



EMPLOYMENT TRIBUNALS

Claimant: Miss R Adegunle

Respondent: (1) N Brown Group plc
(2) J D Williams & Co Ltd

PRELIMINARY HEARING

Heard at: Manchester (in public by CVP)

On: 2 November 2020

Before: Judge Brian Doyle (sitting alone)

Representatives

For the claimant: In person

For the respondent: Ms A Niaz-Dickinson, of counsel
Ms E French, trainee solicitor

RESERVED JUDGMENT

(1) The claimant's complaints of disability harassment contrary to section 26 of the Equality Act 2010 were presented in time so far as those complaints relate to acts or omissions falling after 30 June 2018.

(2) The claimant's complaints of disability harassment contrary to section 26 of the Equality Act 2010 were not presented in time so far as those complaints relate to acts or omissions falling on or before 30 June 2018. It is not just and equitable to extend time. The Tribunal does not have jurisdiction to hear those complaints.

(3) In any event, the claimant's complaints of disability harassment contrary to section 26 of the Equality Act 2010 claim are struck because they have no reasonable prospect of success.

(4) The claimant's sole remaining complaint of constructive unfair dismissal may proceed to a final hearing.

REASONS

Introduction

1. I conducted today's preliminary hearing in public via the Cloud-based Video Platform (CVP). We experienced some initial difficulty with the claimant's audio participation, which was resolved without disadvantage to her. The hearing commenced at 11.55am rather than at 10.00am and concluded at 2.10pm with a 30 minutes break for lunch. I reserved my judgment.
2. I had provided to me by the parties a hearing bundle in PDF format comprising 378 pages. This was backed up by a MS Word version of the same document. I refer below to the relevant pages of the PDF bundle in square brackets.
3. I did not take witness evidence. I have made no findings of fact (other than in respect of time limits). The respondent presented its application in respect of time limitation and strike/out deposit in sections. I permitted the claimant to respond to that application in sections. Both parties were given a further opportunity to put any additional material or submissions before me.

The claim

4. This claim arises from an early conciliation notification made by the claimant to Acas on 23 November 2018, which resulted in an early conciliation certificate being issued on 20 December 2018 [1]. A claim on form ET1 was then presented to the Employment Tribunal by the claimant on 25 January 2019 [2-13]. The claimant provided further particulars on 14 February 2020 [19-21]. The respondent responded to the claim on 8 March 2020 [32-45] and amended its response on 29 January 2020 [123-133]. As the hearing bundle reveals, the claimant at various subsequent times has added to or clarified her claim in correspondence with the respondent and the Tribunal.
5. Following an earlier preliminary hearing for case management purposes held by Employment Judge Warren on 14 June 2019 [57-62], the claim was subject to further case management by Employment Judge Dunlop at a preliminary hearing on 25 September 2019 [101-110] and by Employment Judge Holmes at a preliminary hearing on 3 February 2020 [134-139]. As a result, the Tribunal has identified the claimant's claim as containing two broad complaints: (1) constructive unfair dismissal and (2) unlawful harassment based upon the protected characteristic of disability contrary to section 26 of the Equality Act 2010.
6. The disability expressly relied upon by the claimant is anxiety. The respondent concedes that this is a disability for present purposes. There is also at various points reference to perceived disability and/or associated disability based upon the perception of her as having a psychosis and/or the mental health history of members of her family. The claimant does not expressly rely upon a disability other than anxiety and indeed she contests any suggestion of any other diagnosis. It does appear that she relies upon how she has been allegedly

treated based upon the perception of her by others and her association with others, although that has not been pleaded with any legal sophistication.

7. The complaint under the Equality Act 2010 and the basis upon which a constructive unfair dismissal complaint is advanced rely upon allegations of bullying and/or harassment at work and outside the workplace. There are said to be two periods of such alleged conduct or behaviour towards the claimant: (1) the period 2014 to the end of 2015 and (2) the period from December 2017 to 5 November 2018 when the claimant resigned her employment summarily.

