EMPLOYMENT TRIBUNALS

Claimant: Ms J Roswell

Respondent: Nat West Group Plc

Heard at: Manchester Employment Tribunal by CVP

On: 28 October 2021

Before: Employment Judge Cookson

Representation
Claimant: Mr Broomhead (solicitor)
Respondent: Ms Coutts (solicitor)

JUDGMENT having been sent to the parties on 22 November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. At this open preliminary hearing I had to consider if the claimant's claims for direct race discrimination had been presented in time under s123 Equality Act 2010 ("EqA") had been brought within the relevant times limits and, if not, whether I should find it is just and equitable to allow these claims to proceed.

2. Ms Roswell, the claimant in this case is Black British. She was employed by the respondent from 1 May 1999 to 23 April 2018. Early conciliation was commenced on 16 September 2020 and ended on 12 October 2020. The tribunal claim was lodged on 25 October 2020 in the London Central Employment Tribunal and transferred to Manchester on 28 May 2021.

3. I received evidence orally and in a written statement from the claimant. I received a bundle of documents from the respondent containing the pleadings, tribunal correspondence and various relevant documents and supplemental bundle from the claimant containing medical records (which appears to duplicate documents contained in the respondent's bundle). I received oral submissions from the respondent and the claimant.

4. The supplementary bundle of documents produced by the claimant contains some 91 pages of medical evidence but her witness statement did not refer me to any pages of that evidence. I offered Mr Broomhead the opportunity to as supplemental questions at the outset of the claimant's evidence but he chose not to do so. The claimant has been legally represented throughout these proceedings and in the absence of any specific reference to the documentary evidence in the witness statement or in the course of oral evidence I did not read the extensive medical evidence nor indeed do I consider that Mr Broomhead can have any expectation that I would have time to that in the course of a 3 hour hearing. I noted however that the medical evidence relates to a specific period of time and that the last entry is from August 2018.

Findings of fact

5. I have made my findings of fact in this hearing on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have made findings on matters which are relevant to the issues u had determined rather than all matters in dispute between the parties (and reflecting that the fact the respondent challenged the claimant's evidence but did not call evidence of its own).

6. Ms Roswell ("the claimant") in this case is black British. She was employed from 1 May 1999 to 24 April 2018. The claimant was the subject of disciplinary action which she says was discriminatory and she resigned from her role with immediate effect from 24 April 2018.

7. The claimant says the last discriminatory act was her resignation, in essence raising a constructive dismissal claim but related to discrimination although this is not entirely clear. Mr Broomhead did not explain the claim in precise terms and Ms Coutts pointed out the claimant was invited to a disciplinary hearing in January 2018 to go ahead in February 2018 and the claimant was then off sick. It is not clear how the discrimination is pleaded on that basis but for these purposes I have taken the limitation period as running from 24 April 2018.

8. Under the statutory regime the claimant had until 23 July 2018 to contact ACAS and commence early conciliation but that did not happen until 16 September 2020. The early conciliation certificate was issued on 12 October 2020. She did not do so. I accepted that in terms of the period between 16 September and 12 October 2020 C was essentially in ACAS's hands. The claim was issued on 25 October 2020 which is some 2 years and 3 months after the time limit in s123(1)(a) expired.

9. The claimant submitted her resignation on 24 April 2018. Seven days after her resignation she attempted to take her own life and was hospitalised for several days. She was then under the care of the specialist mental health team at home until July 2018. Then she was discharged and under the care of her GP.

10. As well as having mental health difficulties the claimant also had debt problems which meant that she had to obtain advice about dealing with her debtors. Unsurprisingly the claimant found this very stressful and I accept that at this time the claimant was very unwell.

11. In July 2018 the claimant felt able to speak to ACAS and a number of solicitors about the possibility of bringing a tribunal claim against her former employers. She was already outside the statutory time limit and ACAS explained that her claim could only proceed if that was allowed by the tribunal. The claimant acknowledged that ACAS did tell her that she needed to act as quickly as possible to bring a claim. The claimant did not however bring a claim at that time. She says that that this was because she could not find a solicitor to represent her. She told me that she did not know she did not need legal representation to bring a tribunal claim but I was not offered any explanation for that.

12. At some time in late 2018, around November, the claimant was sufficiently well enough to find alternative employment at Manchester Airport and she has been able to maintain her employment there since then. In her witness statement the claimant said that *"My mental health has been in a fragile state throughout this period*". There is no medical evidence at all beyond the end of August 2018, but I have little doubt that the claimant has continued to express some stress and anxiety in light of the personal circumstances she has described. However, from the claimant's ability to obtain and maintain employment and her ability to begin engaging with solicitors and ACAS in the summer of 2018 I have concluded that certainly by the November 2018 when she restarted work, there was no medical or health barrier to the claimant being able to bring her claim.

