



EMPLOYMENT TRIBUNALS

Claimant Mrs A O'Dwyer

Respondent The Governing Body of the Archway School

Heard at: Exeter
(remotely by video hearing)

On: 6 December 2023

Before:
Employment Judge Goraj

Representation

The claimant: Mrs K Sim, lay representative (the claimant's daughter in law)

The respondent: Mr R Dempsey, solicitor

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS that: -

- 1. The Tribunal does not have jurisdiction to determine the claimant's complaint of age discrimination as it was not presented within the period of 3 months starting with the final act complained of or such further period as the Tribunal thinks just and equitable pursuant to section 123 (1) of the Equality Act 2010.**
- 2. The claimant's application to amend her claim form is dismissed.**

REASONS

CONDUCT OF THE HEARING

1. The hearing was conducted as a remote hearing to which the parties consented. There was insufficient time for the Tribunal to complete its deliberations and deliver its judgment in the allocated time as the Tribunal heard evidence from three witnesses. The Judgment was therefore reserved.

BACKGROUND

2. By a claim form presented on 22 March 2023 the claimant, whose date of birth is 15 October 1965, brought a complaint of age discrimination against the respondent. The claimant states in her claim form that she was employed between 12 October 1998 and 31 October 2022. The claimant also states in her claim form that she commenced alternative employment on 30 October 2022. The allegations contained in the claimant's claim form are very brief. The claimant states at paragraph 8.2 of her claim form that she "Was often referred to as the oldie been around as long as building has been up need to resign and let youngsters in."
3. The claimant's ACAS certificate records that the claimant's Early Conciliation("EC") notification in respect of the respondent was received on 6 March 2023 and that the ACAS EC certificate was issued on 22 March 2023 – page 15 of bundle.
4. The claimant's claim form was served on the respondent by the Tribunal by a letter dated 30 March 2023 which required the respondent to submit a response by 27 April 2023. The respondent's response was not received within the relevant time period. On 3 May 2023 the clerk to the respondent wrote to the Tribunal advising that the papers had only recently come to the attention of the respondent as they were addressed to the clerk who was off sick from work and requesting that the respondent be permitted to submit a formal response. The respondent subsequently submitted a formal application, with attached draft response form, pursuant to Rule 20 of the 2013 Rules of Procedure via its solicitors on 16 June 2023. In summary, the respondent stated in the letter dated 16 June 2023 that the respondent had been unaware of the proceedings until 2 May 2023 (because the proceedings had been addressed to the Clerk who was away sick) and thereafter the response had been delayed because of various administrative/ operational reasons including liaising with the local authority / insurers regarding the matter and a week of school closure.
5. The claimant did not object to the respondent's response being accepted out of time and it was formally accepted by the Tribunal with the

proposed change of name of the respondent to the Governing Body of the Archway School (which was accepted by the parties)

6. The respondent disputed the allegations in its grounds of response including that the Tribunal had jurisdiction to consider the claimant's complaint as it was presented outside the statutory time limit. The respondent stated that notwithstanding that the claimant had resigned her employment with the respondent by a letter dated 30 September 2022 (giving four weeks' notice) and that her effective date of termination was therefore 28 October 2022, the claimant did not thereafter contact ACAS in respect of her claim against the respondent until 6 March 2023.

The Case Management Order dated 3 October 2023

7. The matter was the subject of a case management hearing ("CMPH") on 3 October 2023. The Tribunal recorded in the associated Case Management Order ("CMO dated 3 October 2023") that :-

- (1) The Tribunal had clarified the allegations of alleged age discrimination (harassment) with the claimant who had confirmed that they related to alleged verbal comments by Jordan Allaway on 23 June 2022 and 28 June 2022.
- (2) As the last in the series of allegations (as pleaded) as clarified at the CMPH occurred on 28 June 2022 any such claims such have been brought by 27 September 2022 (as the ACAS EC process did not assist in this case).
- (3) The claimant indicated at the CMPH that she wished to amend her claim form to include two additional allegations of age related harassment pursuant to section 26 of the Equality Act 2010 Act ("the 2010 Act") namely :- (a) a further alleged comment by Jordan Allaway on 13 June 2022 and (b) an alleged comment by Tracey Atkins in or around May or June 2022.

