



EMPLOYMENT TRIBUNALS

Claimant:

Ms P Fernando

v

Respondent:

Travelport International Limited

Heard at: Watford (via CVP)

On: 28 February 2023

Before: Employment Judge Fredericks

Appearances

For the claimant: Mr T Knowles (Lay Representative)

For the respondent: Ms A Greenley (Counsel)

JUDGMENT ON PRELIMINARY ISSUE

1. The claimant's claim in respect of detriment under section 47C Employment Rights Act 1996 and regulation 19 Maternity and Parental Leave Regulations 1999 is dismissed upon withdrawal.
2. The claimant's claims in respect of:
 - 2.1. Pregnancy and maternity discrimination contrary to section 18 Equality Act 2010;
 - 2.2. Direct pregnancy and maternity discrimination contrary to section 13 Equality Act 2010; and
 - 2.3. Direct sex discrimination contrary to section 13 Equality Act 2010,are all dismissed because they were presented out of time and it is not just and equitable to extend time.
3. The claimant's sole remaining claim in respect of indirect race discrimination is struck out because it has no reasonable prospect of success.
4. No part of the claimant's claim survives this hearing.

REASONS

Introduction

1. These reasons are produced at the claimant's request. I gave oral judgment at the end of the preliminary hearing. At the end of the hearing, Mr Knowles indicated that the claimant may wish to request written reasons. The judgment following the hearing was sent to the parties on 6 April 2023 and the claimant then requested these written reasons by email on 14 April 2023.

The issues for this hearing

2. The claimant had brought claims following her experiences of being employed by the respondent around her pregnancy and maternity leave in 2022. The claimant discovered she was pregnant and informed the respondent of this in January 2022. She then says that she was subjected to unfavourable treatment by the respondent. On 8 March 2022, the claimant requested to work from Sri Lanka and that request was denied by the respondent on 11 March 2022. The claimant contends that this was indirect race discrimination. The claimant also raised a grievance and appealed the unfavourable outcome in June 2022.
3. The claimant began early conciliation on 9 June 2022 and this concluded on 20 July 2022. Her claim was presented on 19 August 2022. Any claim relating to events taking place prior to 10 March 2022 was on the face of it brought out of time unless the claimant can establish that there is a continuing course of conduct or that it is just and equitable in the circumstances to extend time.
4. The respondent conceded that the indirect discrimination complaint was brought within time, but submitted that the issue around working abroad, pleaded as a separate indirect claim, did not link to the earlier events. It also submitted that the claim had no reasonable prospects of success because of the way it is put and that it should be struck out.
5. The issues for this hearing were, therefore:-
 - 5.1. *Do the events following 10 March 2022 form part of the same continuous course of conduct as those preceding it?*
 - 5.2. *If not, is it just and equitable to extend time so that those matters prior to 10 March 2022 are in time? (If not, the Tribunal has no jurisdiction to hear those claims)*
 - 5.3. *Should the claimant's indirect race discrimination complaint be struck out because it has no reasonable prospects of success?*

The position at the hearing

6. The claimant was represented by Mr Knowles, a tribunal representative from 'Premier Advocates'. The respondent was represented by Ms Greenley of Counsel.

I had access to a bundle of documents which ran to 66 pages. There had been some correspondence in the bundle about the claims, which I consider below, but it was apparent that the claims were not being articulated in a clear manner and that there was some confusion. In clarification, one of the heads of claim was dismissed upon withdrawal.

7. Unusually for a hearing listed to consider whether it is just and equitable to extend time, Mr Knowles did not call the claimant to give evidence. No witness statement was provided, although the claimant did attend the hearing. I mentioned within the hearing that I had been presented with no evidence from the claimant about the primary matters in respect of which it was submitted that time should be extended. Despite this hint, Mr Knowles did not then proceed to apply for the claimant to give oral evidence in the hearing. I considered whether I should direct her to give oral evidence but, in the circumstances where the claimant was professionally represented, I considered that I should not enter into the arena and provide this level of assistance to a claim which was being put with representation.
8. Generally, there appears to be some confusion about the nature of the claims advanced. The terms 'sex discrimination' and 'pregnancy discrimination' appear to be used interchangeably and there is reference to 'less favourable treatment' and comparators for pregnancy discrimination where the law does not require a comparator because the test is whether or not there is 'unfavourable treatment'. These points of confusion and lack of clarity appears to have contributed to significant time and cost between the parties in trying to understand the claims.