The preliminary issues

8. The issues for today's preliminary hearing were first identified by Employment Judge Dunlop at the case management hearing held on 25 September 2019 and later refined by Employment Judge Holmes at the case management hearing on 3 February 2020.
9. The preliminary issues are: (1) whether any of the claims were presented out of time; (2) if so, whether the Tribunal should exercise its discretion to extend time for their presentation on the grounds that it would be just and equitable to do so; (3) whether any of the claims should be struck out on the grounds that they have no reasonable prospects of success; and (4) whether the claimant should be ordered to pay a deposit as a condition of continuing any of her claims on the grounds that they have little reasonable prospects of success. It is also apparent to me that consideration arises of whether there was any conduct extending over a period of time and/or a series of similar acts or failures.
10. For the avoidance of doubt, the claim of constructive unfair dismissal does not give rise to any preliminary issues and will be allowed to proceed to a final hearing in any event.

The relevant complaints

11. At the case management hearing on 25 September 2019 Judge Dunlop identified 8 specific allegations relating to the second period since December 2017 and these are set out in paragraph 10 of her case management summary. The respondent has presented amended grounds of response in respect of those 8 specific allegations. The claimant provided further particulars of her claim dated 13 December 2019 and those further particulars advanced 10 further allegations, to which the respondent has responded in its amended grounds of response.
12. Those complaints are most helpfully set out by the respondent in Appendix A to its strike out application [150-158].

Submissions

13. The respondent's case is set out in its application to strike out [143-149] and its schedule of the complaints and its response to those complaints in terms of both time limitation and prospects of success [143-158]. The claimant

responded to those matters during the hearing and in pre-hearing correspondence seeks to support her claim in general terms, particularly by reference to the history of her employment, her health and events at large.

The relevant law

14. I gratefully adopt in summary form the respondent's submissions as to the relevant law that I must apply, as follows.
15. Rule 37 of the Employment Tribunals Rules of Procedure 2013 sets out the relevant basis upon which the Tribunal may make an order striking out all or any part of a claim. At any stage of the proceedings a Tribunal may strike out all or part of a claim on the ground that it has no reasonable prospect of success.
16. The authorities establish that a litigant has a right to have her claim litigated provided that it is not frivolous, vexatious or an abuse of process (*Ashmore v British coal Corporation* [1990] IRLR 283). What may constitute such conduct must depend on all the circumstances of the case. The categories are not closed and considerations of public policy and the interests of justice may be very material.
17. It is accepted as a general principle that cases will not ordinarily be struck out on the grounds of no reasonable prospect of success where the central facts are in dispute (see *North Glamorgan NHS Trust v Ezsias* [2007] EWCA Civ 330. Only in exceptional circumstances will this be appropriate, such as where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.
18. It is also open to me, where I am satisfied that the conditions of rule 37 are not met, to make an order under rule 39 that the claimant should pay a deposit as a condition of continuing to advance her claims if I find that they have little reasonable prospect of success. That is subject to the Tribunal making reasonable inquiries to ascertain the ability of a person to pay such a deposit and to take account of any information so ascertained in determining the amount of the deposit. I have that information before me. [198-199]. The case law establishes that the test of little prospect of success is not as rigorous as the test that the claim has no reasonable prospect of success. See *Jansen van Rensburg v Royal Borough of Kingston upon Thames* UKEAT/0096/97.
19. The question of time limitation in respect of the Equality Act 2010 complaint also arises for decision at this preliminary hearing. Section 123 of the Equality Act 2010 provides that Employment Tribunal proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. For the purposes of that section, conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

20. The case law establishes that the Tribunal should consider the same factors as would be considered by the civil courts where there is an application to extend limitation under section 33 of the Limitation Act 1980. See *British Coal Corporation v Keeble* [1997] IRLR 336. The Tribunal is required to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances of the case. In particular, that includes the length of and reasons 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 had cooperated with any request for more information; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.
21. In *Robertson v Bexley Community Centre* [2003] IRLR 434 it was held that it was also of importance to note that the time limits are exercised strictly in employment cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule. In *Accurist Watches Ltd v Wadher* UKEAT/0102/09 it was said that it is always necessary in the exercise of the discretion to extend time on the basis that it is just and equitable to do so for a Tribunal to identify the cause of the claimant's failure to bring the claim within the primary time limit.
22. It is the respondent's position that it would not be just and equitable to extend time for presentation of the majority of the claimant's complaints under the Equality Act 2010 as the respondent is likely to be prejudiced for reasons that it identifies in its submission.

