



EMPLOYMENT TRIBUNALS

Claimant: Ms F Ali

Respondent: The Home Office

Heard at: Remotely by CVP **On:** 31 January 2022

Before: Employment Judge Harrington

Appearances

For the Claimant: In person

For the Respondent: Mr J Duffy, Counsel

JUDGMENT

- 1 The Claimant's complaint of pregnancy discrimination was presented outside the primary limitation period but it is just and equitable to extend time.
- 2 The Claimant's application to amend her claim, dated 25 January 2022, is allowed.
- 3 Accordingly, the claims which continue to hearing are: the complaint of pregnancy discrimination arising from the withdrawal of a job offer to the Claimant on 22 January 2020 and the complaint of sex discrimination and / or disability discrimination arising from the Respondent's decision, communicated to the Claimant on 13 January 2022, that she did not meet the essential criteria for a managed move to a vacant role in Criminal and Financial Investigations.

Introduction

[The references in square brackets are to page numbers in the Preliminary Hearing Bundle.]

- 1 This case comes before me today as an Open Preliminary Hearing to determine the Respondent's application to strike out the Claimant's claims, as detailed in its email dated 11 March 2021 [21].
- 2 By way of background the Claimant, Ms Ali, presented her ET1 to the Tribunal on 5 January 2021 [9]. The Claimant is employed by the Respondent, The Home Office, as an Immigration Officer.
- 3 In her claim form, the Claimant brings a claim of pregnancy or maternity discrimination [14]. The detail of the claim, as received by the Tribunal, is set out at box 8.2 of the ET1 [15]. The Claimant refers to being offered a different job with the Respondent by email dated 16 October 2019 but that she later received an email on 22 January 2020 saying that the job offer had been withdrawn. The Claimant includes a quote from the relevant email and then says that she lodged an internal grievance.
- 4 The Respondent denies the entirety of the claim. In its ET3 and in an email dated 11 March 2021, the Respondent makes an application to strike out the Claimant's claim because it is said to be time barred [21]. The Respondent submits that the Claimant's claim of discrimination must be brought within three months starting with the date of the act to which the complaint relates. The Claimant's complaint is said to relate to the withdrawal of the job offer on 22 January 2020. It is on this basis that the Respondent contends that the ET1 presented on 5 January 2021 was outside of the statutory time limit and her claim is therefore time barred. The Respondent submits that the Claimant's allegation does not amount to conduct extending over a period, such that it is in time and, further, that it would not be just and equitable for the Tribunal to extend time for presenting the claim.
- 5 The case was originally listed for a hearing on 25 June 2021 but due to a lack of judicial resource, it was postponed and listed before me as an Open Preliminary Hearing on 31 January 2022. I am required to consider the Respondent's application for strike out and appropriate case management directions if the case is to proceed. The parties have also agreed that the Claimant's very recent application to amend, dated 25 January 2022, should also be considered at this hearing. The Respondent adopts a neutral position on this application.
- 6 The Tribunal was provided with the following:
 - 6.1 Preliminary Hearing bundle paginated 1 – 43;
 - 6.2 Claimant's witness statement with annexe A – E;

6.3 Claimant's application to amend her claim dated 25 January 2022.

7 The hearing was conducted remotely via the Cloud Video Platform (CVP). The Claimant represented herself and the Respondent was represented by Mr Duffy of Counsel. I heard evidence from the Claimant and submissions from both parties. Due to a lack of available time, I reserved my Judgment.

8 Before setting out my findings of fact I do note that, following the hearing, I received an email from the Claimant which was sent on 31 January 2022 but not forwarded to me until 16 February 2022. In the email, which was copied to the Respondent's representative, the Claimant refers to wanting to make a further submission if possible. The Claimant then reiterates the points she made during the hearing. In this way, whilst I have read the email, I am satisfied that the Respondent is not prejudiced by it despite it being submitted following the end of the hearing.

