CASE NO: 2602114/2022

EMPLOYMENT TRIBUNALS

Claimant: Mrs Parminder Dosanjh

Respondents: Reckitt

At an attended Preliminary Hearing in Public

Heard at: Nottingham **On: 21 February 2023**

Before: Employment Judge Clark (sitting alone)

Representation

Claimant: Mrs Dosanjh in person
Respondent: Mr MacNaughton, employment consultant

Judgment and reasons having been given orally at the hearing, these written reasons are provided on application under rule 62 of the 2013 rules.

REASONS

1. This was listed as a Preliminary Hearing to deal with Case Management but its purpose has been changed, and notice given to the parties, to an attended Public Hearing to determine a substantial matter in respect of time limits. Mrs Dosanjh claims unfair dismissal, sex and race discrimination and arrears of pay. There is no dispute that the claims were presented out of time. The question is whether time should be extended under the various test the Tribunal has power to consider.

2. Mrs Dosanjh attended without her trade union representative, Mr Baines. He had provided a brief witness statement in support of her claim. I explored with her his absence and her ability to proceed today without him. She elected to proceed.

Background Chronology

3. The basic chronology is not in dispute. The Claimant's employment came to an end on 28 March 2022. The claimant's claims relate to allegations of conduct and decisions by various managers over a lengthy period. Ultimately, these are said to lead to the claimant's resignation. This was dated 28 February 2022 and gave 4 weeks' notice.

4. Those events dotted over the preceding 3 years are said to be acts of direct discrimination. They are essentially allegations of detriments which are said to be less favourable treatment because of the protected characteristic of sex and race. Mrs Dosanjh is female and describes her race by reference to "brown skin colour" and and/or "Asian ethnic origin".

5. Against that brief chronology, the time limits set by the relevant provisions expired on 27 June at the latest. I say at the latest because some of these allegations occur earlier. They may form part of a continuing act if they were to proceed although I note that there are four different individuals said to be responsible for the treatment and, arguably, the only state of affairs in the Hendricks sense (Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686) that might bring those earlier matters within the scope of a continuing act would be that they are acts by the same individual. Of course, that would mean there could be four different strands of continuing act. However Kate Merryweather, Brett Hovey and Rabinda Kaur, are said to be responsible for a single incident each occurring between 2019 and October 2021. So whilst some of these incidents may contribute to a decision to resign and be related in that sense, in so far as they stand as discreet allegations of direct discrimination, the time against which the claims are measured go back substantially earlier than the effective date of termination and in some cases by as much as three years before the claim was presented.

6. Returning to the chronology the Claimant was assisted in her disputes by Unite the Union. They assisted her during her employment and that has continued subsequently. She has maintained her membership. She has been assisted by Mr Baines who was identified as her representative in this claim . He has corresponded with the Employment Tribunal in respect of this matter as has another local representative, Mr Fox, who has also supported the Claimant.

7. The ET1 was presented on 6 September 2022, that is over 5 months after the effective date of termination and about 2 months after the expiry of the relevant time limit. Those time limits can be extended by the operation of the relevant early conciliation provisions. Conducting "early conciliation" is, of course, also an essential precursor to engage in jurisdiction in any event. The Claimant did comply with early conciliation and the certificate shows she did that on Wednesday 29 June. Early conciliation continued until 9 August. There was then a period of 4 further weeks before the claim was presented.

8. There is no dispute that early conciliation was commenced after the relevant time limit had expired. The Claimant calculates this to be 1 day late. My calculation is that it is 2 days late as the time limit expired on 27 June. Nevertheless, nothing much turns on the extent to which it was late. The point is that on either calculation, the time spent in early conciliation did not operate to discount any of the days against the time limit set by the relevant provision having regard to section 207B of the Employment Rights Act 1996 and section 140B of the Equality Act 2010. For the same reason, the second extension provision under 207B(4) and its equivalent does not operate to extend the time for presenting a claim by a further month after day B.

Today's hearing

9. That much of the chronology having been identified on the pleadings, this matter was set down by Judge Butler to determine the question of extension of time.

10. I have today been able to go through the discrimination allegations set out in box 15 of the ET1 at some length. That was necessary as a first step to properly understand what happened, and importantly when it happened. To identify who the alleged discriminator was, what basis of comparison will be relied upon and, importantly, which of the two protected characteristics said to be engaged are relied on for each allegation.

11. I will come back to the answers given to those enquiries shortly because the nature of the timing, the nature of the individual strands of any potentially continuing acts and the merits of how the protected characteristics will be said to have been engaged raise question marks as to the merits of the claim. That in turn goes into the mix to some degree in the assessment of the just and equitable extension of time.

The Tests to Extend Time

12. The time limit to present a claim of sex and race discrimination is capable of being extended where I consider it to be just and equitable that a period of other than 3 months is used for the presentation of the claim.