Discussion and decision

23. I turn first to consider the time limitation questions in respect of each of the complaints made by the claimant under section 26 of the Equality Act 2010.
24. The first group of complaints are contained within the claimant's further particulars dated 13 December 2019 as follows. (1) In April 2013 an unnamed individual allegedly made "hair gestures" towards the claimant and acted oddly towards her. The claimant's view was that the matter could have been dealt with better by her line manager as opposed to reporting the concerns to HR. (2) The claimant alleges that she felt under pressure to raise her concerns by way of a formal grievance by Janet Williams and was more or less told that she was a liar. The claimant alleges that she had been pre-judged on a perceived family characteristic and felt insulted when she was advised to make contact with her GP. (3) In April 2013 onwards Chris Smith allegedly read aloud the first few letters of the claimant's surname and then repeatedly stated the word "fraudster" for "a fair while". (4) The claimant alleges that on a lot of occasions her login details when she started were revoked as other team members were trying to access her system. (5) The claimant alleges that her coat was slashed

after returning from lunch. The claimant has not identified any likely named perpetrators and refers to “the usual people were in”. (6) The claimant alleges that the “old security man” would do the same old (hair) gesture as she left and did not do this towards any other individual who entered or left the building. The claimant does not know the individual perpetrator’s name and alludes to him having dark hair and being European-looking. (7) In 2013 the claimant alleges that there was intimidation outside the workplace and confirmed the individuals looked like “plain clothes police officers” and that “she shouldn't have to pass a bunch of men i.e. more than six”. (8) The claimant alleges that on “a strange day” Sarah Mayfield, Chris Smith and unnamed others “started going out of their way to show the claimant their new mobile telephones and she suspects that these were stolen goods as her partner advised that there's been a fire at the warehouse next door to his works”; (9) The claimant alleges that her private life was spun into conversation between Sarah Mayfield, Cathy Brotherton and Kathryn (no surname) and was indirectly informed of things she can and cannot do. The claimant felt that this was an attempt to test her mental health. (10) The particulars of this allegation are the same as allegation (2) above.

25. These ten complaints or allegations were identified as part of the case management order dated 25 September 2019. The claimant was required by the Tribunal to provide specific details of the allegations upon which she sought to rely and which were said to have occurred between April 2013 and December 2015. It is the respondent’s understanding, with which the Tribunal agrees, that the second group of complaints, to be set out further below, refers to a period commencing after 31 December 2015 and occurs from December 2017 onwards. See the case management order dated 25 September 2019. It appears to the Tribunal, as the respondent also submits, that there is a gap of approximately 2 years during which the claimant has made no allegations or complaints against the respondent under the Equality Act 2010.
26. The Tribunal accepts the respondent’s submission that it does not have jurisdiction to hear any of the 10 allegations in the first period above brought under the Equality Act 2010 and relating to the period from April 2013 to December 2015. The claimant presented those claims outside of the primary limitation period of three months specified in section 123 of the 2010 Act. The conduct of which the claimant complained ceased on or about or before 31 December 2015. The appropriate limitation period would have expired on 30 March 2016.
27. The claimant contacted Acas under the early conciliation scheme on 23 November 2018. The Acas early conciliation certificate was sent on 20 December 2018. The claim was presented to the Tribunal on 25 January 2019. Accordingly, these complaints are almost three years out of time.
28. The Tribunal explored with the claimant whether there were any grounds to support a finding that this group of 10 complaints were part of a course of conduct extending over a period of time for the purposes of section 123 of the Equality Act 2010. The time gap is a significant one between the first group of complaints, which ceased in December 2015, and the second group of complaints, which began at the end of 2017 and onwards.

