Case Number: 3303836/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Newby	v	Urenco Limited
Heard at: Watford, via CVP		**On**: 10 March 2021

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Mr C Milsom, of counsel
For the Respondent: Mr D Craig, of Her Majesty's counsel

RESERVED JUDGMENT

1. The claimant has a reasonably arguable case that the subject-matter of her claims of discrimination because of sex and (to the extent that it adds anything) of harassment under section 26(1) of that Act (the protected characteristic for that purpose being sex) in relation to the period up to 14 April 2019 was "conduct extending over a period" within the meaning of section 123(3)(a) of the Equality Act 2010, and that that period continued while she was absent from work on account of sickness after that date until at the earliest 9 December 2019. Accordingly, it is not appropriate to strike out that claim (or those claims) on the basis that it is, or they are, out of time.

2. The claimant has a reasonably arguable case that the subject-matter of her claim of detrimental treatment within the meaning of section 47B of the Employment Rights Act 1996 for the making of one or protected disclosures within the meaning of section 43A of that Act before 14 April 2019 was an act extending over a period within the meaning of section 48(4)(a) of that Act, and that that period continued while she was absent from work on account of sickness after that date until at the earliest 9 December 2019. Accordingly, it is not appropriate to strike out that claim on the basis that it is out of time.

REASONS

Introduction; the issue listed to be determined at the hearing of 10 March 2021

1 In these proceedings, so far as relevant the claimant complains that the respondent discriminated against her because of her sex, within the meaning of section 13 of the Equality Act 2010 ("EqA 2010"), and/or harassed her within the meaning of section 26(1) of that Act (the protected characteristic for that purpose being her sex) contrary to section 39 of that Act, and that that unlawful conduct led to her becoming ill and unable to continue to work from 14 April 2019 onwards. She also claims that she was in the same period, i.e. up to 14 April 2019, treated detrimentally within the meaning of section 47B of the Employment Rights Act 1996 ("ERA 1996") for making a protected disclosure within the meaning of section 43A of that Act. The claimant was absent from work from 14 April 2019 onwards and remains so absent. She has so far made three claims in respect of the situation in which she now finds herself. The first was made in a claim form which was presented to the tribunal on 8 April 2020. The hearing of 10 March 2021 before me concerned only issues arising in the first of those claims.

2 The claimant submitted a written formal grievance to the respondent on 6 August 2019 and two days later her access to the respondent's IT systems and sites was suspended. She did not know that at the time, but she later found out about it. The respondent accepts that a claim in respect of anything done on or after 9 December 2019 is in time.

3 The hearing before me on 10 March 2021 took place because of an order made by Employment Judge Manley on her own initiative, i.e. without an application having been made by the respondent for the hearing to take place. The issue which was listed to be decided was this:

> "Whether the claims have been presented out of time and, therefore, whether the Employment Tribunal has jurisdiction to hear them".

4 At the start of the hearing before me on 10 March 2021, I referred both parties' counsel to the decision of Ellenbogen J in *E v X* UKEAT/0079/20/RN and they both said that the issue for me was not whether or not the claims were in time but, rather

4.1 whether or not the claimant's assertion that the conduct about which she complained which had occurred in the period before 14 April 2019 was part of "conduct extending over a period" within the meaning of section 123(3)(a) of the EqA 2010, and that that period ended on or after 9 December 2019, had a reasonably arguable basis, or alternatively whether there was a prima facie case that the matters about which the claimant complained constituted conduct extending over a period which ended on or after 9 December 2019 (with the same question being applicable in relation to the claim of detrimental treatment for the making of one or more protected disclosures), and, if not,

4.2 "where acts are out of time, whether time should be extended on the basis that it would be just and equitable to extend time (in relation to the discrimination claims) or that it was not reasonably practicable for the Claimant to bring the claims in respect of those acts in time and that such claims were brought within a reasonable period thereafter (in respect of the non-discrimination claims)."

5 The parties were in agreement that the key issue for me was whether the claimant could for the purposes of limitation bridge the gap between 14 April 2019 and 9 December 2019. Both parties put detailed skeleton arguments before me, and supplemented them with extensive oral argument. Having read those skeleton arguments and the authorities to which both counsel referred me, I agreed with them that the key issue was as stated in the first sentence of this paragraph. There was not enough time for me to deliberate, come to a conclusion and give reasons for it on 10 March 2021 (in fact, oral submissions concluded only after 4.30pm on that day), so I reserved my judgment.