Findings of Fact

9 I made the following findings of fact on the balance or probabilities:

10 The Claimant has worked for the Respondent for a number of years, most recently in the role of Criminal Investigator.

11 Following an interview on 11 October 2019, the Claimant received an email on 16 October 2019 to confirm that she had been successful in her application for a promotion to the role of Chief Immigration Officer, Criminal Investigator. There were three positions available; the Claimant had been recruited to one of these three positions and two male candidates had been successful in their applications for the remaining two positions.

12 On 22 January 2020 the Claimant's job offer was withdrawn.

13 The Claimant lodged a grievance about this on 3 March 2020. The submitted grievance was detailed and extended across eleven pages.

14 The Claimant was able to access the internet from January 2020 through to January 2021. However, whilst the Claimant had a general understanding that she could bring an Employment Tribunal ('ET') claim, she had no understanding as to the time limits involved. She was in contact with her local Union representative, who assisted with bringing her grievance, but her focus was understandably very much on the forthcoming birth of her child.

15 On 6 March 2020 the Claimant's job offer was reinstated. On 20 March 2020 the Claimant attended a skype meeting from her home about her grievance.

- 16 The Claimant continued to work up until 21 March 2020, although this was working from home. In April 2020 the Claimant gave birth to her daughter.
- 17 In the period of time between giving birth and July 2020, the Claimant was recovering from the emergency caesarean section she required. She suffered from low mood and anxiety and had no assistance with childcare for both her baby and other child. In or around May 2020, the Claimant's older child began to present with some challenging behavioural and sensory issues. A subsequent blood test confirmed she has a rare genetic condition. The Claimant was attending outpatient remote medical appointments concerning her older child.
- 18 In or around July 2020 the Claimant researched bringing an ET claim. She looked both at Employment Tribunals website and the ACAS website at this time. The Claimant told me that she understood in a general sense that there were time limits which applied to bringing claims but that she did not think about this issue 'properly'. She also did not think that she would need to bring an ET claim because matters would be resolved internally.
- 19 Insofar as the Respondent's internal process was concerned, the Claimant's grievance concluded in August 2020. The outcome to the grievance included various recommendations including that the Claimant's job offer be reinstated with appropriate backdating of pay. At that point, further investigation into why the Claimant's job was withdrawn was also recommended.
- 20 The Claimant appealed the outcome to her grievance on 9 September 2020. In particular, she wished to understand why the business reasons which necessitated the withdrawal of the offer of the role to her, had not so effected the offer of the two other roles to the other candidates. It was at around this time that the Claimant was also signed off sick from work for stress / anxiety. I note from Mr Curtis' email, dated 3 September 2020, that he referred to the Claimant receiving some counselling (see Annex D). She remains absent from work to date.
- 22 In October 2020 the appeal was concluded. The appeal was decided by Ms Armstrong, a manager at the Respondent. The Claimant did not agree with the outcome to the appeal and considered that she had been the subject of further discriminatory treatment at that stage.
- 23 The Claimant notified ACAS of her claim on 7 October 2020 and an EC Certificate was issued on the same day. The Claimant told me that it was when she contacted ACAS that she understood more about the time limits. The Claimant presented her ET1 to the Tribunal on 5 January 2021.

- 24 The completed ET1, as received by the Tribunal, includes the particulars of claim as appear on page 15 of the preliminary bundle. Within the ET3, the Respondent refers to the ET1 being 12 pages in length and alleging discrimination on the basis of a withdrawal of a job offer on 22 January 2020 [paragraphs 37, 38 on page 34]. I accept the Claimant's evidence that she had completed the ET1 on her smartphone and she thought that she had successfully copied and pasted a further long section of narrative into the ET1 form. This narrative referred to the Claimant's grievance and the appeal outcome. At the time of submitting her ET1 to the Tribunal, the Claimant believed that this information was therefore within the claim form and formed part of the case presented to the Tribunal.

