



EMPLOYMENT TRIBUNALS

Claimant: Miss W Faminu
Respondent: London Borough of Hackney
Heard at: East London Hearing Centre (via CVP)
On: 7th October 2022
Before: Employment Judge Reid

Representation

Claimant: in person
Respondent: Ms J Crew, Counsel

JUDGMENT (Reserved)

1. The Claimant's claim was brought outside the time limit in s123(1)(a) Equality Act 2010 and the Tribunal does not extend time under s123(1)(b) Equality Act 2010.
2. The Claimant's claim is therefore dismissed because the Tribunal does not have jurisdiction to hear it.

REASONS

Background and preliminary issue

1 The issue for determination at this preliminary hearing was whether time should be extended under s123(1)(b) of the Equality Act 2010 (just and equitable extension) because the claimant's claim (for sexual harassment) had been presented outside the required three month time limit.

2 The claim was presented on 28th April 2022. The last act complained of in the claim form was on 15th November 2021, a complaint about a reference from the Respondent for the Claimant's new job at her next employer. She resigned on 15th November 2021. The

time limit under s123(1)(a) based on that final act alone therefore expired on 14th February 2022. The Claimant contacted ACAS on 26th April 2022 and the certificate was issued on 28th April 2022, the same day she then presented her claim.

3 The Claimant was not represented and had not provided a witness statement or any other evidence on this issue. I therefore clarified with her at the beginning of the hearing the purpose of the hearing and she confirmed she was aware she was going to have to justify why her claim was late. Because she had not provided a witness statement or any other evidence I asked her to confirm the reason/justification she would be putting forward for her late claim and she said it had been because she had been waiting for the outcome of the grievance she had raised with the Respondent on 22nd November 2021, which was a post-employment grievance as she had by then left the Respondent. It emerged that she had a one page note of the dates she chased the Respondent about the outstanding grievance outcome. I treated that document as her witness statement and gave the Respondent time to take instructions on it; the Respondent's position on the document was that whilst it was accepted generally that the Claimant had chased the Respondent, not all the dates were accepted (there being limited time to check each date) save in respect of emails dated 24th March 2022 and 25th and 26th April 2022, which contacts were accepted. I asked some questions of the Claimant about that document before cross examination to clarify some of the terminology she used in it.

4 I heard oral submissions on both sides after a break to enable the Claimant to make some notes of the points she wanted to make. I reserved my decision due to lack of time.

Findings of fact relevant to the time limit issue

5 The Claimant's claim is about what happened during her fixed term contract with the Respondent from 30th November 2020 to 15th November 2021 (it was due to expire on 30th November 2021 but the Claimant left early when she resigned on 15th November 2021). Her claim (which is essentially her grievance letter dated 22nd November 2021 because she attached that to her claim form as the basis of her claim and did not give any detail on the form itself) is about how she was managed by Mr Abdoul during her employment, including allegations of leering at her, homophobic comments and retaliation (including a less favourable reference for her next job) because she made it clear she was not interested in a relationship with him. The Respondent's case is that this is not what happened and that it investigated fully her post employment grievance and issued her grievance outcome to her on 29th April 2022.

6 The Claimant's claim was presented on 28th April 2022 some 2 ½ months after the 3 month time limit expired on 14th February 2022. The Claimant did not benefit from any extension of the time limit from ACAS conciliation because she did not contact ACAS within the 3 month time limit.

7 The Claimant is an intelligent and able graduate and very capable of looking things up if needing information about an employment tribunal claim. At the time of raising her grievance on 22nd November 2022 she was already referring to the possibility of an employment tribunal claim, at that point the focus being on the claimed poor reference provided by the Respondent which was delaying her starting her new job. The problem with the reference was however resolved and she was able to start her new job on 24th

November 2021.

8 The Claimant was a member of UNISON from around summer of 2021. She had one face to face meeting with a union representative before she raised her grievance although a different union representative attended her grievance interview meeting with her (in person) on 21st December 2021. I do not accept her oral evidence that neither of these two individuals (particularly the representative attending the meeting with her) mentioned time limits for claims at least generally (ie to tell her that there were time limits even if not going into the detail), taking into account her grievance discussed at that meeting already referred to a possible employment tribunal claim. However even if neither did mention time limits to her she was well able to find out this information herself by looking online – see above – or by accessing union help and information resources. The Claimant had some concerns that the two representatives she was allocated were both employed by the Respondent but she is articulate and could have asked for a representative not employed by the Respondent or simply asked the representatives she was allocated for information about employment tribunal claims without asking for any particular further acts of representation, taking into account that she had now left the Respondent in any event. The Claimant remained a member of UNISON until around March 2022.

