EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Mrs P Sahib v **Experian Limited**

Heard at: London Central **by CVP** **On**: 24 July 2023

Before: Employment Judge Clark (Sitting alone)

Representation

For the Claimant: **In person**
For the Respondent: **Mr P Sands - Solicitor**

JUDGMENT

The Tribunal does not have jurisdiction to hear the claimant's claim, which was presented out of time. It is not just and equitable to extend time, accordingly, the claimant's claim is dismissed.

REASONS

Issues for Determination

1. This reserved judgment and reasons follow a public hearing set up by Employment Judge O'Rourke on 18 May 2023 to determine a preliminary issue in relation to time limits and, if necessary, to deal with the claimant's application to amend her claim form. The claim form was presented on 14 December 2022 alleging pregnancy/maternity discrimination dating back to December 2019 and March 2020. The claimant contacted ACAS on 21 November 2022 and an early conciliation certificate was issued on 8 December 2022.

2. The issues for determination at this hearing were set out in the case management record of the hearing dated 18 May 2023 to be:

   2.1 Was the pregnancy discrimination complaint (and if to be permitted as an amendment, the direct sex discrimination and victimisation

complaints) made within the time limit in section 123 of the Equality Act 2010?

2.2 The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

2.2.2 If not, was there conduct extending over a period?

2.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

2.2.5 The Tribunal will decide: Why were the complaints not made to the Tribunal in time?

2.2.6 In any event, is it just and equitable in all the circumstances to extend time?

3. The issues for determination in the full merits hearing (albeit subject to the claimant' application to amend her claim to add complaints of sex discrimination and victimisation) were established at the case management hearing to be whether the "respondent treated the claimant unfavourably by disciplining her/subjecting her to performance management in December 2019/March 2020?" Whilst the record of the case management hearing recorded this as June 2019/March 2020, the parties were both agreed that the reference to June 2019 was a mistake and it should have been December 2019 when the claimant was first placed on a performance development plan by her line manager.

4. Other issues would fall to be determined at the full merits hearing, but it is the allegations of unfavourable treatment which are material for time limit purposes. In the event that the Tribunal considered it has jurisdiction to hear the claimant's claim on time grounds, the claimant seeks to amend her application to add claims for sex discrimination and victimisation in the alternative to the existing section 18 Equality Act 2010 claims and to add further claims, including that a decision to bring disciplinary proceedings against the claimant whilst she was pregnant in June 2020 was an act of discrimination. The claimant submits that she mentioned the disciplinary proceedings in her claim form, although this was not identified as an issue in the case management hearing.

5. For the purposes of this hearing the Tribunal has considered the contents of a joint bundle of documents of 175 pages and witness evidence from the claimant, her father and from Miss Tennison the respondent's Head of Employees Relations and Human Resources in the UK and Ireland. The Tribunal heard oral evidence from the claimant and Miss Tennison. The claimant's father was unwell and did not attend the hearing. This was not a matter of concern, as the claimant was able to answer all relevant questions relating to the subject matter of her father's evidence.

6. The Tribunal took some time at the start of the hearing understanding how much of the listed issues for determination were realistically in dispute

between the parties. The claimant accepts that her claim form was submitted out of time, albeit she suggests that time should run from April 2022 when new information came to the claimant's attention, which prompted her claim rather than March 2020, when the final pleaded act of discrimination occurred. The claimant initially suggested that June 2020 should be the alternative date (when she was subjected to disciplinary proceedings), but the Tribunal explained that this would only become the relevant date were her application to amend successful. The Tribunal expressed the view that for the purposes of the extension of time application, a difference between March 2020 and June 2020 would not be material.

7. The respondent disputes any suggestion that placing the claimant on a performance development plan in December 2019 or marking her at 2 for her end of year grading in March 2020 constituted unlawful acts of discrimination. However, the respondent does accept that the two events are connected in that the end of year grading was informed by the PDP and were decisions taken by the same person (the claimant's then manager). For the purposes of this hearing, therefore, the relevant date from which the time limit runs would be March 2020 as being the last act in a connected series (of two). This streamlined the issues for determination by the Tribunal to that of whether it was just and equitable in the all the circumstances to extend time.

8. The claimant considered that Ms Tennison's evidence related to issues in the substantive case, as it concerned the potential availability of witness. It was explained to her that the Tribunal needs to balance the prejudice of allowing the claim to proceed out of time to the respondent with the prejudice to the claimant of preventing her from progressing the claim. This means that the availability of evidence is potentially relevant to the issues for determination at this stage.

9. There were no material technological issues during the hearing. On a couple of occasions the claimant's camera froze, although she could be heard throughout. These issues were quickly resolved by the claimant's leaving and immediately rejoining the hearing.