13. Extending a claim of unfair dismissal applies a different test. That is subject to the "not reasonably practicable test". Even then, if I conclude that it wasn't reasonably practicable to present the claim in time, it will still not be extended unless the time in which the claim was presented is itself a further reasonable period.

14. The same test applies to any arrears of pay claimed. Technically that time runs from the date on which payment was due and the payment was less than that which was properly payable. I don't think I need concern myself with that today because such a claim could also be articulated as a breach of contract claim which does run from the effective date of termination and is also subject to the same "not reasonably practicable" test.

The Claimant's explanation for the delay in presentation

15. The Claimant's account is set out in her witness statement and I am grateful to her for complying with the orders and setting out the matters relied on. I want her to be assured that there is nothing in that witness statement that causes me any significant concern about the accuracy of what she said. The same applies to what she has told me in the further questions that have been explored with her to explain why ACAS early conciliation was not commenced or attempted until 18 June and the claim then not then presented until 6 September.

16. In summary, the Claimant had been assisted by her Trade Union throughout her employment and they continued to do so afterwards. I have no doubt that the two individuals concerned, Mr Fox and Mr Baines, were sufficiently aware as local Trade Union Representatives to know of her circumstances and of the background to her resignation.

17. She didn't immediately take any steps to bring any claim but did establish that she needed to contact ACAS which she did. That it was prompted initially by her contacting Citizens Advice Bureau in or around March/April of 2022. They provided advice which meant she sufficiently understood that there was a claim that could be brought, how it need to be presented and what steps were needed to do that. That understanding was further reinforced by a subsequent phone call to solicitors operating no win no fee services where a similar exchange of instructions and advice took place between. In both cases the Claimant has left those contacts with an understanding that she had a claim that could be brought before the Employment Tribunal and how to do it.

18. That is what prompted the Claimant to contact ACAS sometime around April or May which caused her to understand that it was necessary to comply with early conciliation before proceeding to present claims to the Employment Tribunal. Soon after that call, she made contact with Mr Fox and Mr Baines to get some more assistance to actually complete the process online. I accept that computer access is not something she is particularly comfortable with and she required some assistance but this is not something she is not reasonable capable of doing. It seems that that assistance wasn't immediately forthcoming. That was not because of any reluctance but simply due to the availability of either of the TU Reps. The earliest date seems to have been 18 June 2022 that they could meet. I find Mr Fox met with her and he assisted her to complete the ACAS notification online, at which date, had it been successful it would have been in time.

19. Commencing early conciliation would have had the effect of metaphorically stopping the limitation clock at that point as the days spent in early conciliation from the following day would not have counted towards the time limit. For reasons that remain unclear, the Claimant's attempt to submit a notification failed despite Mr Fox's assistance on the day. On the balance of probabilities, it is at the operator end where it went wrong and one of them cannot have executed it correctly; or completely; or the final stage was left unactioned so as to actually make the notification.

20. I have a lot of sympathy for the Claimant but, of course, at that time she was still in time. Confirmation emails are sent upon a submission being made to ACAS, at least where that is the method of communication with ACAS. The explanatory information

Sets out what will happen. The Claimant herself understood that she would receive an acknowledgement and believed that would come within 3 days. She waited the 3 working days, to 23 June, that is the Thursday of the following week. Having not then had a confirmation she telephoned ACAS. I have no doubt she did telephone them then and on later occasions. She says as much in her evidence which was not challenged and she has produced phone records to support that. What I don't understand, or accept, is the nature of the advice said to have then been given to her by ACAS. That was that there was no ACAS EC in her name that could be found, but she says she was then advised to wait a further 7 working days to see if an acknowledgement arrived. That I have trouble accepting as a fact, particularly seeing as it was in the Claimant's knowledge that time would expire on 27 June. Even if, for whatever reason, that is not a conclusion open to me she was nonetheless being adequately supported and had demonstrated sufficient understanding to make it reasonable that she did become aware of that date. What is also significant is that even at the time she became aware that the first ACAS notification had failed, there was still time to present the claim in time. Instead, the Claimant waited a further 7 days before calling ACAS again on 28 June and was again told that there was no ACAS early conciliation in respect of her and, of course, she still did not have a reference number. What has not been explained to me in the evidence is why, on that occasion, she decided to start the claim notification process again and why she did not just do that on 23rd. The significance of doing so now was that the time limit set by the relevant provision had by then expired. I find the advice at this stage was as I would expect it to be, that if there was no EC notification on the ACAS system, they would advise the caller to make a notification.

