EMPLOYMENT TRIBUNALS

Claimant: Ms J Schemane

Respondent: Mace Limited

Heard at: London Central (by video)

On: 29 November and 2 December 2022

Before: Employment Judge Khan (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr J Platts-Mills, counsel

JUDGMENT

1. The judgment of the tribunal is that:

    (1) It is just and equitable to extend time for allegations (vv), (ww) and (xx).

    (2) It would not be just and equitable to extend time for allegations (a) to (n), (p) to (u), (x), (bb) and (dd), if they are not deemed to be in time (by virtue of section 123(3)(a) EQA).

2. By an ET1 presented on 20 November 2021, the claimant brought claims for race, disability and sex discrimination or harassment and victimisation, holiday pay, wages and other payments. The claimant also advanced a claim for protected disclosure detriment. The claimant withdrew the claims for protected disclosure detriment and unauthorised deductions from wages (and a second claim presented on 27 April 2022 for holiday pay) and a judgment dismissing these claims was made on 1 November 2022.

3. This public preliminary hearing was listed to determine, amongst other matters:

    (1) Whether the claims have been presented in time which shall involve consideration of (i) whether there was conduct extending over a period; and (ii) whether time should be extended on a "just and equitable" basis.

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

5. The claimant gave evidence. The respondent relied on the witness statement of Edward Goodwyn who did not attend to give evidence. The respondent produced a bundle of 602 pages. The claimant produced a separate bundle of 65 pages. I agreed to admit two emails relied on by the claimant, for the reasons I gave. The respondent provided a written skeleton argument and both parties made oral closing submissions. I considered all the evidence to which I was referred and the submissions that were made.

6. Section 123 of the Equality Act 2010 ("EQA") provides that:

> *(1)…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.*
>
> *…*
>
> *(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 not inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

5. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and amounted to an act of discrimination extending over a period. The test at this preliminary stage is no more than whether the claimant has established that the complaints are capable of being part of an act extending over time i.e. a prima facie case or reasonably arguable case (see Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548; Aziz v FDA [2010] EWCA Civ 304). Factors which are likely to be relevant, although not determinative, include: whether the same or different individuals were involved in the alleged incidents over the period in question; whether a rule, policy or practice was operative and applied to the claimant over this period; and whether there is a break of several months or more between the specified allegations.

6. The discretion to extend time on just and equitable grounds is the exception to the rule but does not require exceptional circumstances. The burden is on the claimant to show that this discretion should be applied. The tribunal has a very broad discretion which should not be fettered or filtered by the use of the checklist of factors enumerated by the EAT in British Coal Corporation v

Keeble [1997] IRLR 336. The correct approach is for the tribunal to assess and take account of all the factors in a particular case which it considers relevant (see Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR D5, CA; and also ABM University Local Health Board v Morgan [2018] IRLR 1050). A multifactorial approach is required with no single factor being determinative. Factors which will almost always be relevant are (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh) (see ABM University Local Health Board). Any explanation for the delay and the nature of any such reason are relevant matters but there is no requirement for a tribunal to conclude that there was a good reason for the delay before it can conclude that it is just and equitable to extend time (see ABM University Local Health Board). Another factor may be the disability itself (see Department of Constitutional Affairs v Jones [2008] IRLR 128, CA). The tribunal must also consider the overall prejudice that each party would suffer if the time limit were to be extended or not.

On whether there was any conduct extending over a period

7. The first question to decide was whether there was any conduct capable of extending over a period. The respondent's position was that (aa) to (vv) or (aa) to (xx) were capable of being part of the same conduct but in either case this was not part of the same conduct as (yy) and (zz), which were in time. The claimant's position was that all the allegations were part of the same conduct.

8. I agreed with the respondent that there was a prima facie case in respect of allegations (a) to (vv). I did not find it reasonably arguable that these allegations were part of the same conduct as allegations (ww), (xx), (yy) or (zz) because they did not have common alleged discriminators, were not of the same type of conduct and were not proximal in time, and nor was the claimant able to say in what way they were part of the same conduct, other than to make the general assertion that there was a common culture in place and she conceded that she was unable to link allegation (vv) with allegations (yy) or (zz). Nor, for the same reasons, did I find that that it was reasonably arguable that allegations (ww) or (xx) were part of the same conduct as allegations (yy) or (zz).

