EMPLOYMENT TRIBUNALS

Claimant: EF

Respondent: British Broadcasting Corporation

Heard at: in private by CVP

On: 25 February 2022

Before: Employment Judge Adkin

Appearances

For the claimant: Mr D Renton, Counsel
For the respondent: Mr B Randle, Counsel

JUDGMENT

(1) Time is extended pursuant to the Tribunal's jurisdiction under section 123 of the Equality Act 2010 in respect of the Claimant's allegation of harassment in March 2021. The question of whether earlier allegations form part of a continuing act will be determined by the full tribunal hearing the substantive merits of the case.

(2) The Claimant's application dated 25 January 2022 for an amendment is granted in respect of points (1) and (2) and refused in respect of point (3).

REASONS

Procedural matters

1. This hearing was a remote hearing using CVP.

2. The Claimant gave oral evidence and was cross examined.

3. Both parties agreed that the jurisdictional points raised by the Respondent relating to time limits should be dealt with at today's hearing rather than listing a further hearing and increasing cost for both parties.

Findings of fact

4. The Claimant commenced working for the Respondent on 9 August 1999.

5. The first alleged harassment which is the substance of this claim is said to occurred on 16 October 2019.

6. The last occasion on which harassment is alleged to have occurred is 12 March 2021.

7. From 15 April 2021 the Claimant was off on sick leave, as a result of stress, against a backdrop of a dramatic event in 2009 which has left her vulnerable.

8. The Claimant submitted a formal grievance to the Respondent on 30 April 2021.

9. On 2 May 2021 the Claimant was allocated a union representative, Mary by her trade union BECTU.

10. On 21 May 2021 a grievance hearing took place. According to a text sent by the Claimant's union representative in July 2021, the Claimant had been told that there would be a resolution by June 2021. In fact there was a further grievance hearing on 6 July 2021 grievance hearing. At both of the meetings the Claimant was told that she was forbidden from discussing the contents of the discussions from anyone other than those in the meeting. It seems that, initially at least, the Claimant took this instruction literally.

11. On 13 July 2021 the Claimant took advice on a confidential basis from a telephone advice service named RASASC, which provides counselling and support for victims of sexual assault. She was referred by that organisation to another organisation called an organisation called Rights of Women, who she spoke to on the same day and further on 14 July 2021. The Claimant says that she was advised about the three-month time-limit in a conversation on the afternoon of 14 July with Rights of Women.

12. At this stage the Claimant began to research her rights to bring a claim and wrote to her union representative on 15 July 2021 "I've just read on a Union workplace guide that I can take this to the Tribunal before an outcome of the hearing". By hearing she meant grievance hearing. The Union representative, Mary told the Claimant that she was a new rep and did not know about time limits. She focussed on referring to a new (more senior) representative from the Union's head office.

13. On 16 July 2021 the Claimant notified ACAS of a dispute under the Early Conciliation process for both the Respondent and the alleged perpetrator of the harassment, who was an employee of the Respondent.

14. The same day ACAS issued an Early Conciliation Certificate in respect of the Respondent.

15. Also on 16 July 2021 the Claimant contacted her insurer Aviva, to begin enquiries about possible funding on her household insurance. That insurer referred her to ARC Legal Assistance.

16. On 23 July 2021 ACAS issued an Early Conciliation Certificate number in respect of the alleged perpetrator. The claimant Concedes that at this stage she was in a position to go ahead and complete her ET1 form. She explains however that she was inexperienced at filling in such a form and was concerned about the mistakes she had already made e.g. about completing the grievance process. She wanted a lawyer to be involved. She met with a more senior representative at her trade union on 27 July 2021. She was hoping that her union would sponsor the claimant. They notified her on 29 July that they would not.

17. The Claimant also says that she was suffering from PTSD and symptoms of anxiety. She says that this means that she comes across as "quite normal" to others but that her brain shuts down when it has to revisit traumatic events. She suffers insomnia and flashbacks and palpitations. She says that in the period 13 July – 18 August 2021 she was not wholly incapacitated, but she was exhausted and slow and everything took longer than someone without this condition.

