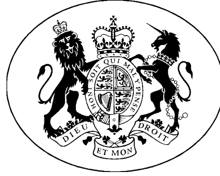

EMPLOYMENT TRIBUNALS

Claimant: **Ms T Seymour**

Respondent: **Homerton Healthcare NHS Foundation Trust**

Heard at: **London East Hearing Centre (via Cloud Video Platform)**

On: **3 July 2023**

Before: **Employment Judge M Brewer**

Representation

Claimant: In person
Respondent: Mr J Crozier (Counsel)

JUDGMENT

The tribunal does not have jurisdiction to hear the claimant's claims which are therefore struck out.

REASONS

Introduction

1. This public preliminary hearing came before me to do a number of things:

   a. determine the issues in the case,

   b. consider the respondent's application two strike out the claim,

   c. consider the respondent's application for deposit orders,

   d. if appropriate make case management orders including listing the case for a final hearing.

2. The claimant represented herself and the respondent was represented by Mr Crozier of Counsel. There was a bundle of documents along with a skeleton argument from the respondent. I heard submissions from both parties.

3. Unfortunately, the sound quality at the hearing was so poor that I did not feel it was fair on the parties to give an oral decision and therefore I reserved my decision and set it out in detail below.

4. In the period between the listing of this hearing and the hearing itself, the parties agreed what the issues in the case were and these are set out in a document at page 67 of the bundle.

5. In her claim, the claimant claims victimisation and direct race discrimination by association.

6. The victimisation detriment is an allegation that the respondent made changes to the structure of the Facilities Department because the claimant was a witness in a claim for race discrimination made by a colleague.

7. The race discrimination claim is an allegation that the claimant was associated with an individual who made a claim for direct race discrimination. The less favourable treatment is the same as the purported detriment in the victimisation claim.

Issues

8. The application to strike out is on the basis that the claimant's claim was submitted significantly out of time, and it is not just and equitable to extend time to allow the claim to proceed.

9. The issues therefore are:

   a. was the claim submitted out of time? and

   b. if so, is it just and equitable to extend time?

Law

10. The three-month time limit for bringing a discrimination claim is not absolute: employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so — S.123(1)(b) EqA.

11. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA,

> '*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'*

12. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require

this but simply requires that an extension of time should be just and equitable — **Pathan v South London Islamic Centre** EAT 0312/13.

13. The Court of Appeal in the **Robertson** case also stressed that the EAT should be very reluctant to overturn the exercise of an employment tribunal's discretion in deciding what is 'just and equitable'. In order to succeed, it would have to be shown that the tribunal took into account facts that it ought not to have done or took an approach to the issue that was very obviously wrong, or that the decision was so unreasonable that no tribunal properly directing itself could have reached it.

14. In exercising the discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in **S.33 of the Limitation Act 1980** (as modified by the EAT in **British Coal Corporation v Keeble and ors** 1997 IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular,

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 has cooperated with any requests 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; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

15. In **Department of Constitutional Affairs v Jones** 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. However, while a tribunal is not required to go through every factor in the list referred to in Keeble, a tribunal will err if a significant factor is left out of account — **London Borough of Southwark v Afolabi** 2003 ICR 800, CA.

16. The relevance of the factors set out in **British Coal Corporation v Keeble and ors** (above) was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 ICR D5, CA. In that case, the Court of Appeal upheld an employment judge's refusal to extend time for a race discrimination claim presented three days late. It noted that the judge had referred to the factors set out in S.33(3) of the Limitation Act 1980, following Keeble. As to the first factor, the length of and reasons for the delay, the judge had been entitled to take into account that, while the three-day delay was not substantial, the alleged discriminatory acts took place long before A's employment terminated, and that he could have complained of them in their own right as soon as they occurred or immediately following his resignation. As for A's assertion that he had mistakenly believed that he could benefit from an automatic extension of time under the early conciliation rules, the judge was entitled to take the view that this did not justify the grant of an extension, given that A had left it until very near the expiry

of the primary deadline to take advice and then chose not to act on that advice because he thought that the solicitors had misunderstood the position.

17. The Court of Appeal's approach in **Adedeji** was followed by the EAT in **Secretary of State for Justice v Johnson** 2022 EAT 1.

18. Finally, I note that a tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.

Findings of fact

19. The claimant was employed by the respondent from 26 July 2004 until 11 April 2022.

20. The claimant commenced early conciliation on 6 December 2022, and she received her early conciliation certificate on 9 December 2022. The claimant presented her claim to the tribunal on 16 December 2022,

21. The matter about which the claimant complains, the structural change to the facilities department, took place in February 2022 although it had been discussed and planned from October 2021.

22. In November 2021 the respondent issued a consultation paper regarding restructuring the facilities department administration team of which the claimant was a part. That consultation paper made it clear that the department would move from employing five people to employing just two. The claimant's role was one of those to be made redundant.

23. In the event, rather than seek alternative employment within the respondent, the claimant accepted voluntary redundancy.

24. The claimant says, although she provided no evidence of this, that one of her colleagues brought a tribunal claim in February 2021 and she was named on that claim form as, in some way, a second claimant. The claimant says that as the claim progressed her colleague was told at a preliminary hearing that he could not include the claimant in his claim, and that she would have to bring a claim in her own name. The claimant believes that that took place on 21 October 2022, and she says she was told about it on 22 October 2022.

