EMPLOYMENT TRIBUNALS

Claimant: Ms K Brittney
Does not appear

Respondent: Ministry of Defence
Represented by Mr J Allsop (Counsel)

2204428/20

Heard on: 9 July 2021, London Central Employment Tribunal (in person)
Employment Judge: Mr D A Pearl

JUDGMENT

The tribunal makes the following Judgment:

1 There is no jurisdiction to entertain any of the discrimination claims, whether sex or disability discrimination.

2 There is no jurisdiction to entertain the section 98(4) complaint of unfair dismissal.

REASONS

1 The first part of my adjudication, the refusal of the Claimant's application to amend the claim for automatic unfair dismissal, is set out in the separate Order, with Reasons. Annexed to that Order is a procedural chronology up to 14 June. Within the Reasons, I brought matters up to date. The Annex is a necessary prologue to what follows and is annexed again to this Judgment, which will become a public document. The Annex focuses on automatic unfair dismissal. As I am now dealing with discrimination claims, I shall give further detail below about those claims, where they are to be found and how and when they arose.

2 After 14 June 2021, no witness statement has been served by the Claimant, as ordered, dealing with extension of time or just and equitable grounds.

3 The relevant directions for this part of the preliminary hearing were made on 10 December 2020 by EJ Adkin and are as follows (using the words of his directions):-

> (a) Time point/jurisdiction: whether there is any discriminatory conduct complained of which occurred earlier than 15 March 2020 and is, on the basis of the pleaded claim, not part of a continuing act or course of conduct?
>
> (b) If so, is it just and equitable to extend time?
>
> (c) Whether the discrimination claims should be struck out pursuant to Rule 37, on the grounds that, as currently pleaded, they have no reasonable prospect of success?
>
> (d) Whether the Claimant should in the alternative be required to pay a deposit pursuant to Rule 39 in order to continue with the discrimination claims.
>
> (e) Any further case management that is required, including reviewing the length of the hearing.

4 As will be seen, the issue of time/jurisdiction at (a) has to be expanded, because the Claimant has brought forward claims of discrimination that are not in the ET1. In these claims, the jurisdictional question is also bound up with the tribunal's power to allow her to amend.

The Disability Discrimination Claim

5 The ETI, received on 20 July 2020, ticks the box for disability discrimination. No claim is formulated in the accompanying, detailed text. In section 15 of the form the Claimant stated that bullying and harassment had caused her severe depression and anxiety; and that she had never suffered mental illness before. There is, therefore, no claim as such, but a pleaded case that the Respondent's behaviour *caused* her to be disabled.

6 The Claimant raised two subject access requests: 18 February and 28 October 2020. On **24 July 2020** the Respondent released correspondence and further documents were sent to her on 26 November 2020. It is apparent from what the Claimant wrote on **22 October 2020**, in response to the ET3, that she must have been sent in the first 24 July batch the offending email which is the basis of the disability claim she now wishes to add by amendment. This is because she wrote (page 61): "The managers believed it was ok to send emails stating I was Mentally Unstable, live in a fantasy world and not to be trusted around Men." I also note that towards the end of this document, under the heading 'Disability', she put matters in a way consistent with the drafting of the ETI. The disability of severe depression and anxiety is said to have been caused by the Respondent's behaviour. No disability discrimination claim was being advanced.

7 The offending email of 6 February 2020 stated that the writer believed the Claimant to be "mentally unstable" and referred to her "fantasy world." The Claimant's paraphrase about working around men is not what was written, but it was said she was not suited to work with the team. This email is the basis for the disability discrimination/harassment claim.

8 At the **10 December 2020** hearing before EJ Adkin, the amendment application that he envisaged did not concern disability discrimination. It was limited to automatic unfair dismissal. The Claimant was, however, ordered to

particularise the disability discrimination claim. The answer came on **8 January 2021** and it was there that the offending email was said to be direct discrimination or harassment.

