



EMPLOYMENT TRIBUNALS

Claimant: Ms A Eke
Respondent: London Borough of Tower Hamlets
Heard at: East London Hearing Centre
On: 21 February 2022
Before: Employment Judge Jones

Representation

Claimant: Ms Leibert (Solicitor)
Respondent: Ms Chan (Counsel)

RESERVED JUDGMENT ON RECONSIDERATION

1. The judgment dated 8 October 2021 is revoked.
2. The claimant has leave to add a complaint of victimisation in respect of the respondent's failure to review the tier of her ill health retirement pension.
3. The claimant has leave to add a complaint of victimisation in respect of the respondent's failure to consider the claimant's appeal against the tier of her ill health retirement pension.

REASONS

1. This was the claimant's application for reconsideration of the judgment dated 6 October 2021 which was promulgated on 17 November 2021.

The history of this matter is as follows:

2. The claimant submitted a complaint of discrimination to the employment tribunal on 10 September 2019. It is agreed between the parties that this is a protected act.

3. On 11 December 2019, the claimant submitted an appeal against the tier of her ill-health retirement. That appeal was submitted to the respondent. The appeal has been received and acknowledged.

4. The respondent informed the claimant by letter dated 21 June 2019 that she had been dismissed, that her ill-health retirement had been granted at tier 3 and that a statutory review would be undertaken 18 months later to determine whether it remained appropriate for the benefit to continue to be paid. They also stated that they would be in touch with her about that in 2021. The claimant's reasonable expectation was that she would not hear about the review until sometime in 2021.

5. On 30 January 2020, the claimant chased her appeal in an email to Ms Marcus of the respondent. She also made a stage II written complaint about the progress of her appeal to Neville Murton on 19 March 2020. On 26 April 2020, the claimant emailed the respondent corporate director about her appeal but had no response. On 18 October 2020, the claimant received an email from the respondent which stated that as the review was due in December 2020 and the appeal could take up to 6 months, they had decided that there was no benefit in hearing the appeal until after the review. The appeal was effectively put on hold.

6. The claimant chased the appeal on 7 December 2020 and the review on 14 January and 17 January 2021. She spoke to Tim Dean who assured that it was being dealt with and that her contact details would be passed to Harjit Jandu. He also explained the process to her and gave her Ms Jandu's contact details. The claimant was reassured. But by February, when she had heard nothing further, she asked her solicitor to act. On 16 February, Ms Liebert wrote to the respondent and requested an update on both the appeal and review. It was at that point that the claimant informed Ms Liebert that she felt that neither the appeal nor the review was being dealt with and that she believed that she was being subjected to detriment as victimisation making a protected act.

7. By letter dated 8 April 2021, the claimant applied to the tribunal for leave to add complaints of victimisation in relation to the respondent's failure to conduct both the review and her appeal against the decision to award her ill-health retirement at tier 3. The tribunal gave the claimant the opportunity to put in writing further grounds in support of the application and to explain the timing of it, and the respondent to set out why it objected to the application.

8. In its opposition to the application, in a letter dated 2 August 2021, the respondent focused on the strength of the complaints of victimisation and whether it was likely to succeed rather than the time point. In respect of the review, Ms Bowes confirmed that the respondent accepted that any complaint with respect of the failure to carry out the review of the pension tier would be in time, as this had yet to be resolved. However, the respondent submitted that there could not be a detriment in respect of the review as a claimant was receiving a pension. The respondent opposed the addition of the failure to consider the appeal against the ill-health retirement tier on the grounds that it was out of time because time should start to run in October 2020. The respondent submitted that time should not be extended.

Law

9. Rule 72 of the Employment Tribunals Rules of Procedure 2013 gives the tribunal power to reconsider its judgements. The tribunal can confirm, revoke or vary the original decision.

10. In considering the written and oral submissions from both parties, the Tribunal was aware of the principles set out in *Selkent Bus Company Ltd v Moore* 1996 ICR 836, which confirmed that in considering whether or not to grant amendments, a tribunal must consider the nature of the proposed amendment, the applicable to time limits, and the timing and manner of the application. In the particular point about time limits is captured in this quotation from Mummery J

'If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provision'.

11. Section 123 of the Equality Act 2010 stipulates that proceedings on a complaint such as this must not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment Tribunal thinks just and equitable. Subsection (3) states that failure to do something is to be treated as occurring when the person in question decided on it.

12. In deciding whether it is just and equitable to extend time where a complaint is brought outside of the applicable statutory time limits, the tribunal must consider the principles set out in the case of *British Coal Corporation v Keeble* [1997] IRLR 336 and section 33 of the Limitation Act 1980; including the length and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action, the extent to which the party sued cooperated with any requests for information, and the steps taken by the claimant to obtain professional advice once she knew of the possibility of taking legal action.

13. Both parties referred the Tribunal to the Presidential Guidance on General Case Management (2018), which, at Guidance Note 1 on amendments states that where there is such an application, a hearing may be necessary to decide whether to allow an amendment. The claimant felt that the time limit issue should not have been considered on the papers but at a hearing where the parties could attend and make representations. The claimant has had that opportunity today and made oral representations at this hearing.

14. The respondent opposed the application today. It considered that the application to add a complaint regarding the appeal and review were both out of time and had little prospects of success and should therefore not be allowed.

Reconsideration

15. The claimant application for reconsideration was considered at today's hearing. Having heard submissions from both sides, the Tribunal concluded follows:

16. The application could be divided into two parts. The review and the appeal. The original claim did not contain a complaint of victimisation and made no complaint about the claimant's ill-health retirement pension. This is therefore an application to amend to add new complaints.