18. By this stage the Claimant was awaiting a view of merits from her insurer. She spoke to another law firm Birketts on 29 July.

19. On 30 July 2021 there was an outcome to the grievance process. The Claimant saw her doctor on that day.

20. On 1 August the Claimant spoke again to ARC, but they had not yet made a decision on the case.

21. On 3 August 2020 one the Claimant contacted the Samaritans. She told them that she felt every door was being closed in her face.

22. On 6 August ARC legal confirmed that there would be an assessment and they should notify her within 5 days. Also on this date Birketts confirmed that the litigation would cost £27,000.

23. The Claimant then spoke to no-win no fee lawyers.

24. The Claimant chased ARC Legal on 10 August, the deadline, but they said they needed more time. The Claimant continued to chase and also spoke to a different firm of solicitors.

25. On 17 August 2021 the Claimant says that she was told by ACAS that the absolute deadline to complete her form was one month from the second certificate, i.e. 23 August 2021. I accept that this is what she was told.

26. On 18 August 2021 the Claimant appealed the grievance outcome.

Claim & application to amend

27. Also on 18 August 2021 the Claimant essentially gave up waiting for advice and presented her claim in the Tribunal (Et1) against the Respondent only, not the alleged named individual perpetrator.

28. On 25 January 2022 the Claimant consulted with Mr Renton, her barrister, on a direct access basis and made an application to amend.

LAW

29. I am grateful to both Counsel for their written submissions.

Time limits

30. Section 123 of the Equality Act 2010 contains the following:

> 123 Time limits
>
> (1) Subject to section 140B 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.

31. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, the Court of Appeal held that when employment tribunals consider exercising the discretion under [what is now] S.123(1)(b) EqA, '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 complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'

32. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision. At paragraph 18-19 Leggatt LJ said:

> "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 s 33 of the Limitation Act 1980, s 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 s 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), 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: see [2003] EWCA Civ 15, [2003] IRLR 220, para [33]. 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 s 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30] [32], [43], [48]; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 All ER 381, para [75].
>
> 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)."

33. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ said:

> "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) the length of, and the reasons for, the delay. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

Amendment

34. I have considered this application to amend applying the tests set out in *Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore* [1996] IRLR 661 and *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634 as well as the Presidential Guidance on General Case Management (2018) Guidance Note 1: Amendment of the Claim and Response.

35. When considering an application to amend, a tribunal must take into all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The relevant circumstances include:

    35.1. The nature of amendment;

    35.2. The applicability of time limits;

    35.3. The timing and manner of the application.

36. In *Vaughan v Modality Partnership* [2021] IRLR 97 it was suggested that a relevant question is "what will be the real practical consequences of allowing or refusing the amendment": Vaughan at [21].

CONCLUSIONS

Jurisdiction/time

37. As to the reasons for the delay, the Claimant has dealt with this in her witness statement. In the first instance she was trying to resolve matter through an internal grievance process and additionally, she gave evidence that she believed that the entreaty on the part of the Respondent that she should not discuss the matter more broadly while the investigation was going on restricted her from initiating litigation, since this would require discussing the matter with others.

38. Respondent's counsel, quite reasonably, put to the Claimant that this was not a reasonable position for her to take and it ought to have been obvious to her that she could at the very least take legal advice before the conclusion of the internal grievance process.

39. I note also that the Claimant did in fact take advice from Rights of Women on 13 July before the outcome of the grievance on 30 July 2021. She also notified ACAS before the conclusion of the grievance. It cannot have been the case that the Claimant believed that she absolutely could not speak to anyone, otherwise she would not have taken these steps.

40. I did form the conclusion however based on the Claimant's evidence that she lacked experience of employment law matters. I accept that she took instructions from HR rather literally, initially at least. She was not someone in a senior management position (in fact her "manager" title is a misnomer, in fact she performs junior administrative grade with no direct reports). She may not have interpreted this instruction as absolute bar on discussions with others, but she was certainly reluctant to speak to anyone else, and this reticence I find was consistent with her natural instinct to try to resolve the matter internally especially since she was and remains an employee of BBC.

