EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mrs N Leeks

Respondent: Brighton and Sussex University Hospitals NHS Trust

Held at: London South Tribunals
On: 06 March 2020
Before: Employment Judge Freer

Appearances
For the Claimant: In person
For the Respondent: Mr C Edwards, Counsel

REASONS FOR JUDGMENT FROM A PRELIMINARY HEARING

1. These are the written reasons for the judgment of the Tribunal that upon the successful application of the Respondent, the Tribunal has no jurisdiction to consider the Claimant's claims.

2. Oral reasons were provided to the parties at the hearing, which are replicated below.

3. This is a Preliminary Hearing to consider the Respondent's applications and to make any further orders as appropriate.

4. This hearing relates to two claims presented by the Claimant numbered 2302070/2019 and 2302071/2019, called the Second and Third Claims. There has been an earlier First Claim which was struck out after the Claimant's non-compliance with an Unless Order.

5. The Second and Third claims raise three complaints: (a) that a letter sent to the Claimant on 12 June 2018 was an act of victimisation on the ground of the Claimant's protected act of presenting the First Claim; (b) the Respondent's alleged action of accessing the Claimant's Occupational Health records as part of the litigation in the First Claim was an act of victimisation on the ground of the Claimant's protected act of presenting the First Claim; and (c) the Respondent's alleged act of accessing the Claimant's Occupational Health records as part of the litigation in the First Claim was also victimisation and

bullying on the ground of the Claimant's history of having whistle-blown in previous NHS employment.

6. The Respondent's applications are summarised in a letter dated 28 February 2020: (i) the Claimant's application to amend the First Claim to add those issues was refused and therefore they have no reasonable prospects of success and should be struck out; (ii) claims (b) and (c) are not within the definition of victimisation under section 39(3) of the Equality Act 2010 with regard to job applicants and should be struck out on the basis they have no reasonable prospect of success; (iii) claims (b) and (c) are covered by judicial proceedings immunity and the Tribunal has no jurisdiction to consider them and or should be struck out; and (iv) all the claims are out of time and therefore the Tribunal has no jurisdiction to consider them.

Application (i)

7. I conclude that the Claimant sought to amend the First Claim to include the same matters as raised in (a) to (c) above. That application was refused by Judge Spencer at a hearing on 17 January 2019 as set out in her Case Management Order.

8. The Claimant sought to amend the First Claim to include a complaint regarding a letter dated 12 June 2018 from the Respondent, which had informed her why a job offer made to her in November 2017 had been withdrawn and that any future applications would fail at the pre-employment check stage.

9. Judge Spencer concluded that this application was to add a wholly new claim out of time, the Claimant had made no application to amend at an earlier Preliminary Hearing on 25 July 2018 when she had knowledge of the 12 June 2018 letter, the Claimant was not new to the Employment Tribunal process and was unable to give any compelling reason why she had not sought the amendment at an earlier stage.

10. At the hearing on 17 January 2019 the Claimant argued that the 12 June 2018 letter amounted to a continuing act and therefore the claim had been presented in time. This argument was rejected by Judge Spencer who explained the difference between a continuing act and act with continuing consequences.

11. The Claimant also sought to amend the First Claim to argue that she had suffered victimisation by the unauthorised access to her occupational health records by the Respondent's HR and solicitors. This too was rejected by Judge Spencer.

12. The Claimant further sought to amend the First Claim to argue that the Respondent's withdrawal of the job offer and alleged unauthorised access to her Occupational Health records were detriments on the ground of the Claimant's history of being an NHS whistleblower. Judge Spencer concluded

that this claim was already pleaded in the First Claim and therefore no amendment was required, although she was unclear how the Claimant would argue this matter as she was neither an employee nor a worker of the Respondent at the time of the alleged detriment.

13. The decision by Judge Spencer was not challenged by the Claimant. There was no application for a reconsideration and no appeal.

14. It is my conclusion that there is nothing in the points relating to the refused application to amend and the Claimant starting fresh proceedings that is not more properly covered by the other applications made by the Respondent.

Application (ii)

15. With regard to complaints (b) and (c), the circumstances are set out in the pleadings by the Claimant and Respondent.

16. Section 39 of the Equality Act 2010, which sets out the potential causes of action, provides:

> "Employee and applicants
> (1) An employer (A) must not discriminate against a person (B)—
> (a) in the arrangements A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by not offering B employment. . . . .
> (3) An employer (A) must not victimise a person (B)—
> (a) in the arrangements A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by not offering B employment".

