EMPLOYMENT TRIBUNALS

Claimant: **V**

Respondent: **Mrs M Redfearn**

HELD in Leeds **ON: 14 June 2023**

BEFORE: Employment Judge Wade

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr B Williams, counsel**

Note: A summary of these reasons was provided orally in an extempore Judgment delivered on 14 June 2023, which was sent to the parties on 20 June 2023. The claimant requested written reasons on 14 June and they are provided below, in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the Judgment given on 14 June is also repeated below:

JUDGMENT

1 The Tribunal does not think a period until 22 January 2023 (the presentation date) in respect of alleged contraventions on 10 June 2021 is just and equitable pursuant to Section 123 (1)(b). The claimant's claim is therefore dismissed for limitation reasons.

2 These proceedings are now at an end.

REASONS

Introduction, hearing and evidence

1. The matter before me this morning is whether to extend time to enable the claimant's singular complaint against Mrs Redfearn to be determined at a final hearing. That singular complaint is that on 10 June 2021 the respondent lied in a note she wrote about seeing the claimant naked from the waist down in workplace changing rooms. The claimant alleges that is direct discrimination and harassment on the grounds of gender reassignment.
2. As a result of previous proceedings the respondent's counsel and the claimant are well used to assisting the Tribunal and each other to ensure that matters proceed fairly. This hearing was similarly conducted with the papers prepared to assist the claimant's dyslexia, and with breaks as appropriate.
3. At the start of the hearing the claimant observed that I had been the Judge to refuse her an application to amend on a case involving a buddy issue; I did not immediately recall that decision and asked her if she wished to make an application for me to stand down and she confirmed she made no such application. The matter was long since forgotten.
4. The claimant had prepared a statement in support of her case on limitation and much of it was unchallenged. She gave oral evidence and answered questions about limited matters – the nature of the allegation she made against the respondent, the chronology of the proceedings, her knowledge of the alleged contravention, and her reasons for the delay. She was not asked about her evidence concerning the conduct of Mr Williams, or the respondent's position on the comparator.
5. On behalf of the respondent I had an email summary of her circumstances, which she confirmed were correct, and that was provided to the claimant with the papers for this hearing.
6. The weight I give to that evidence is a matter for me, but suffice it to say that I consider it a reliable description of the respondent's circumstances, and that was likely also recognised by the claimant in her closing submissions, when she described this matter as finely balanced.

The law

7. I have just read again for myself, well known to those in this room, Section 123(1) of the Equality Act 2010: "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.
8. Those periods are extended by the ACAS conciliation provisions.
9. By the time that their submissions were made, the claimant accepted that time in her case runs from the date of the alleged discriminatory act (but that lack of knowledge is relevant to the grant of an extension) - see Mr GS Virdi v Commissioner of Police of the Metropolis and another [2007] IRLR 24 EAT.
10. The claimant reminded me in her statement that I have to consider "forensic prejudice" in assessing the prejudice to each party from an extension of time – and she asserted there was none in this case for the respondent - see Wells Cathedral School Ltd v Souter EA 2020 000801 JOJ.

11. She further said that Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 made clear that the Tribunal is entitled to consider the merits of a claim in the exercise of its discretion and she asserted that hers was a strong claim.
12. I directed myself that the Act confers the widest possible discretion on the Employment Tribunal in determining whether or not it is just and equitable to fix a different time limit Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640. That said the power of the Tribunal is a discretion, to be exercised judicially, assessing relevant factors and the weight to be given in each case. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.
13. If there are circumstances which would otherwise render it just and equitable to extend time, the length of extension required is not of itself, a limiting factor unless the delay would prejudice the possibility of a fair trial see Afolabi -v-Southwark LBC 2003 EWCA Civ 15.
14. In exercising my discretion under the Section 123 (1)(b) case law has also established that I must consider the length of and reasons for delay, and consider the prejudice to both parties.
15. Section 33(3) of the Limitation Act 1980 contains a helpful checklist of other matters which might need to be considered (in personal injury and other claims with longer time limits), but also for me to bear in mind if relevant:

    the extent to which the cogency of the evidence is likely to be affected by the delay;

    the extent to which the party sued had cooperated with any requests for information;

    the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

    the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Respondent's submissions

16. On behalf of the respondent Mr Williams suggested there were two periods of delay: from the note in June 2021, to the claimant becoming aware of it – a year or so. He makes no criticism of that delay. Then the second period comes in three chapters: he says the claimant had knowledge of the existence of the note in June/July 2022 – as a result of the hearing and reserved Judgment, albeit she did not know the name of the colleague, yet she did not quickly seek that note, but waited until 14 August; then, once she had the note, she did not read it until 22 September. Thirdly there is the period after she received and read it, when she knew the name and the contents, yet delayed during October and November before commencing conciliation.
17. He further says that the respondent accepts the claimant is a vulnerable person and that he cannot imagine the degree of suffering she has endured, both physically and mentally. Nevertheless he reminds the Tribunal that the respondent is also a vulnerable person, who was completely unaware that something she was asked by her employer to do in 2021 would result in

proceedings against her in 2023. The fact that she has legal representation does not take away from the impact of these proceedings upon her.

