



EMPLOYMENT TRIBUNALS

Claimant: Miss O Nketiah

Respondent: National Highways Limited

Heard at: Leeds

On: 14 January 2022

Before: Employment Judge Deeley

Appearances

For the Claimant: Mr Ogunyanwo (Consultant)

For the Respondent: Ms E Hodgetts (Counsel)

RESERVED JUDGMENT

1. This Claimant's claim (consisting of pregnancy and race discrimination and harassment on grounds of race) was presented to the Tribunal outside of the primary time limit (the claim was presented on 8 July 2021, following ACAS early claim conciliation which started and ended on 24 June 2021). It is just and equitable to extend the primary time limit for presenting the Claimant's claim to 31 December 2020. However, it is not just and equitable to extend the time limits beyond that date and the Claimant's claim is therefore dismissed.
2. The Claimant's application to amend her claim form to include a complaint that her team failed to send her a congratulations card regarding the birth of her daughter on 20 September 2020 is rejected.

REASONS

Background

3. This claim has previously been case managed during a Preliminary Hearing on 15 September 2021 by Employment Judge Drake, who summarised the background to this claim and set out the purpose of today's hearing in his case management summary.

4. Employment Judge Drake noted that the Claimant did not submit her discrimination and harassment complaints within the primary time limit at s123 of the Equality Act 2010. He stated that the purpose of today's hearing was to consider whether the Claimant's claim was presented within a further period that the Tribunal considers just and equitable.
5. The dates referred to at paragraph 34.1.1 of Judge Drake's orders were incorrect. I discussed agreed the correct dates with the parties as follows:
 - 5.1 the Claimant presented her claim form on 8 July 2021, following a period of ACAS early claim conciliation which started and ended on 24 June 2021;
 - 5.2 therefore any complaint that took place before 25 March 2021 may not have been brought in time; and
 - 5.3 the last date referred to in the issues listed by Judge Drake took place by either 25 January 2020 or 10 March 2020 (see paragraph 31 of the Judge's preliminary hearing summary).
6. Employment Judge Drake also stated that the Tribunal would consider the Claimant's application to amend her claim to include a complaint that following the birth of her daughter on 20 September 2020, her team did not send her a congratulations card. The Claimant's Representative clarified during this hearing that this was a complaint of direct race and direct pregnancy discrimination (rather than sex discrimination as stated in the Claimant's amended witness statement).

Tribunal procedure

7. The documents that I considered during the hearing today consisted of:
 - 7.1 the Claimant's amended witness statement (she submitted a witness statement in October 2021 but later submitted an amended witness statement during the week prior to this hearing);
 - 7.2 a joint hearing file, with additional documents submitted by the Claimant; and
 - 7.3 skeleton arguments from both parties.
8. We first sought to clarify the issues to be determined at this hearing. It became apparent that Claimant's Representative sought to make a second application to amend the Claimant's claim. He stated that this application was raised as part of his skeleton argument, which he sent to the Respondent two days previously.
9. The Claimant's Representative stated that her second application to amend related to two complaints that:
 - 9.1 HR had lost the Claimant's MATB1 form and requesting an additional copy on 8 July 2020; and
 - 9.2 the Respondent refused to consider issuing the Claimant with a written apology as part of her grievance outcome, following a request by the Claimant's union Representative on 5 October 2020.
10. I noted that:
 - 10.1 Employment Judge Drake discussed the Claimant's complaints in detail with her during the preliminary hearing on 15 September 2021 and the Claimant stated that she wished to make an application to amend regarding her

- team's failure to send her a congratulations card after the birth of her daughter on 20 September 2020. The Claimant did not identify any further amendments that she wished to apply for;
- 10.2 Paragraph 9 of Judge Drake's preliminary hearing summary stated that if either party thought that the list of issues was wrong or incomplete, they must write to the Tribunal by 29 September 2021 (albeit that the preliminary hearing order was not issued until late October 2021);
 - 10.3 neither the Claimant nor her Representative had informed the Tribunal that the Claimant wished to make an application to amend her claim form at the preliminary hearing today;
 - 10.4 the Claimant's Representative's law firm had been on record as acting for the Claimant since late December 2021;
 - 10.5 the Claimant's Representative's skeleton argument did not state expressly that the Claimant intended to make an application to amend her claim; and
 - 10.6 both of these additional complaints would more than 12 months outside of the primary time limits (which expired on 7 October 2020 and 4 January 2021 respectively).
11. I also note the EAT's guidance in *Chandok v Tirkey* 2015 ICR 527 at paragraphs 17 and 18 (with my emphasis added using underlining):

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence....