9 I find based on her oral evidence that the delay in presenting the claim arose in the following circumstances. I find that it was from the outset her objective to try to resolve the issues (in effect to hold Mr Addoul to account for his claimed behaviour) without having to resort to an employment tribunal claim. I find that the reference to bringing a claim in her grievance was particularly focused on the problem with her reference and when that was resolved and she could start her new job, the immediate issue had gone away to an extent. She had included that reference to bringing a claim particularly in the reference context, on advice from her father who had looked up how to challenge a poor reference. Having resolved to a degree that issue and able to start her new job was consistent with no decision at this time to bring a claim, no desire to bring a claim and the wish to resolve matters without bringing a claim. In her grievance she notes that she had already raised the issues in her previous exit interview – I do not have the date of this but it must have been on or around her last day at the Respondent, 15th November 2021. The grievance was therefore not the first time she raised these complaints though it was her first formal complaint.

10 I find based on the Claimant's oral evidence that in the period after her grievance interview meeting on 21st December 2021 until around 24th February 2022 the Claimant had decided not to bring a claim and wanted to leave it to the grievance process to resolve matters (being aware relevant witnesses were being interviewed in January 2022), taking into account the increase in her chasing the Respondent (on her note) from 24th February 2022 onwards and the gap in chasing prior to that date after her grievance interview in December 2021. By 24th February 2022 the time limit had already expired.

11 The Claimant's oral evidence was that she decided at the end of March 2022 that she was ultimately going to have to take it further and bring a claim, not having received her grievance outcome by the end of March 2022. She said she discussed a possible claim with a new colleague in her new job around the end of March 2022 prior to her birthday (31st March), having in mind that she wanted to try and get a resolution by the time of her birthday and having been told by the Respondent that she would hear by the end of March 2022. I find based on her oral evidence that having come to the conclusion at the end of March 2022 that she was going to have to bring a claim she then in her own words 'sat on it' until

the end of April 2022 and during this period was considering whether she really wanted to bring an employment tribunal claim or not, even though she thought that matters were not going to be resolved by the grievance process given the delays and her chasing. I find based on her oral evidence that she eventually decided to bring a claim on 26th April 2022, contacting the Respondent's HR and ACAS that day and then presenting her claim the date the ACAS certificate was issued. This demonstrated the promptitude and efficiency that the Claimant could find out what to do and act, once she had made a decision.

12 Taking the above findings of fact into account I find that during the period from the end of March 2022 to 26th April 2022 the Claimant had simply not made up her mind about whether she wanted to bring a claim or not. Prior to this she had had access to advice and the ability to look things up herself and had decided she did not want to bring a claim despite frustration at the delays and having to chase the Respondent. This was not a case of a claimant who wanted a grievance outcome before bringing a claim (ie to know where she stood on her complaint) or because she thought she had to raise a grievance before the employment tribunal would accept her claim, this was a claimant who wanted to have a grievance outcome because she did not intend to bring a claim because she did not want to do that, particularly once the immediate reference problem was resolved. Part of that lack of wish to bring a claim was linked to her wish not to have to go over upsetting events all over again. The Claimant spent most of April 2022 making up her mind and by the time she presented her claim it was around 2 ½ months out of time and around 5 months after she had left employment. This was not a case where she had remained employed (and thus waiting an internal procedure outcome might be more key, given that ongoing relationship); this was a case where she had left and found a new job some months previously.

Relevant law

13 The primary time limit for complaints of discrimination is three months from the date of the act complained of (s123(1)(a) Equality Act 2010). Where there is conduct extending over a period (a continuing act), the time limit runs from the end of that period.