18. In those circumstances he says it cannot be right that the balance of prejudice lies with the claimant on this occasion, and particularly in circumstances where the claimant has received a remedy for the related contravention by her previous employer.

Claimant's submissions

19. The claimant said the other proceedings were a separate matter. Further that the respondent's circumstances as set out had not been tested by cross examination, given the respondent is a woman with capacity, with sole responsibility for writing the note. The claimant also relied on the decision in the determined proceedings to extend time, recognising the claimant's disadvantages and applying the balance of prejudice test.
20. She further said there were many reasons to extend time. Firstly she had no knowledge of the note at the time; secondly she took all steps once she was aware to see it; thirdly she was vulnerable from the sexual assault in September, her learning disability and her mental health; she was also dealing with complex matters before the Tribunal at the time; the evidence is not affected – the note has been produced; the respondent has experienced counsel and the respondent was able to provide a response and must therefore have recall of the events. Further, June 2021 is not a stale claim.
21. In the round, if this is a marginal case, the prejudice to the claimant in not being able to have a hearing and run her discrimination claim against the author of the note, is greater than that to the respondent in having to defend it, supported by a legal team.

Background and findings

22. [There is an unusual and lengthy background to this matter which I am not going to be rehearse because it is well understood by the parties.]
23. For the purposes of these written reasons it is convenient to adopt the summary of the Employment Judge at the previous preliminary hearing (in italics), to which I have added, in conventional type, further matters which I made as my findings.
24. *The claimant and the respondent were both employed by Sheffield Teaching Hospitals NHS Foundation Trust in its catering department.*

25. *The respondent accepts that the claimant is transgender and the respondent was aware of this at all material times.*

26. *The claimant used the female changing rooms in the catering department.*

27. *The respondent's case is that on 10 June 2021 she went into the female changing room and saw the claimant without any underwear on.*

28. *A supervisor told the respondent to put what she had seen in a statement. The respondent did so and this was referred to in the evidence during the hearing of the claimant's Tribunal claim against Sheffield Teaching Hospitals NHS Foundation Trust and others in June 2022 (*"the determined proceedings"*). It was referred to as a report about the claimant being naked from the waist down.*

29. The reserved Judgment in the determined proceedings was sent to the parties on or around 4 July 2022 and the parties were allocated a remedy hearing. The Tribunal found one contravention out of many alleged contraventions, concerning a Ms Hawkshaw questioning the claimant. This was closely connected in time with the statement provided by Mrs Redfearn, the respondent, which is the subject of these proceedings.

30. The claimant, the Trust employer and a different employee of the Trust were then engaged in preparation for the trial of a different claim, set down to be heard over three days in October 2022 ("the October proceedings").

31. The Trust solicitors sent the claimant a draft bundle for the October proceedings on 17 August and the claimant's reply included a request as follows.

    "can we have some photos of the kitchen in the D floor catering department re the racism complaint so I can set out where everything happened

    Also is there anything in writing to complain about me in the changing rooms in a state of undress

    Can this be disclosed and included"

32. *The respondent's solicitors sent the claimant a copy of the bundle of documents* for the October hearing *which included a copy of the respondent's handwritten statement on 30 August 2022.* It said this:

    > ""walked into the changing room at the end of my shift and saw Aime [sic] standing there with no underwear on and was very startled and shocked, found it very embarrassing".

33. The claimant reported a sexual assault to the police (wholly unconnected with these proceedings) on or around 3 September 2022 and accepted on 22 February 2023 £2000 compensation from the Criminal Injuries Compensation Authority.

34. *The claimant agrees that the note was sent to her on 30 August 2022 but the first time she read it was on 22 September 2022.* I have proceeded on the basis that the claimant did not read the note sooner. On 22 September, having read it, she resolved to bring proceedings, and she considered she had three months from that date to do so.

35. The October proceedings were determined without evidence being heard. The parties moved on to prepare for the remedy hearing in the determined proceedings.

36. The remedy hearing in the determined proceedings took place on 5 December 2022. The extempore Judgment, which was sent to the parties on 7 December 2022, awarded £7810 including interest in connection with the one contravention found.

