Case Number: 3205217/2021

EMPLOYMENT TRIBUNALS

Claimant: **Miss D Gisby**

Respondent: **Southend on Sea Borough Council**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **31 January 2022**

Before: **Employment Judge C Lewis**

Representation
Claimant: M Zaman
Respondent: R Owusu-Agyei

RESERVED JUDGMENT

1. **The claim of race unlawful discrimination was brought outside three months from the date of the last act complained of. The Tribunal does not find it is just and equitable to extend the time limit under Section 123 of the Equality Act 2010.**

2. **The claim is therefore dismissed.**

REASONS

1. By a claim form presented on 23 July 2021 the Claimant brought a claim of race discrimination arising from her dismissal by the Respondent. The Claimant was dismissed as a result of an allegation that she had been involved in a violent altercation outside of work in which she used racial slurs against a member of the public. The Claimant claims that the Respondent chose to believe the member of the public's account because she is black and the Claimant is white.

2. It was accepted that the claim was brought outside the primary three month time limit provided in section 123 (1) of the Equality Act 2010. The preliminary issue before the Tribunal at this hearing was whether it is just and equitable to extend time to allow the claim to proceed.

3. The hearing was heard by video link, the Claimant was represented by Counsel who did their utmost to present her claims in their best light. The Claimant's statement was only served on the morning of the Tribunal hearing and there was a delay whilst the Respondent's representative and the Employment Judge took the opportunity to read the statement together with the supporting documents contained in a bundle which ran to some 64 paragraphs, also served on the morning of the hearing, the documents at pages 50 onwards having been sent to the Respondent on Friday. The bundle contained some limited medical evidence and also photographs. Claimant's Counsel was only instructed late on Friday tis hearing was on Monday. Counsel for the Respondent invited me not to read the Claimant's statement due it its lateness.

4. I considered that it was in accordance with the overriding objective to allow the Claimant to rely on her witness statement. The Claimant gave evidence and was cross examined. Carol Thacker HR Consultant gave evidence on behalf of the Respondent in relation to the issue of prejudice to the Respondent as a result of the delay.

5. I was referred to a draft list of issues which it was suggested identified the issues before the Tribunal today. The list of issues identified a number of questions the relevance of which were not at all clear, for instance there was no evidence to suggest that the Claimant was "hospitalised" for any of the relevant period – apart from attending hospital as an outpatient immediately after the altercation itself. The list of issues wrongly identified the question as whether it was reasonably practicable for the claimant to have brought her claim in time. The draft list of issues also referred to a prospective application to amend the claim to include claims of disability discrimination, failure to provide written terms and conditions and unlawful deductions from wages, based on the same facts.

6. Ms Owusu-Agyei rightly pointed out that no application to amend had yet been made and nor had a draft amendment been provided. There is no reference to a disability in the claim form.

7. No application to amend was made before me, I indicated that if the Claimant wished to pursue it she would need to formally make that application if I allow an extension to the time limit in the extant claim.

8. I reminded counsel that the issue before me was whether it is just and equitable to extend time not whether it was reasonably practicable for the claim to have been brought in time.

9. Claimant's Counsel confirmed that the issues in the claim were whether the Claimant had been directly discriminated against i.e. less favourably treated by the Respondent than a black person would have been treated, in the following ways:

    1) By its failure to properly investigate the incident that took place on 17 June 2020
    2) By deciding to dismiss her
    3) By deciding not to allow her appeal.

Findings of fact

10. The Claimant brought her claim on 23 July 2021, having contacted ACAS and obtained an early conciliation certificate on the same day. In her claim form she gave her dates of employment as 22 December 2020 to 8 October 2021. The Respondent contends that she had been contracted initially through an agency in December 2019 and subsequently taken on as an employee by the Respondent in February 2020.

11. The Claimant brought complaints of race discrimination and constructive dismissal. The constructive dismissal claim was dismissed by a judgment dated 27 August 2021 due to the Claimant's lack of two years' qualifying service.

12. Counsel agreed that the end of the relevant three month period working back from the date of early conciliation was 24 April 2021. The Claimant was suspended from work on 22 June 2020; given notice of her dismissal by the Respondent on 13 August 2020 and the effective date of termination was 15 September 2020; the Claimant's appeal against dismissal was heard on 6 October 2020 and the outcome was notified to her on 8 October 2020. Three months from the outcome of the appeal (the last act complained of) is 7 January 2021. The claim was presented 7 months after the expiry of the three months period provided for in s123(1) of the Equality Act 2010.

13. In July 2020 the Claimant had instructed solicitors in respect of the criminal investigation into the incident. On 10 July 2020 her solicitors wrote to the Respondent to inform them that she would not be answering questions about the incident in any internal meeting or disciplinary [43-44]. The Claimant accepted that she was aware of the three month time limit for bringing claims to the Employment Tribunal in August 2020 when her employment ended.