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal

should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

12. I discussed with the parties whether it would be possible to hear the Claimant's second application to amend her claim during this preliminary hearing, as well as the matters listed by Employment Judge Drake. The Respondent objected on the basis that they had not had and would not have an opportunity to take instructions on the Claimant's second application to amend, including the merits of any amendment that she sought to raise. On that basis, I denied the Claimant leave to make a second application to amend her claim at this preliminary hearing. I noted that the Claimant could, if advised, make a further application depending on the outcome of this preliminary hearing.
13. I heard oral evidence from the Claimant and oral submissions from both parties during this preliminary hearing. However, there was not enough time for me to reach a decision because of the length of time that was taken discussing preliminary matters. I reached the decision set out below after the hearing had ended.

CLAIMANT'S APPLICATION TO EXTEND TIME LIMITS FOR HER EXISTING TRIBUNAL CLAIM

Key legal principles

14. The Claimant has brought complaints of (i) direct pregnancy and direct race discrimination and (ii) harassment on ground of race under the Equality Act 2010. The time limits provisions of the EQA are set out at s123, which states:

*"1) Proceedings.....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."*
15. I considered the legal principles set out below, in addition to those set out in both Representatives' helpful skeleton arguments and submissions. I have not reproduced the contents of those skeleton arguments and submissions in this Judgment in the interests of brevity.
16. Conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (*Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96, CA at paragraphs 51-52).

17. The Court of Appeal in *Robertson v Bexley Community Centre* [2003] IRLR 434 stated that it is for the Claimant seeking an extension of time to persuade the Tribunal that this should be granted.
18. The Court of Appeal in *Adedeji v University College Hospital Birmingham NHS Trust* [2021] EWCA Civ23 has recently set out the approach that the Employment Tribunal should take in relation to the just and equitable test. The Court of Appeal emphasised that there is no need to go through every factor set out in the s33 Limitation Act 1980 'checklist' recommended in *British Coal Corporation v Keeble* [1997] IRLR 336. Underhill LJ stated at paragraph 38 of his judgment:

“The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including.....the length of, and the reasons for, the delay.”

19. In addition, the Tribunal must consider the potential prejudice to the parties of any decision on time limits, including the merits of the claim (*Donald v AVC Media Enterprises Ltd* EAT/00016/14). I also note that in the recent case of *Secretary of State for Justice v Johnson* [2022] EAT1, the EAT applied *Adedeji* and noted that the Employment Tribunal should consider the effect that extending the time limit would have on the Respondent's ability to defend the claim where events took place some time ago.

Claimant's evidence regarding delay

20. The Claimant's delay in presenting her claim was considerable. The parties agreed that the last potential act identified by Employment Judge Drake from the original claim form at the preliminary hearing was either:
 - 20.1 25 February 2020 (which was the last act the Claimant complained of, following which the Claimant was absent from work until her maternity leave commenced in September 2020); or
 - 20.2 10 March 2020 (which was the date on which the Claimant issued her grievance).
21. The primary time limit for presenting a claim expired on either 24 May 2020 (or 9 June 2020). The Claimant did not submit her claim form until 8 July 2021, over 12 months later on the basis of either date.
22. The Claimant's evidence was that there were several reasons for her delay in presenting her claim:
 - 22.1 she submitted a grievance on 10 March 2020 and attempted to resolve matters through the grievance and appeal process, including attending grievance and appeal meetings. (I note that the Claimant was provided with her grievance outcome on 27 May 2020 and an appeal outcome on 28 August 2020);
 - 22.2 the Claimant gave birth to her daughter on 20 September 2020. She suffered from ill health during early September 2020;
 - 22.3 the Claimant's Trade Union Representative was liaising with the Respondent in September and October 2020 on her behalf, seeking an

