



EMPLOYMENT TRIBUNALS

Claimant: Laura Honour
Respondent: Mercedes-Benz Retail Group Limited

Heard: By CVP (Watford)
Before: Employment Judge S. Matthews

On: 8 December 2022

Representation

Claimant: In person
Respondent: Miss Mallin-Martin (Counsel)

RESERVED JUDGMENT

It is just and equitable to extend time in respect of the Claimant's complaint of sexual harassment, but the question of whether there has been a continuing act of discrimination is reserved to the final hearing.

REASONS

The Issues

1. The issue to be decided today was identified at the case management hearing on 2 September 2022: The sexual harassment claim was clearly issued out of time. Is it just and equitable to extend time?
2. I had before me a bundle prepared by the respondent's solicitors. Numbers in brackets below are references to numbered pages within the bundle. Within that there is a witness statement by the claimant on the issue to be decided today (76). I took this as the claimant's evidence in chief together with a separate served document headed 'Response'. The claimant gave evidence under oath. I asked some further questions of the claimant as she was not represented. She was cross-examined by counsel for the respondent, Miss Mallin-Martin. I also had before me a Skeleton argument prepared by counsel for the respondent.

Findings of Fact

3. The claimant commenced work for the respondent, a car dealer, on 1 August 2020. She was employed as a 'Star Expert'. Her role involved advising

customers on the technical aspects of cars when a customer collected a car. She worked in conjunction with the sales team.

4. The claimant's employment terminated on 31 July 2021 as a result of her resignation on 13 July 2021. Her final day at work was 22 July 2021.
5. The claimant commenced proceedings for sexual harassment on 8 November 2021. The ACAS certificate commenced and ended on the same day. The respondent's case set out in the Response is that any instance or allegation of sexual harassment that occurred before 9 August 2021 is out of time. Alternatively (as set out in the skeleton argument lodged today) the primary time limit for proceedings expired at the latest on 30 October 2021 (three months less one day after her last day of employment). The claimant's claim was therefore issued at least nine days after the expiry of the primary time limit.
6. The claimant alleges a continuing act meaning that any events that occurred more than 3 months before the expiry of the primary time limit would be brought in time by being linked to events that occurred after the primary time limit. The events are listed in the case management order dated 2 September 2022. The claimant is unable to specify the dates of each event but will endeavour to do so once provided with disclosure. In evidence today the claimant said that the comments by NC continued through the month in which she left. I did not make a finding today on the last day of alleged continuing conduct but I accept the claimant's case that comments were made in the final month when considering the extent of the delay.
7. The claimant first contacted ACAS a few months before leaving the respondent's employment. In evidence today she said that her focus at that time was on how to deal with the situation while remaining in her job. She did not seek advice on bringing proceedings. ACAS advised her to speak to the Human Resources department.
8. From 23 April 2021, which would have been around the same time as she contacted ACAS, the doctor's letter attached to her statement confirms that the claimant was in touch on 'numerous occasions for very stressful situation' related to the alleged sexual harassment (77).
9. I accept the claimant's evidence that she felt too anxious to raise allegations of sexual harassment until she no longer had to go into work and face the alleged perpetrators. On 23 July 2021, the day after her final working day, she emailed the respondent with allegations of sexual harassment, stating that she was experiencing anxiety (60). On 6 September 2021 she referred to anxiety and panic attacks (63).
10. I find that during September and October 2021, the claimant was focused on dealing with HR as the way forward. She did not know or seek to find out about the 'ins and outs' of bringing a claim or time limits. She had not researched the legal position and did not contact ACAS at that stage or seek legal advice. She did state in an email to HR dated 16 September 2021 that she was 'happy to seek legal help from another source' (70) but the first time she went back to ACAS was 8 November, the day she issued proceedings.

11. Despite feeling able to inform HR of the names of the alleged perpetrators in her email dated 16 September (70) the claimant's anxiety was heightened again when HR asked for witnesses (71/72). She felt unable to name witnesses as they still worked for the respondent, and she was concerned they may face recriminations (70). From her point of view, the response to her grievance by HR appeared adversarial and she said in evidence that she felt that they were putting up 'hurdles'. In correspondence HR accused her of being adversarial (69). The claimant was also concerned that details of her complaint had been given to her work colleagues (73). It is clear that trust had broken down.
12. The claimant stated in evidence that her high anxiety made making decisions harder and she did not know if she could face the alleged perpetrators again. She said, 'the thought of bringing it up would make me feel sick, breathless, anything to do with it was really hard'. In the document submitted to the tribunal headed Response which I accepted as sworn evidence she says 'the reason I was late in reporting the incidents that happened to me at Mercedes-Benz was due to my anxiety that I have experienced due to what was done to me whilst working at Mercedes. My GP clearly stated this. My mental health, anxiety and the pure trauma of the situation is a very substantial reason for being unsure what to do and scared of reporting the people who have made your (sic) feel this way and naming those people'.
13. The bundle contains a 'Fit note' for the period from 1 September 2021 to 31 October 2021 (75), the claimant having self-certified from 22 July 2021 to the date of termination of her employment. The Fit note states that her condition is assessed as 'Stress at work'. It does not refer to an anxiety disorder, and the claimant confirmed in evidence that she was not prescribed medication or treatment such as counselling by her GP. She attributed this to work being the cause of her anxiety and it gradually subsiding once she left work. There was not an instant recovery but, as time went by, she says she managed to 'calm down', and she felt that she was getting better. When her Fit note ended on 31.10.21 she did not seek another one as she said she wanted to 'move forwards' and was 'not the type of person to want to sit at home'.
14. Although she did not seek a new Fit note at the end of October 2021, she described the period from 16 September 2021 when she was last in contact with HR and 8 November 2021 when she issued proceedings as a time when she 'never felt 100% confident', 'at every point very uncomfortable for me'.
15. When the claimant contacted ACAS on 8 November 2021, she realised her claim was out of time, filled in the claim form and issued it the same day.

