



EMPLOYMENT TRIBUNALS

Claimant: Ms C Edwards
Respondent: (1) LB Hammersmith and Fulham
(2) Anthony Muga
(3) Daryle Mathurin
(4) Nick Dottin

Heard at: London Central (by CVP)

On: 10/11/2023
Before: Employment Judge Mr J S Burns

Representation

Claimant: In person
Respondent: Mr F McCombie (Counsel)

AMENDED¹ JUDGMENT

1. The claims of direct sex, race and age discrimination are struck out.
2. By consent, the Claimant is granted permission to amend her claim to bring a victimisation claim as detailed in the Schedule to the CMO issued today, but otherwise her application to amend is refused.
3. Dominic Ward-Horner and Peter Haylock are released as Respondents from the proceedings.

REASONS

1. I read a witness statement from the Claimant and was referred to the following documents:
 - a bundle prepared by the Respondent of 2494 pages:
 - A powerpoint file entitled "2022_02_08 Pat Bunche mistaken identity",
 - a separate further zip folder of documents obtained by the Claimant via a DSAR,
 - a Claimant's witness statement of 93 pages
 - written submissions from Mr McCombie.
2. Mr McCombie declined to cross-examine the Claimant on her witness statement. I received oral submissions from both parties. The first part of the hearing was difficult because of the Claimant's poor internet connection but she was then able to connect by telephone so communication after that was clear.

¹ To correct some typographical and grammatical errors

The timing of the claims

3. The Claimant applied for EC certificates against all Respondents on 6/2/23 and the certificates were issued on 21/2/23. The ET1 was presented on 19/3/23. Any act or omission which was completed before 7/11/22 is prima facie outside the primary time limit.
4. EJ Snelson had directed that the Claimant should produce a witness statement to deal with the timeliness of her claims and, if they were out of time, the reasons why it would be just and equitable to extend time. In response the Claimant produced her 93 page statement which set out a detailed chronology of her work problems since 2017 to date, but which does not focus on or refer directly to the matters for which she had been directed to produce it. This statement was sent to me only at the beginning of the hearing but during the hearing I gave the Claimant an extended opportunity to address me on the timeliness issue, to point out to me any matters in her witness statement or in the bundles that she wished and I then adjourned so as to be able to consider all the relevant material carefully before making my decision in this matter.
5. The direct discrimination claims were identified at the previous hearing by EJ Snelson. I have set them out in italics below:

Claim 1: Direct sex discrimination : Treating the Claimant less favourably than Mr Richie Adeyeye, her comparator, in 2017/2018 when new posts were created following the end of the 'Tri- borough' arrangements in that his appointment was at a higher grade and/or salary than hers.

6. I find this was a one-off act which occurred in April 2018. It is also notable that the Claimant did not apply for the post which Mr Adeyeye obtained. Hence it is unlikely that he is a valid comparator. The claim is brought 4 and a half years out of time.

Claim 2 Direct sex race and age discrimination - hypothetical comparator; Failing to conduct appraisals of the Claimant in the period from 2019 to 2022, thereby denying her the opportunity for her grading (and therefore salary) to be revised upwards during that period.

7. On 9 May 2022 the Claimant had an appraisal. In her oral submissions the Claimant clarified that the appraisals she missed should have occurred in 2020 and 2021. This claim is at least ten months out of time.
8. When I asked the Claimant to say what connection there was in claim 2 to race, sex or age she said that it may be that other persons (of different race, sex or age to her - whom however she had not identified) within the Respondent's large work force, had had appraisals during the said period when she did not, but she did not know whether or not that was the case.

Claim 3 Direct sex, race and age discrimination - hypothetical comparator. After her post was re-graded in 2022, denying her compensation, or proper compensation, in respect of the losses attributable to the matters referred to claims 1 and 2.

9. The Claimant raised a grievance about this in October 2022. At a meeting in October 2022 she was told informally that she would have her increased pay back-dated to April 22 but not before. She did not accept this and approached her union. A meeting was arranged to discuss the matter in December 2022 but it was inconclusive.

10. On a proper analysis the matter complained about is the refusal to back-date her pay which was a one-off event occurring in October 2022. It is not part of a continuing act with claims 1 and 2 and it did not continue into December 2022. It was a pay decision, and not a decision about an appointment or an appraisal. The claim is a few weeks out of time.
11. The decision makers in relation to refusing to back-date the pay-increase were the Second and Third Respondents. When I asked the Claimant whether she was claiming that the decisions makers had made their decision because of her protected characteristics, she said she did not know.
12. The Claimant, who is currently a PO5 grade, in explaining in her oral submissions why she had waited so long to complain about these matters, stated that the Respondent had promised her years ago that after she attained line management experience (which she had done by November 2021) she would then be regraded as PO6; however the Respondent reneged on its promise and imposed further requirements, resulting in injustice, so it would be fair to extend time.

Relevant law on extension of time

13. Section 123 of the Equality Act 2010 provides that *'proceedings on a complaint within 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 complaint relates, or b) such other period as the employment tribunal thinks just and equitable.'*
14. This is known as the “just and equitable test” and applies to the claim for discrimination. It is for the Claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434
15. The Tribunal may have regard to the checklist in section 33 of the Limitation Act 1980 as modified by the EAT in British Coal Corporation v Keeble and Ors 1997 IRLR 336, EAT: The length and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party has cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.
16. However, in applying the just and equitable formula, the Court of Appeal held in Southwark London Borough v Alfolabi 2003 IRLR 220 that while the factors above frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'.
17. This was approved by the Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050 when the Court noted 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).”

18. The decision of the Court of Appeal in Apleogun-Gabriel v London Borough of Lambeth 2001 IRLR 116 makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing.

Assessment

19. It is agreed that the Claimant did not complain about prohibited discrimination in relation to any of the above three claims at the time the relevant events/omissions occurred.
20. It would be very difficult for the Respondent now to be required to try to investigate and defend claims going back years which would be the case in claims 1 and 2 especially. The Claimant is using claim 3 also as a means of re-opening or repeating her complaints about 2018 to 2021, which are the subject of claims 1 and 2.
21. In relation to claim 3 the Claimant who is a capable person with access to union assistance was capable of pursuing the pay issue as a grievance in October 2022. The Respondent had made its position clear and the Claimant was well aware of this. There is no real justification for her waiting to bring her pay complaint.
22. The Claimant has failed to identify a coherent or credible reason to explain or mitigate the delay in bringing any of her direct discrimination claims. The balance of prejudice does not favour an extension of time.
23. Hence the direct discrimination claims are struck out as out of time.

Amendment

24. The Claimant indicated at the last hearing that she wished to amend to add a victimisation claim. EJ Snelson directed the Claimant to produce a schedule listing the claimed protected acts and the claimed detriments. With one exception, the Claimant's table of protected acts does not set out any matter falling within s.27(1) and (2) of the Equality Act 2010. All but one numbered item sets out things done or believed to be done by others, not by the Claimant.
25. The exception is no.16, where C says she emailed Anthony Mukan on 17.5.2023 about a comment he had made during a meeting the previous day. It is accepted that this was a protected act and the Respondent does not oppose the Claimant being permitted to amend her claim to bring a victimisation claim based on it.
26. It is not possible to allow any further amendment because the claims particulars do not otherwise disclose any reasonable cause of action.

Employment Judge J S Burns
10/11/2023
For Secretary of the Tribunals
Date sent to parties: 13/11/2023