8. The Employment Judge at the CMPH listed the matter for this Preliminary Hearing to determine: -

- (1) Whether the Tribunal had jurisdiction to entertain the claimant's claims pursuant to section 123 of the 2010 Act including, if they were presented outside the relevant time limits, whether it was just and equitable to extend time. Further, or alternatively, because of such time limits should the claims be struck out or a deposit ordered on the basis that they had no or little reasonable prospect of success.
- (2) Determination of the claimant's amendment application.

9. The Tribunal made associated case management orders including permitting the claimant to explain the basis for her amendment application and allowing the respondent to provide a response to such application.
10. The claimant subsequently submitted on 25 October 2023 a written amendment application together with a witness statement and signed statement from an alleged witness to one of the proposed allegations in the amendment application.
11. The respondent submitted on 21 November 2023 a response to the claimant's amendment application together with submissions on the time point.

Witness Statements/oral evidence

12. The Tribunal has received a witness statement from the claimant. The Tribunal also received, on the morning of the hearing, a short, proposed witness statement from Mr Keiron Smith (headteacher of the respondent school) dated 4 December 2023 (which was submitted on 5 December 2023) responding to/ denying an allegation by the claimant that Mr Smith had told her that he did not know the identity of the claimant's employer. The claimant did not object to the submission of this statement which was permitted by the Tribunal. The claimant's daughter in law, Mrs K Sim, also gave oral evidence to the Tribunal as it emerged during the hearing that she had had relevant dealings with ACAS including relating to the claimant's EC notification against Caterlink and Gloucestershire County Council. The respondent did not object to such evidence and was offered / permitted the opportunity to take his client's instructions regarding such evidence.

FINDINGS OF FACT

13. The following findings of fact are made strictly for the purposes of this Preliminary Hearing.
14. The claimant was employed by the respondent/ its predecessors from on or around 12 October 1998 in catering at Archway School ("the School"). The claimant's resigned her employment at the School by a letter dated 30 September 2022 giving four weeks' notice and her employment subsequently came to an end on 28 October 2022. At the time of the termination of her employment the claimant was employed as a catering assistant.
15. The claimant was issued with a contract of employment at the commencement of her employment in which Caterlink, the outsourcing company which delivered/ continues to deliver catering services at the School, was named as her employer. The claimant was however

employed by the respondent at all material times. The claimant did not, however, receive an updated contract of employment confirming the change in employer. At all material times, the claimant's wage slips were issued in the name of Gloucestershire County Council, which made payment of the claimant's salary, and the claimant was a member of the Council's pension scheme.

The School

16. The School is a comprehensive co – educational school for pupils aged 11 to 18. The School is a community school with a delegated budget. Mr Keiron Smith is the headmaster of the School. The claimant's husband Mr O' Dwyer also worked at the School. The alleged perpetrators of the alleged acts of age discrimination, who are also members of the catering staff at the School, are employed by Caterlink.

The claimant's grievance dated 26 June 2022

17. By a letter dated 26 June 2022, the claimant raised a formal grievance against Jordan Allaway (her manager), Tracey Atkins and another member of the catering staff, whom she alleged had bullied her. In summary, the claimant alleged that they had engaged in unwanted conduct related to her age creating an intimidating, hostile, degrading and humiliating environment. The claimant listed in her grievance a number of "alleged occurrences" including that she was told "because of my age I was stuck in my ways". The claimant did not however include in that letter the specific allegations on which she relies/ proposes to rely for the purposes of these proceedings.