13. What reignited the claimant's interest in bringing a tribunal claim seems to have been interactions with a colleague in late 2019. Sometime around Christmas and the new year, one of the claimant's colleagues told her that he was being represented by Mr Broomhead in employment tribunal proceedings and recommended him to the claimant. The claimant contacted Mr Broomhead in early 2020. She was vague about the date, but it seems to have been before the national pandemic lockdown in March 2020. Proceedings were not however issued until October.

14. The reason given for that delay is "covid" but only in very vague terms. The claimant says in her witness statement that taking advice from Mr Broomhead that would entail a home visit and, because of the covid lockdowns, that was not possible until October 2020 when Mr Broomhead came round to her house and advised her to issue proceedings immediately because of time limit issues. Mr Broomhead did not give evidence about this but suggested in submissions that the reason was that he had to visit the claimant at home to take instructions and could not do that "because he was not in the claimant's bubble". That is no explanation. Instructions could have been sought and given by other means. Mr Broomhead suggested that he is unfamiliar with Zoom and other means of internet video conferencing, but of course instructions can always be given by telephone, email or even letter. In any event there was no restriction on a solicitor meeting their client because they were not in the same "bubble".

15. There was then a further delay between the issue of the early conciliation certificate and the issue of proceedings. No reason for that delay is given. Mr Broomhead says it was not material that there was a delay between the issue of the early conciliation certificate but a further delay of two weeks when the matter was in the hands of a solicitor and time was of the essence is a surprising delay.

Time limits in discrimination claims

16. In discrimination claims I must apply a rather different test to the strict test applied to whether a claim has brought in time in unfair dismissal and other claims cases. Under s123 of the Equality Act 2010 a claim must be submitted within 3 months starting with the date of the act to which the complaints relate, or such other period as the employment tribunal thinks is just and equitable".

17. There is guidance in the *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 to how I should approach this issue. In that case, Leggatt LJ said as follows: -

"It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980, the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998.

That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)".

18. I have taken into account the paragraph highlighted to me by Mr Broomhead which says this

"As discussed above, the discretion given by section 123(1) of the Equality Act to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent

reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard."

19. That means that the exercise of this broad discretion involves the multi-factual approach, taking into account all the circumstances of the case in which no single factor is determinative or the starting point. Unlike the approach under s111 of the Employment Rights Act which requires that the claimant must show she had a good reason for not bringing the same in time before an extension can even be considered, delay is simply one of the factors that I must take into account in addition to factors such as the extent to which the weight of the evidence is likely to be affected by the delay, the merits, and balance of prejudice. Other factors which may be relevant include the promptness with which a claimant acted once he or she knew of factors giving rise to the course of action and the steps taken by the claimant to obtain the appropriate legal advice once the possibility of taking action is known.

20. I have also taken into account the judgment of the Court of Appeal in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576 which reminds me that when Tribunals consider their discretion to consider a claim on the amount 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. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*". However, I have also reminded myself that this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable. *Robertson* simply reminds me of the general principle which applies in relation to the exercise of a judicial discretion, that the burden of persuading the tribunal to exercise its discretion to extend time falls on the party seeking the exercise of that discretion in her favour.

Conclusions

21. The claimant was clearly very unwell after her employment ended and she was not in a position to bring a claim at that time but around the time the three-month time limit expired the claimant was able to approach ACAS and solicitors.

22. In his submissions Mr Broomhead referred me to the decision of the Court of Appeal in *Schultz v Esso Petroleum Company Ltd* [1999] IRLR 488, CA. That is a case about the "reasonable practicability" of submitting a claim due to ill-health. In that case the Court of Appeal held that whilst the three-month limitation period needed to be looked at as a whole, attention would normally focus upon the closing stages rather than the early stages of that period. It is a not decision which I found very helpful in reaching my decision here. I accept that the claimant was too unwell to bring her claim during the three-month statutory time limit and indeed the respondent does not appear to dispute that. What I am more concerned about, as explained is the period after the summer of 2018 for which there is no medical evidence, until October 2020.

