



EMPLOYMENT TRIBUNALS

Claimant: Ms M Brown
Respondent: London Borough of Waltham Forest

Heard at: East London Hearing Centre
On: 25 July 2022
Before: Employment Judge Burgher

Appearances:

For the Claimant: In person
For the Respondent: Mr T Wilding (Counsel)

JUDGMENT having been sent to the parties on 25 July 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The matter was listed before me to consider whether the Claimant's claims were presented within the statutory time limit, and if not, whether, having regard to the relevant statutory time limits and discretion to extend time the Tribunal has jurisdiction to consider the complaints.
2. At the outset of the hearing I forensically considered the Claimant's claims by reference to EJ Goodrich's case management summary, that was made after a lengthy case management hearing on 6 June 2022.
3. The scope of my consideration was identified at paragraph 8 of EJ Goodrich's case management order which states the open preliminary hearing would consider
 - 3.1 whether the complaint(s) were presented outside the prescribed 3 months' time limit (as extended by any relevant ACAS early conciliation period) and if so should the complaint(s) be dismissed on the basis that the Tribunal has no jurisdiction to hear it;
 - 3.2 Because of the time limits (and not for any other reason), should the complaint(s) be struck out under rule 37 on the basis that they have no

reasonable prospect of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospect of success?

4. I considered what the extent of that direction was and concluded that the strike out was limited to time limit points. However, I was less constrained in what I could consider when deciding whether a deposit order was appropriate as that could be considered at any stage in the proceedings.

5. I therefore informed the parties that I would not consider any matters of strike out relating to the merits but I would consider merits, if necessary, in the context of a deposit application.

6. The Claimant's claims were identified at paragraphs 18 to 33 of EJ Goodrich's case management order. The Claimant claims:

6.1 Constructive unfair dismissal under the Employment Rights Act 1996. It was identified that the Claimant resigned by email dated 1 April 2021, her last day at work was 16 April 2021 and the effective date of termination, when her resignation took effect, was 2 May 2021.

6.2 Failure to make reasonable adjustments pursuant to section 20 and 21 of the Equality Act 2010 (EA). Given the Claimant's resignation, this claim relates to matters up to her last day at work which was 16 April 2021. However, the Claimant contended, in relation to the failure to make reasonable adjustments complaint that it concerned matters up to and including her last date of employment which was been 2 May 2021. The Claimant further contends that there was a failure to make reasonable adjustments in June 2021 (after her employment ceased) concerning not revising the decision to be offer her retirement on compassionate grounds.

6.3 Discrimination arising from disability pursuant to section 15 EA. I was unclear how the Claimant put her case in this regard. However, it is alleged that from April 2019 to September 2021 the Respondent failed to follow its grievance procedures in dealing with the Claimant's grievance. The Claimant's last day of work was 16 April 2021 and last day of employment was 2 May 2021 so for the purposes of my assessment of the discrimination arising from disability claim, time starts to runs from 2 May 2021, and not September 2021 as the Claimant contends.

6.4 Harassment related to disability. The Claimant alleges a number of harassment events occurring between in 2018 until to 1 April 2021. It was clarified before me, by reference to ET1, that the allegations of harassment are against a number of individuals including Sandra Bennett and the last act of alleged harassment was 1 April 2021.

6.5 Indirect sex discrimination. This claim relates to an alleged remark made by Stuart Petrie on 14 February 2020.

- 6.6 Race discrimination. The Claimant makes claims of race discrimination relation to alleged events between June 2019 to February 2021. The Claimant also refers to the outcome of the grievance not being reviewed with respect of her request for review of compassionate early retirement, leave the outcome of which was communicated to her in September 2021.
- 6.7 Equal pay. The Claimant claims that she has not been paid the appropriate rate pay. Mr Wilding accepted that, on the face of it, this claim is presented within time by virtue of the extension provided by the ACAS early conciliation period. The Claimant's claim, as clarified, refers to Mr Frank Quinn who was the predecessor of Ms Karen Tilley, the Claimant's predecessor in the role. Apparently Mr Quinn was employed over 10 years previous to Ms Tilley. The appointment of the Claimant to her role took place sometime after Mr Quinn. I did not consider whether the Claimant was actually employed as Chief Inspector of Weights and Measures, or some other lesser role, and made it clear that I was not determining this.
7. The Claimant gave evidence and was questioned by Mr Wilding. Ms Bennett gave evidence and was subject to limited questions relating to the equal pay complaint.
8. The relevant procedural chronology is as follows:
 - 8.1 The Claimant contacted ACAS in respect of a claim on 30 September 2021.
 - 8.2 She received an EC certificate dated 9 November 2021; and
 - 8.3 subsequently submitted her claim to the Tribunal on 5 December 2021.
9. In evidence the Claimant stated that:
 - 9.1 she was suffering from anxiety and depression and she was taking medication for this. Her condition created brain fog got her and she was unable to focus;
 - 9.2 she had significant personal responsibilities to undertake in respect of the care of a husband and latterly her mother;
 - 9.3 she was unable to apply her mind to the difficult task of proceeding with tribunal litigation at the time and focused on attempting to resolve the grievance internally. Resolve matters internally was her preference and would be better for her than the stressful process of proceeding with tribunal litigation
 - 9.4 she did not know about Tribunal processes and the CAB had not advised her of this.
 - 9.5 she stated that the employer had delayed in responding to her grievance review between the period of June 2021 and September 2021 and therefore the Respondent is responsible for a large part of the delays that were reflected in the timescale.