Relevant law on time limit and just and equitable considerations

9. Section 123(1) Equality Act 2010 sets out the relevant time limit for bringing a claim in the Employment Tribunal. That provision reads:-

“(1) Proceedings on a complaint under 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 proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

10. Conduct complained of which extends over a period of time is treated as being done at the end of the period (s123(3)(a) Equality Act 2010). In this way, where conduct is a continuous course, it does not matter if something complained of more than 3 months previously, so long as the last conduct within that chain is done within the 3 months prior to the bringing of the claim.
11. It is for the claimant to persuade me to exercise my discretion to extend time (Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298). That discretion is wide, and is to be exercised in response to the particular facts or circumstances of the case in question (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 CA; University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23).

12. In the usual way, considering what is 'just and equitable' to extend time involves balancing various factors which are common to situations where a Judge must consider whether to waive a breach of a time limit or some other order. This includes the length and reasons for the delay and, perhaps most importantly when considering fairness, where the balance of prejudice lies between the parties. This, in turn, includes considering factors such as the merits of the claim should it continue and whether the delay has resulted in any material degradation to the principles enshrined by the overriding objective.

Relevant Law – strike out under Rule 37(1)(a)

13. The relevant part of Rule 37 Employment Tribunal Rules of Procedure say:-

“37(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

...

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”

14. Caution must be exercised given the draconian nature of the strike out, and the ground relating to prospects should only be used in the most clear and obvious cases (QDOS Consulting Ltd & Others v Swanson [2012] UKEAT/495/11). It is rare for a claim of discrimination to be suitable for striking out because they are often very fact sensitive, meaning that the Tribunal will need to hear all of the evidence from both sides to be sufficiently certain of resolving the facts which will inform the outcome of the case (Mechkarov v Citibank NA [2016] UKEAT/41/16).

15. Plainly, it is not the case that discrimination complaints can never be struck out for lack of prospects where, for example, the claim as pleaded does not set out a cause of action in law or where a claim would not, even if all of the claimed facts are correct, constitute discrimination under the particular section being relied upon (Ahir v British Airways Plc [2017] EWCA Civ 1392). Where the claim as it is pleaded does not succeed as a matter of law, it is not in the interests of justice for it to continue because of the prejudicial effect to both parties from investing the time and cost litigating a matter for which the outcome is already clear. It would not be in accordance with the overriding objective to allow such a claim to continue.

Discussion and conclusion – just and equitable extension of time

16. Mr Knowles urges me to consider that the entire conduct complained of is one course which culminated in the decision not to allow the claimant to relocate to Sri Lanka, which is the sole complaint within the primary time period. I am being asked to consider that matters described a sex discrimination and/or pregnancy and

maternity discrimination are part of the same conduct which is complained of as race discrimination. The pleadings give the clearest indication of how to consider the different claims. The complaint relating to the refusal to work abroad appears at paragraph 19 on page 21. It is a standalone claim which does not reference the paragraphs or events before. It is expressed only as the claimant being "*discriminated against in respect to her national origin*". I do not consider that it is part of the same course of conduct.

17. I accept that the claimant made her request to relocate because of her pregnancy, but the complaint articulated about that is firmly rooted in race discrimination only and this remained the case even under some pressure in the hearing about the viability of that claim. In my judgment, this complaint does not connect to the earlier complaints through being the same conduct over time and so all other complaints are brought outside of the primary time limit and the claimant requires me to exercise my discretion to extend time in order for the Tribunal to have jurisdiction over those claims.
18. In my view, the length of time in the delay to bringing the claims which are, on the face of it, out of time, is not significant. The claimant complains of unfavourable treatment following disclosure of her pregnancy in January and February 2022. To capture these, early conciliation should have been started several weeks before it did. Given the backlog in dealing with Employment Tribunal claims, those weeks are not significant when measured against the amount of time it would have taken the case to come to trial. I do not consider that the delay would have a material degradation on the evidence available. However, length of delay is not the only factor to consider. The time limits are in place for a good reason and should be complied with unless I can be persuaded otherwise. It is not enough to request time is extended simply because the delay is a matter of weeks and not months.
19. Justification for delay can well lead to the conclusion that it is just and equitable to extend time. In this case, I was provided with no evidence as to the reasons for the delay. The claimant did not provide oral evidence and there was no documentary evidence in the bundle which might justify the delay or set out any impact following a failure to extend time in the case. It was submitted very broadly that the time limit passed because the claimant was trying to resolve the dispute informally. I am aware that there have been without prejudice discussions but I do not know the nature of them. The only information I have about the delay to bring proceedings is that there was a delay to the extent that all but one of the claimant's complaints have been brought out of time. Mr Knowles is not able to give evidence on his client's behalf, and it would be an error of law to treat his submissions as evidence in circumstances where the respondent has been unable to test that evidence with cross examination. I consider no reason has been advanced to explain the delay.
20. In terms of overall prejudice, Mr Knowles submits that the claimant would lose the opportunity to present claims to the Tribunal which she considers have merit. I accept that a refusal to extend time stops the claimant from access to justice about her complaints. This is a significant prejudice, particularly if I consider that the claim has good merits on the information I have.
21. I turn now to consider the merits of the claims in respect of which I am being asked to extend time. The respondent had applied for the direct sex discrimination claim