14. The bundle contained a fit note dated 7 August 2020 which described the Claimant as having mixed anxiety and depressive disorder and that she was unfit for work for one month from 7 August to 6 September 2020. On 10 November 2020 the Claimant was invited to trauma therapy and on 1 June 2021 she received a letter discharging her from therapy. [62]. The Claimant told me that she underwent EMDR therapy but the therapy was paused in June 2021 as she was expecting her baby and was concerned about the impact on her baby of her reliving the trauma. She told me that she restarted the therapy after her baby was born, which was on 27 September 2021

15. I asked the Claimant a number of questions to try to clarify the circumstances of the delay. The Claimant told me she did not have the mental capacity to put in the claim between August 2020 and July 2021. The Claimant was asked about the periods of her ill health and its effect on her ability to function in daily life. The Claimant's answers were vague and given in general terms.

16. In cross examination the Claimant accepted that she had made an application for Universal Credit after her employment ended and had been

in receipt of Universal Credit since November 2020 [33-34]. She accepted that she made this application during the period when she had told the tribunal that she had not been able to function. She told me that it was very different matter and did not involve having to read the documents from the Respondent. The Claimant accepted that she was aware of all the events referred to in the claim form at the relevant time but stated that she was suffering from PTSD and was unable to deal with bringing proceedings. She accepted that she had not provided evidence to support a diagnosis of PTSD, the only relevant medical evidence being the fit note from her GP [47] which she accepted she did not send to the Respondent at the time, and an email dated 10 November 2020 inviting her to a virtual (on line) Trauma Stabilization Group for an hour a week for 5 weeks.

17. The Claimant was asked what prompted her to put in her claim when she did and explained that she had received a call from the solicitor who had represented her in the criminal investigation who rang to see how she was, coincidentally this was during the time when she was on a break from therapy and he told her she needed to put in her claim as she was out of therapy. The Claimant said she was out of therapy for 6 weeks and she went on line in that time and filled in the application easily. The Claimant was discharged from therapy in a letter dated 1 June 2021 and contacted ACAS and issued her claim on 23 July 2021, some fifty three days later.

18. The Claimant also told me that she had become very stressed in the run up to this hearing and had experienced heart palpitations and went to A&E, it was after this that she realised she would not be able to do this on her own and she found and instructed a solicitor, a week before this preliminary hearing.

19. The Claimant told me that she had brought these proceedings because she wanted to have an opportunity to clear her name, she had not been able to defend herself against the allegations at the time and wished to be able to do so in these proceedings.

20. The Respondent submitted that it had suffered specific prejudice as a result of the delay. Carol Thacker, HR Consultant employed by the Respondent, was in attendance at the hearing and asked to give evidence in relation to Ms Reed and Ms Ruffle. Ms Thacker gave evidence that both Ms Reed who made the decision to dismiss and Ms Ruffle who heard the appeal, have since left the Respondent's employment. Ms Thacker told me that it was common practice within the Respondent to destroy any personal notes after the time for appealing or binging proceedings has lapsed, for data protection reasons. The IT department is informed when a member of staff leaves and IT will wipe their computer so that it can be allocated to another staff member. Staff do not have their own desks and all the spaces are shared, there are no filing cabinets etc for storing your own notes which means that any notes would be destroyed when the person leaves. The HR Consultant will have taken summary notes of any hearings and those are then incorporated into the outcome letter, a clean copy of the hearing pack will have been retained. Mrs Thacker accepted that the Respondent was still able to contact both witnesses.

Relevant law

21. Section 123(1) of the Equality Act 2010 provides that a complaint 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 Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(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.

22. If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. The following principles can be derived from the case law:

23. The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless it is satisfied that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. There is no presumption that time will be extended, however, nor is there any magic to that phrase and it should not be applied too vigorously as an additional threshold or barrier;

24. Factors which are almost always relevant are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing it or inhibiting it from investigating the claim while matters were fresh). Abertawe Bro Morgannwg v Morgan [2018] EWCA Civ 640 CA

25. The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;

26. This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined.

27. As identified in Miller v Ministry of Justice UKEAT/003/004/15 (at paragraph 12), there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the

limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

28. There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, British Coal Corporation v Keeble [1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case; see Department of Constitutional Affairs v Jones [2008] IRLR 128.