29. The claimant was also asked directly by the Tribunal for an explanation of why she had not acted on those complaints previously. She explained that she had not been in such a situation before. She agreed that she had had contact and advice from Acas in respect of other employment in which she was engaged. She said that she had been a trade union member (USDAW) at the relevant time, but was no longer a member and had no representative. Nevertheless, that is the extent of her case as to why she did not deal with the matter sooner.
30. I am not satisfied that the two groups of complaints amount to a course of conduct, separated as they are by a sizeable gap of 2 years and having been dealt with under internal procedures at the relevant times. I am also not satisfied that the claimant has provided an adequate explanation to explain the delay in presenting her claim to the Tribunal.
31. I do not consider that this is an exceptional case in which it would be just and equitable to extend time for presentation of this group of complaints. I accept that the respondent is very likely to be prejudiced in its ability to respond to the complaints because they relate to incidents said to have occurred over four years ago; a number of key individuals employed by the respondent at the relevant time have since left the respondent's employment; and the vast majority of the allegations in this first group of complaints were investigated internally by the respondent at the time and were found not to be upheld as part of the original grievance hearing and two subsequent appeal stages.
32. Accordingly, the complaints or allegations in this first group have not been presented to the Tribunal in time and, there being no just and equitable basis to extend time, the Tribunal does not have jurisdiction to hear them. Those complaints are therefore dismissed.
33. Strictly speaking, it is not necessary for me to consider whether this first group of complaints or allegations might be struck out as having no reasonable prospect of success. However, should I be wrong on the question of time limitation, I will now also consider the strike out application (and whether alternatively a deposit order would have been appropriate).
34. This group of 10 allegations or complaints variously suffers from a combination of a number of common defects which lead me to conclude that they have no reasonable prospect of success. Many of them are expressed in generalisations or in vague or non-specific terms. They lack the detail that would be necessary to allow the respondent properly to respond to the complaints. It is often difficult to identify the dates on which these allegations are said to have arisen and in some of the complaints the individuals concerned are not properly identified. Many of these matters had already been considered within the internal procedures of the respondent and found to be without substance.
35. Perhaps most importantly, it is unclear in these complaints to what extent the claimant says that the matters alleged amounted to disability harassment for the purposes of section 26 of the Equality Act 2010. That section, so far as relevant to the present claim, provides that a person (A) harasses another (B) if A

engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. A relevant protected characteristic for this purpose is disability. Accepting the claimants asserted case at its highest, and assuming for present purposes that she might be able to establish the factual basis of it, the connection with or relation to the claimant's disability of anxiety (or so far as her hair is concerned, a possible disability arising from Lupus, as yet not conceded) is simply not established on a proper basis that can be responded to.

36. Finally, a number of these complaints relate to events said to have occurred outside the workplace; are concerned with so-called third parties; and do not appear to have anything to do with the actions or omissions of the respondent employer.
37. Accordingly, and in the alternative, I would have struck out these complaints as having no reasonable prospect of success or I would have made them the subject of a deposit order as having little reasonable prospect of success.
38. That takes me to the second group of complaints or allegations as set out in the claimant's further particulars and referred to in paragraphs 10.1 to 10.8 of the case management order dated 25 September 2019.
39. Those complaints or allegations are as follows. (1) The claimant's line manager, Mark Wilson, refused to provide a letter for the claimant's GP in relation to a dispute with her GP over the accuracy of her medical records. This is said to have occurred first in December 2017 and then again in March 2018. (2) On several occasions in Spring and Summer 2018 two of the claimant's co-workers arrived on shift dressed in similar clothing to the claimant that day. She perceived this to be behaviour that was targeted at her and designed to make her paranoid. The claimant was unsure of the identity of the two employees involved, but believes that they were temporary workers who no longer work for the respondent. One may have been called Lucy and worked as a temporary member of staff in the respondent's fraud section. (3) In a conversation with a colleague, Megan Woods, regarding mental health issues, Ms Woods made the comment "you have schizophrenia, don't you". This is alleged to have occurred in mid-2018. The claimant states that she does not have that condition and found the comment offensive. (4) In October 2018 the claimant attended a well-being meeting related to some sickness absence. The notes of that meeting subsequently produced by the respondent's HR Department refer to her as being "delusional" when the word used in the meeting was "delirious". The claimant considered this to be inappropriate. (5) In October 2018 the claimant discovered that password-protected documents she had saved on the respondent's IT system had been accessed by another user and the passwords had been changed. The claimant explained that she believes her documents were being accessed by an external third party person or persons rather than by the respondent itself. She complains, in respect to the respondent, that its IT Department should have notified her of this breach and advised her of appropriate steps. (6) In October 2018 an incident occurred in the respondent's car park in which the claimant saw a woman with children gain unauthorised

access to the car park. The claimant viewed this as potentially part of the third party campaign against her. As a result of her concerns, it was agreed with Mr Wilson, she alleges, that a supervisor (Jade) would meet her in the car park when she next arrived at work. Jade did not meet the claimant as planned and this failure is the issue complained of. (7) On 4 October 2018 a particular song ("Sit Down" by the singer James) was playing on the radio when the claimant arrived at the office. The claimant found the song upsetting (because as part of her return to work after sickness absence related her health condition she was working apart from others). She clarified that she did not believe that any of the individuals present in the office had caused the song to be played. Rather it is offered as an example of 3rd party manipulation of her environment, which she experiences both in and out of work. She asserts that the respondent had a duty to protect her from harassment in those circumstances. (8) The claimant also complains about the alleged failure on the part of the respondent to allow the claimant to retract her resignation in November 2018.