37. *The ACAS early Conciliation shows that the claimant notified ACAS on 8 December 2022.*

38. The Tribunal in the determined proceedings sent reasons for its remedy Judgment to the parties on 21 December 2023 and was clear about the basis of its compensation assessment - the actions of Mrs Redfearn were a separate matter – see paragraph 1.8 of the remedy reasons.

39. *The certificate was issued on 19 January 2023. The claim was presented to the Employment Tribunal on 22 January 2023.* The claimant may well have contacted ACAS a little sooner than 8 December, as often happens before formal commencement of the conciliation period.

40. *There was some discussion of the claimant's allegations. She said that the note prepared by the respondent about what occurred 10 June 2022 is a lie and the respondent was motivated to lie because of the claimant's transgender status.*

41. *The claimant said that she had permission to use the female changing room. She was not completely naked. She was not naked from the waist down and her genitalia were not on show.*

42. *The claims brought are for direct discrimination and harassment related to the protected characteristic of gender reassignment.*

Further conclusions and discussion

43. In the determined proceedings there was no disclosure of the respondent's note by the Trust and it was not before the Tribunal during the June hearing.
44. The circumstances in relation to it were found by the previous Tribunal at paragraph 152.4 and 153 of its Judgment
45. The respondent's response in these proceedings sets out her case that she told a Miss Cross about observing the claimant in the changing room, Miss Cross told Miss Townsend and Miss Townsend asked for that information to be put into a statement, and the respondent then did so, creating the note.
46. On the claimant's case, the dispute to be tried between these parties, if it comes to be tried, is whether or not the information in that note was true, and then whether the respondent's actions amounted to a contravention of the Act. The claimant could have pursued it on the basis that even if true, it amounted to harassment, or less favourable treatment, but she does not do so. The determination of the truth of the report will require limited oral evidence from the respondent and limited oral evidence from The claimant. It is a very discreet and self-contained matter, currently envisaged for a hearing in two days, but which ultimately will involve the Tribunal's assessment of that evidence.
47. I proceed on the basis that the claimant did not read the contents of the note until September 22nd, a Thursday. She was occupied with her work at the weekends, and was using week days to work on litigation.
48. I also proceed on the basis that the claimant is a vulnerable person as evidenced in her witness statement and on which she has not been challenged - certainly as respects the September assault, her mental ill health and learning

disabilities. She is though, also, an experienced litigant in person who demonstrates resilience in response to her circumstances and continues her weekend work. She also understood that there was a time limit. She approached matters on the basis of her understanding that she had three months to present her complaint from 22 September, plus, given her understanding of Tribunal proceedings, the ACAS conciliation extension.

49. In ordinary circumstances then, if the time limit ran from the date on which she became aware of the contents of the note, her claim, as she says, would have been in time.
50. The difficulty is that the Act is very clear – which she accepted and conceded today, time runs from the date of the alleged contravention which was on 10 June 2021.
51. The respondent has had a number of difficult bereavements, including her son's father and older relatives whom she has nursed. She and her son suffer with depression. This claim is exacerbating her symptoms which include self harming, and other life events continue to cause strain and upset and she simply wants this case to go away.
52. The reasons for the delay in this case has many parts to it. The claimant gained some knowledge in the hearing in June when evidence about it was given, some further knowledge in early July 2022 through the Reserved Decision, some further knowledge with confirmation of the note existing and it being provided to her on 30 August, and finally its contents and the identity of the respondent on 22 September when she read it.
53. This was not a situation where knowledge of the components of a claim arrived on one date. In that respect I agree with Mr Williams. A further part of the reason for delay is the claimant's understanding of the time limit, which albeit inaccurate, is unsurprising.
54. The length of the delay then, from June 2021 to the presentation of the claim in January 2023 is about 18 months. In reality, taking into account the effect of ACAS conciliation, it is likely to be determined about 13 months later than it would have been, absent delay.
55. I also bear in mind the speed with which this matter might come on for hearing, which is likely late this year – in that sense the claimant is right that the allegations are not overly stale and the evidence will not be prejudiced by delay.
56. The respondent's case on prejudice is not about memory being impaired or cogency of evidence through delay, but about the personal distress caused by having one's actions in the workplace examined more than two years after they occurred - the overall impact of this litigation on Mrs Redfearn, the respondent, and how distressing and upsetting that is layered, on top of the other aspects of her life which have caused vulnerability. That may affect her ability to give evidence as I am told it has on this occasion.
57. The claimant makes the perfectly fair point that a witness statement could have been taken from Mrs Redfearn, which could have been signed and sworn. She is very well represented and albeit she is unwell currently with a bad back and depression (I read), perhaps she could have attended or arrangements could have been made for her to connect remotely and perhaps that evidence could have been tested before me.
58. Nevertheless I give Mrs Redfearn's email, recording her instructions, some weight, because, much like Mr Williams' decision not to ask the claimant about her vulnerabilities, it is rarely the case that people lie about bereavement or

similar matters. In reality, had she attended, it is unlikely the claimant would have suggested to her she was exaggerating or mistaken about such matters as health and bereavement. Further it is not the respondent's burden to persuade the Tribunal not to grant an extension of time.