- apology from the Respondent (for example, as set out in her Representative's email of 5 October 2020);
- 22.4 the Claimant also stated in her witness statement that she *"was not mentally and physically strong enough to have been able to deal with the case"* at an earlier stage because:
- 22.4.1 of her own health difficulties during her pregnancy; and
- 22.4.2 due to her daughter's health difficulties, details of which were not provided as part of the Claimant's witness statement or during her oral evidence.
- 22.5 the Claimant said in her oral evidence that she was not 'mentally ready to put in the claim' until June 2021, after she had met with a mental health therapist in May 2021.
23. The Claimant also provided a letter from her GP dated 29 September 2021 which provided the following limits information:
"She has seen us several times from 26/2/20 regarding work related stress. She has been seen by several different GPs including myself. Her stress seems to be triggered by incidents and allegations that have occurred at work. We have tried to employ several coping strategies including talking therapies. Her treatment is still ongoing."
24. However, the Claimant accepted during cross-examination that she was suffering from other sources of stress in the period leading up to 8 July 2021 including the following matters detailed in her GP records:
- 24.1 her health during the latter stages of her pregnancy and following her emergency caesarean section on 20 September 2020;
- 24.2 that she broke up with her partner in late August/early September 2020;
- 24.3 that her partner was unable to enter the UK around the time of her daughter's birth due to Covid-related restrictions;
- 24.4 that she experience muscle strain or RSI during October/November 2020; and
- 24.5 that her mother had asked her to leave the family home that they shared and she was struggling to find alternative housing in early June 2021.
25. I also note that the Claimant's medical records include her responses to the Whooley depression screening questions. The Claimant accepted that her responses to those questions indicated an improvement in her mental health on 1 October 2020, compared to 2 September 2020. The Claimant's medical notes for 14 September 2020 state:
"...Relationship with partner of 3 years broke down a few weeks ago. Sleep affected as over thinking about work. Despite all this she is looking forward to the arrival of her baby and making plans. No issues with appetite or concentration. Goes out for walks, meets friends, enjoys doing hair on her mannequins. No persistent low mood or loss of interest in activities. Discussed some self help strategies to manage stress and low mood...No other concerns expressed, no imminent risks identified today."
26. The Claimant's medical notes for 1 October 2020 state:
"Mood observations. Denies feeling of low mood or anxiety [the Claimant] feels 'overwhelmed with love' for her daughter...She reports that being a single [parent]

can be challenging but that she has good support from her family. Good eye contact made throughout visit....

Issues remain with HR department at work however [the Claimant is] trying to focus on baby and not let it get her down."

27. The Claimant received advice from her Trade Union and ACAS during this period:
 - 27.1 the Claimant joined her Trade Union on 25 February 2020 and spoke to them before lodging her detailed grievance on 10 March 2020;
 - 27.2 the Claimant was accompanied to the grievance and appeal meetings by her Trade Union Representative. Her Representative corresponded with her and with the Respondent about whether she would receive an apology following her appeal outcome (as set out in the Representative's email of 5 October 2020) and the Claimant chased up her Representative regarding this issue by email on 8 November 2020. The Representative also referred the Claimant's complaints to a solicitor, but the solicitor did not discuss matters with the Claimant;
 - 27.3 the Claimant stated in her witness statement that she spoke with ACAS on 9 September 2020 but *"I withdrew my case as I was going through depression and stress"*. The Claimant confirmed during cross-examination that the ACAS adviser explained the time limits for submitting a Tribunal claim to her at in September 2020;
 - 27.4 the Claimant later obtained an ACAS early claim conciliation certificate, relating to a period of ACAS early claim conciliation which started and ended on 24 June 2021;
 - 27.5 the Claimant submitted her Tribunal claim on 8 July 2021. She provided very brief details of her complaints in her claim form. She explained when I asked her why she did not provide further information: *"I don't know how the Tribunal works – I'm new to this – I didn't know that things have to be done, I just filled in anything....I was writing a summary. I didn't have much knowledge – I just wrote whatever came to mind"*.

28. The Claimant also stated during her oral evidence that she had obtained information about discrimination complaints from:
 - 28.1 the BAME society; and
 - 28.2 the Citizen's Advice Bureau.The Claimant did not provide details of those discussions, but she accepted that the Citizen's Advice Bureau's website referred to the time limits for submitting Tribunal claims.

29. In addition, on 17 December 2020 the Claimant asked her GP for a copy of her medical records and/or a GP letter summarising that information. The GP's notes state that the reason why she requested this was that she was "facing a potential racial case and prejudice against pregnancy". The Claimant agreed in cross-examination that she asked for this information from her GP to assist with her potential Tribunal claim.