41. It is not the law that following an internal process entitles a claimant to an extension of time. Nevertheless I consider that that this it is a relevant factor to be considered when understanding the reasons for delay. Both the Claimant and Respondent were dealing with the substance of the claim.

42. I accept the Claimant's evidence that she was stressed, and dealing with matters slowly given that she struggled to process what she regarded as traumatic events.

43. Considering the balance of hardship I do not find that the Respondent is significantly prejudiced by the passage of time, given that the substance of the claim has been investigated in an internal grievance process and was in the

process of investigation when the 3 month time limit from events in March 2021 expired. This is not a situation where the Respondent has been prevented or inhibited from investigating matters while matters were fresh.

44. For these reasons I have concluded that it is just and equitable to extend time for the claim brought in respect of the date of the last allegation of harassment on 12 March 2021. What I have not done is extend time for all allegations. The Claimant will need to establish a continuing act in respect of earlier allegations in order to successfully pursue those allegations to a remedy.

Application to amendment

45. The addition required by way of amendment made by email of 25 January 2022 is as follows:

> "The author of the grievance report indirectly discriminated against me in that she applied to my grievance a provision, criterion or practice of believing, whenever the facts were disputed, the version supplied by the perpetrator over the accuser. In other words, she believed the perpetrator not principally because he was a man, but principally because he was the object of a sexual harassment complaint. Such a practice was relevant to a protected characteristic of mine, i.e. my sex, because my complaint was one of sexual harassment. Such a PCP, if applied routinely, would have discriminatory effects on women, since more sexual harassment complaints are made by women than men."

46. The nature of the amendment is to introduce a new head of claim, namely an indirect sex discrimination claim pursuant to section 19 of the Equality Act 2010. The nature of the amendment does not rely upon a substantial new factual basis. It is said that the rejection of allegations of harassment in the Claimant's grievance amounted to a PCP of preferring the alleged perpetrator's account.

47. The timing of the application to amend, made on 25 January 2022, is made approximately 6 months after the conclusion of the grievance outcome and approximately 3 months before the date on which the full merits hearing was listed to take place (although this has now been moved).

48. While the amendment only requires a limited additional factual pleading, I consider that it is likely to lead to some wider factual enquiry. Mr Renton clarified in submissions that the claim would be limited to the "practice" of this individual grievance investigator rather than a wider "policy" within the Respondent. Nevertheless, I consider that even this limited approach would require the Respondent to call wider evidence of the practice of the individual manager in their approach.

49. This amendment is to introduce a completely different type of claim, essentially a claim about the operation of the investigation procedure rather than a claim of harassment. It is brought out of time. It will inevitably complicate and elongate the hearing.

50. The Tribunal is entitled to consider the merits of the application. While it is not appropriate to conduct a "mini-trial" on this point, I do not see that refusing this application to amend would lead to an obviously or clearly meritorious claim being shut out.

51. I bear in mind that if the Claimant succeeds in her claim of harassment, she will likely recover an award for injury to feeling that reflects the events that naturally flow from those actions, which would naturally include the investigation process and the effect on the Claimant of this. This might, in some limited circumstances, lead to aggravated damages or an aggravated element of injury to feeling in the event that the Tribunal find that the Respondent has behaved in a high-handed and inappropriate way in simply rejecting her complaints.

52. Nothing about this present judgment reflects any comment on the merits of the existing claim or the likelihood of obtaining aggravated damages. However it is relevant to the balance of hardship that the Claimant's claim is successful may include an element of damages for these matters even based on the existing claim without the application to amend succeeding.

53. For the reasons I have given I refuse this part of the application to amend.

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Employment Judge Adkin

Date 1.3.22

WRITTEN REASONS SENT TO THE PARTIES ON

.01/03/2022

FOR THE TRIBUNAL OFFICE

Notes

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