



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms T Tisha

v

Sainsbury's Supermarket Ltd

Heard at: London Central

On: 7 July 2021

Before: Employment Judge Hodgson

Representation

For the Claimant: Mr A Kamara, consultant

For the Respondent: Mr N Bidnell-Edwards, counsel

DECISION

1. The tribunal does not have jurisdiction to hear the discrimination claim as they are out of time and time will not be extended.
2. The wages claim is not dismissed at this stage it must be clarified in accordance with the directions issued.

REASONS

Introduction

1. On 5 January 2021, the claimant submitted her claim. The ACAS conciliation period ran from 9 November 2020 to 9 December 2020. It is

accepted the claims that are subject to a three month limitation period, an which are older than 10 August 2020, are out of time.

2. The claimant ticked the boxes alleging claims of race discrimination and maternity/pregnancy discrimination. In addition, there was a money claim which is understood to be for wages.
3. There was a lengthy narrative attached. However, that narrative was unclear and failed to identify any specific claim adequately.
4. The matter came before EJ Norris on 19 April 2021. She listed the matter for a public preliminary hearing to consider three matters; whether time should be extended for any claims of direct race and/or pregnancy discrimination; whether all or any other claim should be struck out as having no reasonable prospect of success; thereafter, time permitting, the full merits hearing to determine the wages claim.
5. Her note indicates there was a discussion on the nature of the claims.

The Claimant complains of the following:

- a) **Race: direct discrimination (section 13 (1) Equality Act 2010 (EqA)) - that in 2017 the Respondent withdrew her work placement without consultation. The Claimant says that this was because she was an international student;**
- b) **Pregnancy: direct discrimination (section 18(2)(a) EqA) - that at the end of 2017, when the Claimant was pregnant, the Respondent failed for three months to supply her with a chair that she had requested; when a chair was provided in January 2018, the Claimant says it was wholly inadequate.**
- c) **Unlawful deductions (- that since July or August 2020, the Respondent has failed to pay her in full.**

6. EJ Norris made a number of observations as follows:

1. The Claimant has worked for the Respondent since March 2014, having come to the UK from Bangladesh in 2002 to complete her further education. She told me that she was working at least initially under a Tier 4 visa that entitled her to work for 20 hours a week in term time. In 2017, she was required by her university to complete a work placement. She says that the Respondent withdrew that placement later in 2017, without consultation, because she is an international student. She confirmed that this is the only complaint of race discrimination on which she relies.

2. Also in 2017, the Claimant became pregnant and she says she asked for a chair to enable her to work on the checkouts. She says no

chair was provided for three months, and in January 2018, the chair that was provided was extremely dirty, broken and unsuitable, to the extent that (she says) she actually vomited when she saw it. The Claimant said that this failure to provide a (suitable) chair was “inhuman” and an act of pregnancy discrimination. She confirmed there were no acts of pregnancy or maternity discrimination thereafter. The Claimant went on maternity leave later in 2018. While she was on maternity leave, there was a restructure, and when she returned from her maternity leave in January 2019, she was required to work at the Paddington Station store; she has remained working there ever since.

3. The Claimant says that she is contracted to work ten hours a day (07.00 to 17.00), two days a week. She does not take her break during the day but at the end of her shift, and it is at this point that she leaves work. She alleges that the Respondent is thereby treating her as if she is leaving work early, when in fact this should be treated as her break and paid accordingly. (She told me she is contractually entitled to be paid for her breaks).

4. The Claimant entered Early Conciliation between 9 November and 9 December 2020 and submitted her claim to the Tribunal on 5 January 2021. On the face of it, therefore, she would be out of time to complain about any act done before 10 August 2020, which includes her complaints of discrimination in 2017 and/or 2018. The Respondent defends the claim (so far as it can be understood) in its entirety and sought Further and Better Particulars in the ET3, repeated in the draft case management agenda prepared by its representative prior to the PHCM.

