



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Mesuria

Respondent: Eurofins Forensic Services Limited

Heard at: London South **On:** 3/3/2023
(Croydon) via CVP

Before: Employment Judge Wright

Representation:

Claimant: Ms P Baria – claimant’s sister

Respondent: Mr J Boyd - counsel

JUDGMENT

The claimant’s first claim was presented out of time. The Tribunal does not have jurisdiction to consider it and so it is dismissed.

REASONS

1. This hearing was listed on 5/12/2022 to consider:

‘... if any complaint presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 and if so should it be

dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including: whether there was “conduct extending over a period”; whether it would be “just and equitable” for the tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about occurred.’

2. Ms Baria said in her submissions that she had only prepared to deal with the time point, not the strike out. It was however clear that the hearing had been listed to consider strike out and in the alternative, a deposit order.
3. The claimant’s employment commenced on 24/9/1998 and she remains employed. She has been absent from work due to ill health since 3/8/2019. She started to receive 50% of her salary under the respondent’s permanent health insurance policy, through Unum in November 2019. She entered into Acas early conciliation between 25/6/2021 and 6/8/2021. Her claim was presented on 4/9/2021. Any act, unless it is an act or omission with continuing consequences prior to 26/3/2021 is therefore out of time.
4. The time limits are deliberately short in the Employment Tribunal. This is so that claims are presented promptly and are considered whilst matters are still fresh in the parties’ minds. If there is, as is currently the case, delay due to an oversubscribed system, the fact a claim has been presented promptly means that evidence can be preserved if the hearing is not going to take place for some time. Personnel move on and can be difficult to trace. Employment Tribunal time limits are not aspirational, they are deadlines. A lack of legal knowledge does not excuse, particularly when a simple internet search will reveal the time limits within approximately three clicks. There are numerous, well-known sources of information, such as Acas, CAB, the GOV.UK website etc.
5. The claimant entered into a second period of conciliation with Acas between 18/2/2022 and 31/3/2022 and presented claim 2301837/2022 on 10/5/2022. It appears the substance of the claim under the Equality Act 2010 is a repetition of the first claim. There is an additional claim of failure to pay holiday pay in January 2022 (it appears to be brought as an

- unlawful deduction from wages claim). The respondent accepts this holiday pay claim is presented in time.
6. The Tribunal spent some time at the outset of the hearing clarifying when the each of the claimant's allegations crystallised. The claimant's primary contention is that the claims are not out of time, as the date of knowledge was when the claimant was sent the Unum user guide on 6/5/2021, giving a limitation date of 5/9/2021 and hence she presented her claim on 4/9/2021. That time calculation does not account for the period of early conciliation between 25/6/2021 and 6/8/2021, which if the claimant's calculation was correct, would give a time limit of 16/9/2021.
 7. In the alternative, the claimant claims that there is ongoing conduct, as per s.123 (3) Equality Act 2010 (EQA), normally referred to as continuing conduct. It is not however clear from the claimant's case, what the end of the period is, so as to calculate the time limit. The further alternative is that it is just and equitable to extend the time limit. The rationale for that seemed to be in the main, the claimant's health issues.
 8. The respondent contends for the opposite. In the main, that the majority of the allegations are simply and substantially out of time. There is no continuing act and it is not just and equitable to extend the time limit.
 9. Going then through the allegations one-by-one, the first allegation of direct discrimination was failing to contact the claimant and to offer her support during her sickness absence from August 2018 (2.1.1); the respondent submits that may be a continuing act. Mr Boyd referred to the claimant's own note of a previous absence in 2016 when she stated in writing her Manager was contacting her every two weeks or so. Looking however at the substance of the allegation, the respondent submitted that it is going to be difficult for the claimant to demonstrate that a failure (if any) was because of the claimant's disability and referred to the 'reason why' the respondent omitted to contact the claimant or to support her. This cannot be related to the disclosure of the Unum user guide on 6/5/2021 and so even if that point was accepted, the date does not crystallise then.
 10. In the claim form there is a generalised allegation that the respondent did not check on the claimant's wellbeing, provide support or inform her regarding updates or changes at work. It is not enough to refer to treatment about which the claimant complains and a protected characteristic. The detrimental treatment has to be 'because of' the claimant's disability and there has to be a causative link. That link is not there.