17. The Claimant was not a job applicant at the time of the alleged detriments. The job was withdrawn on 12 June 2018. The issue over the Occupational Health records related to later in time in the litigation process (see paragraph 30 of the Claimant's Particulars of Claim). Therefore section 39 subsections (1) and (3) (a) to (c) of the Equality Act 2010 did not apply to the Claimant with regard to the alleged detriments. Further, for completeness, section 108 of the Equality Act 2010 covers relationships that have come to an end but the Claimant had not been in a working relationship with the Respondent as either a worker or an employee and so also cannot rely on that protection. Therefore I conclude that the Claimant has no reasonable prospect of success of demonstrating that section 39(1) and (3) or section 108 applied to her circumstances and claims (b) and (c) are struck out.

Application (iii)

18. In the First Claim and in relation to the issue of whether or not the Claimant was a disabled person, it was ordered for the Claimant to write to the

Respondent and provide consent to the release of her Occupational Health documents. No such consent was forthcoming. The Respondent being under an obligation to provide general disclosure wrote to Occupational Health (which is a division of the Respondent) asking for copies of all letters notes e-mails and documents held by them. In response to that request the Respondent argues that an e-mail exchange between the Claimant and Ms Chandler of Occupational Health was provided in which all medical information was redacted. This material was then disclosed to the Claimant.

19. I conclude that it is always open in the general course of events for a request to be made by an employer to Occupational Health for disclosure of documents. Whether or not then Occupational Health considers itself able to provide that information (perhaps after liaison with the individual concerned) is a matter for them.

20. The Respondent relies upon judicial proceedings immunity. The Court of Appeal gave a useful summary of the principle in **Singh -v- Governing Body of Moorland Primary School** [2013] EWCA Civ 909:

> "i) The core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court;
>
> ii) The core immunity also comprises statements of case and other documents placed before the court;
>
> iii) That immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked;
>
> iv) Whether something is necessary is to be decided by reference to what is practically necessary;
>
> v) Where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity;
>
> vi) In such cases the principle that a wrong should not be without a remedy prevails".

21. It is my conclusion that the principle of judicial proceedings immunity covers the disclosure documents to which the Claimant's claim relates. They were documents prepared to be placed before the tribunal in evidence, forming part of the Respondent's disclosure obligation and were practically necessary as they related to an issue to be determined. The disclosure documents were not misused, obtained by fraud, or similar, such as to 'outflank' the core principle. Therefore the communications under review attract absolute privilege and the Tribunal has no jurisdiction to consider claims set out at (b) and (c).

22. Also the Claimant has no reasonable prospect of success in showing this privilege does not apply in the circumstances. Therefore on both these counts the employment Tribunal has no jurisdiction to consider complaints (b) and (c).

Application (iv)

23. As claims (b) and (c) cannot proceed because of successful applications (ii) and (ii) the only matter remaining for consideration in respect of time limits is claim (a). This relates to the 12 June 2018 letter. The application to amend the First Claim to include this matter was refused by Judge Spencer because the act was out of time and did not amount to a continuing act for the reasons given relating to a continuing act as opposed to continuing consequences. The Claimant presented her claims to the employment Tribunal for both the Second and Third claims on 23 May 2019. The Respondent's act of sending to the Claimant the 12 June 2018 letter is clearly significantly out of time. The time limit for that act expired on 11 September 2018.

24. I have therefore considered whether it is just and equitable to consider the claim once presented out of time.

25. In a discrimination claim an employment tribunal can consider a claim presented out of time "if, in all the circumstances of the case, it considers that it is just and equitable to do so". This gives a tribunal a wide discretion and to take into account anything which it judges to be relevant.

26. Notwithstanding the breadth of the discretion, the exercise of discretion is the exception rather than the rule (see **Robertson –v- Bexley Community Centre** [2003] IRLR 434).

27. The discretion to grant an extension of time under the 'just and equitable' formula has been held to be as wide as that given to the civil courts by s 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions (**British Coal Corporation –v- Keeble** [1997] IRLR 336, EAT).

28. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances. Although, the stated factors often serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, provided no significant factor has been left out of account.

29. The Claimant has pursued numerous claims, including at the High Court and has also been to the Employment Appeal Tribunal. She is very aware of the time limits as demonstrated in evidence. I have referred myself to the Limitation Act 1980 and in particular considered the length of the delay, the reasons for it, the extent to which the cogency of the evidence would be affected, and the promptness in which the Claimant acted once she knew

about the claim. The length of the delay is significant, particularly given the Claimant's knowledge of time limits and familiarity with the legal process. The application to amend the First Claim was judged to have been made out of time. Even if the Claimant had waited until a decision had been made on the application to amend the First Claim, there was a further material delay before the claim was presented. There was no good reason given for the delay. It is my conclusion that the cogency of the evidence will be affected by the delay in presenting the claim and the Claimant waited too long after knowing the essential elements of her claim before presenting it. Having balanced all the relevant factors and it is my conclusion that it is not just and equitable to extend time.

30. Therefore for all the reasons set out above the Claimant's claims cannot proceed as the Tribunal has no jurisdiction to consider them.

Employment Judge Freer
Date: 24 February 2020