Submissions

29. The Respondent submitted that the Claimant had not provided an adequate explanation for the delay, the fact that she was undergoing therapy did not explain why she was unable to bring a claim to the Employment Tribunal particularly when she was demonstrably able to pursue other applications such as making an application for universal credit. The Claimant had not given any chronology of events between the dismissal and bringing her claim and that she had not put forward a sufficient basis for an extension of the time limit. The Respondent would suffer both kinds of prejudice; prejudice, from having to meet a weak claim brought out of time, the claim lacked particulars and it was now proposed would be the subject of an application to amend, which if granted would mean the respondent would have to amend it grounds of resistance, the hearing listed in May would not be able to go ahead, and the final hearing would be put off until a date even further in the future; and also forensic prejudice, through the fact that memories would have faded, any personal notes indicating the relevant decision takers thoughts or reactions will have been destroyed and that the witnesses are no longer employed by the Respondent will make it more difficult for the Respondent to take their evidence and to call them as witnesses.

30. Respondent's Counsel submitted that the merits of claim were weak, it was based on a mere assertion that the Claimant was disbelieved because she was white, there was no evidence of any difference in treatment and a simple assertion is not enough. The Claimant's account given in her ET1 is different to her explanation at the appeal hearing when she said that the incident did not happen and that the other individual was a fantasist [ET3 para 22 at page27].

31. Claimant's Counsel disputed there was any prejudice to the Respondent as both witnesses were still contactable, and it is not usual for employers to call former employees to give evidence and the outcome letters are comprehensive accounts of both hearings. He submitted that the Claimant

had put forward a compelling case for an extension of time, the prejudice to the Respondent was not enough to outweigh the prejudice to the Claimant if her claim was not allowed to proceed.

Conclusion

32. I found the Claimant's explanation for the delay to be vague and lacking in dates or specificity. The Claimant referred to suffering from PTSD and mental trauma but provided no evidence of a medical diagnosis of PTSD. The Claimant referred to not being able to start her claim because of her mental state and not being able to function or process most things in life. However, she was able to appeal against her dismissal and also apply for Universal Credit in this time. The Claimant appealed against her dismissal and attended an appeal meeting in October 2020 accompanied by her therapist. Although the Claimant told me she was in a desperate state in December 2020 she gave no clear explanation as to why she had not taken any steps to pursue her claim during the period between August and December 2020, when she had been able to pursue her appeal, or between December 2020 and July 2021, a period of a further 7 months. The Claimant did say that she was undergoing therapy in that time, she told me it was a difficult period in her life, there was a possibility of homelessness in December 2020 and after this she became pregnant. However based on the information provided to me it is not clear how this would have prevented the Claimant from bring proceedings throughout the entirety of the period from 8 October 2020 (the last act complained of) to 23 July 2021. The Claimant told me that the therapy involved reliving the trauma but apart from that gave no further explanation as to how or why this meant she was unable to take any steps in respect of commencing these proceedings. She told me that she found it easy to complete an application to the tribunal online once she tried. She accepted that she had known about the three month time limit at the time of her dismissal and therefore at the time she lodged her appeal.

Assessing the balance of prejudice between the parties

33. I am satisfied that the Respondent is prejudiced by the delay, there is the general prejudice that inherently follows from being required to respond to a claim which is presented out of time (the prejudice of meeting the claim) and any prejudice to the evidence caused by the delay (the forensic prejudice). The two decision takers have since left the Respondent, I accept this is likely to make it more difficult to call them as witnesses and any additional notes they may have made are likely to have been destroyed, however the outcome letters contain a full account of the decision. I do not find the fact that they are no longer employed by the Respondent to be a decisive factor. I accept however that the Respondent faces forensic prejudice caused by the delay in that the cogency of the evidence is likely to be affected.

34. The Claimant told me that she is pursuing this claim now because she wants to clear her name. However, the issue before the tribunal is not whether the Claimant did or did not get into an altercation with someone and use racist slurs towards them, it is about how she was treated by the Respondent once the incident came to their attention. It is not disputed that the Respondent invited the Claimant to attend a meeting where she had an opportunity to

put her account, she declined to do so on the basis of legal advice – due to the ongoing criminal investigation. The question for the tribunal would be whether if the Claimant was black the Respondent would have gone ahead and made a decision in the absence of her full explanation. The relevant comparator would be someone in the same circumstances as the Claimant, that is, an employee who had declined to give their account or answer questions at the disciplinary hearing (or probationary review) and where the Respondent had no indication how long the criminal investigation was likely to take; the relevant circumstances may well also include that the employee was considered to be still in their probationary period and was employed on a fixed term contract.

35. I bear in mind that it is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim. I am satisfied that the claim is weak and that is a relevant factor to take into consideration when assessing the balance of prejudice to the respective parties.

36. I have not found that the Claimant has adequately explained the delay in bringing this claim. I am satisfied that the balance of prejudice to the Respondent in having to defend this claim outweighs the prejudice to the Claimant in not being able to pursue a weak claim. I do not consider that it is just and equitable to extend time in this case. The claim therefore falls to be dismissed.

Employment Judge C Lewis
Dated: 21 March 2022