The sex discrimination claims

9 These claims have emerged in a confused way.

(1) In the text attached to the ET1 at pages 17 and 18, the Claimant alleges that in the first part of her employment ('Main Building') the CCTV camera repeatedly zoomed in on her face and chest. This was on **13 September 2018**. The associated and unspecific allegation of harassment also refers to that date.
(2) On page 18 are some further allegations of harassment going up to **10 December 2018** but it is unclear if these are said to be sex discriminatory. It appears that the Claimant moved to work at Horseguards on 29 January 2019.

(3) In response to EJ Adkin's 10 December 2020 order for particulars, the Claimant in her response of **8 January 2021** raised four new matters. The first was an alleged sexist comment by Mr Bean on 8 August 2018. The second was being blocked from going on a course in September 2018. The third was being blocked in a similar way in October 2018. The fourth was not being installed as data manager in February 2020.

Conclusions

10 I will deal with matters chronologically and start with the claim of sex discrimination in the ET1 particulars document. This seems to be centred on the incident of 13 September 2018 and the Respondent's case is that it is long out of time; and, further, it has no reasonable prospect of success.

11 This claim is on the face of matters 19 months out of time. I accept the Respondent's contention that there will inevitably be prejudice in having to reconstruct the events of September 2018 at this remove in time. I also accept that the prospects of adhering to a final hearing starting on 27 September 2021 are remote. The history of interlocutory difficulties and disagreements, do not inspire confidence that the date can be kept.[1] In any event, Mr Allsop, on instructions, applies for the existing hearing date to be vacated if the claim is allowed to proceed and I would be inclined to accede to that, as it seems improbable that pre-trial preparations can be made in time.

12 A further important consideration is that the Claimant raised a grievance about these matters on 28 January 2019 and knew the outcome about a month later, on 18 February 2019. There is no explanation why she delayed in making a claim until 20 July 2020. These are substantial periods of delay.

13 Were I to allow it to proceed, Mr Allsop says it should, in any event, be struck out, because it is bound to fail. This is based on the rejection of the grievance (the CCTV having been viewed) and the apparent refusal of the

[1] The evidence for this observation can be found in the Claimant's emails this year, examples of which are communications dated 28 and 29 April, which make allegations against the Respondent's solicitors. As recorded in the case management order dealing with amendment to add the automatic whistle-blowing claim, the Respondent has made a counter-allegation against the Claimant.

Claimant's union in July 2019 to support her in this complaint. These matters are documented in the bundle.

14 It is not conclusive that the Claimant has not explained the delay; but it is something I cannot overlook. When I add it to the other factors I have summarised, I conclude that the Respondent will be prejudiced in having to deal with this, probably in spring to mid-2022; and that there is no basis asserted for saying it would be just or equitable to hear this old and stale complaint. It also appears to have no realistic prospect of success and I adopt the short reasoning Mr Allsop outlined.

15 Turning next to the four matters in paragraph 9(3) above, the most recent relates to February 2020. This claim seems next to hopeless, as the documents show that the Respondent already had a Data Protection officer in place. The three other matters cover a similar timeframe to the pleaded 2018 claim, extending a little further back to August 2018. They are not claimed in the ET1 but have been inserted in later particulars. The absence of any explanation for this is also relevant. The third claim in the above paragraph also has the difficulty in the papers that the Claimant was seemingly supported by a manager for the programme she wanted to attend. In my view, there is no basis on which I could reasonably say that it is just and equitable either to allow the amendment or to extend time for any of these four new claims. Two of them also seem to lack any reasonable prospect of success.

16 The final jurisdictional question concerning an out of time claim relates to the disability discrimination claim. Again, there is unexplained delay. Here, I can see that the Claimant could not have raised this in the ET1, but she was in possession of the relevant facts by 24 July 2020. On 22 October she alluded to the offensive email but formulated no claim. This only surfaced on 8 January 2021. The chronology of delay calls out for some sort of explanation, but there is none available.

17 The question of prejudice requires two other points to be noted. First, the delay in final adjudication after 24 July 2020 becomes all the greater when one notes that a trial will not happen until 2022. If this were just a post-lockdown listing problem, no point could be fairly taken against the Claimant. But it is evident to me that the delays this year, which have made the September listing ineffective, are largely because of the Claimant's default. She has not complied with orders and the consequence is that something that ought to have been decided on 23 March did not receive an adjudication until August.