18. There were a number of meetings / discussions during the summer regarding the claimant's grievance. On 7 July 2022 the claimant produced a statement of fitness for work dated 6 July 2022 which stated that the claimant was not fit for work due to stress and anxiety. Such stated unfitness for work on such grounds continued until the termination of the claimant's employment on 28 October 2022.

The termination of the claimant's employment

19. The claimant terminated her employment with the respondent on 4 weeks' notice by a letter dated 30 September 2022 and her employment came to an end on 28 October 2022.

Alternative employment

20. The claimant commenced alternative employment, working in housekeeping, starting on 30 October 2022. The claimant worked in such role throughout the relevant period.

The claimant's dealings with ACAS in 2022

21. Having given careful consideration to the oral evidence of the claimant and Mrs Sim the Tribunal is satisfied, on the balance of probabilities, that the claimant/ Mrs Sim had the following contact with ACAS in November 2022- December 2022: -

- (1) Mrs Sim contacted ACAS on her mother-in-law's behalf around 20 November 2022. The claimant believed at this time that she had been employed by Caterlink and therefore commenced the EC process against that business. ACAS informed Mrs Sim at this time of the time limits which applied to the bringing of age discrimination claims but also told her that such time limits were at the discretion of the Tribunal.
- (2) The claimant/ Mrs Sim were informed by ACAS around 22/ 23 November that Caterlink was saying that it was not the claimant's employer. Mrs Sim therefore undertook research on the internet to establish how to identify the claimant's employer which indicated that this could be determined by the contract of employment and/or who paid the employee.
- (3) On or around 3 December 2022, Mrs Sim contacted ACAS again on behalf of her mother-in-law to commence the EC process against Gloucestershire County Council as the claimant was paid by them as stated on her payslips / was named on her pension documents. ACAS however informed Mrs Sim on or around 21 December 2022 that Gloucestershire County Council was saying that it was not the claimant's employer.

The discussions with Mr Smith

22. In summary, the claimant contends that there were the following discussions with Mr Smith regarding the identity of her employer namely:-

- (1) In or around late August 2022 when she contends that Mr Smith told her that he did not know the identity of her employer. This is denied by Mr Smith including that he was unaware that the governing body of the School was the claimant's employer / had any such discussion with the claimant.
- (2) That there was a subsequent discussion, which the claimant believes took place in January -March 2023, between the claimant's husband (who also worked at the School) and Mr Smith. The claimant contends that during this conversation Mr Smith asked how the claimant was doing to which Mr O' Dwyer

replied that the claimant was not doing very well and that they had still not identified the correct employer and that in further response Mr Smith suggested that she tried the Governors of the School. The claimant further contends that this conversation was subsequently re-laid to her and Mrs Sim (who were together at the time) by Mr O'Dwyer sometime between January and March 2023.

- (3) Mr Smith accepted in evidence that he had had a conversation with Mr O'Dwyer during which he enquired about the claimant which he believes would have taken place in the summer of 2022. Mr Smith further stated in cross examination that he could not recall any conversation with Mr O' Dwyer regarding the claimant/ the identify of her employer during January – March 2023. The Tribunal has not received any evidence from Mr O'Dwyer regarding this matter.