21. The weight to be applied to that becomes even heavier because of two things that then follow. One is that when she does commence EC again, it works perfectly well. Secondly, the claimant's evidence invites an inference that it was done on 28th, the same day as the phone call but in fact it wasn't. It is a matter of record that it was in fact done on 29th so there is yet another day of unexplained delay before it was attempted successfully. Moreover, it was done knowing that the claim was already out of time. EC was then allowed to continue without it having any effect on time limits for a further 6 weeks. When it did eventually conclude, even then it did not lead to a claim being presented for a further 4 weeks. I am not able to accept that there was a good reason for that delay. If the Claimant has a claim to bring through her own efforts and supported by her Trade Union, both with sufficient knowledge of the time limits, it was incumbent on both her and the Trade Union to act promptly particularly where it was clear the claim was already out of time.

22. The evidence of who received the email from ACAS is less than clear. The certificate was issued by email as it says as much. It was suggested it was sent to the Representative of the Claimant but I am told it was the Claimant's email that was provided to ACAS which seems to me far more likely to be the method and address for communication. Whatever the explanation, if Mr Baines or Mr Fox received the ACAS notification they were are acting as advisors to the Claimant to progress her claim within time. That has not happened.

The Respondent's Contentions

23. The Respondent's position opposes any extensions. It relies firstly, on the general disadvantage or prejudice it faces on a statutory limitation not being applied. There is no specific evidential prejudice put to me by way any examples of witnesses who may no longer be contactable and I note that there was some sort of grievance concluded May 2022. To a degree, that would tend to suggest that has been some preservation evidence relevant to that. However, I do accept that there is a general prejudice of delay in so far as recollection is concerned and particularly where some of these allegations go back as far as 3 years already. I also accept that the fact the grievance doesn't itself allege sex or race discrimination means it has not been on notice that that is the issue that the Respondent may have to meet so some this is not a case where one can entirely rule out some evidential prejudice emerging and it is a factor that has to weigh in the balance.

24. The Respondent principally argues, at least insofar as the just and equitable jurisdiction is concerned, is that when the 15 allegations are analysed, the protected characteristic does not engage. The crucial question of the reason why is explained repeatedly by the Claimant either as a rhetorical, "not sure why, perhaps it is sex or race". Alternatively, the treatment is described only as being unfair or picked on or bullied without reference to the protected characteristics. Indeed, alternative reasons are advanced such as that she was someone that spoke out or was constantly fighting for issues. Whilst there is nothing in principal wrong with alleging more than one protected characteristic to be engaged at the same time in respect of any treatment, one thing that does emerge is how the characteristic changes. To quote Mr McNaughton's phrase: *"The protected characteristic flip flops according to the comparator that can be identified. Race disappears where the only comparator is a male, sex disappears if there is a female comparator who was treated the same way".* Those are also matters that can be weighed to some degree in the balance.

Decision

25. Applying the tests as they arise, the "stricter" of the two tests is that relating to unfair dismissal and breach of contract and/or arrears of pay. The Claimant has to show that it was not reasonably practicable for the claim to be presented in time. (or to commence the early conciliation process in time). I have to accept Mr McNaughton's submission that this is a case where it patently was reasonably practicable: -

    a. The Trade Union had been engaged throughout
    b. The Claimant took more than reasonable steps to proceed and progress her complaints in time.
    c. She made arrangements with her Trade Union trade union advisers in time.
    d. She made her own enquiries at Citizens Advice.
    e. She made her own enquiries at no win no fee solicitors.
    f. She made direct contact with ACAS.

26. To the extent that the error in attempting to submit the early conciliation notification went unnoticed and could then be said to render it not practicable, the error was identified within time to put it right.

27. Against that background, there can't be any basis on which it could be said there was any obstacle of any nature to early conciliation being commenced within time, on or before 27 June 2022. On the basis that the Claimant hasn't established that it wasn't reasonably practicable to do so, the test fails to extend time for those claims.

28. That means it is not necessary for me to consider the second limb of the test. As an alternative, however, it seems to me that there is then a further period of 10 weeks of delay after the time limit expired without sufficient explanation as would make it reasonable so that I could have said the claim was presented "within a further reasonable period".

29. This is a case where the Claimant was relying on and entitled to rely on skilled advisors in the sense of her Trade Union representatives and if there is a failing on their part that's a matter that she may wish to address with them. On the other hand, she clearly had sufficient knowledge and ability herself to present the claim in time but did not.

30. Turning to the discrimination claims, these can be extended under the "just and equitable". This doesn't have the same strictness. It is for me to balance all the factors. I am not bound by the test in Section 33 of the Limitation Act, that is a similar test for disapplying the limitation period in claims for personally injury, but it does serve as something of a useful guide as long as it is only part of the analysis and any other relevant factors are taken into account. Other relevant factors could be, and are in this case, the merits of the case. However, there needs to be some caution about merits because this isn't a strike out application or a deposit order application but it is a factor that I am entitled to have regard to.

31. So far as the length and reasons for the delay is a factor, it seems to me there is a substantial delay. Firstly, in so far as there is delay from the effective date of termination, the claim is not presented for over 5 months. The reasons for that delay have not been adequately explained although I accept that there is an extent to which the fact that the failures maybe those of Trade Union do not rest with the Claimant quite as they do under the not reasonably practicable test. Nevertheless, the length and reasons for the delay become more weighty when I consider the time in which some of these allegations are said to have occurred, going back as far as March 2019. Some of the allegations are literally 3½ years before the claim was presented. These are claims which the law ordinarily requires to be presented within 3 months. even then, however, I am not determining the continuing act point in this application, although it does not jump out as an obvious point.

32. There is then the extent to which the cogency of the evidence is likely to be affected by the delay. There is a general deterioration, and I put it no higher than that because the Respondent doesn't point to any specific prejudice. I do accept that there was a general adverse effect whenever a witness is required to cast their mind back to recall verbal exchanges from 3½ years earlier although some of these exchanges are more recent.

33. I don't see that there is anything in the delay which could be laid at the door of the employer respondent, in the sense of not disclosing anything or being obstructive or failing to co-operate with any requests from the Claimant and that doesn't particularly assist either way.

34. The promptness with which the Claimant acted once she knew of the facts is a factor which carries some weight going against the Claimant because of the delay. First of all in commencing the process although she waited for her Trade Union to assist her. The first attempt at early conciliation was itself only matter of 9 days before the time limit would expire and then when things were known to have gone wrong so far as the time limit it took until 6 September for the claim to be presented. This isn't a case where the claimant acted particularly promptly. I remind myself that the Claimant is not required to show a good reason as a threshold before a just and equitable extension can be granted, but the reason for the delay is still a relevant factor to weigh.

35. The final factor are the steps taken to obtain appropriate professional advice once the Claimant knew of the possibility of taking action. Once again, there is no criticism in the fact she has acted perfectly reasonably in obtaining various lines of professional advice. The problem for the claimant in this case is that it has been obtained throughout the period during which the claim would have been in time and, indeed, before it started running. It weighs against extension because there remains an unexplained failing on the part of the Claimant and her advisors to promptly prosecute this claim.

36. The final factor in the mix is the merits. The essence of this claim focuses on the reason why the Claimant felt compelled to resign. The sad conclusion I have to come to is that so far as merits are concerned, that is the part of the claim which arguably had the strongest arguments. If she has been treated badly, if she has been treated unfairly, if she has been picked on or bullied as she suggests all of which may have accumulated to the point where the weight of concern was such that she decided to resign in response. There might well be reasonable arguments about a repudiatory breach, acceptance in response leading to the alleged constructive unfair dismissal. This claim certainly has the feel as to that being what was front and centre of the allegations. I say it's a sad because of course that is also the claim which is subject to the more stricter test which I have already concluded has to fail.

37. That aspect of the claim has gone but it leaves a shadow over the discrimination claims. When they are considered against the way that claim has been explained today, and particularly the causation, the merits are poor. Some allegations are positively expressed as being because of other non-discriminatory reasons. Indeed, the theme that the Claimant argued her corner, and I don't doubt she did so articulately and forcefully, is expressly said as being the reason why people such as Jim Hardy took against the Claimant. That is not related to either protected characteristic.

38. Whilst the merits may be a relevant factor, I am always cautious in the extent to which the merits can be given great weight if they fall at anything other than either extreme. This hearing has not considered merits in quite the same way as would happen on strike out or deposit order but I am reinforced that this should go into the mix by the

the fact that the protected characteristic has changed, albeit as alleged against the same wrongdoers depending on how the comparator stacks up in that case as a matter of convenience. It seems to me that whilst I am not expressly considering the test of strike out or deposit, this is a case that has at least little reasonable prospect of success.

39. The question then is why, against the apparent prospects of success, would it be just and equitable to allow it to continue out of time only to immediately impose a deposit on the Claimant as a condition of allowing her to continue in her claim. That may indeed expose the Respondent to costs that it can't recover and expose the Claimant to paying some of the costs against the Respondent.

40. This is a balance. Those factors are not the only issue for me to weigh or even the principal reasons. They add to the time limit, the delay, the effect on the evidence and the entire reasons why we are where we are. That leads me to a conclusion that it is not just and equitable to extend time to 6 September 2022. For those reasons both the claims of unfair dismissal and wages deductions and the claims of direct discrimination were presented out of time and the Tribunal doesn't have jurisdiction to deal with the matters. Tor those reasons I am afraid the claims have to be dismissed.

EMPLOYMENT JUDGE R Clark

DATE 18 May 2023