Factual Background

10. The claimant started work for the respondent on 15 November 2015 as a Consumer PR Manager. She is a graduate, with a degree in marketing, which included elements of market research. During her employment, the claimant had two periods of maternity leave. The first of those commenced in April 2018 and the claimant returned to work in June 2019. In December 2019 the claimant's then manager, Mr Lakhani, put the claimant on a performance development plan (PDP). This had never happened to the claimant before and she considered it was unjustified. The claimant was moved off the PDP in January 2020 as she had met all the required objectives, but in March 2020 she was given an end of year rating of "2" (which equates to underperformance/inconsistent performance) for the 2019/2020 year end. This was based on only 9 months work and the

claimant thought it was both unfair and influenced by her pregnancy or absence on maternity leave.

11. The claimant raised a formal grievance alleging pregnancy/maternity discrimination in relation to both events, but this grievance was not upheld. The letter confirming the outcome of the grievance was contained in the bundle of documents and is dated 6 May 2020. The claimant appealed against this outcome, but the appeal was unsuccessful. The respondent did not retain a copy of the outcome of the grievance appeal (due to an error), albeit the fact of its dismissal and the identity of the manager who determined is available to the respondent.

12. The claimant was prompted to raise an internal grievance following conversations with ACAS in the spring of 2020. The claimant was aware that ACAS have a role in providing information to employees about their rights and spoke to ACAS a few times and to more than one adviser about her rights. ACAS advised the claimant to raise an internal grievance as a first step and expressed the view that her claim might not be strong enough to succeed in a discrimination claim. The claimant could not remember whether she had also spoken to Citizen's Advice back in 2020 or whether ACAS advised her about the practicalities of making a Tribunal claim, such as time limits. She did not recall being told about the need for early conciliation. The claimant explained in her evidence that as this was over 2 years ago, she could not precisely remember all the advice she received from ACAS. The claimant did not take legal advice from a solicitor in 2020, as she did not know she could have done so. She could have paid for advice if necessary. She also contacted the charity "Pregnant then Screwed" in 2020, but did not get a response from them.

13. Having gone through the grievance process without success and then faced a disciplinary hearing the claimant described herself as "broken" and said that she did not think she had the evidence to bring a claim, so did not take matters any further. The claimant was pregnant with her second child at this time, had a period of sick leave and explained that her confidence had been affected by the PDP process. The spring of 2020 was also the start of the Covid pandemic. In response to questioning by Mr Sands, the claimant accepted that had she known of the Tribunal disclosure process, she might have lodged a claim in 2020.

14. In April 2020 the claimant informed the respondent of her second pregnancy and commenced her second maternity leave on 24th October 2020, returning to work on 1 November 2021. The manager about whom she had raised a grievance resigned from the respondent at around the same time, so the claimant returned to work to see if she could make things work and she was not thinking of bringing a claim against the respondent at that time.

15. The claimant resigned on 1st March 2022. Whilst she does not suggest this was in response to any new allegations of discrimination, she states she "could not get over her mistreatment" which forms the subject matter of this claim. By agreement, the claimant extended her notice period such that her final working day was 21 April 2022. On the day before she stopped

work, April 20th, the claimant had a conversation with a senior employee at the respondent, the Head of Corporate PR (Mr Jones) concerning the disciplinary proceedings to which she was subject in June 2020. Mr Jones told the claimant that he thought the respondent should not have put the claimant through the performance management process in 2020. He did not know why her manager at the time did so, but expressed the view that he was a "misogynist". It is this conversation which prompted the claimant's claim.

16. In addition to any work-related issues, the claimant had some very challenging circumstances in her private life. Both the claimant's father and her young son experienced serious health issues throughout 2022. It is not necessary to record the details, but suffice it to say, the claimant's father's health problems were life threatening and involved a number of hospital admissions in the course of 2022 as well as the need for high levels of care at home. The claimant was one of her father's carers along with her mother. The claimant's young son experienced worrying health issues and investigations over a 6 month period from April 2022. These included an emergency admission to hospital and an exploratory operation under general anaesthetic. In November 2022, the claimant's son was diagnosed with a long-term health condition and formulating a treatment plan continued into December 2022.

17. The Tribunal accepts that the claimant's caring responsibilities would have taken up her time and focus as well as an emotional toll on her in the six months following her resignation. It is against this background that the claimant contacted ACAS on 21 November 2022 and filed her claim form on 14 December 2022. She submits that once she was aware of the new "evidence" from Mr Jones, the delay in presenting her claim was a result of the extenuating circumstances set out above.