11. In addition, the claimant's sister raised various complaints and concerns which the claimant had on 22/4/2021 (page 200), which were: holidays and holiday pay; payslips; and Unum paperwork. There was a further exchange of emails following on from this, culminating in a grievance outcome, following a meeting on 13/7/2021 (page 221) and a four-page grievance outcome letter dated 28/7/2021 (page 239). The headings in the grievance outcome letter are: procedural unfairness; repeated requests for information; dismissal from the company; knowledge of the Unum policy; failure to pay holiday pay and full salary in January 2019; failure to submit a claim to Unum; disability discrimination; and failures in the duty of care (owed to the claimant). Some of the claimant's grievances were upheld. It was not until the claimant's sister responded to that letter on 3/8/2021 (page 243) that she mentioned that during the entire year of absence commencing on 4/8/2018 that there was no communication from HR.
12. The Tribunal finds that this was the first time this omission was raised by the claimant. In any event, this must have crystallised in September 2019 when, on the claimant's own account and following an enquiry she made to HR on 3/9/2019 (page 155), the respondent contacted her to inform her entitlement to contractual sickness pay had ended on 16/9/2019 (page 156). There was then a referral to Occupational Health (OH) who reported on 30/9/2019 (page 157) and email exchanges, a meeting on 11/10/2019 which resulted in the claimant's dismissal under the capability process with the rescission of the decision to dismiss on 22/10/2019 (page 165).
13. The reason for the rescission of the decision to dismiss appears to be HR becoming aware that the claimant was entitled to claim under the Unum policy with the result that payments were made to the claimant in accordance with that policy from November 2019. This is detailed in the claimant's witness statement at paragraphs 41 to 51. Clearly the claimant accepted the reinstatement of her employment and also accepted any variation to her contract as a result.
14. It is also of note that the claimant stated at paragraph 56 of her witness statement, under the heading 2019; 'I was told I had a claim for injury to feelings and the time limits'.
15. The claimant's evidence continues that in February, March and April 2021 she made enquiries of HR regarding holiday pay. She received responses to these emails, which she says were unsatisfactory, in that they were holding responses. The claimant stated that she felt that her concerns

- were not being taken seriously and that she was being ignored. This view did not however feature in her complaint of 22/4/2021 and from that the Tribunal concludes, on the balance of probabilities, that although HR's response may not have been what the claimant wished for (immediate payment of what she said was outstanding holiday pay), that HR was in contact with her and support was offered, in terms of the respondent seeking a response from Umun in respect of the queries the claimant had raised.
16. The Tribunal therefore finds that any omission by the respondent crystallised in September 2019. If there was a second failure to act arising out of the same complaint from October 2019 to 2021, this ceased in February 2021. There is no continuing act, any allegation which pre-dates 26/3/2021 is out of time. It is not just and equitable to extend the time limit as the claimant (later via her sister) proved that she was capable, despite any ill health, to raise matters with the respondent and to the extent that the respondent was able to, it resolved matters, or at least informed the claimant of the difficulties or reasons for any delay.
 17. The second allegation of direct discrimination (2.1.2) is that the respondent failed to apply the Unum policy to the claimant sooner. It should have been applied from about the 10/11/2018 and it was not applied until November 2019, following the rescission of the claimant's dismissal.
 18. That claim is out of time and it is not a continuing act. The claimant said she was told about a claim for injury to feelings and time limits in 2019. It is also difficult to see how the reason for not applying the Umun policy in 2018 was because of the claimant's disability. The respondent's non-discriminatory explanation is that due to various acquisitions and changes in personnel, HR staff were not aware that the claimant had the benefit of the Umun policy. The 'reason why' therefore was a lack of knowledge, not less favourable treatment because of the claimant's disability. There is no just and equitable basis for extending the time limit.
 19. The third allegation of direct discrimination is failing to pay sums equivalent to her full salary from February 2019 (comprising of 50% salary from the Unum policy and 50% salary under contractual sickness pay) (2.1.3). Mr Boyd submitted, this allegation was tied to when cover under the Umun policy was applied to the claimant, so in November 2019. Certainly, any omission took place on the claimant's own case in February 2019. It is out of time. It is not a continuing act; if anything, it is an act with continuing consequences. It is not because of the claimant's