to be struck out in any event for having no reasonable prospects of success. This is on the basis that the claim pleads that an expectant mothers at risk form was not conducted because the person conducting it was a man and did not wish to conduct that assessment. It was also noted that the claimant had not introduced a comparator in respect of this part of the claim. In reply on page 65, Mr Knowles asserts that *"the obvious comparator would be a woman who is not pregnant"*. I therefore take this to be the claimant's position, as committed in writing and submitted with the bundle. It is plain that such a claim cannot succeed. A direct sex discrimination cannot be found if the comparator for the less favourable treatment has the same protected characteristic (ie. comparing two women). Even if in time, I consider this head of claim would have been struck out and so its merits are extremely poor.

22. There were several components to the claim relating to unfavourable treatment relating to the claimant's pregnancy. In my view, none of these claims had great merits at the time that I came to consider them (and there was no application to amend the claims). The claimant alleges that she was not allowed to work from home when pregnant without conditions. One of those conditions was that the claimant was not allowed to attend a meeting with her camera off when she felt ill. This stipulation, including being reminded of it when the claimant attended a meeting without her camera on, is said to be an example of unfavourable treatment. There is no dispute of fact about this area of the claim. It is accepted that the claimant had those conditions, as did everyone else, and it is accepted that the issue was commented upon when the camera was off. In my judgment, the argument that this is unfavourable treatment has limited merits. If the claimant was so unwell that she was unable to have her camera on in a meeting, then she likely should have been on sick leave.
23. Of the other claims, which Mr Knowles sought to explain in writing from page 60 to 66 of the bundle, no real assessment of merits can be made without hearing evidence which was not the purpose of this hearing. It is clear, though, that the description of those claims is not well articulated and it is likely that an amendment to the claim would be required to plead those facts. This would lead to further delay if the claims were to continue.
24. The respondent has responded to the claim on time and, on the material before me, appropriately. It requested this hearing because parts of the claim appear out of time without an explanation and because the prospects of the claims overall appear weak as they have been pleaded. In the circumstances, I consider that the respondent has followed an appropriate course of action and the claimant has suffered no undue prejudice by the respondent's actions. Conversely, the claimant has brought claims out of time with no reasons offered for the delay. Some of those claims appear fatally weak and, even after a morning of exploring the claims, I could not see an obvious route to their success without a wholesale amendment to what are quite confusing particulars of claim.
25. Given these factors, I consider that the balance of prejudice should the time to present the claim be extended would fall unfairly on the respondent. If time was extended, the claimant would need to apply to amend her claims to include some of the material offered as clarification. This would require another hearing. Even then, I note, the respondent considers that some elements of the claim should be

struck out. That would require further consideration, and more time and cost, in order to rectify problems with the claim as it has been put. I am not confident that the process would be efficient or timely.