Parties' Submissions

- 25 On behalf of the Respondent, Mr Duffy submitted that the Claimant's claim as presented to the Tribunal refers to a single act; the withdrawal of the job offer on 22 January 2020. He identified 21 April 2020 as the last date upon which the claim could have been brought in time. Whilst the Claimant had referred to including further information and that there was an issue with what had been effectively copied into the ET1, he contended that the Tribunal must proceed on what has actually been received. It is not possible for the Tribunal to guess as what the Claimant might have been intended to put in the claim form. In this way, whilst there has been a reference to conduct which continued up to and including the appeal hearing on 6 October 2020, no details have been provided by the Claimant in the ET1 about this and it does not form part of the case before the Tribunal.
- 26 Mr Duffy referred to the Claimant knowing that there were time limits which applied to bringing an ET claim but that she had failed to take steps to find out what the time limits were until it was too late. Mr Duffy reminded the Tribunal that the burden was on the Claimant to satisfy the Tribunal that the discretion to extend time should be exercised and that, with reference to Section 33 of the Limitation Act 1980, I should consider the balance of prejudice. There were two reasons for the Claimant's delay - her failure to properly investigate the application of the rules on time limits and her choice to pursue the Respondent's internal process. In this way, it was the Respondent's submission that the claim is clearly out of time and that the Tribunal should not exercise its discretion to extend time.
- 27 The Claimant submitted that this is a case where the complaint concerns a series of discriminatory acts and that she always intended her claim form to refer to the totality of matters up to and including her grievance appeal. In the alternative, the Claimant submitted that it is just and equitable to extend time.
- 28 The Claimant reminded me that if the time for bringing her claim was 21 April 2020, it was relevant that she gave birth to her child on 1 April

2020 and that this was in the height of the Covid-10 pandemic. In her statement the Claimant also refers to not being 'well enough mentally to lodge a ET claim' from May 2020 to January 2020 (although I presume this is a typographical error and should read 'January 2021'). The Claimant submitted that she contacted ACAS on 6 or 7 October 2020 and she was advised that time started to run from the last act of discrimination if the acts were linked. The Claimant submitted that she felt that she was discriminated against in the way the Respondent's manager considered her appeal.

Legal Summary

- 29 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.
- 30 Under Section 123(3),
- (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- 31 The distinction between a continuing act and a one-off act with continuing consequences is easier to state than to define with precision. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved (see Aziz v FDA 2010 EWCA Civ 304 CA. At a preliminary hearing when a claimant, otherwise out of time, seeks to show an act extending over a period, he must show a prima facie case (see Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548 CA.
- 32 The Tribunal has a broad discretion to extend the time limit where it considers it just and equitable so to do. 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. The burden is on the claimant to persuade the tribunal to exercise its discretion in his or her favour. A Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time – the exercise of the discretion being the exception rather than the rule.

- 33 In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might 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 information; the promptness with which the claimant acted once he knew of facts giving rise to the cause of action; and 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 the Tribunal does not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered (see Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA).
- 34 Reasonable ignorance of time limits can be a relevant factor in deciding whether or not it is just and equitable to extend time (see Director of Public Prosecutions v Marshall 1998 ICR 518 EAT). In such cases, the date from which a claimant could have become aware of the right to present a worthwhile complaint is relevant.
- 35 In Apelogun-Gabriels v Lambeth London Borough Council [2001] EWCA Civ 1853 it was said that the fact that a claimant deferred commencing proceedings in the tribunal while awaiting the outcome of internal proceedings is only one factor to be taken into account when considering an application to extend time.
- 36 In claims before civil courts, Section 33 of the Limitation Act 1980 provides that in considering whether to allow a claim which has been presented outside the primary limitation period to proceed, the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. Whilst this may be useful for a tribunal, it is clear that a tribunal is not required to go through such a list. It will be relevant to

consider the length of and reasons for the delay and whether the delay has prejudiced the respondent.