The applicable law

Introduction

6 As will be apparent from my above judgment, I determined the first issue of the two listed in paragraph 4 above in the claimant's favour. I therefore did not need to consider whether time should be extended for the making of the claims concerning what happened before 14 April 2019. That does not mean that that has ceased to be a material issue: rather, it remains one, since all that I have decided is that the claimant's claim of what I will refer to simply as continuing conduct has a reasonable prospect of success. As a result, that argument may at trial be rejected, so that the second issue listed in paragraph 4 above may need to be decided. What my decision on the first issue does mean, however, is that I do not need to state or apply the law relating to that second issue.

The law relating to the first issue

7 Mr Milsom submitted that the key question on the first issue was stated succinctly by Mummery LJ (with whose judgment Sedley and Rix LJJ agreed) in *Ma v Merck Sharpe and Dahme Ltd* [2008] EWCA Civ 1426, at page 17, in the following manner:

> "[It is not enough for a claimant] simply to assert that the acts [complained about in the claim form] are continuing acts or that they evidence a state of affairs extending over a period. The complainant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs."

8 That was said in relation to the application of the test in the Race Relations Act 1976, which was slightly different from that which is in the EqA 2010. I did not see the difference as being material, and it was not contended that I should see it as being material. Both parties focused heavily (and in my view correctly) on the earlier judgment of Mummery LJ in *Commissioner of Police for the Metropolis v Hendricks* [2003] ICR 230, and Mr Craig submitted forcefully that I should not focus on the words "an ongoing state of affairs", on the basis that the concept of a continuing state of affairs is amorphous and unhelpful, and that what one needs to focus on is the acts about which complaint is made. It was said too that when Mummery LJ referred in *Hendricks* to "a discriminatory state of affairs", he was doing so by reference to the concept of a continuing act.

9 In his skeleton argument, Mr Craig said this:

> '29. ... The Court in [*Hendricks*] was not saying that it is sufficient merely to allege that there was a continuing state of affairs or a discriminatory culture (contrary to the Claimant's approach in her evidence); it was saying that there has to be some link between the events identified and then proved by a claimant which link is the act extending over a period. The link need not be as formal as a policy, rule or scheme etc but it nevertheless has to amount to "an act": see paragraphs 47-52 of the judgment of Mummery LJ (emphasis added).
>
> > "48.… the burden is on [the claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a discriminatory state of affairs covered by the concept of "an act extending over a period"…
> >
> > 49. At the end of the day Ms Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no 'act extending over a period' for which the commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination…".
> >
> > 52. "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period"… the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is an "act extending over a period" as distinct from

> a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

30. This analysis has been borne out in the subsequent cases . Thus:

    (1) Per Mummery LJ in *Ma v Merck Sharpe and Dohme Ltd* [2008] EWCA Civ 1426:

    > "I have no difficulty in agreeing ...that it is not enough for Dr Ma simply to assert that the acts are continuing acts or that they evidence a state of affairs extending over a period. The Complainant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs."

    (2) In *Aziz v FDA* [2010] EWCA Civ 304; (2010) 154(14) SJLB 29, at 36: the Court of Appeal made clear:

    > "… the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs..."

    One relevant factor is whether the same individuals or different individuals were involved in those incidents. If the incidents are alleged against different people the task of establishing a linking act is more difficult for a claimant.'

10 Those quotations themselves, by their references to "an ongoing state of affairs" undermined the submission that I have set out at the end of paragraph 8 above. In fact, the concept of "conduct extending over a period", which are the words in section 123(3)(a) of the EqA 2010, as with the other statutory provisions referring to an act or conduct extending over a period, is, objectively speaking (and looking at the matter from the point of view of a newcomer to the situation) an odd one, which may well have been created in order to cater for a situation in which there is an ongoing discriminatory approach on the part of (for example) an employer.

The law relating to striking out a claim on the basis that it has no reasonable prospect of success

11 The law relating to the striking out of a claim on the basis that it has no reasonable prospect of success was applicable here. In *Ahir v British Airways plc* [2017] EWCA Civ 1392, Underhill LJ (with whose judgment McFarlane LJ agreed) said this in paragraph 16 of his judgment:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are

> satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."

12 That case was an unusual one, where so far as relevant the claimant (who was the appellant) asserted that the respondent's impugned acts (which it was claimed constituted victimisation within the meaning of section 27 of the EqA 2010 and "detriment as result of raising a complaint under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002") were the result of the victimisation by one employee, employed in the respondent's legal department. As Underhill LJ recorded in paragraph 20 of his judgment):

> "It was [the appellant's] case, advanced in his particulars of claim and also in correspondence with the Tribunal prior to the strike-out hearing seeking disclosure of documents and telephone records, that a BA employee in the legal department, Mr Navdeep Deol, was already aware of the circumstances of the appellant's departure from Continental Tyres and had a copy of the Employment Tribunal judgments; that he had in that knowledge sent the anonymous letter to the HR department; and that he was motivated by one or more of the protected acts. There was, as he put it, 'a well-laid plan' to get rid of him as a troublemaker."