40. I shall deal with the time limitation questions first.

41. The respondent accepts that the complaints or allegations numbered (4) to (8) provide the Tribunal with jurisdiction and have been presented within the appropriate time limitation period. It is the complaints or allegations numbered (1) to (3) on which the time limitation point is taken.

42. I accept the respondent's submission that the Tribunal does not have jurisdiction to hear any of those three allegations. The claimant has submitted her claim containing those three complaints outside the primary limitation period specified in section 123 of the Equality Act at 2010 (that is, the period of three months from the date of the act to which the complaint relates).

43. Taking those three allegations together, the date on which the conduct complained of ceased is no later than 30 June 2018. The primary limitation period expired on 29 September 2018. Acas was notified under the early conciliation scheme on 23 November 2018 and issued a relevant certificate on 20 December 2018. The claimant presented a claim in which those three allegations or complaints were a part on 25 January 2019. It follows that those three complaints are over four months out of time.

44. Are there any grounds to support a finding that these allegations or complaints are part of a course of conduct extending over a period of time for the purposes of section 123 of the Equality Act 2010? I accept the respondent's submission that there are no such grounds given that there is a gap of some three months from that conduct ceasing in June 2018 until the next group of alleged incidents occurs in October and November 2018. In addition, the claimant has provided no adequate explanation in support of her delay in presenting a claim to the Tribunal in respect of those three incidents.

45. I also accept the respondent's submission that it would not be just and equitable to extend time for the presentation of those particular complaints. The respondent has already investigated the large majority of those complaints,

which were not upheld, as part of an original grievance hearing and two subsequent appeal hearings.

46. Accordingly, the first three complaints or allegations in the second group have not been presented to the Tribunal in time and, there being no just and equitable basis to extend time, the Tribunal does not have jurisdiction to hear them. Those complaints are therefore dismissed.
47. It is necessary for me to consider whether this second group of complaints or allegations might be struck out as having no reasonable prospect of success. I will now also consider the strike out application (and whether alternatively a deposit order would have been appropriate).
48. This second group of 8 allegations or complaints also variously suffers from a number of common defects, as before, which leads me to conclude that they have no reasonable prospect of success.
49. As already discussed above, many of them are expressed in generalisations or in vague or non-specific terms. They lack the detail that would be necessary to allow the respondent properly to respond to the complaints. It is often difficult to identify the dates on which these allegations are said to have arisen and in some of the complaints the individuals concerned are not properly identified. Many of these matters had already been considered within the internal procedures of the respondent and found to be without substance.
50. Perhaps most importantly, it is unclear in these complaints to what extent the claimant says that the matters alleged amounted to disability harassment for the purposes of section 26 of the Equality Act 2010. That section, so far as relevant to the present claim, provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. A relevant protected characteristic for this purpose is disability. Accepting the claimant's asserted case at its highest, and assuming for present purposes that she might be able to establish the factual basis of it, the connection with or relation to the claimant's disability of anxiety (or so far as her hair is concerned, a possible disability arising from Lupus, as yet not conceded) is simply not established on a proper basis that can be responded to.
51. Finally, a number of these complaints relate to events said to have occurred outside the workplace; are concerned with so-called third parties; and do not appear to have anything to do with the actions or omissions of the respondent employer.
52. Accordingly, and in the alternative, I would have struck out these complaints as having no reasonable prospect of success or made them the subject of a deposit order as having little reasonable prospect of success.

53. In conclusion, the complaints in the second group may not proceed either because they have not been presented in time (and time may not be extended) or because they have no reasonable prospect of success.

Conclusion

54. To put the matter another way, all the complaints under the Equality Act 2010, in both groups, may not proceed further. They are either out of time and/or (while not vexatious) are misconceived or ill-judged (in that they spring from the claimant's concerns about her health, in her private life or outside of the workplace). The complaint of constructive unfair dismissal may proceed to a final hearing. The claimant is not prejudiced in this outcome as many of the matters alleged as amounting to disability harassment may be relevant as part of the background to or context of the constructive unfair dismissal complaint.

55. I shall now direct that the complaint of unfair dismissal be listed for a 1 day final hearing with standard case management orders.

Judge Brian Doyle

DATE 3 November 2020

JUDGMENT & REASONS
SENT TO THE PARTIES ON

9 November 2020

FOR THE TRIBUNAL OFFICE