23. Having carefully weighed the available evidence the Tribunal is :-

- (1) Not satisfied, on the balance of probabilities, that there was a discussion between the claimant and Mr Smith as contended in or around August 2022 during which he told her that he was unaware of the identity of her employer. When reaching this conclusion, the Tribunal has taken into account in particular that it is denied by Mr Smith, that there is no corroborating evidence and that the Tribunal considers it likely, on the balance of probabilities, that the Mr Smith, as headteacher of the School, would have known the identity of the claimant's employer particularly in the light of his involvement in the claimant's grievance in the summer of 2022.
- (2) Satisfied, on the balance of probabilities, that there was a discussion between the claimant and Mr O'Dwyer, in Mrs Sim's presence, at some point after 21 December 2022 during which Mr O'Dwyer told them that he had had a discussion with Mr Smith regarding the claimant including that she had been unable to identify her employer and that Mr Smith had suggested in response that she should try the Governors of the School.
- (3) When reaching this conclusion, the Tribunal has taken into account that Mr Smith denied/ could not recall having any such discussion with Mr O'Dwyer and that the Tribunal has not heard any evidence from Mr O'Dwyer concerning any such discussion. The Tribunal has also taken into account however, the claimant's and Mrs Sim's oral evidence regarding this matter which is consistent with the claimant's decision to apply for an ACAS certificate against the Chair of Governors at the School in March 2023. The Tribunal is unable however, to make any findings of fact on the actual date of the conversation between the claimant and Mr O'Dwyer in the light

of the lack of clarity in the evidence of the claimant/ Mrs Sim/ any evidence from Mr O'Dwyer.

Subsequent events

- 24. The claimant obtained an ACAS EC certificate against the Chair of Governors. The ACAS certificate records that ACAS received the ACAS EC notification on 6 March 2023 and that the ACAS EC certificate was issued on 22 March 2023.
- 25. The claimant presented her claim form against the Clerk to the Governors of the School to the Tribunal on 22 March 2023.

The claimant's health

- 26. The claimant contends that one of the reasons for the delay in pursuing her claim in the Tribunal was because she experienced ongoing mental health issues as a result of the issues at work and associated grievance in the summer of 2022. The claimant was absent from work at the respondent with stated "work related stress" between 6 July 2022 and 20 October 2022. Further, the claimant has provided extracts from her GP records from 22 August 2022 to 16 September 2022 which record a history of low mood and stress related to the claimant's work grievance and (on 16 September 2022) a plan for the introduction of a trial of medication (sertraline) together with counselling to improve the claimant's mood. The claimant has not however provided any further medical evidence for the period after September 2022.

Other matters

- 27. The respondent confirmed that the alleged perpetrators of the alleged age related discrimination (who are employed by Caterlink) all continue to work at the School. Tracey Atkins (who is named in the claimant's amendment application) is however due to commence maternity leave in January 2024. It is understood from social media posts that her baby is due around 1 March 2024, but this is unconfirmed.

CLOSING SUBMISSIONS

- 28. The Tribunal has had regard to the oral closing submissions/ legal authorities relied upon by the parties which are referred to further below.

THE CLAIMANT'S SUBMISSIONS

Time limits

- 29. Whilst the claimant accepts that her claims were not brought within the primary statutory time limit of 3 months she contends in summary,

that it would be just and equitable for the Tribunal to extend time to allow her claims to proceed in the light in particular, of her lack of knowledge of Tribunal processes/ procedures/ the confusion regarding the identity of her employer and the health problems which she experienced as a result of her treatment by the respondent which affected her ability to prosecute her claims. The claimant also contends that if her claims were permitted to proceed it would not cause the respondent any hardship whereas from her perspective, she would suffer hardship and that her claim needed to be dealt with to ensure that no - one else was treated in a similar manner in the respondent's employment.

The amendment application

30. The claimant contends that her amendment application should be allowed as she says that the prejudice and hardship of not being allowed to pursue her further claim would be greater to her than to the respondent who would still be able to defend it. The claimant further contends that the broad description of the comments in the claim form was wide enough to cover the allegations, that she had never completed a claim form before, that she was in a very dark place due to anxiety when she completed it and was unaware that she needed to identify specific occurrences.

THE RESPONDENT'S SUBMISSIONS

Time limits

31. In brief summary, the respondent contended in its written/ oral submissions as follows:-

- (1) The delay in bringing the claims is extensive – around 9 months. The last in the series of allegations has been clarified as occurring on 28 June 2022. The date by which the claim should have been presented is therefore 27 September 2022 however the claim was not issued until 22 March 2023. The claimant did not act promptly or with any sense of urgency. The claimant was first in touch with ACAS on 20 November 2022 when she / Mrs Sim became aware of the time limits for bringing a claim in the Employment Tribunals, the claimant did not however, issue her claim until 22 March 2023. If the claim is allowed to proceed the quality and cogency of the evidence would inevitably be adversely affected by such a protracted delay as witness memories will be less clear than they might otherwise have been.

