



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Thomas

Respondent: The Governing Body of Aldingbourne Primary School (R1)
Andrew Kyte (R2)
West Sussex County Council (R3)

Heard at: Bristol **On:** 24th October 2023

Before: Employment Judge P Cadney

Representation:

Claimant: In Person

Respondent: Mr P Doughty (Counsel)

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claims against the first and second respondents are dismissed as having been presented out of time.

Reasons

Preliminary Hearing

1. On 17th August 2023 I heard a TCMPH at which I listed the case for today's Preliminary Hearing to determine the following issues:
 - i) *Whether the claims against R1 and/or R2 were presented out of time; and if so whether time should be extended (for the avoidance of doubt it will be open to the EJ to reserve any time points to the final hearing in the event that s/he considers it arguable that the allegations against R1 and/or R2 form part of a continuing act with those against R3);*

- ii) *Whether any of the claims against R1 and/or R2 should be struck out as having no reasonable prospect of success and/or whether a deposit order should be made in respect of any claim against R1 and/or R2 having little reasonable prospect of success;*
- iii) *To list and give directions for the final hearing.*

2. By a claim form submitted on 12th May 2022 the claimant brought claims of disability discrimination, unlawful deduction from wages, and unpaid holiday pay.

3. By a claim form presented on 6th January 2023 the Claimant brought the following complaints;

- (a) Detriment on the grounds of public interest disclosure;

Education (Modification of Enactments Relating to Employment) (England) Order 2003

4. The understanding of both parties, as set out at para 2.1 of the Annex to the Response, was that the provisions of the above order applied to this litigation. The consequence was, as set out by the respondents, that the third respondent was the “legal employer” whilst de facto employer, the “Deciding Body” was R1. It followed, and the case has proceeded on the basis of the 2003 Order, that the correct respondent to the claim, at least for the early period, and arguably the whole period was the first respondent as the claimant’s deemed employer.

5. The respondent contended, that although that may have been true for the earlier period covered by the claim, from December 2021 as a matter of fact R1 was not the deciding body. The basis for this was that from that point R3 had taken over responsibility for dealing with grievance and disciplinary issues and that it was both the legal and de facto employer for that period. On this basis the claims against R1 and R2 were asserted to be out of time. The claimant sought to dispute this, in part because she contended that R1 remained, by reason of the order, her deemed employer for the whole of the period. On this analysis the fact that R3 had taken over de facto control simply meant that it was acting as the agent for R1 during the later part of the period. The significance of this was that, if the claimant’s analysis was correct, the claims were all at least arguably in time as against R1 as a continuing act.

6. The first question is, therefore whether this analysis of the effect of the order is in fact correct. The broad structure of the order is that although the third respondent was as a matter of fact the claimant’s employer for the whole of the period, the first respondent was deemed to be her employer (see Regulation 3 (a) to (c)):

Interpretation

2. - (1) *In this Order -*

“the 1996 Act” means the Employment Rights Act 1996[3];

"the 1998 Act" means the School Standards and Framework Act 1998;
"the 2003 Regulations" mean the School Staffing (England) Regulations 2003[4];
"authority" means the local education authority by which a maintained school is, or a proposed school is to be, maintained;
"governing body" means the governing body of a school which is maintained by an authority;
"governing body having a right to a delegated budget" and "school having a delegated budget" have the same meaning as in Part 2 of the 1998 Act.

(2) In this Order references to employment powers are references to the powers of appointment, suspension, conduct and discipline, capability and dismissal of staff conferred by the 2003 Regulations.

General modifications of employment enactments

3. - *(1) In their application to a governing body having a right to a delegated budget, the enactments set out in the Schedule have effect as if -*

(a) any reference to an employer (however expressed) included a reference to the governing body acting in the exercise of its employment powers and as if that governing body had at all material times been such an employer;

(b) in relation to the exercise of the governing body's employment powers, employment by the authority at a school were employment by the governing body of the school;

(c) references to employees were references to employees at the school in question;

(d) references to dismissal by an employer included references to dismissal by the authority following notification of a determination by a governing body under regulation 18(1) of the 2003 Regulations; and

(e) references to trade unions recognised by an employer were references to trade unions recognised by the authority or the governing body.