30. My findings on these points are as follows:

- 30.1 the Claimant sought to resolve matters internally by pursuing a grievance and a grievance appeal with the Respondent. The Claimant received the outcome of her grievance appeal on 28 August 2020;
- 30.2 the Claimant was aware of the Tribunal's time limits on or around 9 September 2020 at the latest, having been advised by ACAS;
- 30.3 the Claimant's ill health during the latter stages of her pregnancy prevented her from submitting a Tribunal claim in September 2020;
- 30.4 the Claimant was able to correspond with her Trade Union Representative regarding the apology that she wished to receive following her appeal outcome in October and November 2020; and
- 30.5 by mid-December 2020 the Claimant had started to prepare for her Tribunal claim by requesting her medical records and/or a letter from her GP;
- 30.6 the Claimant referred to her daughter's ill health as a reason why she did not submit her claim at an earlier stage. However, the Claimant did not provide any evidence as to why her daughter's ill health prevented her from doing so, given that she was able to discuss matters with her union Representative and request her medical records. I also note that the Claimant's medical records do not refer to any difficulties caused by her daughter's ill health, despite containing detailed entries regarding multiple contacts with the Claimant during the months following her daughter's birth on September 2020;
- 30.7 the Claimant has not provided an adequate explanation of why she was unable to present her claim between the end of December 2020 and 9 May 2021 (when she contacted her GP regarding her anxiety relating to her forthcoming return to work following maternity leave).

Balance of prejudice

31. I must also consider the balance of prejudice to the parties. If I do not extend the time limits, the Claimant will not be able to proceed with her discrimination complaints. The Claimant was until recently a litigant in person, her current advisers having acted for her since late December 2021.
32. The Respondent would suffer prejudice in having to deal with complaints that are substantially out of time if I extend the time limit for the Claimant to bring her claim. I note that the Claimant stated in her oral evidence on two occasions that she was unable to recall certain events because they happened "*a long time ago*". It is likely that the Respondent's witnesses would have similar difficulties.
33. I am required to consider the merits of the Claimant's complaints as part of the balance of prejudice to the parties. In terms of the Claimant's complaints up to and including 10 March 2020, I note that:
 - 33.1 the Claimant started working for the Respondent on 2 December 2019. She stated in her claim form that she was on holiday from 20 December 2019 and returned to work on 21 January 2020. She states that she found out that she was pregnant later that day on 21 January 2020;
 - 33.2 the acts that the Claimant states in her witness statement amount to pregnancy discrimination as part of her claim form took place from 22 January to 6 February 2020;

- 33.3 the acts that the Claimant states in her witness statement amount to pregnancy discrimination and race discrimination took place from 18 February to 10 March 2020;
- 33.4 the acts that the Claimant states in her witness statement amount to harassment on grounds of race took place between 7 and 25 February 2020;
- 33.5 when I asked the Claimant why she believed that the later acts (but not the earlier acts) amounted to race discrimination and/or harassment, she said it was because the Respondent's staff accused her of possessing drugs in the office.
34. I note that the Claimant would be required to provide sufficient evidence to the Tribunal to show a prima facie claim for discrimination and/or harassment. I am not making findings of fact on these matters today. However, on the face of it (and without hearing any evidence from the Respondent), the Claimant appears to have a prima facie claim for pregnancy discrimination relating to her complaints between 22 January and 6 February 2020. For example, she complains that the Respondent failed to conduct a pregnancy risk assessment. However, it is more difficult to discern a prima facie link between the matters that the Claimant complains of in relation to race discrimination and/or harassment and her race. The Claimant states that she was the only black member of the team. However, I note that 'something more' than a difference in treatment and a difference in status is required to shift the burden of proof from the Claimant to the Respondent in discrimination complaints (see, for example, *Madarassy v Nomura International plc* 2007 ICR 867 CA).
35. I also note that the full details of the Claimant's claim are still unclear. She stated at the preliminary hearing in September 2021 that she wished to bring a further complaint regarding her team's failure to send her a congratulations card after the birth of her daughter on 20 September 2020 (which is the subject of the amendment application that I heard today). However, at this hearing she now states that she also wishes to bring additional complaints of discrimination relating to:
- 35.1 a complaint that HR had lost the Claimant's MATB1 form and requesting an additional copy on 8 July 2020; and
- 35.2 the Respondent's refusal to consider issuing the Claimant with a written apology as part of her grievance outcome, following a request by the Claimant's union Representative on 5 October 2020.