- (2) The claimant has given two principal reasons for the delay in commencing the proceedings namely, mental health issues and lack of clarity as to the identity of her employer neither of which provide an adequate explanation for the delay.
- (3) The claimant has not provided any/ any adequate medical evidence to support her contention that she was unable to commence proceedings earlier because of mental health issues. The mental health issues upon which the claimant relies appear to have been resolved by 20 October 2022 when her sick note expired and, at the latest, by around 30 October 2022 when the claimant started her new job. In any event, the claimant was able to secure alternative employment/ continue working without a break from the end of October 2022 and also pursue contact with ACAS in November, December 2022 and March 2023.
- (4) It should have been apparent to the claimant that her employer was the School in the light of her grievance in the summer and, in any event, any lack of clarity regarding the identity of the claimant's employer was, on the claimant's own case, resolved in early 2023. The claimant however, still delayed in pursuing her claim.
- (5) The respondent relies on the following statutory provisions/ authorities:-

Section 33 of the Limitation Act 1980.

**Robertson v Bexley Community Centre(t/a Leisure Link)
[2003] EWCA IRLR 434 CA.**

**Department of Constitutional Affairs v Jones [2008] IRLR128
CA and Chief Constable of Lincolnshire Police v Caston
[2010] IRLR 327CA**

Hutchinson v Westward Television Limited [1977] IRLR 69.

London Borough of Southwark v Afolabi [2003] IRLR 220 CA

DPP v Marshall [1998] IRLR 494 EAT

Barclays Bank plc v Kapur and others [1991] ICR 208 HL

Sougrin v Haringey Health Authority [1992] IRLR 416 CA

The amendment application

32. The respondent relied in particular on the following submissions/ authorities :-

- (1) Whilst Employment Tribunals have a broad discretion to allow amendments at any stage of the proceedings, it has to be exercised in accordance with the overriding objective which requires the Tribunal to deal with cases fairly and justly.
- (2) The claim form is not something to set the ball rolling it serves a necessary function namely, to set out the essential case to which the respondent is required to respond. When determining whether to grant an application to amend the Tribunal should carry out a careful balancing exercise of all the relevant factors, having regard to the interest of justice and to the levels of prejudice/ hardship that would be caused to the parties by granting or refusing the amendment.
- (3) The respondent relies on the following authorities :-

Chandhok v Tirkey [2015] ICR 527 EAT.

Selkent Bus Company v Moore [1996] ICR 836 EAT

Cocking v Sandhurst (Stationers) Ltd and another 1974 ICR 650, NIRC.

Trimble and another v North Lanarkshire Council and another EATS0048/12.

- (4) The respondent relies, for the purposes of the balancing exercise of prejudice and hardship, on the matters referred to above in respect of the out of time arguments relating to delay including the disputed effect of the claimant's mental health issues.
- (5) In brief summary, the respondent also contended that there was nothing preventing the claimant from bringing the proposed additional allegations at an earlier date including as a simple search on the internet regarding the completion of a claim form made it clear that it was necessary to include the specific allegations/ provide as much details in the claim form. The respondent further contended that the hardship of allowing such amendments would be greater to the respondent than to the claimant as it would be necessary for the respondent to divert resources away from pupils (time and money in defending the proceedings.

THE LAW

Time Limits

33. The Tribunal has considered first the law relating to time limits. The Tribunal has had regard in particular, to section 123 (1) of the 2010 Act together with the authorities relied upon by the respondent and the additional authorities referred to below.