18. The respondent submits that an extension of time in these circumstances would cause prejudice to the respondent. Should the claim proceed to a full merits hearing, the respondent would wish to adduce evidence from Mr Lakhani, the manager alleged to have discriminated against the claimant and Mr Ashwood, the manager who chaired the claimant's internal grievance about the alleged discrimination. Mr Lakhani ceased employment with the respondent in November 2021 and Mr Ashwood in October 2021. The respondent has not retained their contact details. Further, the respondent introduced an email retention policy at the end of 2021, which means that from the start of 2022 emails were automatically deleted after 180 days (in so far as they were not transferred to a data repository) and this had the same effect on historic emails. Documentation concerning grievance and disciplinary proceedings were deleted after one year and three months (five quarters).

19. For the purposes of this claim, the email accounts for the claimant, Mr Lakhani and Mr Ashwood have all been deleted and cannot be recovered. None of the documentation concerning the PDP process or the end of year grading from March 2020 will have been retained. In so far as there would have been documentation or messages stored in Microsoft Teams, these

would no longer be available. Whilst the respondent has retained the decision letter in relation to the claimant's grievance dated 6 May 2020, the equivalent appeal letter has not been kept. The surrounding documentation concerning the grievance (such as investigation reports, minutes etc) would have been deleted in accordance with the respondent's policy in September 2021. An individual's electronic HR file would keep a record of the bare outcome of grievance and disciplinary procedures for 7 years. Miss Tennison explained to the Tribunal that in cases where the respondent considers there is a risk of litigation, the respondent would be saving emails into a case file, so that they were not routinely deleted in accordance with the email retention policy.

The Law

20. The substantive law concerning discrimination time limits is contained in section 123 of the Equality Act 2010. The relevant parts of the section provides that:

"

(1) *"Subject to sections 140(A) 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;"

21. This preliminary hearing was set up to consider the time limit as a preliminary issue under rule 53(1)(b) rather than rule 53(1)(c) (strike out). Generally, the case law suggests that the determination of whether a series of events amount to conduct extending over a period should be left to the full merits hearing (*Commissioner of Police of the Metropolis v Hendricks [*2003] ICR 530 and *Aziz v FDA* [2010] EWCA 304). However, in the current claim, it is conceded that the two allegations of discrimination identified in the list of issues were connected (albeit the respondent maintains they were not acts of discrimination).

22. The "just and equitable" extension in section 123(1)(b) gives the Tribunal a broad discretion to extend time, albeit there is no presumption in favour of granting an extension. It falls to the Claimant to prove that there are grounds to extend (*Robertson v Bexley community Centre t/a Leisure Link* [2003] IRLR 434). The factors set out in section 33 of the Limitation Act 1980 are likely to be relevant to the exercise of the Tribunal's discretion, but there may be other factors and the 1980 Act factors are not a "checklist". The length and reason for the delay will clearly be relevant, as may be whether the Claimant has had access to legal advice and what prejudice might be caused to either party by the grant or refusal of an extension. One of the factors under section 33 of the Limitation Act 1980 relevant to the facts in this case is "extent to which the cogency of the evidence is likely to be affected by the delay".

23. In additional to the authorities above, the Tribunal was referred to a number of authorities by Mr Sands on behalf of the respondent as follows: *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*, at paragraph 24 in which Lord Justice Underhill outlined the public interest in the enforcement of time limits; *Abertawe Bro Morgaanwg University Health Board v Ferguson* [2018} EWCA Civ 640 at paragraph 19 in which it was said that "*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*)." In *Bowden v Ministry of Defence* [2017] UKEAT/0018/17/LA the EAT (at paragraphs 37 to 39) held that the distinction drawn in the context of the unfair dismissal time limit between ignorance of a right itself rather than the practicalities of enforcing it holds good for discrimination cases. *Inchcape Retail Ltd v Shelton* UKEAT/0142/19/JOJ outlined (in the context of an unfair dismissal claim) that claimants can generally be expected to use the internet to find information about how and when to bring a claim (subject to their educational and linguistic abilities.

<u>Conclusion</u>

24. The time limit for a discrimination claim runs from "the date of the act to which the complaint relates" – or in a case where there are a series of acts, the last of those. In this case, having regard to the list of issues, the most recent act of unfavourable treatment alleged occurred in March 2020 (when the claimant was given an end of year performance rating of 2, consequent on the early PDP). The precise date was not before the Tribunal, but, as explained to the parties at the start of the hearing, had that date been June 2020 (in accordance with the claimant's application to amend), there would have been no material difference to the outcome.

25. The claimant refers in her witness statement to a "slight delay" in presenting her claim form, but this makes the assumption that the time limit starts to run from 20 April 2022 when the claimant's colleague expressed the view to her that her previous manager was a misogynist. Whilst a subsequent discovery of new evidence can properly impact on the second question for the Tribunal (as to whether it is just and equitable to extend the time limit), it does not change the primary time limit. The time limit for the claimant's claim expired in or about early July 2020, three months from March 2020 when her end of year grading was 2.