10. The Respondent countered the Claimant's evidence by stating:
 - 10.1 that the Claimant's medication and state of health did not affect her ability to bring the claim. Specifically the Claimant's medication was reduced following her resignation May 2021.
 - 10.2 the Claimant was able to write very detailed and lengthy grievances setting out her position and as such her mental health could not have been a barrier to her with a claim earlier than she did;
 - 10.3 the Claimant had access CAB, her the trade union and internet to undertake an appropriate research to proceed with the claim in time and her ignorance of proceedings was no justification, especially in the context of her ongoing grievances and earlier resignation.
 - 10.4 The allegations were dated and it would be more prejudicial for the Respondent's witnesses to have to seek to try and address them.
11. I was assisted by the helpful written submissions that the Claimant provided submitted with the assistance of the CAB and the helpful written submissions advanced by Mr Wilding.
12. When considering the matter before me there are two particular time limits namely
 - 12.1 the Equality Act time limit under section 123 of the Equality Act; and
 - 12.2 the unfair dismissal time limit under section 111 of the Employment Rights Act 1996

Equality Act

13. For the Equality Act claims section 123 EA states:
 - (1) Subject to Section 140B proceedings on a complaint within section 120 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 employment tribunal thinks just and equitable.
 - (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
 - (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
 - (b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(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.

(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.

14. The Tribunal's discretion to extend time is wide but emphasises that, as Auld LJ observed in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 at [25]:

“there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule”.

15. Sedley LJ remarked in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 at [31] and [32] that there is “no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised” and that whether to grant an extension “is not a question of either policy or law” but “of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it”.

16. Both parties referred me to the relevant law and agreed that the focus of my consideration is the balance of prejudice between the Claimant of not being able to proceed with her claim against the prejudice the Respondent of having to deal with complaints, some very dated, and which had not been specifically raised prior to December 2021.

17. In relation to failure to make reasonable adjustments the last act was the time the Claimant decided that enough was enough as at 16 April 2021 when she indicated to the Respondent that she was not accepting their failures any further. Time would run from that date notwithstanding the fact that her notice took effect on 2 May 2021. The Claimant contacted ACAS outside the 3 month time limit and her claim in this regard is therefore a claim out of time.

18. When considering whether it is just and equitable to extend time, I have had regard to the Claimant's evidence and state of health. However, I accept the Respondent's submission that the Claimant's health did not prevent her from proceeding with employment tribunal litigation. On the evidence before me, the Claimant was sending lengthy emails and was able to communicate to advance her concerns in the context of a resignation that she had made. The Claimant asserts that she did not know about the law and Tribunal time limits. However, I do not consider

that the Claimant's ignorance was reasonable. In 2021 parties are expected to be able to find out about tribunal time limits. The fact that the Claimant focused solely on the internal grievance is not sufficient to convince me that it was just and equitable for not making enquiries about what she could have done to protect her rights through Tribunal earlier than she did.

19. In relation to the delay of the Respondent in concluding the internal grievance, this was a review of the unequivocal refusal of the Respondent to offer the Claimant early retirement on compassionate grounds in February 2021. The Claimant's request for compassionate retirement had been refused and following that the Claimant submitted her resignation. She consistently tried to overturn the decision but it had already been made. It was that time, in February 2021, that it would have been reasonable for the Claimant to seek advice on the process to bring her complaint in relation to those matters.

20. It is also clear that the Claimant's claim in this regard is weak. Reasonable adjustments are designed to ensure that an employee can undertake their work or remain in employment. However, the Claimant was seeking favourable terms to end employment. Paragraph 92 of the Claimant's witness statement stated:

"I received the letter the respondent HR only on the 14 – 09 - 21 refusing my request for early retirement. I was expected and was depending on some sort a positive result the very least the reason outcome and this was a dreadful disappointment that all the provide your information at that matter in relation to not getting the positively so was clear from the claimant in February 2021 and at there was no change as at September 2021."

21. The Claimant did not take proactive steps to seek advice until she got the final review letter. The Respondent will have to source and proof witnesses to secure and appropriate evidence in respect of matters going back to 2020.

22. I conclude that the Respondent will suffer greater prejudice in permitting the out of time claim to proceed. Having to defend a dated claim with limited prospects of success outweighs the prejudice to the Claimant of not being able to pursue it. The Claimant has not convinced me that it is just and equitable to extend time for her failure to make reasonable adjustment complaints. The Tribunal does not have jurisdiction to consider this claim which is therefore dismissed.