34. The Tribunal has reminded itself in particular, of the following: -

- (1) Pursuant to section 123 (1) of the 2010 Act, a complaint of discrimination may not be brought after the end of the period of 3 months (subject to any adjustment by reason of the ACAS process) starting with the date of the act to which the complaint related or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period pursuant to 123 (3) (a) of the 2010 Act.
- (2) Whilst the discretion to extend time is a wide one, time limits are to be observed strictly in the Employment Tribunals and there is no presumption in favour of an extension of time (**Bexley** referred to above). A good reason for an extension generally has to be demonstrated albeit that the absence of a reason is not necessarily determinative.
- (3) As drawn to the attention of the parties at the hearing, the Tribunal has had regard, in addition to the authorities relied upon by the respondent, to the guidance contained in the Court of Appeal Judgment of **Adedeji v University Hospitals Birmingham NHS Foundation Trust (2021) EWCA Civ 23**. The Tribunal has reminded itself that in **Adedeji** Tribunals are cautioned against adopting a mechanistic use of the checklist contained in the Judgment of **British Coal Corporation v Keeble [1997] IRLR 336 EAT** as the factors which are relevant in a given case are case sensitive and must be identified by the Tribunal on a case by case basis.
- (4) The fact that there may have been no forensic prejudice caused to a respondent by the delay is not, in and of itself, necessarily decisive.
- (5) Whether it is just and equitable to extend time will depend on the Tribunal's weighing in the balance all the factors that it regards as relevant in the case which are likely to include the length and reasons for the delay together with the respective prejudice to the parties if the case is / is not allowed to proceed. In some cases, the features may not be enough in all the circumstances to persuade the Tribunal to extend time but in others they may.
- (6) This is a different, less stringent, test to that applied in unfair dismissal claims where the principal consideration is one of reasonable practicability.

The claimant's application to amend her claim

35. The Tribunal has had regard, insofar as it may be necessary to consider the claimant's application to amend, to the authorities relied upon by the respondent referred to above together with (as drawn to the attention of the parties) the recent EAT judgment of **Vaughan v Modality Partnership UK EAT 014720 BA(V)**.

36. The Tribunal has reminded itself in particular, for such purposes of the following :-

- (1) A Tribunal has a wide discretion when determining an application to amend.
- (2) When deciding whether to grant an application to amend the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
- (3) Moreover, when undertaking such balancing exercise, the Tribunal should focus on the practical consequences of allowing or refusing an amendment including if the application to amend is refused how severe the consequences will be to the prospects of success of the claim and if permitted what will be the practical problems in responding.

THE CONCLUSIONS OF THE TRIBUNAL

The time issue

37. The Tribunal has considered first whether the Tribunal has jurisdiction to entertain the claimant's claims of age related harassment as clarified/ confirmed in the CMO dated 3 October 2023 (paragraph 2.1 of the List of Issues) concerning alleged verbal comments by Jordan Allaway on 23 and 28 June 2022.

38. The Tribunal has considered this issue first as it is agreed that the claimant's claim form was presented to the Tribunal outside the primary statutory time limit of 3 months (as the relevant ACAS Early Conciliation process did not commence until 6 March 2023 and does not therefore serve to extend the time limit on the facts of this case). Further, the allegations which form the basis of the claimant's amendment application do not assist the claimant with regard to time limits as they relate to alleged verbal comments (paragraph 4 of the CMO dated 3 October 2023) in May or June 2022 and 13 June 2022 which therefore appear to predate the above alleged acts.

39. When determining whether the proceedings have been brought in "such other period as the employment tribunal thinks just and equitable" for the purposes of section 123 (1) (b) of the 2010 Act, the Tribunal considers the following matters to be of particular importance on the facts of this case.