5. The Claimant attended the PHCM and explained that she is being advised by a Mr Dey of Lexpert Solicitors LLP. He is not on the record with the Tribunal and has not made himself known to the Respondent as the Claimant’s representative. However, the Claimant said that she has been taking advice from him since February and that he would have attended the PHCM to represent her had he not been prevented from doing so by having food poisoning. It was therefore regrettable that Mr Dey had not assisted the Claimant prior to the PHCM in finalising a list of issues so that the matter could be progressed, or even in supplying answers to the request for particulars of the discrimination complaints that was set out in the Respondent’s ET3 and repeated in the agenda. The Claimant did however appear to have been given assistance by Mr Dey to the extent that she told me she wished to seek an extension of time under section 123 EqA for the complaints of race and pregnancy discrimination, which she acknowledged were out of time.

6. In order to make some progress, I therefore spent some time with the Claimant discussing how she puts these complaints, which are now confirmed in the summary above. The Claimant is clearly aggrieved at what she perceives as poor and potentially unlawful treatment in 2017 and early 2018, and she is unhappy with the Respondent’s requirement for her to move to Paddington Station in 2019. However, the legal and factual basis for the complaint of race discrimination in particular was still not clear to me, even after asking the Claimant over a period of some 50 minutes to help me understand it, at which point Mr Bidnell-Edwards intervened and submitted that I risked the creation of an unequal footing between the parties, contrary to the overriding objective, given that the Claimant was still unable to articulate her complaints. There was also no explanation for her delay in going to ACAS.

7. I explained to the Claimant the difference between a continuing act and an act with continuing consequences. Even if the Claimant was

asserting that the requirement to work at Paddington Station was an act of victimisation following her return from maternity leave (and she did not specifically say that it was, even after I pressed her repeatedly to confirm the last date of any act complained of), that would appear to have been an act with continuing consequences and the claim so far as the discrimination complaints are concerned would be out of time by many months, if not two years.

8. The Claimant told me that she was not a member of the union USDAW at the material time, though she is now, and that she has been in poor health following her Caesarean section; she has a young child and a disabled husband for whom she is the sole carer. However, if she wishes to rely on these or any other explanations for the delay, it seemed to me to be proportionate for her to do so as part of a PH, which Mr Bidnell-Edwards and the Claimant herself agreed was the appropriate way to proceed.

9. That PH, which was listed to the parties' convenience, will therefore consider first the time point and whether to extend time for the race and pregnancy discrimination complaints. The Claimant must address this issue in the witness statement that she has been ordered to serve by no later than 4 pm on 21 May 2021. If the Employment Judge does allow the complaints to proceed notwithstanding that they were presented out of time, the Tribunal will go on to consider whether they stand any (reasonable) prospect of success, under the Rules of Procedure) and whether they should be struck out or a deposit (or more than one) ordered if the Claimant pursues those complaints. I made no order that the Claimant produce either medical evidence or evidence as to her means, but if she wishes the Tribunal to consider either of these at the PH (the latter in relation to any deposit that the Employment Judge might order), she should ensure that such evidence is sent to the Respondent in sufficient time for it to be inserted into the bundle, which must otherwise contain at least the pleadings and this summary, as well as the evidence in relation to the wages complaint on which either party intends to rely.

10. Having dealt with these preliminary points in relation to the discrimination aspect, the Employment Judge will consider making any further necessary case management orders and listing the case for a full merits Hearing in front of a Tribunal panel (Employment Judge sitting with Members) if the case is to proceed in whole or in part. The Employment Judge will then convert the PH to a final Hearing in accordance with Rule 48 to address the complaint of unlawful deductions from wages only; this is said to be a continuing act and therefore does not require either an extension of time or a full panel to deal with it.

11. The parties are reminded that the services of ACAS, which are free to use, are available throughout the process. If the matter is resolved through ACAS or other means, the parties must notify the Tribunal at the earliest opportunity.

7. At the hearing, I was eventually able to download the bundle and relevant statements. I adjourned in order to consider the documents. The hearing commenced at 11 o'clock. Thereafter, I sought to clarify the claims identified.
8. The claimant was represented by consultants Mr Kamara. He confirmed he had been instructed by the solicitors, The claimant was also assisted by a paralegal from the solicitor's firm.