13 The leading authority on the question whether or not a claim should be struck out in civil proceedings is the decision of the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1. That case concerned the application of the test in rule 24.2(a) of the Civil Procedure Rules 1998 ("CPR"). That provision empowers a court to give summary judgment (which is in substance what striking out a case because of a lack of a reasonable prospect of success does in an employment tribunal) where there is "no real prospect" of success. At page 260 of *Three Rivers*, in paragraph 93, Lord Hope set out the following key passage from Lord Woolf's judgment in *Swain v Hillman* [2001] 1 All ER 91, which concerned rule 24.2(a):

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this

serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

14 In paragraphs 94 and 95 of his speech in *Three Rivers*, at 260-261, Lord Hope said this:

> "**94** ... I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is – what is to be the scope of that inquiry?
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> **95** I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

15 The decision on the facts before the Court of Appeal in *Swain v Hillman* is instructive. There, Lord Woolf said (at p 93e) that it was:

> "fair ... to take the view that the judge regarded this as a case where he thought that it was possible, but improbable, that the claim or defence would succeed."

16 I could see no material difference between the tests in CPR r 24.2(a) and that which is in rule 37, namely whether or not a case has "no reasonable prospect of success".

17 I referred myself in addition to the passage in *Harvey on Industrial Relations and Employment Law* at paragraphs PI[633]-[633.12], which it is not necessary to set out here, but which reinforced the need for caution before concluding that a particular claim or part of a claim of unlawful discrimination (including detrimental treatment for whistleblowing, i.e. the making of a protected disclosure within the meaning of section 43A of the ERA 1996) has no reasonable prospect of success.

The factors relied on by the claimant in saying that she was relying on there being conduct extending over a period or an act extending over a period

18 Mr Milsom relied principally in support of the proposition that there was here conduct or an act extending over a period up to and including 9 December 2019 on the circumstances to which he referred in paragraphs 21-25 of his skeleton argument, namely (in summary) "specific instances as to the treatment of Ms Amy Wisdom, Ms Melissa Mann and Ms Miriam Maes".

19 Mr Craig submitted with some force that those instances were laid at the door of two employees who left the respondent's employment in March and September 2019: they were, respectively, Mr Thomas Haeberle and Mr Dominic Kieran. However, that about which the other employees to whom I refer in the preceding paragraph above, and the claimant, complained, was "a [quite] strong alpha male culture in [the respondent's] organisation".

20 In addition, there was in the claimant's additional bundle a record of an interview of Mr Dave Sexton of Ms Alison Dyer, who was employed by the respondent as its Chief Information Security Officer. Mr Sexton is, I understood from that bundle, the respondent's Chief Operating Officer. Mr Milsom relied on this passage in that bundle, at pages 507-508:

> "I would say there are two specific individuals who display what I call alpha male, typical alpha male behaviour. This hasn't changed over time. I would say those people are the people actually who are deemed to be most influential and their behaviour has never been addressed and that hasn't changed in the two years I've been here…From my personal observation and experience, when you raise an issue it doesn't get addressed…the behaviours which are the problem are absolutely still there and have never been addressed".

21 Those "two specific individuals" were Mr Haeberle and Mr Kieran. Therefore, it is possible to say that they were the cause of the "state of affairs" which the claimant contends was conduct or an act extending over a period, so that it could be said that (1) that conduct ended at the latest by September 2019, and (2) there is too

much of a gap between then and 9 December 2019 for it to be reasonably arguable that there was conduct or an act extending over a period until the start of the period in respect of which the claim was in time.

My conclusion

22 While I could see some force in that argument, I could not conclude that the claim that there was conduct or an act extending over the period from April 2019 to December 2019 had no reasonable prospect of success. That was because if several forceful individuals have fostered a discriminatory culture (to use a term that was once much in use but has fallen somewhat into disuse, and which I use here cautiously but in the belief that it is helpful in this context) in an organisation, then that culture may well endure at least for some time after they have left the organisation. That may well have occurred here, and in my view the question whether there was here conduct or an act extending over a period until 9 December 2019 must be determined at trial.

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Employment Judge Hyams

Date: 20 March 2021

Sent to the parties on:

.....31st March 2021.....

.....R Darling.....

For the Tribunal Office