Conclusion

36. I have concluded that it would be just and equitable to extend the time limits for the Claimant to bring her claim to 31 December 2020. By that stage:
- 36.1 the Claimant's grievance and grievance appeal had concluded;
- 36.2 the Claimant had received advice from her Trade Union Representative and information from the Citizens Advice Bureau and others regarding her potential claim;
- 36.3 the Claimant had spoken with ACAS, who informed her of the Tribunal time limits;

- 36.4 the Claimant had recovered from her health difficulties relating to her pregnancy and her medical records do not contain any record of any further mental health concerns until 9 May 2021;
- 36.5 the Claimant had been liaising with her Trade Union Representative regarding obtaining an apology from the Respondent regarding her grievance outcome; and
- 36.6 the Claimant had requested a copy of her medical records from her GP in preparation for her Tribunal claim.
37. However, I have concluded that it would not be just and equitable to extend the time limit for bringing the Claimant's claim, such that the presentation of her claim on 8 July 2021 would have been in time. The key reasons for my conclusion are:
- 37.1 the Claimant has failed to provide an adequate explanation of why she was unable to present her claim between 1 January 2021 and 9 May 2021 (when she was referred to the IAPT mental health services by her GP);
- 37.2 the Claimant referred to her daughter's ill health but did not provide any oral or documentary evidence as to why this prevented her from presenting her claim; and
- 37.3 the Respondent will be prejudiced if the Tribunal extends the time limits such that the Claimant is able to pursue her complaints, which already date back nearly two years as at the date of this Judgment. In particular, I note that the Claimant herself was unable to recall details relating to her claim because the events took place "*a long time ago*".
38. I therefore dismiss the Claimant's complaints of direct pregnancy and race discrimination and harassment on ground of race.

CLAIMANT'S APPLICATION TO AMEND HER CLAIM (to include an additional complaint of race and/or pregnancy discrimination regarding her team's failure to send her a congratulations card, after her daughter's birth on 20 September 2020)

39. I decided to reject the Claimant's application, having considered the guidance in *Selkent Bus Co Ltd v Moore* [1996] ICR 836, subsequent caselaw and Guidance Note 1 to the Employment Tribunal's Presidential Guidance on General Case Management (2018). I note that the recent Court of Appeal judgment in *Adedeji v University Hospitals Birmingham NHS Trust* [2021] EWCA Civ 23 noted that the Tribunal is not required to refer to the list of factors set out in s33(3) of the Limitation Act 1980 as a checklist.
40. My key reasons for rejecting the application included:
- 40.1 **the nature of the amendment and applicability of time limits** - the Claimant's complaint regarding her team's failure to send her a congratulations card is a new factual complaint of race and/or pregnancy discrimination that was not set out in her claim form. The Claimant has not identified the individual (or individuals) whom she states were responsible for such failure or any comparator (whether real or hypothetical) for the purposes of her claim;

40.2 the timing and manner of application – the Claimant should have commenced ACAS early claim conciliation within a period of 3 months (less one day) from the date which she states that she should have received the card. The Claimant did not identify a specific date, but states she expected to receive a card within a few weeks of her daughter’s birth. I have assumed a date of 12 October 2020 as the date by which the Claimant expected to receive such a card. This means that the primary time limit expired on 11 January 2021. However, the Claimant did not refer to this factual complaint until the preliminary hearing on 15 September 2021 (around 8 months after the expiry of the primary time limit). For the same reasons stated above in relation to the Claimant’s original claim:

40.2.1 I have concluded that it would have been just and equitable to extend the time limit for the Claimant to submit the complaint regarding the congratulations card to 31 December 2020;

40.2.2 however it would not be just and equitable to extend the time limit for bringing the complaint regarding the congratulations card to 15 September 2021. This is because the Claimant has failed to provide an adequate explanation of why she was unable to present her claim between 1 January 2021 and 9 May 2021 (when she was referred to the IAPT mental health services) and between 24 June 2021 (i.e. when she contacted ACAS for a second time) and 15 September 2021.

40.3 potential prejudice to the parties (including the merits of the claim) - I considered the balance of injustice and hardship to both parties. I took into account the same issues that I considered in relation to the issue of the extension of time limits for the Claimant’s original claim at paragraph 29-33 above.

Employment Judge Deeley

2 February 2022