14 If a claim is presented out of time the Tribunal can extend time for bringing it if it finds that in all the circumstances it is just and equitable to do so (s123(1)(b)). Time limits are usually exercised strictly in employment cases and that there is no presumption for exercising the Tribunal's discretion in a claimant's favour unless there are grounds for not doing so; an extension would be the exception rather than the rule (*Robertson v Bexley Community Centre* [2003] IRLR 434). The Tribunal must weigh up all the circumstances and reach a just conclusion whilst bearing in mind that it is for a claimant to establish the Tribunal's jurisdiction (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327).

15 The Tribunal may take into account as potentially relevant factors the factors set out in s33(5) Limitation Act 1980, namely (a) the length of and reasons for the delay (b) the effect of the delay on the cogency of the evidence (c) the conduct of the parties including the provision of information and whether they acted promptly once aware of relevant information and (d) steps taken to obtain advice. These are not however a checklist (*Adedeji v University Hospitals Birmingham NHS Foundation Trust*. [2021] EWCA Civ 23) and the discretion is a broad one meaning that all relevant factors should be considered, including in particular the length of and reasons for the delay.

16 There is no requirement in the statutory test that there must be a good reason for the delay but it is a relevant matter (*Abertawe Local Health Board v Morgan* [2018] ICR 1194). There is no general principle that it is just and equitable to extend the time limit because there is an ongoing internal procedure; the delay caused by a claimant waiting for the outcome of an internal procedure may justify an extension but is only one factor (*Apelogum-Gabriels v Lambeth BC* [2002] ICR 713 approving the *Robinson v Post Office* approach).

Reasons

17 Taking into account the above findings of fact, the delay was of 2 ½ months after the Tribunal deadline expired, not just a short delay of only a few days or a few weeks. The Claimant had unreasonably taken no steps at all to look into making a claim and how to do it until towards the end of April 2022; she had not even contacted ACAS, even if that was out of time to get an extension to the time limit. This was not a case where the Claimant did not have access to advice or could not reasonably be expected to do some research herself to find out about time limits. There was nothing stopping her finding out about time limits (even if accepting her union representatives did not mention them at all) so she had that information to hand even if she wanted to wait and see about her grievance; she could have done both and kept an eye on the date. The Claimant's ignorance was not reasonable. Until the end of March 2022 she did not want to bring a claim at all, it was not a situation where she thought she had to await a grievance outcome before she could bring a claim or a period of time during which something reasonably prevented her from being able to make that decision, the reason she did not act was because she had not decided to bring a claim, although aware of the possibility as evident from her grievance; in fact she wanted the opposite of a claim, resolution by way of her grievance.

18 During the period between the end of March 2022 when she realised she was probably going to have to escalate matters to the employment tribunal and bring a claim because she had not had the grievance outcome by the mental deadline in her head (her birthday) she delayed until 26th April 2022 to make the decision. Whilst accepting it was a difficult decision to make and understandable that she might want to avoid it if she could, the delay after the end of March 2022 was a period of around 4 weeks when she was making up her mind. This was not a period she was waiting to see what the grievance outcome would be because she had already mentally accepted that she could not rely on the Respondent to issue it in a timely manner and might just have to go ahead and bring the claim anyway. Whilst there might have been a good reason for the delay initially due to an understandable desire to avoid an employment tribunal claim, that reason ceased to have traction at the latest by the end of March 2022. By the end of March 2022 the Claimant was no longer waiting for a grievance outcome as the trigger for a decision about bringing a claim because she had concluded that she could not wait any longer. Every day that passed after the end of March 2022 in effect supported her view that that the Respondent was not to be relied upon to issue her grievance outcome because she no longer believed that they would stick to the dates they said they would do it by.

19 The still ongoing grievance procedure (ongoing because the Respondent had not issued an outcome rather than because it was still for example interviewing witnesses) is an important factor but is only one factor. I have taken into account that there was a delay by the Respondent which it has not particularly explained or tried to justify in its response but that equally it was at least giving her dates she would get a response after 25th February

2022 and into March and April 2022, even if those deadlines were not met. That delay is an important factor in the assessment though not determinative as a ground for a late claim.

20 I am unable to assess the merits of the Claimant's case or the Respondent's response at this stage in the claim given most of the allegations will require witness evidence. The merits either way are therefore neutral in this assessment.