23. The claimant conceded in cross examination that after she had spoken to ACAS and solicitors in July 2018 she became aware of the primary three-month time limit for bringing a claim and was told that she needed to act promptly. I do not accept that the claimant can have believed that she needed to be represented by a solicitor in order to bring a tribunal claim. She had had contact with solicitors and ACAS. She was clearly aware of how to access information about the legal process and she is an intelligent woman. A significant majority of claimants in the tribunals bring claims without legal representation and that is clear from information provided on the tribunal website and other sources of information. I found the claimant's evidence about that to be implausible. I understand that it may have been the claimant's preference to have legal representation but the fact that she had not found a solicitor in July 2018 to represent her was no barrier to bringing a claim. As my findings of fact make clear I am satisfied that, at the latest, by the time the claimant began employment at Manchester Airport in November 2018 she would certainly have been well enough in terms of her mental health to bring a claim.

24. Parliament has given tribunals a broad discretion to extend time in appropriate cases, but it is also the case that the legislation allows a short timescale for bringing claims. If it had been intended that claimants could take as long as they liked to bring discrimination claims that three-month time limit would have not been imposed. The exercise of discretion cannot be regarded as a foregone conclusion on the basis that a claimant will face a prejudice if their claim is not allowed to proceed because that will always be the case for claims brought out of time. Such an approach would render the statutory time limit in s123(1)(a) meaningless.

25. As well as the prejudice to the claimant I have to balance the prejudice to the respondent if the claim is allowed to proceed. Mr Broomhead suggests that there will be no prejudice to the respondent from the delay in this case being brought because there was an investigation underway at the time the claimant resigned. I prefer Ms Coutt's submissions. The investigation was into the disciplinary allegations against the claimant and she resigned before that process was concluded. That was not an investigation into her allegations of discrimination. The time that has elapsed since the claimant resigned is significant and it is inevitable that the cogency of evidence which will be available to the tribunal has been affected. Indeed that was clear from the evidence of the claimant before me as she was unable to identify dates when things happened with any certainty such as when she began employment at the airport, when she spoke to her colleague and when she first spoke to Mr Broomhead. The claimant referred to instructing Mr Broomhead in October 2020, but the ACAS process was initiated in September and she says that was done by him. These are all things which happened much more recently than the events her claim refers to.

26. Although the respondent has not offered me any specific evidence of prejudice it faces from the delay in the claimant bringing her claim I am satisfied that the prejudice it faces is inevitable given the passage of time in a case where the claim was not brought days or weeks late, but more than 2 years and a half years after employment ended. Memories will have faded. The claim will be harder to defend as result and it will become more difficult

for the tribunal to deal with it expeditiously and justly faced with evidence which is inevitably less cogent.

27. In light of this prejudice, it is relevant to balance that against the delay and the reasons for it. I found the delay between the claimant being recommended to approach Mr Broomhead in early 2020 and the submission of the claim form in late October 2020, to be particularly significant. The claimant knew urgency was required because she had been told that by ACAS in 2018 and yet no meaningful explanation for the more than 6-month delay that followed for the initial contact with Mr Broomhead and the issue of proceedings has been offered to me. It must have been obvious to the claimant and her solicitor that the longer the delay the greater the risk that time would not be extended because of the prejudice to the respondent. I find that delay, which was attributed by the claimant not to her health at that time but to "covid", to be impossible to understand. This is simply no credible explanation for a failure to act in a timely matter.

28. I accept that the claimant was extremely unwell in the spring and summer of 2018. It seems to me it is doubtful that it would have been reasonably practicable for her to bring proceedings before July 2018 but that is not the issue I have to determine. I accept that after July 2018 the claimant continued to be unwell, but she was able to find employment in late 2018 and has been well enough to stay in that employment since then. She has not referred in her witness evidence to anything health wise which is a barrier to bringing a claim since 2018 except to say her mental state continued to be "fragile".

29. I acknowledge that the claimant does not have to show a reason for her delay in bringing this claim for time to be extended but it is clear from the *Abertawe Bro Morgannwg University Local Health Board case* referred to me by Mr Broomhead, and indeed other leading judgments in this area, that delay is still relevant. The absence of an explanation for delay mitigates against the exercise of discretion in a claimant's favour and given the prejudice to the respondent in this case I find the balance falls away from the claimant and in favour of the respondent. Whatever conclusion I might have reached if the claim had been submitted in early 2020 soon after Mr Broomhead was first contacted (and I find unnecessary to reach that conclusion), the delay between then and the issue of the claim in October was fatal to the exercise of discretion in the claimant's favour. It is not just and equitable to extend time in this case. In those circumstances the employment tribunal has no jurisdiction to consider the claim and it is dismissed.

Employment Judge Cookson

19 November 2021

REASONS SENT TO THE PARTIES ON

22 November 2021

FOR THE TRIBUNAL OFFICE