9. I expressed concerns as to whether the claimant, in fact, intended to bring other claims. I allowed a further adjournment so the claimant's instructions could be obtained. Mr Kamara confirms that the only claims pursued were those identified in the order EJ Norris. During the course of the hearing, I clarified those claims further.
10. The claim of race discrimination concerned the removal of secondment to the respondent from about 7 July 2017. The claimant was undertaking a business course with BPP. That secondment was terminated by email of 7 July 2017 by BPP. To the extent this is a claim brought against the respondent, it is said that Ms Lorraine Pearson, area HR manager, terminated the claimant's workplace. It was a six-month work placement.
11. The claimant already worked for Sainsbury for 20 hour; her normal employment continued. It was agreed that this was the only claim of direct race discrimination and the alleged detriment occurred on 7 July 2017.
12. There was a claim of pregnancy discrimination. It is common ground the claimant was pregnant at the material time. It is the claimant's case that in November 2017 she made a verbal request of Mr Ruhul Amin, her line manager, for a chair. It is alleged that the chair was not provided until the first week of January 2018, and that it was, in any event, wholly inadequate. It is said that first the delay and second the provision of the actual chair were acts of pregnancy discrimination. It is accepted that the date of the detriments was no later than 7 January 2018.
13. The only other claim was the alleged failure to pay wages. I was unable to determine if this claim is in time.
14. It was specifically agreed that there were no other claims. I noted that there were other references, including a reference to backlash because of previous complaints. The term whistleblowing was used. The term harassment was used. There was also reference to medical conditions.
15. It was difficult to understand what was intended, and it did not appear to me that there were clear words identifying specific claims and linking them to a cause of action such as unfair treatment, victimisation, harassment, or detrimental treatment for protected disclosure. The claimant indicated that she may wish to bring other claims, in particular, I identified discrimination associated with disability. However, no application was made either orally or in writing.
16. Any further claims would necessitate an application to amend.
17. Having clarified the claims before the tribunal, I considered it appropriate to first consider the question of time, as it was a jurisdictional point.
18. I noted that the wages claim of failure to pay wages had not been set out adequately in the claim form, any further document, or the claimant's witness statement. I confirmed it would be necessary for the claimant to

provide proper particulars. Given her failure to clarify the claim despite a number of attempts, I considered whether an unless order should be attached. It is impossible to know the claim the claimant envisages. It is not possible for the respondent to meet the claim. What is required is for the claimant to set out the details. If she fails to do so, there can be no possibility of a fair hearing. The claimant has had ample opportunity to clarify the claim. If she fails to do so in accordance with the order which I will do separately, it is appropriate that the claim for wages should be struck out. It is appropriate to attach an unless order to my order requiring particularisation, I will attend to this of this in my case management order.

19. I had regard to the bundle of documents. In particular I consider the claim form and EJ Norris's case management order. The claimant produced a witness statement. She was cross examined by respondent's counsel.
20. A witness statement had been ordered EJ Norris. The order stated, "The statement must deal with the reason why the complaints of discrimination were not submitted in time and with her evidence on the wages claim."
21. I considered the claimant's original statement, as updated and amended on 6 July 2021.
22. The statement gave much background information concerning the claimant's employment. She described what she considered to be unfair treatment extending over a long period. That narrative includes the history relevant to the two complaints.
23. The claimant also set out specific factors which appear to be advanced as explanations for the failure to present her claims in time.
24. The claimant referred to a number of grievances and stated she pursued grievances under the employer's policy when subject to discrimination and harassment. She stated, "I thought they are ongoing matters until and/or unless the employer is finished looking into the matter and provided outcome." This would suggest that the claimant was conscious of the potential to bring a claim, but chose not to do so whilst the grievances were ongoing.
25. She referred to her maternity leave from 18 February 2018, returning in January 2019. She stated she experienced a hostile environment even before returning to work. The statement does not explain how this contributed to any delay in bringing a claim.
26. The statement refers to a medical condition. She stated she had a C-section by epidural with side effects. The nature and duration of the side effects is not specified. She also refers to various problems including sciatica, back pain, and haemorrhoids. The statement falls short of explaining how that prevented her from bringing a claim, if at all.