25. As indicated above, the claimant then waited until 9 December 2022 before contacting ACAS for early conciliation. Once early conciliation was completed, the claimant then waited another week before she presented her claim.

26. It is also important to understand that in the list of issues agreed between the parties the two key issues which the claimant agrees the tribunal has to determine at a final hearing, should the case go that far are:

a. in relation to the claim of victimisation - did the respondent make the structure change as a result of the 'protected act claim' or because of the things mentioned in the claim,

b. in relation to the claim for direct race discrimination by association - did the structure change show favourable treatment to Mica Wallis, the senior administrator, compared to the claimant and the other administrators.

Discussion and conclusion

27. I shall consider first the length and reason for the delay.

28. The last date that something occurred which the claimant could legitimately complain about, looking at the agreed list of issues, was 1 February 2022 which is when the restructure was implemented. Even allowing for some slippage in the timeline, the claimant should have commenced her claim in late April or early May 2022.

29. Even if the claimant relies upon a misunderstanding and that she genuinely believed that she had presented a claim through her colleagues claim, once she was aware that this was wrong She waited more than two weeks before contacting ACAS and a further week after she received her early conciliation certificate and even though these periods are not excessive, given the delay that was already apparent at the time, even this small delay is significant.

30. The claimant confirmed that when she was considering how she had been treated in the restructure process she was a member of Unison, but she decided not to take any advice from them. The claimant also said that she decided not to take legal advice. The claimant confirmed that she had access to the internet.

31. The claimant was in the position of administrator and was clearly capable of undertaking research about bringing an employment tribunal claim should she have wished to do so. I consider that the claimant ought reasonably to have known how to commence her own tribunal claim well before the expiry of the time limit for commencing such a claim had expired. I consider that the reason for delay was her own failure to research and understand how to commence an employment tribunal claim. I consider that in the circumstances the delay was extensive, just over 8 months before contact was made with ACAS.

32. I have touched on the question of how promptly the claimant acted once she was aware that she needed to make a claim herself and I consider that in the circumstances although the delay at that point was just over two weeks, followed by a further week after receipt of the early conciliation certificate, in the circumstances that was a lengthy delay.

33. In relation to the cogency of the evidence, it is apparent from the pleadings that the respondent should have two key witnesses being Liam Trigg and Mica Wallis.

34. The importance of their witness evidence is as follows. The claimant alleges that Ms Wallis was placed into one of the roles which was not going to be made redundant in the facilities administration department, being a new role of facilities coordinator. The claimant alleges that the person who did that was the head of facilities, Mr Trigg. Neither of these individuals are employed by the respondent any longer and they cannot guarantee that they will be witnesses.

35. In the circumstances I consider that the cogency of the evidence will be adversely affected by the delay.

36. Of course, the key point is the balance of prejudice. If I do not extend the time, then the claimant is clearly prejudiced by the fact that she would not be able to pursue her claims. Conversely if I extend time then the respondent will be put to the time, trouble, and expense of defending those claims.

37. In those circumstances I consider it relevant to analyse as far as possible whether there is an arguable case based on the agreed list of issues and available documentation.

38. The key point is that in both the victimisation and the direct race discrimination by association claims the claimant asserts that the structural change to the facilities administration department was done respectively in order to victimise the claimant and to discriminate against the claimant because of race or more correctly because of her association with somebody who had made a race discrimination claim.

39. I consider that both of these claims are fundamentally misconceived. Of a department consisting of five people and five roles, four of the roles were made redundant and three of the four people in those roles were either dismissed by reason of redundancy or found alternative employment. It cannot possibly be argued in those circumstances that the claimant was victimised merely by the fact that these changes were made, but that is her case and I consider that it has no prospect of success.

40. In relation to the claim for race discrimination by association, even if I could understand what the claimant really means by this, the fact of the matter is her claim is that Ms Wallis was showed 'preferential treatment' as she puts it in the list of issues "*compared to the claimant and other administrators*" so it is difficult to see how she also says that her treatment was because of her connection to or association with an individual who had made a race discrimination claim. The claimant was treated no differently to two of her colleagues.

41. Furthermore, in a statement which the claimant sent to the employment tribunal in June 2023 she says as follows:

> "Liam [Trigg] created the senior admin role, which never existed within the previous structure and simply placed Thrina Fenech within this role. Thrina was a friend of Liam's then fiancé…. When Thrina was due to go on maternity leave Piotr Luc and Mica Wallis both applied for her post. Thrina divulged to me that her and Liam will be giving the position to Mica Wallis because she has known her for years and had been her manager previously…"

42. In short, on the basis of the claimant's own written statement, the reason Ms Wallis got the job and not the claimant or any other of the otherwise redundant staff was not to victimise the claimant nor to treat her less favourably because of her association with somebody who had made a race discrimination claim, but because Ms Wallis was favoured as a friend of either Mr Trigg and/or Ms Fenech.

43. This is relevant to my consideration of the balance of prejudice because although on the face of it if I am against the claimant she would have no claim, in truth her claim is so weak and flawed, the reality is she will not be prejudiced if I do not extend time

because she is very unlikely to succeed and that fundamentally shifts the balance of prejudice in favour of not allowing the extension of time.

44. For those reasons it is not just and equitable to extend time in this case and the claimant's claims are dismissed.

Employment Judge M Brewer

3 July 2023