought some 7 months out of time. Even applying a liberal approach to the claim and adopting a date of 10 July 2019 (the last actual day of working) for the last act makes her complaint 4 months out of time.
29. Was the complaint brought within such other period that the Employment Tribunal thinks just and equitable? I have come to the conclusion that the answer to this question is also no. Applying the factors set out in paragraph 12 above - (i) the delay was a lengthy one. The claimant was plainly not completely incapacitated during her sick leave. She was able to regularly attend medical appointments and had access to the internet. Moreover, the reason she gave for issuing proceedings in February was not because she had only recovered sufficiently to do so at that stage but because she had seen a TV programme which persuaded her to enforce her rights (ii) it is likely that cogency of the evidence will have been affected by the delay. The witnesses could not be asked about their recollection of events when the events were still relatively fresh in their minds (iii) the respondent did not facilitate the delay in any way (iv) It was the TV programme which brought the possibility of legal action to the forefront of her mind. Up to the point of resignation the claimant had been contemplating a return to work but was persuaded by her medical advisors that this would not be appropriate. The claimant only considered legal action once she had resigned (v) it is likely that the claimant knew of the possibility of taking action at a much earlier date but waited until she had seen the TV program to try to enforce her rights and then immediately contacted ACAS.

30. Accordingly, I have come to the conclusion that the claim is time barred and the tribunal has no jurisdiction to deal with it.

Employment Judge Lang

12th October 2020

Sent to the parties on:

4th November 2020.

For the Tribunal:

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