The reason for the delay

40. The primary time limit of 3 months expired in this case on 27 September 2022 as the last alleged discriminatory act relied on by the claimant is alleged to have occurred on 28 June 2022. The claimant's claim form was not however presented to the Tribunals until 22 March 2023. The claim is therefore over 5 months out of time for the purposes of the primary time limit.
41. In summary, the claimant has provided three main reasons for the delay in commencing proceedings namely, difficulties with her mental health, lack of knowledge of relevant time limits (until around 20 November 2022) and lack of clarity as to the correct identity of her employer.
42. As referred to above, the respondent says that the above matters do not provide a satisfactory explanation for the delay including as the claimant should have been aware of the identity of her employer/ been more proactive in establishing the position. The respondent further says that the medical evidence / the claimant's continuous alternative employment following her departure from the respondent does not support her contention that she was unable to commence the proceedings earlier because of her mental health.
43. Having given the matter careful consideration, the Tribunal is satisfied on the evidence that the claimant has provided an adequate explanation for the delay in commencing proceedings for the period up to and including the end of December 2022.
44. When reaching this conclusion, the Tribunal has taken into account in particular, that the claimant, who had been with the respondent/ its predecessors for over twenty years, had had no previous involvement with Tribunal proceedings and the Tribunal accepts that the claimant / her daughter in law were unaware of the statutory time limits until the contact with ACAS on or around 20 November 2022. The Tribunal has further taken into account that notwithstanding that the claimant was able to undertake alternative employment following her departure from the respondent, the claimant had been absent from work from July 2022 onwards due to low mood and stress. Further the claimant's GP record for 16 September 2022 records a history of low mood and stress together with the commencement of medication(sertraline) and referral for counselling.
45. The Tribunal is further satisfied that during this period there was a lack of clarity on the part of the claimant as to the correct identity of her employer in the absence of the issue of an up-to-date contract of employment. This is demonstrated by the claimant's abortive attempts to engage in the ACAS EC process with proposed claims against Caterlink, whom she initially believed to be her employer, (in late

November 2022) and subsequently against Gloucestershire County Council (who were named on her payslips) in December 2022.

46. The Tribunal is not however satisfied that the claimant has provided an adequate explanation for the delay in commencing Tribunal proceedings between the beginning of January 2023 and 22 March 2023. When reaching this conclusion, the Tribunal has taken into account in particular, that the claimant was aware by late November 2022 of the statutory time limits for presenting claims to the Tribunal and by 21 December 2022 that neither Caterlink nor Gloucestershire Council were her employers. Further, the Tribunal is not satisfied on the evidence that the claimant made any attempt to contact the headteacher, Mr Smith with whom she appears to have had a good relationship, or anyone else at the School, at this time to seek assistance in clarifying the identity of her employer / otherwise acted promptly in response to the suggestion passed on by Mr Smith to Mr O'Dwyer during this period. Moreover, the Tribunal is not satisfied, in the absence of any medical evidence after September 2022 together with the claimant's accepted continued alternative employment during this period, that there was any medical reason why the claimant could not have been more proactive in pursuing her claims in the period between January 2023 – March 2023.
47. When considering the question of delay the Tribunal has taken into account that there was a subsequent delay by the respondent in submitting its response to the proceedings (due on 27 April 2023 and draft response not submitted until 16 June 2023) for the reasons given at paragraph 4 above when balancing the relevant factors to be considered as referred to further below.

The question of prejudice

48. The Tribunal has gone on to consider the question of prejudice and hardship of permitting/ not permitting the claim to proceed. The claimant contended that the prejudice and hardship would be greater to her than to the respondent if she was not permitted to pursue her claim as the respondent would still be able to defend it on the merits.
49. The respondent accepted that the relevant personnel are still employed at the School. Tracey Atkins, who is the alleged discriminator in respect of one of the incidents (which is alleged to have occurred in around May – June 2022), on which the claimant is seeking to rely pursuant to her amendment application is however due to go on maternity leave in January 2024 / give birth around 1 March 2024.
50. The respondent contended that it would, however, suffer real prejudice and hardship if the claimant's claims were permitted to proceed as the cogency of the evidence which concerns alleged oral comments in June 2022 would inevitably be adversely affected by the protracted delay as memories will have faded.