- disability. As already found, it is because of the respondent's lack of awareness of the Umun policy and that it applied to the claimant. For the reasons already provided, it is not just and equitable to extend the time limit.
20. The fourth allegation of direct discrimination is re-engaging the claimant on varied terms and condition in November 2019 which prevent her from being able to return to work at some point in the future (2.1.4). Whatever this allegation relates to, it clearly is a decision taken, based upon the claimant's own case, in November 2019. It is out of time and it is not a continuing act. It is not just and equitable to extend the time limit.
21. The fifth allegation was re-engaging the claimant on varied terms and conditions in November 2019 which did not provide for the payment of holiday pay (2.1.5). This is a decision taken in November 2019 with continuing consequences. It is out of time. It is not just and equitable to extend the time limit.
22. The final allegation of direct discrimination was a failure to make regular payments of holiday pay to the claimant alongside sums paid from the Umun policy (2.1.6). It was agreed this was a decision taken in November 2019 when the payments under the Unum policy commenced. It is out of time. It is a decision taken with continuing consequences. It is not just and equitable to extend the time limit.
23. The allegation in respect of s.15 EQA discrimination arising from disability, the unfavourable treatment was alleged to be failure to apply the Unum policy to the claimant's absence which began in August 2018 and instead subjected her to a capability procedure which resulted in her dismissal (3.1.1.). The date for this was agreed to be 11/10/2019 when the claimant was dismissed. This claim is out to time. It is not just and equitable to extend the time limit.
24. Under indirect discrimination, the PCP is alleged to be a practice of not information or training employees, including those in management, about the availability and operation of the Unum policy (4.1.1). This PCP was also relied upon for the indirect discrimination claim (5.2.1). This crystallised in November 2019 when the respondent applied the policy to the claimant. This is out of time and it is not just and equitable to extend the time limit.
25. The final discrimination allegation is of victimisation under s.27 EQA. This was discussed and it was agreed that the respondent would have become

aware of the claimant's potential claim during the period of early conciliation between 25/6/2021 and 6/8/2021. The claimant is not able to rely upon the presentation of the claim to the Tribunal, which was served upon the respondent on the 14/9/2021 as that event post dates the claimed detriment. The determinants were:

Fail[ure] to remove clauses objectionable to the claimant from the settlement agreement being negotiated between the parties, specifically those preventing the claimant from being able to make further claims or obtain further payments from the respondent; and

Fail[ure] to offer to pay sums relating to compensation for injury to feelings without deductions for tax. (6.2.1. and 6.2.2).

26. There is evidence in the bundle that Ms Broomhead of HR was corresponding with the claimant's sister in respect of the settlement agreement on a without prejudice basis from 3/8/2021 (page 248). The Acas conciliation officer emailed Ms Broomhead on 1/7/2021 and informed her the claimant was alleging direct discrimination and breach of contract (page 238). Ms Broomhead was therefore aware the potential claim and as such of a protected act. The Acas early conciliation certificate was issued on 6/8/2021. On the same date, HR informed the claimant they were aware the certificate had been issued by Acas and the settlement offer was conditional upon the claimant not commencing Tribunal proceedings (page 251). There was discussion about the tax treatment of the settlement offer. The claimant's sister confirmed the claimant would not appeal or 'lodge' Tribunal proceedings and asked for a draft agreement (page 252). The respondent in submissions conceded that the agreement was poorly drafted in that it was a precedent used when employment is to terminate, which was not the case here. The claimant's solicitor set out the legal objections to the draft agreement on 24/8/2021 (page 268). In the circumstances, the issues which the claimant's solicitor took were entirely reasonable. The respondent's solicitor replied on 27/8/2021 (page 270). They then engaged in further correspondence.
27. On the 2/9/2021 the respondent's solicitor informed the claimant's solicitor that if a claim was presented to the Tribunal, the settlement offer would be withdrawn (page 273).
28. An amended settlement agreement was sent to the claimant's solicitor on 3/9/2021 (page 274).