18 The second point is even more significant. It might be tempting on the basis of my summary of events to think that the disability discrimination/ harassment claim is a short matter that concerns one email of 6 February 2020. This would, in my opinion, be an unrealistic and misleading conclusion. The reference to the Claimant's mental health in the email will be said by the Respondent to be justified. Mr Allsop made this clear. No doubt, the Claimant would counter this and say that it was wholly unjustified. I have no doubt that she would seek to rely on her version of events up to that point and this would bring in her voluminous catalogue of complaint and grievance. The extent of this in the pleadings and correspondence

raises the likely prospect of a hearing that might occupy many days.[2] For this hearing alone, over 800 pages have been produced. This out of time complaint, if allowed by amendment, would bring in all the factual matters that underlie the Claimant's claims that I have ruled we should not hear, including the whistle-blowing claim. It would, I consider, amount to a hearing of the factual content of those claims by the back door. In my view, there is no realistic prospect of a relatively short hearing that can be limited to the remarks made in writing by one person.

Summary

19 The CCTV allegation of September 2018 is substantially out of time. It would be prejudicial to allow this to proceed at this point, bearing in mind the absence of any explanation. In the alternative, were it to proceed, it seems to have no reasonable prospect of success.

20 The next 3 claims that are new are also 2018 matters: the Bean comment and the two allegations of being blocked. These are new claims not allowed by amendment, as, bearing in mind the manner and timing of the application and the other relevant factors, it is prejudicial to the Respondent for the amendments to be granted. Further, two of the claims seem to have no reasonable prospect of success and these are the allegations of being blocked from a programme in 2018 and the data manager complaint in 2020.

21 The disability discrimination claim is presented out of time and there is no explanation of the delay between 24 July 2020 and 8 January 2021, or even the earlier date of 10 December 2020. Leave to amend is refused on the same basis as above. The additional degree of prejudice are the consequences I have identified, were the amendment to be allowed.

22 For all the reasons I have set out, there is no jurisdiction to entertain the discrimination claims.

23 I cannot see that I have made an Order to dismiss the 'ordinary' unfair dismissal claim as the Claimant lacks two years' qualifying service. I have therefore added this to the above Judgment.

Employment Judge Pearl

Date: 10th August 2021.

JUDGMENT & RESERVED REASONS SENT TO THE PARTIES ON

10/08/2021.

[2] The documents and submissions made by the Claimant in 2021 include such documents as that dated 6 April, which are, in effect, lengthy witness statements containing a large number of factual allegations. The Claimant alleges consistency of adverse treatment, and collusion between managers, across both work places in this employment.

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Annex A

1. This Annex will summarise the relevant background up to 9 July 2021. The ET1 received on 20 July 2020 makes principal claims of unfair dismissal, sex discrimination and disability discrimination. It contains a statement over eight pages of single typed text. The Claimant was employed by the Respondent in two nytcapacities from 30 July 2018 to 17 June 2020. She was dismissed for alleged misconduct. In the long statement she makes allegations of bullying and harassment and also criticises complaints that were raised against her as being malicious. This is plainly an unfair dismissal complaint but nowhere does the Claimant either (a) say she made 'whistleblowing' disclosures; or (b) that she was dismissed because she had done so. The whistleblowing claim is absent in any manifestation, factually or otherwise.

2. The ET3 pointed out that the Claimant lacked two years' qualifying service for an 'ordinary' unfair dismissal claim. There was a brief summary of the Claimant's grievance proceedings and the Respondent's disciplinary proceedings that led to dismissal. In a response dated 22 October 2020 and received on 12 November, which covers over nine pages of text, the Claimant went into great detail, giving her response to the ET3. She made one reference to whistleblowing disclosures and automatic unfair dismissal. "They dismissed me for whistleblowing on the fraud that was being committed in the Irish Guards HQ".