51. Having given the matter careful consideration, the Tribunal is satisfied that whilst the claimant would suffer obvious prejudice if she was not permitted to proceed with her claim the respondent would also be likely to suffer real prejudice if the claimant is allowed to proceed with a claim which was presented over 5 months after the expiry of the primary statutory time limit (27 September 2022 to 22 March 2023). This is a case which centres on oral comments which are alleged to have been made on 23/ 28 June 2022 and the cogency of the evidence is likely to be adversely affected by such delay. Further, although the claimant raised a grievance by a letter dated 26 June 2022, in which she complained about the conduct of Jordan Allaway and Tracey Atkins (and another) including that they had harassed her because of her age, there was no reference to the alleged comments upon which the claimant now seeks to rely in such letter of grievance such as to put the respondent / the alleged perpetrators on notice at that time of the alleged comments. Moreover, the precise allegations were only clarified at the CMPH on 3 October 2023.

The balancing exercise

52. When exercising its discretion, the Tribunal has considered the matter in the light of the relevant legal provisions / authorities referred to previously above including in particular that :- (a) section 123 (1) of the 2010 Act provides that a complaint of discrimination may not be brought after the end of the relevant 3 month period or such other period as the Tribunal thinks just and equitable (b) there is no presumption in favour of granting an extension of time with a claimant generally being required to demonstrate a good reason for such an extension and (c) that the presence/ absence of any prejudice caused to the respondent by the delay are likely to be relevant factors but are not of themselves decisive.

53. Having given the matter careful consideration and balanced the factors identified above, the Tribunal is not satisfied, in all the circumstances of this case, that the claimant has brought her claim in “such other period as the employment tribunal thinks just and equitable”.

54. When reaching this conclusion, the Tribunal has taken into account that there is no presumption in favour of granting an extension of time. The Tribunal has taken into account when balancing the above mentioned factors that whilst there are “mitigating factors” for the period between 27 September 2022 and the end of December 2022 relating to the claimant’s lack of knowledge of time limits, her mental health and lack of certainty as to the identity of her employer, the claimant has not however, provided an adequate explanation for the period from January 2023 onwards when the claimant should have been more proactive in pursuing her claims particularly as she / her daughter in law had been made aware of the statutory time limits by ACAS in November 2022. Moreover, whilst there was a subsequent delay by the respondent in presenting its response it is the primary

responsibility of the claimant to bring his /or her claims within the statutory time limit.

55. Finally, the Tribunal is satisfied for the purposes of the balancing exercise that the delay in pursuing the proceedings for a period of over 5 ½ months after the expiry of the primary time limit is likely to cause real prejudice to the respondent in defending proceedings which centre on alleged oral comments dating back to June 2022 including as the allegations on which the claimant seeks to rely were not raised by the claimant in her letter of grievance dated 26 June 2022.

56. Having weighed all of the above, the Tribunal is not satisfied that it is just and equitable, in all the circumstances, to extend time to allow the claimant's claim to proceed. The Tribunal does not therefore have jurisdiction to entertain the claimant's complaint of harassment related to age.

The amendment application

57. Further in the light of the above findings of the Tribunal on the time issue, the claimant's amendment application which relates to allegations which predate those contained in the extant claim is also dismissed.

Employment Judge Goraj
Date: 20 December 2023

Judgment sent to the Parties on 12 January 2024

For the Tribunal Office

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of judgments and written reasons. The register must be accessible to the public. Judgments and reasons from February 2017 are available at: <https://www.gov.uk/employment-tribunal-decisions>

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge

(where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

Transcripts

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge.

There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings. You can access the Direction and the accompanying Guidance here:

[Practice Directions and Guidance for Employment Tribunals \(England and Wales\) - Courts and Tribunals Judiciary](#)