



EMPLOYMENT TRIBUNALS

Claimant: Ms U Canning

Respondent: National Institute for Health and Care Excellence

Heard at: via CVP **On:** 21/10/2021

Before: Employment Judge Wright

Representation:

Claimant: In person

Respondent: Mr A Allen QC - counsel

JUDGMENT having been sent to the parties on 27 October 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

1. The respondent invited the Tribunal to strike out the claimant's claim, or in the alternative to order that a deposit be paid as a condition of her continuing with the claim. The respondent takes three points and Mr Allen dealt with them in this order:

the claim is three years out of time;

res judicata (abuse of process, estoppel and Henderson v Henderson) in short, that the issue has previously been litigated and decided or that it could have been litigated in the previous proceedings); or

the claim should be struck out as it has no reasonable prospects of success.

2. The claim was presented three years out of time and the claimant did not seriously attempt to persuade the Tribunal to exercise its discretion to extend time on a just and equitable basis. In the claim form, the claimant referred to the discretion and the Law Commission report on Tribunal time limits. There is nothing in and of itself in the Law Commission report, which feeds into the Tribunal discretion and the fact it was published has no bearing on the matter to be decided.
3. In her submissions, the claimant referred to unsuccessful job applications. It is not clear how they (apart from it understandably being demoralising for her) prevented her from presenting a claim much earlier. She had presented a previous claim and knew the process. She knew time limits are short in the ET and referred to knowing the time limit was three months less one day. She referred to a rejection for a job she applied for with the respondent two weeks after the 27/5/2020 and yet the claim form was not presented until the 11/7/2020. The claimant in particular referred the Tribunal to the Gidman¹ Judgment and paragraph 121 of that, which summarises the discretion to extend the time limit under the Equality Act 2010. There is reference to Robertson v Bexley Community Centre t/a Leisure Link 2003 [IRLR] 685 that there is no presumption of an extension of time, rather the converse is the case, it is the exception rather than the rule and an out of time claimant would have to convince the Tribunal why an extension should be granted. Unfortunately, the claimant did not make any attempt to convince or persuade the Tribunal to extend the time limit, and on the first point of submission, the Tribunal finds the claim is out of time and it is not just and equitable to extend the time limit.
4. Res Judicata – the Tribunal takes the point that discrimination contrary to the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 was referenced in the claimant's first claim form and her submission is that during her employment: she spoke to her line manager on this issue; contacted the Union; and raised a grievance. Even then it would be generous to accept, in view of that, that she did not realise she

¹ This was a claim presented to the Manchester Employment Tribunal against the same respondent, which came to the claimant's attention.

had a potential claim under the Regulations and she has now raised it for the first time in this claim. The point is also noted that an application to amend the first claim was discussed and is recorded in the Judgment. Although the claimant now says she was more confused, not less confused after three preliminary hearings (noting she said she was legally represented at the first preliminary hearing). The Tribunal finds fact she was aware of the claim under the Regulations, referred to it in the first claim and raised it during her employment (on her own account) results in an abuse of process under the rule in Henderson v Henderson. The claimant could have and should have raised any fixed-term employee discrimination in the first claim. To allow her to do so now is an abuse of process and issue estoppel applies. The Tribunal therefore strikes out this claim under Rule 12 (1)(b) as it is an abused of process.

5. In light of that, the Tribunal does not necessarily need to deal with the strike out application under Rule 27 (1) that there is no reasonable prospect of success. The Tribunal does find that the claimant is seeking to relitigate her first and unsuccessful claim, using an alternative form of discrimination under the Regulations, rather than under the Equality Act 2010. In the first claim, the Tribunal accepted the respondent's evidence over the claimant's and accepted the respondent's non-discriminatory explanation. It is difficult to see how the claimant would be able to re-run her case, using the same or similar allegations, but instead of relying upon the protected characteristic of sex or age, to rely upon her assertion that she was a fixed-term employee. For those reasons, the Tribunal would also have struck out the claim as having no reasonable prospects of success.

Employment Judge Wright

3 November 2021