(2) Paragraph (1) does not cause the exemption in respect of an employer with fewer employees than is specified in section 7(1) of the Disability Discrimination Act 1995[5] to apply (without prejudice to whether it applies irrespective of that paragraph).

7. The effect of those regulations (if they apply) is that any claim falling within the ambit of Reg 3 must be brought against the governing body (see Reg 6):

Applications to Employment Tribunals

6. - *(1) Without prejudice to articles 3 and 4, and notwithstanding any provision in the Employment Tribunals Act 1996[10] and any regulations made under section 1(1) of that Act, this article applies in respect of any application to an employment tribunal, and any proceedings pursuant to such an application, in relation to which by virtue of article 3 or 4 a governing body is to be treated as if it were an employer (however expressed).*

(2) The application must be made, and the proceedings must be carried on, against that governing body.

(3) Notwithstanding paragraph (2), any decision, declaration, order, recommendation or award made in the course of such proceedings except in so far as it requires reinstatement or re-engagement has effect as if made against the authority.

(4) Where any application is made against a governing body under paragraph (2) -

(a) the governing body must notify the authority within 14 days of receiving notification; and

(b) the authority, on written application to the employment tribunal, is entitled to be made an additional party to the proceedings and to take part in the proceedings accordingly

8. However in order for that to be correct the claims being brought have to fall within those listed in the Schedule to the Order. The Schedule itself refers to legislation superseded by the Equality Act 2010; and Employment Rights Act 1996 sections 66-68, 70,71,92 and part X (Unfair Dismissal). It follows that any claim for discrimination and/or unfair dismissal falls within the ambit of the Schedule. However the claimants sole claims are for whistleblowing detriment (s47B Employment Rights Act 1996). On the face of it these claims do not fall within the Schedule. If this is correct for the purposes of these claims the third respondent has at all times been the claimant's employer and the deeming provisions of the order do not apply this case.

SCHEDULE

Article 3

*Sex Discrimination Act 1975 [[11](#)]
sections 6, 7, 9, 41 and 82(1A)*

Race Relations Act 1976[[12](#)]

sections 4, 5, 7 and 32

Trade Union and Labour Relations (Consolidation) Act 1992[[13](#)]

sections 146, 147, 152-154 and 181-185

Disability Discrimination Act 1995[[14](#)]

sections 4-6, 11, 12, 16, 55, 57 and 58

Employment Rights Act 1996[[15](#)]

sections 66-68, 70, 71, 92, 93 and Part X

9. I raised this with Mr Doughty at the outset of the hearing as it had a potentially significant effect upon the structure of the employment relationships which underly

the claims, and a significant effect on the respondents strike out applications. Although given sometime to research the point, he accepted that there had been no amendment to the order or schedule which would bring the claimants claims within it, and did not in the final analysis seek to dissuade me from the conclusion that the correct analysis in his case is that:

- i) The Order does not apply to this case as he claims do not fall within those set out within the Schedule;
- ii) In consequence the third respondent was at all times the claimant's legal and de facto employer;
- iii) That to the extent that decisions were taken by the first respondent its authority to do so resulted from delegation by the third respondent;
- iv) It is at least arguable that the first respondent was therefore acting as the agent of the third respondent and arguable that the third respondent is vicariously liable for the actions of the first respondent.
- v) As a consequence even if the claims against the first and second respondents are struck out as having been presented out of time, it will not prevent the claimant from pursuing the underlying claims against the third respondent;
- vi) The question of whether any of the acts alleged to be public interest disclosure detriments are part of a continuing act and therefore in time; or if not whether it would be just and equitable to extend time in respect of any alleged detriment that is out of time will have be determined by the tribunal that finally hears the claim.