23. I conclude that the Claimant's claims of discrimination arising from disability are out of time, and it is not just and equitable to extend time, for the same reasons as outlined in paragraphs in paragraphs 17 – 22 above. Further, the claim that the management of the grievance was discrimination arising from disability is factually tenuous. The Tribunal does not have jurisdiction to consider this claim which is therefore dismissed.

24. The Claimant's claims for harassment related to disability relate to miscellaneous allegations, the last of which was 1 April 2019. I do not consider that it is just and equitable to extend time in relation those matter. Some allegations date back to 2018 and it would be more prejudicial for Ms Bennett to answer questions for which there had been no contemporaneous complaint, and which were first specified on 5 December 2021. The Tribunal does not have jurisdiction to consider this claim

which is therefore dismissed.

25. The Claimant's indirect sex discrimination complaint stems from an alleged comment made by Mr Petrie on 14 February 2020. This is significantly out of time and there has been no proper explanation from the Claimant as to why it would be just and equitable to extend time in relation to this. I conclude that the Respondent will suffer greater balance of prejudice than the Claimant of having to address this alleged 2020 remark. The Tribunal does not have jurisdiction to consider this claim which is therefore dismissed.

26. In respect of the race discrimination complaints, the Claimant's claims relate to failure to offer compassionate early retirement again and to review it timeously. The unequivocal decision regarding refusing compassionate early retirement was made in February 2021. The Claimant's attempts to change that after her resignation do not render the claim in time. The Claimant resigned because of this and there was no indication that the timing of the review or the failure to change the decision on review could be affected by the Claimant's race. . The confirmation of the decision already made, following review in September 2021 did not bring the out of time claim in time.

27. The Claimant has no positive case to put on the basis of race apart from her being black. In relation to terms and conditions and the race of her predecessors, including Mr Quinn, who was employed over 10 years previous to the Claimant as Chief Inspector of Weights and Measures the prejudice to the Respondent of having to obtain evidence from that long ago period outweighs the prejudice to the Claimant who out to have brought her claim sooner.

28. In any event, there is no inferential or other documents or evidence that she can reference but simply makes an assertion. This assertion is out of time. The Claimant has not convinced me that it is just and equitable to extend time. The Tribunal does not have jurisdiction to consider the race discrimination claim which is therefore dismissed.

Unfair constructive dismissal

29. For unfair dismissal complaints the section 111 of the Employment Rights Act 1996 states:

Complaints to employment tribunal.

(1)A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a)before the end of the period of three months beginning with the effective date of termination, or

(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

30. In relation to the Employment Rights Act time provisions, the issue is whether it was reasonably practicable to have presented the claim in time. I consider the guidance in the case of Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, CA per May LJ at paragraph 35 in respect of the test of reasonable practicability. This is also construed as assessing what is reasonably feasible or what is reasonably capable of being done. I am aware that there are numerous factors that a Tribunal can properly consider when determining whether it is reasonably feasible. When considering whether it is reasonably feasible to have been done, modern methods of obtaining information and communication mean ignorance of the law is no excuse.

31. I conclude that the Claimant was reasonably capable of bringing a claim within the 3-month time limit. She did not do so. It was therefore reasonably practicable for the Claimant to have presented this claim within the time limit. The Claimant could have presented her complaint in time, albeit she was focusing on internal resolution. The Claimant could have undertaken research, contacted her union, contacted the CAB. She was capable of doing this, as is evident from her really extensive letters seeking the progression of her internal grievance. Therefore, the Tribunal has no jurisdiction to consider the Claimant's constructive unfair dismissal complaint. This has been being presented way out of time and is dismissed.

Equal pay and deposit

32. The Claimant's equal pay claim is in time. I considered to what extent it was appropriate for her to pay a deposit as a condition to proceed with this claim. Having considered submissions I concluded that this claim has little reasonable prospect of success for the following reasons.

- 31.1 The Claimant refers to the work undertaken by Mr Frank Quinn, her predecessors, predecessor who worked at the Respondent over 10 years before the Claimant allegedly assumed the role of Chief Inspector of Weights and Measures.
- 31.2 Mr Frank Quinn worked prior to Partnership Agreement between the Respondent and other local authorities which affected the scope of the role.
- 31.3 The Claimant's predecessor, Ms Karen Tilley, was paid more than the Claimant seemingly pointing to a fair pay as opposed to an equal pay claim.

32 I considered the Claimant's means. She has a monthly income of about £1300 and outgoings of £1000. I order the Claimant to pay a deposit of £300 as condition of her proceeding with her equal pay complaint. This must be paid by 1 September 2022.

33 If the deposit is paid then the case will then be listed at 3 day hearing, considering equal pay only on the 24, 25 and 26 January 2024.

**Employment Judge Burgher
Dated: 12 September 2022**