21 Turning to the balance of prejudice, there is a clear prejudice to the Claimant if not allowed to proceed with her claim. There are serious allegations of harassment. It was very unfortunate that there was a delay in issuing the Claimant's grievance outcome until 29th April 2022. Whilst it appears from the Claimant's note that the Respondent was at least giving her expected dates she would be sent it, these passed and she was then given a new date which was understandably frustrating. The Respondent does not explain in its response why it took as long as it did. In the end it took around 4 months to issue the outcome after interviewing the Claimant. I have taken this into account.

22 There is also a prejudice to the Respondent having to deal with a claim spanning events during her contract from November 2020 to November 2021. Whilst it was noted at this hearing that further particulars would be required of the incidents referred to in the attachment to the claim form (ie the grievance) the Respondent interviewed the Claimant about that grievance on 21st December 2021 so must in practice have more information about the various incidents and complaints; the Respondent was then able to identify and interview relevant witnesses in early 2022. The prejudice of a claim out of the blue with multiple very historic allegations to investigate is not therefore present to such an extent in this claim, taking into account the extent of the actual allegations giving rise to a claim for sexual harassment (as opposed to more general complaints of mismanagement not linked to her sex). The cogency of its witness evidence is also not a particularly significant issue in favour of the Respondent taking into account the short period of employment and the grievance investigations which will to an extent have allowed witnesses to get down a basic recollection of events; however balanced against that is the fact that many of the allegations will rely on witness evidence and not contemporaneous documents and therefore witnesses will still have to be recalling events in 2020-2021, particularly if requested particulars of her claim (identified at this hearing at necessary if the claim went ahead) do not match what she discussed in her grievance interview which the Respondent then investigated. The Respondent could reasonably have concluded by the beginning of March 2022 that she was not bringing a claim, even though it was still working on her grievance at this stage. Given she had mentioned a possible claim as early as her 22nd November 2021 grievance the Respondent could reasonably conclude that she was concentrating on the grievance and did not plan to bring a claim. The Respondent is particularly prejudiced by the allowance of a late claim in circumstances where between at the latest the end of March 2022 to the date the claim was presented the Claimant in effect failed to make up her mind. There is also prejudice to the Respondent in allowing a late claim where their former employee had access to advice, could in any event have looked in to how and when to bring a claim herself but spends the last few weeks before presenting her claim as time to make up her mind.

23 Weighing it up and looking at all the factors in the round I conclude that it is not just and equitable to extend time under s123(1)(b) Equality Act on just and equitable grounds, taking into account it is for the Claimant to show those grounds.

24 The reason the Claimant gave for delay was until the end of March 2022 because she had no desire to bring a claim and after the end of March 2022 to 28th April 2022 when she presented her claim was because she was making up her mind as to whether to bring a claim. The uncompleted grievance process was a factor in this and I accept that the Respondent was to an extent at fault in apparently letting its own deadlines pass and that the Claimant was chasing for an outcome, but that reason does not reasonably justify the delay of 2 ½ months (a substantial delay) after the time limit expired, particularly in the period after the end of March 2022; the length of the then delay until 28th April 2022 is an important factor. The Claimant did not mistakenly think she had to wait for the outcome before bringing a claim, she didn't want to bring a claim. As to the balance of prejudice I find that the prejudice to the Claimant of not being able to pursue what are serious allegations is outweighed by the other factors in particular the delay after the end of March 2022 when she failed to take a decision when she had already concluded that the Respondent could not be relied upon to issue a timely outcome to her grievance. She wasn't waiting for an outcome in that period, the reason she gave for her late claim, because the reason had by then shifted to in effect allowing her a period to make up her mind about something she had contemplated at least as an option since November 2021. Although the reason and extent of the delay is not determinative, weighing it up I conclude that notwithstanding the prejudice to the Claimant and notwithstanding the absence of significant prejudice to the Respondent for example in terms of historic allegations it has not previously been alert to affecting cogency of evidence, the balance of prejudice falling on the side of the Claimant because she will be unable to bring her claim is not sufficient to outweigh the other factors. The purpose of the time limit is to give certainty and it is not necessarily just and equitable to extend time for a period so that a claimant can make up their mind whether to claim or not, even against the backdrop of a previous period of frustrating delays in a grievance outcome being issued.

25 Her claim is therefore dismissed because the Tribunal does not have jurisdiction to hear it.

**Employment Judge Reid
Dated: 13th October 2022**