



EMPLOYMENT TRIBUNALS

Claimant: Miss S Matthews

Respondent: Thirteen Housing Group Limited

Heard at: via Common Video Platform

On: 17th June 2022

Before: Employment Judge AE Pitt

Representation

Claimant: In Person

Respondent: Ms Bullard Solicitor

JUDGMENT

1. The claimant's application to amend her claim to include claims of harassment because of the protected characteristic of age is refused.

REASONS

1. This is an application by the claimant to amend her claim under the Equality Act 2010 to include claims of harassment against another colleague working at the respondents.
2. The need for an application was identified at a preliminary hearing on 14th December 2021. At which time the claimant was ordered to provide to the tribunal and the respondent the following information in a statement: -
 - i. the date of each and every act of bullying by Paul Benson that she complains about.
 - ii. a description of each act of bullying.
 - iii. any witnesses to each alleged act.
 - iv. a brief explanation as to why she says each act of bullying had something to do with her age.
 - v. why her claim form did not include any mention of the claim of bullying by

Paul Benson.

- vi. what prejudice she would suffer if she were not given permission to amend her claim to include the bullying allegations she now makes.

Facts

3. The claimant was employed by the respondent, a social housing provider, in an assistive technology support role from 7th January 2000 until 12 July 2021. The claim form was presented on 26 September 2021. It was noted by Employment Judge Jeram that the complaints at that time were unfair dismissal, direct age discrimination, holiday pay, arrears of pay, and notice pay. I note that during the telephone hearing on 14th of December the Judge noted that the claims were discussed at some length with the claimant, and in particular there was much discussion concerning the claimant's claim of disability discrimination. It is clearly noted by the judge that there is no suggestion of any allegation of bullying by Mr Benson in her ET1. The Judge notes "and this despite the fact that she had been asked on three occasions by the tribunal to submit any attachment to her claim form before it was served upon the respondent, and no such document was forthcoming."
4. The application to amend was submitted on 10 January 2022.
5. The claimant submitted a document to the tribunal which set out thirty claims against Mr Benson. The earliest claim goes back to 2010, although it may well be this is simply comment. The claimant in her application states she discussed the matter of Mr Benson's behaviour with Mr Crone who was her trade union representative. In response, he had said there will always be that way. This does not appear to be a separate head of claim itself but rather a comment.
6. She also refers to Christine Mulgrew and calls being left open. It appears that the claimant's complaint here is that there was some discussion about the behaviour of people on a call and bullying behaviour and arranging nights out to which she was not invited this is not dated but I understand this was some years ago.
7. The claimant makes complaints in relation to one matter in 2013, one matter in 2015, twelve allegations in 2017, three in 2019, and six in 2021 in 2022. Although I note that in relation to those matters relating to health the claimant states were ongoing from December 2020 until her dismissal and indeed some of the other matters relating to her health seem to have an element of continuity about them.

8. The respondents objected to the application on the basis that the claimant had not raised her allegations until the hearing before Employment Judge Jeram. The Claimant had previously been asked to submit further any further information but there was no indication until the hearing that the claimant was seeking to claim harassment. This, therefore, is a new claim which has not been pleaded before. In addition, it is submitted that the claimant has failed to explain why the events amounted to bullying and why it was because of her age. Further, there are some events which do not relate to Paul Benson and are, therefore irrelevant.
9. In particular, the respondent objects to the amendment because the claim is substantially out of time. Despite the claimant's assertions that she was suffering from anxiety and was working under extreme pressure, she was able to include claims of directed discrimination unfair dismissal holiday pay and arrears of pay in her ET1.
10. The respondent refers me to the case of Kuznetsov v Royal Bank Of Scotland[2017] EWCA Civ 43 and the Presidential Guidance in relation to such an application.
11. Although I did not hear evidence on oath from the claimant, I did go through the application. In particular, I attempted to ascertain from the claimant why she felt that the claims or any individual claim were because of her age. The claimant was unable to particularise this save to say that there was an age gap between herself and Mr Benson the high point of her case is that she and her colleagues, Elaine and Robert who were of a similar age to her, were treated differently than others who were younger, in particular on one occasion that there were not given the opportunity to carry out extra responsibilities like younger members of staff were.
12. The last allegation of harassment that I have been able to identify is dated 1st August 2021. In regard to this, the claimant writes "due to 3% cutbacks within Thirteen Housing Group Ltd a new proposed rota was drafted to commence from 1 August 2021 for 8 shift staff. There were nine members of the full-time shift staff and I was the closest to receiving my pension which will be in September 2022. If proposed redundancies were announced, as I had 21 years of service for the company my redundancy would be a substantial amount to pay. 13 were taking work from our department – the ATT team and transferred the works to Thomas

Cook's department (conciierge out of hours) I had mentioned to Paul Benson with the new proposed rotors that I would struggle due to only having one and a half days rest when the rota previously that we were worked allow three days rest".