The review

17. Even though she was told that the review could be conducted in December, the claimant had originally been told in the letter of dismissal to expect to be contacted about the review in 2021. Therefore, it would not be until 2021 that she could be expected to start to consider that the respondent had made a decision not to conduct the review.

18. The claimant could not have brought that complaint in 2020, (at the same time as her existing complaints) because in June 2020 she was advised that the review would not be conducted until at least 18 months had passed and that she would be contacted in 2021 about it.

19. This tribunal did not have evidence on whether, as submitted, the failure to review the pension tier could not be considered to be a detriment to the claimant. The tribunal heard no evidence on the amount that the claimant is paid at the present tier and how much/what level she feels would be more appropriate for her to be paid. It is the respondent's case that the tier is set based on medical evidence and that it has no choice but to accept the medical recommendation. It submitted that the claimant could not prove that there was a causal connection between her protected act and the failures about which she complains. I was persuaded of that when I considered this on the papers but on further consideration, it is my judgment that those are matters for the final hearing, after both parties have been given an opportunity to produce evidence and the matter is explored further. I was reminded that even if the respondent takes the medical opinion into account, the claimant was told that Ms Jandu or someone in her position would need to instruct the medical professional and may also advise or make recommendations. The respondent's part in the process is not clear.

20. Taking all those factors into consideration, it is this tribunal's judgment that the application to add a complaint of victimisation in relation to the respondent's failure to conduct a review of the claimant's ill-health retirement pension tier is within time.

21. The claimant would be prejudiced if she was not allowed to bring it. The tier had still not yet been reviewed at the time of this hearing. It was clear that she was had never abandoned this matter and that she acted as soon as it was clear that it was not going to be addressed.

22. It is therefore this Tribunal's judgment that the judgment of 6 October should be revoked to allow the claimant to bring a complaint of victimisation in relation to the respondent's failure to review its decision on the level of the claimant ill-health retirement.

The appeal

23. The claimant submitted her appeal against the ill-health retirement tier in December 2019. That appeal was in time and has been acknowledged by the respondent.

24. There was no set date by which the appeal should have been conducted although it is likely that it should have been done within a reasonable time after submission. In its objection to the claimant's application to amend the respondent submitted that time should start to run from October 2020. In the hearing Counsel submitted that time should start to run from December 2020.

25. It is this Tribunal's judgment that up until February 2021, the claimant had every reasonable expectation that the appeal was going to be dealt with. In response to her emails in January 2021, the emails in January failed to produce a substantive response or the appeal. Previously she had been told that it was likely to take 6 months and that the respondent would not do it before the review. It was reasonable for her to conclude that the respondent had moved the date and that until she had the review, she should not expect the appeal. It was in February, after her chasing emails failed that she spoke to her solicitor about it. The respondent's response to Ms Liebert's email led the claimant to consider that the respondent may have made the decision not to conduct the review or consider her appeal. Up until then she was given the names of the officers who were dealing with it and had correspondence with officers who reassured her that it was being dealt with.

26. The chasing correspondence does not move the date but is helpful in determining when the claimant could reasonably have concluded that the respondent had made a decision not to address her appeal.

27. In this Tribunal's judgment, there was no set date for the appeal. It was not set for either October or December. In its letter of 18 October 2020, the respondent did not say that it would definitely address the appeal in December. It told her that it would not do so until after the review, which was due in December 2020, as the appeal was a longer process, taking around 6 months. It is this Tribunal's judgment that the application was not out of time and the claimant can amend her claim to add a complaint that the decision not to address her appeal was an act of victimisation.

28. If it is out of time, it is also this Tribunal's judgment that it is just and equitable to extend time for the following reasons:

29. The claimant suffers from severe mental health issues, having been diagnosed with unspecified, nonorganic psychosis and has been a litigant in person for most of this litigation. As both aspects of this application were omissions rather than acts, it would have been difficult for the claimant to work out when time started to run in order to issue her complaints in time. On the day of the hearing the respondent informed the Tribunal that a decision on the claimant's appeal and possibly the review of her ill-health retirement level was imminent, but it still had not been done. That was a considerable period of time after the claimant's correspondence in early 2021 and the respondent's timeline of 2021, when she was told to expect to be contacted about it. If that included the appeal then that

was also a considerable period of time after the original target date of December 2020.

30. The claimant did not delay after her correspondence with the respondent in January/February 2021. She acted promptly by speaking to her solicitor about it who wrote to the Tribunal soon after to seek the amendment.

31. The balance of hardship would be against the claimant if she were not allowed to bring this complaint. She still, in February 2022 has not had any substantive response to her application for an appeal or the statutory review of the level of her ill-health retirement. It is likely that the level of her retirement pension has an impact on her finances, which is why she is pursuing it.

32. Taking all those factors into consideration, it is this Tribunal's judgment that if the application to amend is outside of the three month time limit, then it is just and equitable to extend time so that the complaint was presented within time when the claimant made her application on 8 April 2021.

33. It is this Tribunal's primary judgment that the complaint that the respondent's failure to consider the claimant's appeal against the decision to award her Tier 3 ill-health retirement is an act of victimisation, is within time.

34. The Tribunal grants the claimant leave to add both the complaint about the failure to conduct the review and the failure to address her appeal as acts of victimisation; to her case.

35. This matter is in Tribunal today and so the Tribunal conducting the hearing can make the necessary case management orders to enable this matter to be added to the hearing.

**Employment Judge Jones
Dated: 9 March 2022**