Claims

10. As set out in my earlier case management order in summary the claimant alleges *that*:

- i) *Between 3rd July 2017 - 10th July 2018 she made a series of eight protected disclosures (see Draft List of Issues Para 3.1 – 3.8);*
- ii) *Between 28th June 2018 and 20th September 2022 she suffered fifty six detriments (see document DT1)*

11. For the reasons set out above, in my judgment I should regard all of the claims as claims brought against R3 as the claimants employer and the allegation against R1/R2 is that they were acting as R3's agents. This is in effect the reverse of the position contended for originally by the claimant.

12. The respondent contends that on the basis of the claimants own outline of her claims the last act alleged against R1 and/or R2 is 7th April 2022. Moreover R2 ceased to be a governor of R1 on 23rd July 2021. Whilst it is arguable in my judgment (for the reasons give above) that as a governor he was acting as R3's agent prior to that point, thereafter any act of his could only be attributed to R3 if

he was acting with its explicit authority, which has never been alleged. Similarly conduct of the disciplinary/grievance was specifically taken over by R3, and R1 had no further involvement in the process, beyond December 2021. It follows, the respondent asserts that any claims against R1 and R2 as respondents to the claim were submitted out of time.

13. On the basis of the analysis above the situation is in fact somewhat different for the claimant than she argues. Her initial position was that there was a continuing at on the part of R1, in that R3 was acting as its agent after December 2021. If the above analysis is correct this obviously cannot be sustained. However if the analysis is correct it also follows, as set out at paragraph.. above, that any time points as against R3 will have to be determined at the final hearing and that even if the claims against R1 and R2 are dismissed as being out of time against them, they will still be live claims as against R3 and the claimant will not be prejudiced in the sense that she will still be able to advance all the claims she wishes to. As a result the issue of striking out the claims against R1/R2 is potentially more academic than was previously the case.

Strike Out /Time Limits

14. As is set out above the claim form was presented on 6th January 2023; and the EC certificates are dated 8th November 2022/ 15th December 2022 (R2) and 8th November 2022 / 22nd December 2022 (R1 and R3). This means that any act prior to 9th August 2022 is out of time on the face of it.

15. As set out above the claimant's position is that allegations after 7th April 2022 relating to R1/and or R2 occurred on 5th May 2022; 8th July 2022, and 20th September 2022. In respect of each the claimant alleges that R3 was acting as agent for R1, which for the reasons given above is in my view no longer a sustainable position. The result is that the last allegations specifically relating to R1 and/or R2 relate to 7th April 2022 which means that he allegations are out of time. S 48(B) ERA 1996 provides that any claim must be presented within three months f the act complained of, or the last of a series of similar acts. For today's purposes I will assume that allegations against R1 and R2 are at least arguably part of a series ending, on the claimant's case, on 7th April 2022. Time can be extended if it was not reasonably practicable for the claim to have been presented in time; and if it was presented within a reasonable time thereafter. (s48(3)(b)) .

16. The respondent relies on the well-known case of *Walls Meat Company Limited v Khan 1978 IRLR* in which it was held that the presentation of a complaint is not reasonably practicable if there is some impediment which reasonably prevents or interferes with or inhibits performance. The test was summarised. most recently in the case of *Lowri Beck Services v Patrick Brophy [2019] EWCA Civ 2490*:

“12 There has been a good deal of case law about the correct approach to the test of reasonable practicability. The essential points for our purposes can be summarised as follows:

(1) *The test should be given "a liberal interpretation in favour of the employee (Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] ICR 1293, which reaffirms the older case law going back to Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53).*

(2) *The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119. (I am bound to say that the reference to "feasibility" does not seem to me to be a particularly apt way of making the point that the test is not concerned only with physical impracticability, but I mention it because the Employment Judge uses it in a passage of her Reasons to which I will be coming.)*

(3) *If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see Wall's Meat Co Ltd v Khan [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.*

(4) *If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (Dedman). I make that point not because there is any suggestion in this case that the Claimant's brother was a skilled adviser but, again, because the point is referred to by the Employment Judge.*

(5) *The test of reasonable practicability is one of fact and not of law (Palmer).*

17. Essentially the question is whether it was "reasonably feasible" (*Palmer* above) for the claim to have been presented in time.