26. It is of some relevance in this case that the claimant was aware of the potential for a discrimination claim in 2020 and genuinely believed that her treatment in 2019/2020 was influenced by her maternity absence. She sought advice from ACAS on that basis and raised a formal grievance alleging discrimination. The claimant decided not bring proceedings in 2020, not because she thought that no discrimination had occurred, but on the basis of an assessment of the evidence then available to her (informed by a suggestion from ACAS that she might not be able to prove discrimination). This was compounded by her own lack of knowledge of the Tribunal discovery process and the fact that being put on the PDP had knocked her confidence. The claimant is a graduate and well able to

conduct and interpret online research or, as she accepted, could have paid for legal advice in 2020. Taking either of these options might well have led to her initiating timely proceedings.

27. What the claimant was told by Mr Jones in April 2022 has, understandably strengthened the claimant's long held view that being put on a PDP in 2019/2020 was connected to her pregnancy/maternity (or more broadly her sex), albeit Mr Jones was not involved in the PDP or grievance which forms the subject matter of these proceedings, but the later disciplinary hearing, when the claimant was exonerated. Quite how significant Mr Jones' stated opinion about Mr Lakhani might be to the claimant's case is unclear, given the limited evidence before the tribunal as to the substantive issues.

28. It is now more than three years since the events in question, which presents evidential challenges. As the claimant herself explained during cross-examination, she cannot remember whether ACAS advised her of the Employment Tribunal time limit or the need for early conciliation back in 2020, because it took place over three years ago. Not only do memories fade with the passage of time, but evidence can be lost and in the particular context of an employment claim, mobility in the workforce can make it challenging for a respondent to adduce evidence from the relevant decision makers in an historic claim. That is precisely what has happened in this case. The respondent has not made specific inquiries as to whether Mr Lakhani and Mr Ashwood can be found (for instance, via Linked In or colleagues who might still be in touch with them), so the Tribunal cannot be satisfied that they are untraceable. Even if they can be found, whether they would be willing to give evidence without a witness order is unknown and how much they will be able to remember of events in 2019/2020 in a previous job must also be questionable.

29. Whilst the respondent can be criticised for failing to retain the outcome of the claimant's grievance appeal, there is no suggestion that the respondent has deliberately concealed or destroyed evidence generally to ensure that the claimant did not bring a Tribunal claim. The deletion of emails and other documentary records has occurred in accordance with a company policy (of which the claimant was aware) for reasons related to data storage capacity and GDPR. Had the claimant brought a timely claim (or even a claim a matter of months out of time), all the relevant documentary evidence would have been available to the parties and the Tribunal. In a case where evidence would be given about events which occurred over three years earlier, the contemporaneous documentary evidence is the more important to refresh the witnesses' memories of what happened. The Tribunal at the full merits hearing would need to examine the evidence in the run up to the PDP to determine whether there were legitimate business/management reasons for it and/or whether it was tainted by discrimination. The tone and content of written communications are important, but most of the documents which the Tribunal would normally expect to see in a case like this would be missing. This significantly impacts the cogency of the evidence available.

30. The Tribunal has to balance the hardship to the claimant in preventing her from bringing her claim with the potential prejudice to the respondent in having to defend an historic claim which it reasonably assumed the claimant would not make. Not only had the time limit long passed, but

events had also moved on. The alleged perpetrator had left the respondent's employment and the claimant had returned to work from her maternity leave in the autumn of 2021, so there was nothing to suggest that the claimant might bring a Tribunal claim, such that the respondent should have retained historic documentation. The delay in lodging a claim has had a material impact on the possibility of a fair hearing.

31. All other things being equal, the Tribunal would have accepted that the challenges in the claimant's personal life explain and excuse the delay in her making a Tribunal claim between April 2022 and December 2022, but that is to ignore the fact that the claimant could have made a claim in 2020 or even late 2021, when the various evidential difficulties with the claim would not have been present. Whilst Mr Jones is presumably available to provide oral evidence of events in June 2020, the allegations of discrimination currently before the Tribunal (whether labelled as pregnancy/maternity related or sex) concern the PDP in December 2019 and the end of year rating in March 2020, in which he was not involved. Even if the two most relevant witnesses can be traced (Mr Lakhani and Mr Ashwood), their memory of the detail of actions taken in a former role three or four years earlier (by the time of a full merits hearing) will be hazy at best. As almost all of the potentially relevant emails and other documents have been deleted, a fair hearing for the respondent simply would not be possible. For this reason, together with the fact that the delay itself was so long, the Tribunal is satisfied that the prejudice to the respondent in extending time outweighs that to the claimant in failing to do so. In all the circumstances, it would not be just and equitable to extend the time limit.

H Clark

Employment Judge H Clark

Date: 26 July 2023

ORDER SENT TO THE PARTIES ON

27/07/2023

FOR THE TRIBUNAL OFFICE