On whether to extend time on just and equitable grounds

9. In deciding this second question, I took account of the following factors:

    (1) The length of the delay: The claim was presented on 20 November 2021. Accordingly: allegations (a) to (uu), which I found were capable of being part of the same conduct, were presented more than three years and seven months out of time; allegation (vv) was presented more than three years and five months out of time; and allegation (ww) was presented more than two years and ten months out of time.
    (2) The reasons for the delay: I found that the delay was explained by the interaction of following factors: (i) the claimant's significant and ongoing poor mental and physical health since October 2017 (including: anxiety, panic attacks, insomnia, night terrors, nausea, foggy-mindedness, alopecia, adrenal fatigue, choking, long-Covid, and agoraphobia) which

I found had a significant impact on her functional capacity including cognitive processing, reading, writing, concentration, focus and decision-making; (ii) her financial stressors i.e. of being without pay for 12 months or more until May 2019, relying on foodbanks and loans, and the fear of losing her home; (iii) the grievances which the claimant brought in March 2018 and which were concluded in August and September 2021, in respect of which I found that: the list of 236 questions sent to her in June 2018 overwhelmed the claimant and consumed much of her time thereafter, she received the grievance reports and documents in December 2018, she attended grievance hearings in April and May 2019 following which she had a panic attack and was admitted to hospital via A&E, no further progress was made in 2019 and the claimant's health intervened in 2020 and it took her a year to go through all of the paperwork before she was able to re-engage with the grievance process in July 2021; (iv) the claimant's initial objective of obtaining legal support through her trade union for which she was advised, in July 2018, that she needed to exhaust the grievance process; (v) her ignorance, until late August 2018, that her claims were out of time (via a debt counsellor); (vi) her unsuccessful attempts to obtain legal support on a conditional fee basis in March 2021 when she was again told that her claims were out of time; (vii) her ignorance, until July 2021, that she was able to bring a claim that was prima facie out of time (via a barrister acting pro bono).

(3) The claimant's health: I have dealt with this above, to which I would add that I relied on the claimant's evidence in relation to her health and its impact on her, including her disability impact statement, which was not challenged by the respondent.

(4) The grievance process: I have dealt with this above and below.

(5) The involvement of the trade union: I have dealt with this above, to which I would add that I did not find that the claimant's union representative acted as a skilled advisor in relation to employment law and employment tribunal procedure.

(6) The claimant's ignorance of the law: I have dealt with this above, to which I would add that I took account of the claimant's focus on the grievance, not least because of the advice of her union representative, the impact and nature of her mental health and the fact that by the time she was advised about time limits she understood that her claims were out of time.

(7) The forensic prejudice to the respondent: I found that Mr Goodwyn's statement lacked particularity and substance and was of limited assistance: in respect of the effect of the passage of time on the cogency of evidence, there was a lack of clarity about which of the putative witnesses had been canvassed by the respondent's solicitors and in relation to which allegations so that the extent of any impairment on cogency was unclear; in respect of the willingness of the (four) putative witnesses who are no longer employed by the respondent to give evidence in these proceedings, in relation to the out of time allegations, this appeared to be an unsubstantiated and therefore speculative assertion as there was no evidence that the willingness of these witnesses to cooperate with the respondent had been ascertained and for completeness: Ms Melnicu was not an alleged discriminator; and there was likely to be some documentary evidence in relation to

allegations (vv) and (ww) which would be probative of the impugned conduct of Ms Patterson and Ms Johnson. I also took account of Mr Platts-Mills' submission that the claimant could have acted sooner in bringing her claim because she had already complained about the substance of the claim, in her email to Mr Elder on 18 September 2017 and her three grievances dated 6 March 2018, so that on the respondent's case there was a substantial degree of overlap between the claimant's grievance, which the respondent had investigated when it had interviewed several of the alleged discriminators which was capable, in my judgement, of mitigating the effects of time on the cogency of the evidence, to some degree. However, I found that the position in relation to Mr Pettit was different, in that the likelihood of his being able to give evidence, based on his current location was less uncertain. I explained to the parties that Mr Pettit would require the express consent of the German state to give oral evidence from Germany and that it has declined to provide such consent on each occasion that it has been sought to date it was highly unlikely that he would be able to give oral evidence from his current location. For completeness, I noted that whilst it was envisaged that Ms Pesconi and Mr Farmahini would be working overseas in 2023 their exact location was not specified and I was therefore unable to assess the likelihood of either being permitted to give oral evidence from abroad.

10. Taking account of these factors, and balancing the respective prejudice to the parties, I found that it would be just and equitable to extend time to 4 April 2018 so that allegations (vv), (ww) and (xx) were all deemed to be in time.

11. I also found, because of the likelihood that Mr Pettit would not be available to give evidence and also because many of the allegations against him were based on conduct, in respect of which there was unlikely to any probative or disprobative documentary evidence, that it would not be just to extend time in relation to the allegations which brought against him only i.e. (a) to (n), (p) to (u), (x), (bb) and (dd). It is worth restating that my assessment of Mr Pettit's availability was based on his current location and he may yet become available to give evidence at the final hearing if consent is sought and obtained from the German authorities or if Mr Pettit returns to the UK or moves to another state from which such permission is granted. I should add, because the claimant is a litigant in person, that in the event that Mr Pettit is available to give evidence then it is open to the claimant to make an out of time application to reconsider this part of my judgment, or for the tribunal at the final hearing to decide to reconsider this part of my judgment, on its own initiative.

Employment Judge Khan
22.12.2022
(Corrected 16.05.23)

JUDGMENT SENT TO THE PARTIES ON

17/05/2023

FOR THE TRIBUNAL OFFICE