Tribunal's Conclusions

- 37 In reaching my conclusions I have considered the entirety of the evidence I have heard and seen. I have also taken into account the closing oral submissions from both parties.
- 38 This case involves a consideration of whether a claim has been brought outside of the relevant time limit and, if so, whether it should be allowed to proceed in any event.
- 39 From the information included within the ET1, it is clear that the Claimant complained about the withdrawal of a job offer on 22 January 2020. She identified this as an act of pregnancy discrimination. As this was the only claim set out within the ET1, I am satisfied that when the claim was presented on 5 January 2021, this was outside of the primary limitation period of three months. Accordingly, I must consider whether it is just and equitable to extend time to allow the claim to proceed. As set out above, there is no presumption in favour of the extension of time and the onus is on the Claimant to convince the tribunal to do so.
- 40 I have carefully considered the circumstances of this case. Of particular relevance is the factual context to the Claimant presenting her claim when she did. The Claimant considered that the withdrawal of her job offer was wrong and a matter she should raise further with the Respondent. Therefore, following the withdrawal of the offer, she pursued an internal grievance. In her evidence, the Claimant described the Respondent's poor treatment of her which continued beyond the withdrawal of the job offer. It was in relation to how her grievance was considered and the failure, as the Claimant saw it, to grapple specifically with the important question of why the job offer had been withdrawn. It was the ongoing failure by the Respondent to properly address the issue of 'why', which then prompted the Claimant to submit her ET claim following the appeal stage of her grievance. As described in my findings of fact, the Claimant then drafted her ET1, mistakenly understanding that she had successfully cut and pasted into the ET1 form a lengthy narrative she had drafted referring to the issues arising in the Respondent's handling of the grievance procedure.
- 41 In this way the reason for any delay in the presentation of the ET1, was the Claimant's view that she had a series of complaints to make about the Respondent including the withdrawal of the job offer but also the handling of the grievance process. The Claimant's error in failing to complete the ET1 with the entirety of the information she wished to include has resulted in the argument about time limits being raised.

- 42 I am satisfied that the error made by the Claimant was an inadvertent oversight on her part. She attempted to complete the ET1 with the entirety of the narrative, including matters about the grievance process, but failed to successfully populate the form with this material. In addition to this factual context, I have also had regard to the length of time which passed between the withdrawal of the job offer and the submission of the ET1. Mr Duffy referred me more generally to the balance of prejudice and I have particularly considered the prejudice that would be suffered by the Respondent if the claim was permitted to proceed as against the prejudice to the Claimant if she is refused an extension of time. I have concluded that the prejudice to the Claimant is far greater - in short, if I refuse to extend time, the Claimant is entirely prevented in proceeding with her claim of pregnancy discrimination.
- 43 Taking account of the explanation for why the claim was brought out of time and the other relevant factors including the balance of prejudice, I have concluded that it is appropriate on the facts of this case to extend time for presentation of the claim under the just and equitable principle. The information provided by the Claimant on this issue has been sufficient to satisfy me that this is the correct application of the relevant provisions as to time limits.
- 44 Accordingly, the claim as set out in the ET1 [15] is allowed to proceed. This is a claim of pregnancy discrimination arising from the factual complaint that the job offer made to the Claimant on 16 October 2019 was withdrawn by an email received by the Claimant on 22 January 2020.
- 45 The Claimant's complaints about the Respondent's handling of the grievance process were entirely relevant in my consideration of whether the time limit for the presentation of the ET1 should be extended. However, for the avoidance of doubt, those complaints are not included within the ET1 before the Tribunal and therefore, whilst the Claimant may wish to refer to the grievance process and appeal by way of factual background, at this stage those matters do not form part of any complaints of discrimination which the Tribunal is required to determine.
- 46 The Claimant is able to make an application to amend her claim in order to proceed with any further claims of discrimination.
- 47 As previously noted, by a letter dated 25 January 2022 the Claimant brings an application to amend her claim to include a further complaint about the Respondent's refusal, on 13 January 2022, to allow her a managed move to a role advertised in the Criminal and Financial Investigations Department. The reason given for the Claimant failing to meet the essential criteria included the lack of any operational investigative experience over a protracted period. The Claimant refers to this lack of experience being contributed to by her absence on

maternity leave and her absence due to mental ill health. In this way, the Claimant refers to a further claim for sex and disability discrimination.

- 48 There is no suggestion that this claim has been brought out of time and the Respondent is neutral on the Claimant's application. I allow the Claimant's application to amend her claim to include this further complaint which is relied upon as both sex and / or disability discrimination.
- 49 This case will now be listed for a telephone case management hearing when appropriate case management directions will be made, including listing the case for a final hearing.

**Employment Judge Harrington
10 March 2022**