The Law

16. Section 123 of the Equality Act requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.
17. Anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the

Employment Tribunals Act 1996). In doing so, time stops running during the period of the certificate, for the purposes of calculating time limit.

18. Counsel for the respondent has referred me to the 'Keeble checklist' (British Coal Corporation v Keeble [1997] IRLR 336). This sets out a list of factors that can be useful to take into account when deciding whether to exercise discretion to extend time. The factors are (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.
19. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to apply the Limitation Act checklist or any other check list under the wide discretion afforded tribunals by s123(1), although it was often useful to do so. The only requirement is not to leave a significant factor out of account, (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account, (paragraph 25). Nevertheless it is important not to lose sight of the fact that the burden is on the claimant to persuade the tribunal to extend time.
20. The relative prejudice to the parties and having regard to the overriding objective will always be considerations in exercising judicial discretion.
21. In Chief Constable of Lincolnshire v Caston [2010] IRLR 327 it was emphasised that the discretion to extend time in which to bring Tribunal proceedings has remained a question of fact and judgment for the individual Tribunals, on a case by case basis.
22. Counsel for the respondent drew my attention to the case of Watkins v HSBC UKEAT/0018/18/DA (4 July 2018, unreported) in relation to the extent the claimant's mental impairment impacted on the claimant's ability to decide whether to take legal action.

Submissions

23. The Claimant submitted that the reason she was not able to bring proceedings sooner or research the time limits and process for doing so was anxiety. The nature of her condition meant that she did not suddenly recover but as soon as she contacted ACAS and realised that there was a time limit, she issued proceedings that day.
24. Counsel for the Respondent submitted that the fit note stating 'Stress at work' was not sufficient evidence to establish why the claimant was not able to bring proceedings on time. There was no formal diagnosis of anxiety, and the fit note does not establish what physically prevented the claimant making a claim online. She submitted that the evidence indicated that she was well enough from 16 September 2021 when she gave names and details to HR.

Her ignorance of the time limits was not a reasonable excuse; she could have found out the answers.

Conclusions

25. In considering whether it is just and equitable to extend time I have borne in mind that the burden is on the claimant to persuade the tribunal to extend time. I have considered the length and reason for delay, the prejudice to both parties if the claim is allowed to proceed or not, and the claimant's promptness in acting once she knew the time limit had passed.
26. The length of the delay is relatively short. A time limit calculated from the date the claimant left employment would only be a delay of 9 days. I accept that the conduct may have ended before her effective date of termination, and I have taken this into account. Even if I accept the respondent's case that any event before 9 August 2021 was out of time the length of the delay is unlikely to be more than one month as I accept the claimant's evidence that NC continued to make comments within the last month of her employment.
27. I find that the claimant was consistent in her evidence that she was suffering from anxiety. She first referred to anxiety when she contacted HR after her last day at work. The evidence that she put forward today both orally and in writing confirms that her anxiety was present from at least April 2021.
28. I accepted her evidence that she did not feel able to bring a grievance before she left employment as she was frightened to confront the alleged perpetrators and because the medical evidence establishes that the situation at work was causing her anxiety from April onwards. This anxiety continued after she left employment such that it caused her to delay naming the alleged perpetrators to HR. The relationship of trust with HR broke down on 16 September 2021 for the reasons described at paragraph 11 above. This increased her anxiety which impacted her ability to address the situation.
29. Even though there was not a diagnosis of a specific anxiety disorder I accept that the claimant experienced debilitating symptoms when she thought about progressing her grievance with HR. I find that is why she did not research the legal procedure or time limits. The claimant described a reaction to trauma (paragraph 12 above). I do not make any findings about whether the events occurred in the manner described as that is a matter for the final hearing. I do accept the claimant's evidence that her perception of the circumstances caused a reaction which led to her delay in issuing proceedings.
30. In the claimant's perception HR were putting up hurdles in their approach to her grievance. As the claimant was not feeling robust enough to progress her grievance it is not surprising that she did not feel able to investigate making a tribunal claim. She was at a disadvantage because of anxiety symptoms which increased when she tried to face up to progressing her complaint. She was focusing her limited resources on dealing with HR and even then she was too anxious to pursue her complaint. I find that these factors were the dominant cause of the failure to pursue her complaint and remained so until the claim was made on 8 November 2021.

31. I find that her recovery from the symptoms was not instantaneous at the end of October 2021. Her recovery was a gradual process. I therefore accept the claimant's evidence that she was unable to submit a discrimination claim to the Employment Tribunal immediately after the end of her fit note, but she did so within a very short period of time. Once she was able to contact ACAS for advice she acted on the same day. I therefore find that the claim was issued within a reasonable further period by being issued on 8 November 2021.
32. The prejudice to the respondent is that the passage of time may have had an effect on cogency of evidence and possibly on the availability of witnesses. I take into account that the passage of time is relatively short and the claimant advised the respondent of details of her claim on 16 September 2021. Moreover, Counsel for the Respondent confirmed that the respondent is still able to call evidence from the relevant witnesses.
33. The prejudice to the claimant, if I find that the claims are out of time, is that she will be deprived of the opportunity of seeking adjudication on her allegations about the way she says she was treated by her former employers. I am therefore satisfied that the balance of hardship favours the claimant.
34. For those reasons I find that it is just and equitable to extend time, leaving to the final hearing, the question of whether there was a continuing act.

Employment Judge S. Matthews

Date 22 December 2022

RESERVED JUDGMENT & REASONS SENT TO THE
PARTIES ON

2/2/2023

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FOR EMPLOYMENT TRIBUNALS