27. The statement refers to her husband's medical condition. He contracted polio as a child and I understand this has paralysed his right leg. She does not set out how this prevented the claimant from bringing a claim.
28. However, in oral evidence, the claimant alleged that she was her husband's sole carer. She accepted that her husband works for Sainsbury. She says that he has limited mobility. He uses a stair lift. His walking is limited. As for her personal care to him, this appears to be limited to assisting him to dress. The claimant undertakes all the cooking washing cleaning another domestic activities for her husband.
29. The statement states she is the sole carer for a husband and her new-born baby.
30. The statement refers to a housing eviction. It is alleged she was evicted from a house due to a licensing issue between the landlord and the council. The relevant date is not set out. The statement does not explain how this prevented her from presenting a claim.
31. She refers to her immigration status as a full-time student. She states that as an international student she experienced pressure in complying with the time constraints of a course.
32. The claimant states she was not a member of a trade union and was unable to obtain advice must trade union about legal proceedings.
33. She refers to her financial capability. She states that the tuition fees for her and husband educational were more than £75,000. She states, "Any additional costs would have been a means of huge pressure so would have been legal proceedings cost as they are quite expensive and difficult to manage for me and my family." There is no indication in this section if the claimant did not know that she could pursue legal proceedings.
34. The statement refers to mental and physical condition. She alleges that the discrimination and harassment contributed to mental and physical stress and depression. She states, "Having been advised that legal proceedings may take 6 to 12 months' time and much mental and physical engagement over time also cause me much stress and depression and lost strength of legal proceedings." The claimant fails to say when she received advice, or the nature of legal proceedings she had in mind.
35. The statement refers to the pandemic and states the claimant and her family were depressed and worried.
36. The claim refers to the fact her father passed away more than a decade ago her mother continues to live in Bangladesh. She stated her ability to travel was constrained. But she does not set out how this prevented from bringing a claim.

37. In oral evidence, the claimant alleged that she did not know of the right to bring any claim for direct race or pregnancy discrimination until she approached ACAS in November 2020. The respondent's counsel sought to ascertain when the claimant knew of the possibility to bringing a claim for race discrimination. I clarified to the claimant that what she was being asked was whether she knew that there was a potential claim of race discrimination, and if so, when she knew that. The claimant's answers were equivocal and at times evasive. The claimant did indicate, at one point, that she had difficulty understanding, and perhaps her answers were confused because of the language barrier. I clarified the questions for her and she confirmed she understood. I am satisfied that she did understand the questions being raised.
38. The claimant maintained that she knew nothing of the potential for bringing a claim of direct discrimination, whether because of race or pregnancy, at any point prior to contacting ACAS in November 2020. However, the claimant failed to explain what prompted her to contact ACAS, or when, or how, she became aware of that potential rights.
39. I consider carefully her statement. It is apparent that the statement makes reference to legal proceedings. There is nothing in her statement which would indicate that she had no knowledge of the potential to bring claims until November 2020. Her statement would suggest the opposite.
40. At paragraph 67 of her statement she specifically says that she had been advised that legal proceedings may take some 6 to 12 months. She also repeatedly refers to bringing grievances concerning discrimination. I reached the conclusion that the claimant gave misleading and evasive evidence. I do not accept that she only learned of the right to bring direct discrimination claims when approaching ACAS November 2020. On the balance of probability, I find that she knew that she could bring claims of direct discrimination at all material times

The law

41. Section 123 Equality Act 2010 sets out the time limits for bringing a claim.

(1) Subject to section 140A 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.

42. It is possible to extend time for bringing discrimination claims. The test is whether the tribunal considers in all the circumstances of the case that it is just and equitable to extend time.
43. It is for the claimant to convince the tribunal that it is just and equitable to extend the time limit. The tribunal has wide discretion but there is no presumption that the tribunal should exercise its discretion to extend time (see **Robertson v Bexley Community Centre TA Leisure Link 2003 IRLR 434 CA**).
44. It is necessary to identify when the act complained of was done. Continuing acts are deemed done at the end of the act. Single acts are done on the date of the act. Specific consideration may need to be given to the timing of omissions. In any event, the relevant date must be identified.
45. The tribunal can take into account a wide range of factors when considering whether it is just and equitable to extend time.
46. The tribunal notes the case of **Chohan v Derby Law Centre 2004 IRLR 685** in which it was held that the tribunal in exercising its discretion should have regard to the checklist under the Limitation Act 1980 as modified by the Employment Appeal Tribunal in **British Coal Corporation V Keeble and others 1997 IRLR 336**. A tribunal should consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances in the case particular: the reason for the delay; the length of 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 information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
47. This list is not exhaustive and is for guidance. The list need not be adhered to slavishly. In exercising discretion the tribunal may consider whether the claimant was professionally advised and whether there was a genuine mistake based on erroneous advice or information. We should have regard to what prejudice if any would be caused by allowing a claim to proceed.