3. In a further document dated 12 November 2020 the Claimant did raise automatic unfair dismissal. She cited legal provisions that she had found and then added "this applies to me the Claimant". No particulars were given.

4. At the first hearing on 1 December 2020 Employment Judge Adkin listed a preliminary hearing to determine six matters. The first was whether permission would be granted to amend the claim so as to add a claim under s.103A ERA 1006. The second issue was whether there was jurisdiction to bring a claim under s.98(4) given the Claimant's length of service. I shall refer in the Judgement and Reasons to the other four issues.

5. The Order made by Employment Judge Adkin directed that by 8 January 2021 the Claimant was to provide further information of the protected disclosures relied on and she was asked to deal, specifically, with five areas of particularisation that arise under the statute. These are the content of each disclosure; whether it was written or oral; to whom it was made; whether she considered it was in the public interest; and which of the statutory bases of disclosure she was relying on.

6. Additionally, I have been informed by Counsel that the Employment Judge addressed these matters at length during the hearing.

7. On 26 March, at the second preliminary hearing before me, Mr Alsop relied on his written skeleton argument. On the amendment question he submitted that the claim was new, had not been pleaded and that there was no reference to any protected disclosures. The application was also made nine months after dismissal. A ten-day hearing had already been listed in September and October 2021 and this would be put at risk. He pointed out that the Claimant had sought amendment

on 12 November 2020, having been warned some three days earlier of the possibility of the section 98(4) unfair dismissal claim being struck out.

8. The Respondent's submission was that (a) the Claimant had not provided the particulars that Employment Judge Adkin had ordered her to produce; and (b) she had seemingly widened the claim that was referred to in paragraph 8.4 of her response dated 8 January 2021.

9. At this 26 March 2021 hearing I spent considerable time with the Claimant, in a hearing that lasted over three hours, explaining to her that disclosures are words either spoken or written and that she must set them out. She told me that she had "quite a few disclosures" and had audio-recorded all conversations. At this point I needed to make further Orders and I adjourned the application. I directed that she must disclose copies of all documents relied on as disclosures and also list verbal disclosures. She was also to send copies of audio files to the Respondent.

10. This information was not provided. At the third hearing, which I conducted on 30 April 2021, the Claimant said that the disclosures were to be found on the tapes, i.e. the digital recordings. There is no criticism of her for not having provided them at that point because she certainly had difficulty in doing so. (I tried to help resolve this by identifying the precise model of her Dictaphone). However, she had not listed the disclosures or transcribed them. Another postponement was regrettably required. I again explained the ways in which the Claimant should identify disclosures if she was seeking to bring a whistleblowing claim. This is important because the records that the Respondent had made of conversations she refers to, and which contain no disclosures, are said by the Claimant to have been "sanitised".

11. Also, at this hearing the Claimant said that there were three relevant disclosures: 18 March 2019 (but see below), 4 January 2020 and 18 February 2020. Each of these three, she said, were conversations and in each case disclosures had been made by her.

12. On 14 June 2021 I held my third preliminary hearing (the fourth in all) and I set out there the various matters that were going to be discussed at the further hearing on 9 July. The first related to disability discrimination and the issue of time. The second was sex discrimination which requires consideration of time and also other grounds for amendment. Third, there were other strike out grounds. The whistleblowing particulars had still not been provided.

13. The Claimant at this hearing corrected the three above dates for conversations that allegedly contained whistleblowing disclosures and these are 19 March 2019, 4 January 2020 and 18 February 2020.

14. I accepted that the Claimant had still not fully complied with Orders and that she needed to do so before the amendment application together with the other applications made by the Respondent could be adjudicated. I therefore made an Order that she provide further information setting out "the wording for all the disclosures she relies on; and so far as is practicable, she shall give an indication for each disclosure of where in the recording it can be found".

15. Additionally, she had to serve a witness statement "concerning extension of time or just and equitable extension of time". Again, I tried to explain all matters

clearly to the Claimant. I also asked her if she preferred the hearing to be in person. She said she did, so I made that direction for the hearing on 9 July.