13. Prior to that, the claimant makes complaints in relation to the Covid 19 pandemic. These include 21 February 2020 a request for medical history which should have been requested from human resources and not by Mr Benson. She was asked again in March that year for further medical evidence in relation to her diagnosis of COPD. In addition, Mr Benson requested from December 2020 why she had to attend every two weeks to have her blood pressure taken.

The Law

14. I have taken account of Kuznetsov v Royal Bank Of Scotland[2017] EWCA Civ 43, SelKent Bus Co Ltd v Moore 1990 ICR, EAT and the Presidential Guidance which set out factors which will include, the nature of the amendment, the applicability of time limits, the timing and manner of the application.
15. It is clear from Olayemi v Athena Medical Centre and others EAT 0913/10 that in considering whether to allow the amendment I am entitled to consider the merits of the claim.
16. The time limits in relation to discrimination claims are contained within section 123 Equality act 2010. A claim must be presented within three months of the last act of discrimination complained of OR such other period as the employment tribunal considers reasonable.
17. In the case of Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA it was pointed out that whilst the Tribunal may take into account the checklist listed in Section 33 Limitation Act 1980, it should not follow the list slavishly and use it as a guide. In particular that following a checklist may lead to a mechanistic approach in the exercise of judicial discretion.

Discussion And Conclusions

I considered the following factors

- i. The delay;

- ii. the reason for the delay;
- iii. ignorance of rights;
- iv. the merits of the amendment;
- v. prejudice to both parties.

General Considerations

18. The claimant has not set out why the earliest matters that is to say up to 2020 were not raised with the tribunal or her employer before December 2021. This is an important consideration for the tribunal when considering issues of amendment in particular where an amendment is out of time.
19. In relation to the later matters in 2020, she has stated she was under extreme pressure and suffering from anxiety and it was not until later she became aware the matters she seeks to add may amount to harassment under the Act. I reject this assertion. The claimant was able to complete an ET1 indicating the nature of her claims whilst still suffering from the same pressure and anxiety.
20. I considered whether or not the claimant was aware of her rights as an employee in relation to any form of discrimination and in particular harassment. I note that as early as 2010 the claimant was speaking to her trade union official, Mr Croone, regarding Mr Benson's behaviour. Despite the assertion that that's just what they are like, it seems clear to me that the claimant was aware that she was able to make a complaint about the behaviour, and take it further which she decided not to do. In addition, the claimant had the benefit of a trade union representative, from whom she could have taken advice, if she was not satisfied with that advice she could have pursued with a full time official. I conclude therefore that the claimant had knowledge of the rights as an employee or had the ability to find out about the right from her union.
21. I take account of the fact that the reason the Employment Tribunal has time limits is to ensure cases are brought before it swiftly so that documentation is retained, and memories are fresh. The claimant is inviting me to extend the time for a period of twelve years.

The complaints 2010-2017

22. I note that a substantial number of the matters raised by the claimant are historic. The earliest claim claimant relies upon is in 2010 there are periodic claims until 2017 when there a number of matters raised. I have looked at these matters together because of the substantial delay in them being forward by the claimant as complaints. There was no explanation from the claimant as to why she did not pursue these matters either internally or with the tribunal until she raised them at the hearing on 14th December 2021. In such circumstances, I concluded that there would be significant prejudice to the respondent defending such claims. I take account of the fact that many of these rely on memory which after four years will be diminished by the passage of time. Where documents are concerned may well be that they are longer held by the respondent.
23. Turning to the merits of the complaints. Some of them do not appear to be complaints at all for example the reference to Gary Crone seems to be a comment that these were aware of the behaviour of Mr Benson, rather than an actual complaint. Similarly, the matter in June 2015 speaks to confidential information being discussed in the office and appears not to involve the claimant.
24. With regard to matters in 2017, these relate to matters where Mr Benson had raised an issue via email with the claimant as to her work. There is no explanation as to why this should be harassment in particular on the basis of the protected characteristic of age. The same applies to matters in March 2017 April 2017 September 2017 August 2017.
25. After setting out these matters the claimant concludes 'she felt she was being targeted', but does not go on to explain why these would amount to harassment and in particular why they would amount harassment on the basis of her age.
26. With regard to the matters in November 2017, the claimant relates to Mr Benson again raising working issues with her again without stating why this

was harassment.

27. In particular, the claimant complains that from March until August 2017 she and her colleague were placed on Planned Improvement Performance. Although she appears to have queried this with Mr Benson, she did not take it any further with the respondent.

28. Although there may be an argument that this is a continuing series of events conducted by Mr Benson. I note that there are periods of time between 2017- 2019 when there are no matters of concern raised by the claimant. I can foresee difficulties in the claimant arguing that this was ongoing harassment because of the periods of time which elapsed between some of the complaints.