29. On 7/9/2021 the claimant's sister informed the respondent that a claim had been presented to the Tribunal on 5/9/2021 'in order to meet the statutory deadline' (page 307).
30. On the 15/9/2021 the respondent's solicitor emailed the claimant's sister and informed her that they would not make any further amendments to the agreement which had been sent on 3/9/2021 and the offer of settlement remained open until 22/9/2021 (page 310). It is not clear what then happened. The claimant's sister emailed HR on 20/9/2021 (page 311), the claimant's solicitor confirmed she was no longer acting for her on 22/9/2021 and that is the final document in the bundle (page 313).
31. Clearly, a binding settlement agreement was not entered into.
32. The respondent made some amendments to the agreement at the claimant's request. It did not agree to all of the amendments the claimant proposed. For example, as it had agreed to pay the sum of £12,000 which the claimant had requested for injury to feelings, without negotiation, it would not remove the tax liability which it expected the claimant to bare. The respondent was not prepared to expose itself to a potential tax liability of 20% or even 40% of £12,000.
33. It was clear from the correspondence that the respondent was prepared to compromise and wished to reach a settlement without the need for these Tribunal proceedings. The respondent did not concede every point the claimant had taken. The fact that the respondent did not agree to every amendment the claimant proposed was detrimental to the claimant. There was however nothing unreasonable about this and it was not because the claimant had done a protected act. If that were the case, the Tribunal finds that the respondent would not have made a settlement offer once it became aware of the claimant's protected act on 1/7/2021 (page 238) and would have withdrawn completely from the proceedings once the Acas certificate was issued, rather than continuing to negotiate with the claimant. The respondent's refusal to make the amendments the claimant had proposed was due to the respondent wishing to protect its legal position. It was not because the claimant had done a protected act.
34. The general observation is repeated that the claimant said that in 2019 she knew of the time limits. She was also a member of a Trade Union and had sought advice from it. Other than ill health (the claimant was not incapacitated), which did not prevent the claimant from engaging with the respondent from 22/4/2021, there was no cogent reason advanced as to why the Tribunal should exercise its discretion and extend the time limit.

There was no material change in the claimant's circumstances before and after the 22/4/2021. The claimant's sister was under a misapprehension that any time limit started to run from the 6/5/2021, that was incorrect and even if it were correct, the claim was still presented out of time.

35. The list of issues refers (at 8.1) to holiday pay due under the Working Time Regulations 1998. This claim however is not particularised and refers to holiday which had accrued but had not been taken when the claimant's employment terminated. The claimant's employment had not terminated when this claim was presented (the dismissal on 11/10/2019 was rescinded). There therefore cannot be such a claim before the Tribunal.
36. The final claim listed on the list of issues is for unauthorised deductions. The allegation is set as: 'Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?' It is not clear what this claim refers to. In the claim form, the claimant stated that she had a grievance meeting on 13/7/2021 and although the respondent did not uphold all her grievances, it agreed to pay the money she should have received under the Umun policy and she was paid £13,104.94 gross on 31/8/2021. There is no sum claimed in respect of unauthorised deductions in the claimant's schedule of loss. Furthermore, there is no entitlement to a payment in lieu of holiday pay whilst the claimant remains in the respondent's employ.

3/3/2023 [corrected on 26/5/2023]

Employment Judge Wright