18. The respondent submits that there is no contention on the part of the claimant that there was any physical or practical impediment preventing her from presenting the case in time; and that she was represented by a trade union representative at all times during the internal proceedings. Whilst the representative may not herself have been an expert in the employment tribunal or its procedures, as the claimant asserted in evidence, the claimant necessarily had access through the union to legal advice at any point had she chosen to take it. A union advisor should in any event be taken to be a skilled advisor. In addition the fact that the internal processes were ongoing is not in and of itself a circumstance that renders the presentation of the claim not reasonably practicable (*Palmer*). It follows, submits the respondent, that on any analysis it must have been reasonably practicable for the claim to have been presented in time .

19. The claimant essentially relies on the ongoing internal proceedings as the explanation for the failure, which she contends means that it was not reasonably practicable for her to have presented the claim in time. In her witness

statement she sets out a timeline of the internal process and she contends that the failure to comply with the time limits is the fault of the respondents, and she relies on Marks and Spencer v Williams-Ryan [2005] EWCA.

20. The basis for contending that the delay was the fault of the respondent is that she contends that she was misled into believing that if her grievance was upheld that disciplinary action, perhaps leading to dismissal would be instituted. She had meticulously followed the internal procedures in the expectation that the situation would be resolved. She states that she believed it was necessary to wait for the outcome of the grievance appeal before instituting tribunal proceedings.

21. However in my judgement even on the claimant's case she chose not to make enquiries about or bring a tribunal claim earlier than she did because she believed she would be entirely satisfied by the outcome of the internal procedure. Had she made any enquiries earlier she would have discovered that it was not necessary to await the outcome of the grievance appeal before instituting tribunal proceedings. Even if her view that she was likely to be satisfied by the outcome of the internal proceedings was correct, and was contributed to by the respondent it cannot be said, and has not been alleged, that she was at any point misled in any way in respect of the tribunal proceedings or specifically that she was obliged to await the outcome of the internal proceedings; and she at all times had access to legal advice through her trade union advisor. It follows in my view that it was reasonably feasible for the claim to have been presented in time and the claims against the first and second respondents are dismissed as having been presented out of time.

22. For the reasons given above this does not in fact cause the claimant any significant prejudice, as it does not prevent any of the claims being pursued as claims against the third respondent.

CASE MANAGEMENT ORDERS

Listing of further hearings

Final Hearing

23. After all the matters set out below had been discussed, the claim was listed for a final hearing for **twenty days**, and it was agreed that it would be completed within that allocation. It has been listed for hearing before an Employment Judge sitting alone/with members at the **Southampton Employment Tribunal, West Hampshire Magistrate's Court, 100 The Avenue, Southampton, Hampshire SO17 1EY** on **1st / 2nd / 3rd / 4th / 5th / 8th / 9th / 10th / 11th / 12th / 15th / 16th / 17th / 18th / 19th / 22nd / 23rd / 24th / 25th July 2024.**

TCMPH

24. The claim was also listed for a further Case Management Preliminary Hearing which will be conducted by telephone on **15th December 2023 at 10.00 am**. The

purpose of the hearing is to ensure compliance with all case management directions. If the parties are able to satisfy a Judge in writing that the case is ready for hearing, he or she may be prepared to cancel the hearing. Otherwise, the parties should dial **0333 300 1440** at the appropriate time and enter the code **557500#** when prompted to do so.

Amended Response

25. The Respondent is permitted to serve an amended response, so as to arrive with the Tribunal and the Claimant on or before **17th November 2023**, if so advised.

Claims and Issues

26. The parties are directed to supply an agreed final List of Issues no later than **8th December 2023** (marked FAO EJ Cadney) which will be discussed at the TCMPh.

Employment Judge P Cadney
Date: 15 November 2023

Order sent to the Parties: 7 December 2023

FOR THE TRIBUNAL OFFICE