29. In relation to these matters taking them at their highest, I do not think there is a reasonable prospect of success in any of the claims up to 2017. I take account of the fact that they are of considerable age, there has been no explanation as to why they were not raised either with the employer or with the tribunal prior to 14th December. In all the circumstances, therefore, I do not permit the amendment in relation to those matters.

2019-2021 Complaints

30. The more recent complaints start in 2019 and there is a final tranche relating to her medical and health issues, and the issue of the shift change which is the last matter I have been able to identify.

31. With regard to the three complaints raised in 2019 again, there is some delay. However as important is the fact that the claimant has failed to identify in relation to those matters why she says Mr Benson was bullying her, amounting to harassment under the Equality Act because of her age. She simply relies on the difference in their own ages.

32. Again, I note in relation to many of the matters in 2019 the claimant complains of Mr Benson raising work issues. One of the matters is Mr

Benson informing a new colleague to be “be wary of Shirley don’t trust her”. In brackets after this claimant has written indirect discrimination. It is unclear if this is harassment or some other head of claim.

33. Again, one of the factors I considered is the fact that the claimant has failed to identify why the matter she relies upon amounts to harassment of her and in particular why it is harassment because of the protected characteristic of age.
34. In January 2020 the claimant complains that Mr Benson had sent her an email regarding work. In particular, she says that Mr Benson had not checked who had failed to ‘close a work item’ and that he had automatically assumed it was her. She maintains this is an example of age discrimination and bullying because ‘Paul does not check trails or ask other members of staff and always pinpoints her.’ Again, other than the assertion that this is age discrimination, there is nothing there that leads me to conclude that this was related to her age.
35. The claim refers to an incident in August 2020 when the claimant was speaking to Miss McLaren. This does not appear to be an allegation but rather background information perhaps pointing to the fact that the respondents were aware of Mr Benson’s behaviour. This again raises the question as to why the claimant failed to bring it to the attention of her employer to resolve the problem.
36. A complaint in December 2020 relates to the claimant being spoken to about a mobile phone number which had, allegedly, been given out by the claimant. As a result of the conversation, the claimant was placed on the respondent’s data protection course. The claimant says this added extra pressure and increased her workload, and she didn’t need to do it because she had not breached the GDPR rules. Again the claimant has not identified why she thinks this is harassment because of her age. There is no information whatsoever in that section which leads me to the suspicion even that this was because Mr Benson was treating her differently because of her age.

37. There is an allegation undated in relation to never being given the opportunity to do extra responsibilities this is so unspecific it is impossible for the respondent to defend. In any event, the claimant has failed to identify why this relates to her age.
38. This leads me onto the matters in relation to the claimant's health, starting in February 2020 and continuing until the claimant was dismissed, these have the appearance of disability claims. As noted by Employment Judge Jeram it may be that there is a sound argument for COPD amounting to a disability depending upon how it impacts upon the claimant. The claimant was quite clear that she was not going to make a claim for disability discrimination in relation to those matters relating to the medical condition.
39. I went on to consider how these may be harassment because of the claimant's age. On the face of it, these are matters which the respondent, via Mr Benson raised legitimately with the claimant. I question whether they would amount to harassment. In addition, there is nothing in the application nor was any forthcoming from the claimant as to why this would be harassment because of her age. She simply relies on the fact that Mr Benson is younger than her.
40. In considering the merits of all the claims I concluded that the explanation given by the claimant, i.e. that Mr Benson was younger than her, was not sufficient to establish that any harassment was because of the protected characteristic of the age.
41. Turning to the information in relation to 1st August 2021 and the new proposed rota. It is unclear why this would amount to harassment of the claimant. The claimant seems to rely on the fact that she would only have one and a half days rest, but presumably, this applied to all those on this new rota. And therefore, does not have the appearance of harassment. Again, it may well be that only having one and half days rest may impact her health but that would be a disability claim which has been discussed

fully with the claimant and dismissed.

Conclusions

42. The claimant states that if the matters do not proceed it would have a significant impact on her health and also have an impact financially. Whilst I may sympathise with that position, I must weigh that against the prejudice to the respondent in having to defend claims of such age. Which will include substantial costs and the possibility that documents no longer exist and memories are diminished.
43. Having considered the explanations from the claimant and the prejudice to both parties I concluded that in relation to those matters prior to 2019 for the reasons set out above there would be substantial prejudice to the respondent if the matters did proceed. The amendments are not permitted
44. In relation to the later claims, again for the reasons set out above I do not permit the amendments.

Employment Judge AE Pitt

Date 6th July 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

26 July 2022

Miss K Featherstone
FOR THE TRIBUNAL OFFICE