48. Tribunal's may, if they consider it necessary in exercising discretion, also consider the merits of the application, but if the tribunal does so the party should be invited to make submissions.
49. There is no suggestion in this case of any continuing act. It is accepted that the allegation of race discrimination is approximately three years out of time. It's accepted the allegation pregnancy discrimination is to nearly half a year out of time.
50. Whilst the claimant indicated that she may wish to apply for amendment, there was no suggestion that any amendment would introduce any matters which could form any continuing course of conduct: since the material events, the claimant has moved to a new branch has different management.
51. It is for the claimant to establish her reason.
52. It is possible to identify three broad areas relied on. First, the claimant alleges that she was under pressure which limited the time that she could dedicate. Second, the claimant alleges she was concerned about cost. Third, the claimant alleges that she lacked the relevant knowledge of the causes of action.
53. I will consider each of these.
54. The delays involved are lengthy. I do not accept that the claimant was under such pressure that she could not have sought advice, established the potential claims, and lodged a claim form. Specific pressures, at specific times, may explain short delays. The pressures experience by the claimant do not explain the delays in this case.
55. It is unclear to me why the claimant alleges that she was concerned about cost. It would have been possible for the claimant to seek advice, and it would have been simple for her to ascertain that tribunal's are generally no cost forums.
56. I do not accept there is any significant language barrier. English may not be claimant's first language, but it is clear that she has academic ability, and she is a student. Any language barrier is not sufficient to prevent her from obtaining basic information. The claimant is intelligent, and it would be possible for her to seek advice. Indeed, her statement would indicate she did seek advice, albeit she has chosen to give no proper detail of that.
57. I considered the claimant's explanation that she lacked the relevant knowledge of the potential to bring claims of direct discrimination until she approached ACAS in November 2020. I have found her evidence on this to be misleading, and I do not accept it. I reject that evidence for the reasons I have given.

58. The reasons given by the claimant for delay are therefore unconvincing. Taking her evidence as a whole, it is clear that part of the reason for delay is that she chose not bring a claim. I find the main reason why the claimant did not bring the claims is because that was the claimant's choice. I also find when she made that choice, she knew that she could bring claims.
59. The length of the delays are considerable as explained above.
60. It is unclear how far the evidence will be less cogent. The respondent does not seek to argue that it would be possible to defend this claim.
61. There is nothing to suggest any action of the respondent led to any delay.
62. There is nothing to suggest respondent's failure to cooperate.
63. The claimant has not explained what steps she took to obtain advice. To the extent that it is referred to in her statement, it is clear that she obtained some advice and then chose to present no claim. It is unclear what advice was given and when. However, it is clear the claimant could have obtained advice at any time, or undertaken research.
64. The claimant has done nothing to explain how she came to understand that she could approach ACAS, and it is clear that she has not given a full account of her actual knowledge or the research undertaken.
65. It is necessary to consider the balance of prejudice. However, the fact that the respondent could meet a claim is not conclusive when considering whether discretion should be exercised. The claimant should explain the reason for delay and the extension of time is discretionary.
66. Having regard to all the matters I have identified, I do not find that is just and equitable to extend time. Any prejudice to claimant is caused because of her own choice to delay. Moreover, I do not consider that she has given accurate or frank evidence. I have rejected parts of her evidence.
67. The fact that the respondent could deal with a claim does not mean that it should, or that it is just to extend time. The respondent will find it more difficult to meet these old claims now than if they had been brought at the time.
68. I find that both claim of discrimination are out of time. I refuse to extend time.
69. This leaves only the claim of unlawful deduction from wages.
70. The directions of EJ Norris envisage a full merits hearing of the wages claim before a judge sitting alone. Whether it is permissible to delineate the wages claim in that manner, I do not need to decide. If there is no

further claim added by way of amendment, it would now be appropriate for that wages claim to be dealt with by just sitting alone. In the circumstances I do not have to consider whether I would have had the power to decide that claim as a "preliminary issue" or as part of some split liability hearing, had I decided to extend time.

Employment Judge Hodgson

Dated: 5 August 2021

Sent to the parties on:

05/08/2021.

For the Tribunal Office