26. All but the indirect race discrimination claim are brought outside of the primary time period. Although the delay is short, no reasons have been offered for the delay and the claimant has not articulated any persuasive argument as to why I should exercise my discretion to extend time. I might decide to do so where the merits of the claims appear particularly strong or capable of succeeding. Some parts of the claim appear fatally weak and I see no obvious problem with the respondent's position which would lead me to consider any other part of the claim is particularly meritorious (although I accept I have not heard evidence and that a final Tribunal could reach a different conclusion if the case reached that stage). In those circumstances, it would be highly prejudicial to the respondent for me to extend time in respect of these claims. Indeed, at least in respect of the parts which might otherwise be struck out, I consider it would also be prejudicial to the claimant for me to extend time and subject the claimant to further delay, stress and ultimately a risk of costs if parts of the claims are then struck out as the respondent requests.
27. Consequently, I do not extend time in respect of those claims. The claims are out of time and the Tribunal has no jurisdiction to consider them. Time limits are in place for a good reason and they should be complied with. I recognise this is disappointing for the claimant, but the claimant and her adviser (if engaged) bore the responsibility for bringing the claim in time and for bringing the evidence I might require to be able to exercise my discretion to extend time.

Discussion and conclusion – strike out of indirect race claim

28. To succeed with an indirect race discrimination claim, the claimant would need to show that the respondent had a provision, criterion of practice ("PCP") which was applied to her and to those without her race and which put her and those with her race at a particular disadvantage. She would then need to show the PCP put her at a particular disadvantage. The Tribunal would also need to be satisfied that the PCP was not a proportionate means of achieving a legitimate aim.
29. This claim is articulated around the respondent's refusal of her request to work in Sri Lanka for the last two months of her pregnancy. She says the respondent has a PCP that members of staff cannot work abroad. In my view, the claim is confused. In its application for strike out of the claim, the respondent wrote:-

"This claim is fatally flawed. It is pleaded under s.19 but no PCP is set out, it is not said what the group disadvantage is said to be nor any suggestion made as to how that might be established nor the particular suffered by the claimant. Instead, it is said that a white British female who made the request (to work from Sri Lanka) would not have been refused. That is not the basis for an indirect discrimination claim. Even were it a s.13 claim, it would be illogical. It is unclear how the claimant might establish a white British female would have been allowed to work from Sri Lanka. That request was denied on the basis of the claimant's health and the respondent would not have an office in that country/insurance implications/tax issues."

30. Mr Knowles' response to this was:-

"A white British female married to a Sri Lankan male like the claimant may have opted to work in Sri Lanka in the period leading up to the due date to give birth with the intention of giving birth in Sri Lanka. No OH report was sought in respect of the claimant's health and the respondent offered no evidence that the decision was based on a professional opinion. There are no tax implications for short stays less than 180 days and the respondent has offered no evidence to suggest otherwise. The claimant was discriminated against on the basis of her national origin which caused a disadvantage because she could not work whilst awaiting the birth of her child in the country of her choice Sri Lanka.

It is the respondent that says it is against their policy to allow staff to work in Sri Lanka."

31. The claim is pleaded under the section relating to indirect discrimination. The respondent noted that the claim might be best articulated as a direct discrimination claim, but Mr Knowles disagreed with this. In the hearing, it was only expressed as an indirect claim and no application was made to amend the claim to one of a direct race discrimination claim. Consequently, I was required to consider whether the claim had any reasonable prospects of success as an indirect claim.

32. In my judgment, the claim has no reasonable prospects of success. I assess the claim at its highest, as I am required to do. Even if I assume the respondent has a ban on relocating abroad as a PCP, which it applied to all and to her, I do not see how the pleaded claim can succeed. I do not see the relevance of a reference to a white woman who might wish to relocate to Sri Lanka in the same period. If there is a disadvantage in not being allowed to relocate to Sri Lanka, then that white woman would be similarly affected and so there is not a pleaded disadvantage to the claimant's racial group. There has been no application to amend, and so the claim cannot in my view succeed as a matter of law. I accept that strike out is draconian and should only be used exceptionally in discrimination claims. However, I consider that this is one of those rare occasions where the claim pleaded cannot succeed as a matter of law. The clarifications sought about the claim in the hearing did not shed any light on how the claim could succeed, and it did not shake out an application to amend the claim which could have put a claim on a more secure footing if it had been successful.

33. Consequently, the indirect race discrimination claim is struck out.

Disposal

34. At the end of the hearing, all of the claimant's claims had either been withdrawn, dismissed as beyond the jurisdiction of the Tribunal, or struck out. No claims continue and the matter is at an end.

Employment Judge Fredericks

Date: 25 May 2023

Case Number: 3310864/2022

Sent to the parties on:

26 May 2023

For the Tribunal Office: