



EMPLOYMENT TRIBUNALS

Claimant: Natalie Hughes

Respondent: City of Liverpool College

Heard at: Manchester (in public; by CVP)

On: 19th June 2023

Before: Employment Judge Cline (sitting alone)

Representation

Claimant: In-person

Respondent: Mrs K Skeaping (solicitor)

JUDGMENT

- 1) The Respondent's application to strike out the Claimant's claims for race discrimination under Rule 37 of the Employment Tribunal Rules of Procedure because there is no reasonable prospect of the Claimant showing that the claims of discrimination were brought within such period as a Tribunal may think is just and equitable is refused.

REASONS

Background

- 1) Pursuant to paragraph 5 of the order dated 17th February 2023, an open preliminary hearing was listed in order to determine the Respondent's application to strike out the Claimant's claims for race discrimination on the basis that there is no reasonable prospect of the Claimant showing that the claims of discrimination were brought within such period as a Tribunal may think is just and equitable.
- 2) It was not in dispute that, the ET1 claim form having been issued on 15th June 2022 (and allowing time for the ACAS early conciliation period), any claim arising from an act which occurred prior to 14th March 2022 has been brought outside the statutory 3-month time limit. On that basis, the Claimant would need to establish that it is just and equitable to allow any such claim to continue nonetheless and the Respondent's position was that, in all the circumstances of the case, there was no reasonable prospect of a Tribunal exercising this discretion.

The Respondent's Submissions

- 3) The Respondent's position, as put by Mrs Skeaping, can be summarised as follows:
- a. The race discrimination claims relate solely to the Respondent's decision not to interview the Claimant when she expressed an interest in the position of assistant dean of academic studies; this refusal took place in September 2021 and the outcome of the Claimant's subsequent grievance was notified to her by way of a letter sent in December 2021;
 - b. On the face of it, such acts are significantly out of time as they took place before 14th March 2022;
 - c. The Claimant has, in preparation for this hearing, sought to rely on two further allegations from May 2022 (namely not allowing her appeal against the decision to uphold a formal improvement notice and the disregarding of college policies in relation to formal improvement notices) and one further allegation from August 2022 (namely unspecified treatment that led to the Claimant resigning from her employment), none of which has been raised before as the basis for her race discrimination claims;
 - d. These additional allegations have been raised at this stage in order to give the impression that the race discrimination claims arise from a continuing act such that the time limit issue does not arise;
 - e. However, there is no justification for these allegations being raised at such a late stage and it is nothing more than a disingenuous attempt to shoe-horn in further allegations to allow the earlier allegations to continue;
 - f. There is forensic prejudice to the Respondent if the claims are allowed to continue;
 - g. It is not just and equitable to allow the claims to continue for these reasons and, as such, no Tribunal could reasonably come to that conclusion;
 - h. It is therefore appropriate to strike out the claims or, if not, make deposit orders.

The Claimant's Submissions

- 4) The Claimant's position in response can be summarised as follows:
- a. She had no intention of being disingenuous and her point has always been that the race discrimination was ongoing throughout the whole academic year "underneath the surface";
 - b. She has had no legal advice and, although she was assisted by a union representative during her grievance procedures, she was not advised on time limit issues;
 - c. She received an addendum to the appeal dismissal on 21st January 2022 and the Respondent's policies dictated that this was the date on which the process ended, not in December 2021; and
 - d. This was a serious issue in her life and she needed to consider carefully whether or not to bring a claim as it would mean leaving her job and adding more stress and emotional toll to that which she was already experiencing.

Findings

- 5) Having considered the submissions made on behalf of both parties, I made the following findings:
- a. The delay in bringing the claim, even if taken from the later date of the addendum letter of 21st January 2022, amounted to some 7 weeks and, if the December decision is the relevant date, several weeks longer;
 - b. Whilst the Claimant no doubt found the whole episode stressful, her account was very unclear in terms of what advice she actually received regarding time limits and, after being asked a number of questions on this and appearing to alter her account at least twice, she agreed that she was aware of some sort of time limit but could not remember what;
 - c. Although the Claimant was not legally represented, she is clearly an

- intelligent and resourceful person who would have had no difficulty in establishing the applicable time limits and their importance;
- d. On her own account, the Claimant did not research time limits because she believed that the Respondent would, at some point, act more fairly (something which she herself admitted was somewhat naïve);
 - e. There is little evidential prejudice to the Respondent as one relevant witness, Rebecca Gooch, is already assisting with other aspects of the case and the other relevant witness, Ashley Griffiths, no longer works for the Respondent and there is no reason to suggest that this would be any different had the Claimant's claims been brought earlier;
 - f. There was no good explanation for why the Claimant is now raising new allegations from May and August 2022 in order to try and argue that the race discrimination was a continuing act;
 - g. Whilst the Claimant asserts that it was always her case that the race discrimination was continuous, the relatively small number of specific allegations made in her ET1 claim form are very discrete and are not suggestive of a continuing act; and
 - h. Given that the initial claims of race discrimination, as well as her claims relating to disability discrimination, were set out in some detail at the outset, although there is insufficient evidence to find that the Claimant has acted disingenuously, she appears unable to provide a good explanation as to why she has not set out further detail if, as she alleges, the race discrimination was constant and ongoing such that it would constitute a continuous act.

The Legal Framework

- 6) The race discrimination claim was brought under the Equality Act 2010. The time limit for bringing a claim appears in Section 123 as follows:

“(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –

(a) the period of three 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.

(2) ...

(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.”

- 7) The case law on the application of the “just and equitable” extension (and its predecessor in the Race Relations Act 1976) includes *British Coal Corporation v Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal (Smith L J presiding) confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in *Keeble*:

“that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in

particular, *inter alia*, to –

- (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 cooperated with any request for information;
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
- (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.”

- 8) However, the factors set out in *Keeble* are not an exhaustive list and the task of the Tribunal is to take account of all relevant factors, and leave out of account any which are not relevant: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640. Leggatt LJ said this at paragraphs 18-19:

“18. First, it is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, para 75.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time 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).”

- 9) In *Robertson v Bexley Community Centre (T/A Leisure Link)* 2003 [IRLR 434], the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis under the discrimination legislation. The Employment Tribunal has a “wide ambit”. At paragraph 25 of the judgment Auld LJ said:-

“it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

- 10) Subsequently in *Chief Constable of Lincolnshire v Caston* [2010] IRLR 327, the

Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

- 11) Also relevant is a decision of the Court of Appeal in *Department of Constitutional Affairs v Jones [2008] IRLR 128*. The Court emphasised that the guidelines expressed in *Keeble* are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. At paragraph 50 Hill L J said:-

“The factors which have to be taken into account depend on the facts, and the self-directions which need to be given must be tailored to the facts of the case as found”.

- 12) In paragraph 56 Hill LJ recognised that the Tribunal was entitled to take into account factors which affected the claimant in that case which were described as a “series of misfortunes”. This illustrates that the factors which may be relevant to the exercise of discretion are not confined to those enumerated in *Keeble*. They can include the merits of the complaint as well as the balance of prejudice: *Rathakrishnan v Pizza Express (Restaurants) Limited UKEAT/0073/15*, a decision of the EAT of 23 October 2015. The absence of a good explanation for the delay is relevant but not determinative.

Determination

- 13) In the absence of any significant forensic prejudice to the Respondent and in the absence of a clear basis upon which it could be said that the Claimant has sought to manipulate the Tribunal's process in order to bring her race discrimination claims within time, I rejected the Respondent's argument that there are no reasonable prospects of a Tribunal exercising its discretion at a future hearing so as to find that it is just and equitable to allow the claims to continue. I therefore rejected the application to strike out the claims.
- 14) However, for the same reasons, I did accept the Respondent's alternative argument that there is little reasonable prospect of the claims being allowed to continue such that deposit orders pursuant to Rule 39 were appropriate. Such orders have been made under separate cover.

Employment Judge Cline

Date: 19th June 2023

JUDGMENT SENT TO THE PARTIES ON

28 June 2023

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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