59. For this reason I do not discount the respondent's email evidence entirely. I also give weight to the aspects of the claimant's statement on which she has not been challenged. These matters, in my judgment, can be taken as read. These are two vulnerable parties before the Tribunal. This is, I consider, a finely balanced case. There is prejudice on both sides and difficulty on both sides.
60. As for the overall context - it is suggested that the claimant suffers less prejudice because she has already been compensated for the questioning that took place by management, found to have been influenced by the note produced by Mrs Redfearn. The Tribunal in the determined proceedings was clear about the basis of its compensation assessment - the actions of Mrs Redfearn are a separate matter – see paragraph 1.8 of the remedy reasons.
61. Mr Williams must agree with that to the extent that he accepts on behalf of Mrs Redfearn that this case is about whether the note accurately reflected what Mrs Redfearn experienced on that day, or was it, as is the claimant's case, that she was lying about it. Being questioned is one thing; a colleague fabricating matters about you is another, which one could see could cause additional hurt. The claimant's position is that she has a strong case, and that adds to the balance of prejudice tipping in her favour – indeed she has sought a strike out of the response. I cannot agree with that assessment. She has a case which will come down to the Tribunal's assessment of the evidence, just as it did in the determined proceedings. In those proceedings her evidence was not accepted on a number of important matters.
62. Nobody in this room can know in truth how this matter will be determined if it comes on for a hearing. Given that it will be an assessment of oral evidence, with no opportunity to avoid a finding that either one or the other is unreliable, it has high stakes for both parties and causes the consequent strain for both parties. The difference is, it is strain which the claimant has chosen to pursue in the way that she has, and which Mrs Redfearn has to defend.
63. It is inherently prejudicial to lose a limitation defence. There does not need to be some other special or further prejudice to which a respondent can point. That of itself is prejudicial and I weigh that accordingly. It is self evidently prejudicial to not be able to pursue an arguable complaint for limitation reasons. Having said that, the context includes that the claimant has had an eight day hearing of a multitude of other allegations against her former employer and colleagues, and her employment ended a long time ago. It is fair to describe this case as a satellite case.
64. It is a matter of exercising my discretion in all the circumstances. A factor which must play a part, it seems to me, is the extent to which there could have been an earlier and more timely disposal of this matter had Mrs Redfearn's note been provided by her employers in the determined proceedings.
65. This is yet another aspect of delay in this case, which generates prejudice for both the claimant and the respondent. In reality it is simply a reminder that neither the claimant nor the respondent can bear responsibility for the delay between June 2021 and June/July 2022 when the note's existence came to light, and that lies with others.

66. Against that I bear in mind that it is not Mrs Redfearn's employers, the Trust, who are obliged to defend this case, it is Mrs Redfearn herself. She was not a respondent in the determined proceedings, when her colleagues were, including Miss Townsend. In all likelihood she would have been a respondent had the note come to light sooner. She now faces proceedings alone, and in circumstances where their continuation will likely serve to worsen her mental health and the care she can give to others.
67. The multi factoral nature of the assessment, and the rather unique circumstances of this case, make identifying where the balance lies and the exercise of discretion very difficult.
68. Mrs Redfearn the respondent bears no responsibility for the claim being presented later than it might otherwise have done. On the other hand the claimant knew on 22 September that she wished to commence proceedings in connection with the note. The allegation is singular and could reasonably have been advanced, at least by EC and then a short claim form, within a few days of the October proceedings coming to an end. Prioritising other matters - preparation for the remedy hearing on 5 December, the CICA claim - was a choice, a choice made in light of the claimant's litigation experience, her vulnerabilities and other calls on her time, including her weekend work. Her choice is one over which the respondent has no influence or control.
69. There is potential injustice to both parties, but on balance it appears more unjust to me for the respondent to lose her limitation defence in all the circumstances, including that the claimant has known she was to litigate from 22 September, but has chosen to delay. I appreciate that deprives the claimant of the opportunity to pursue this singular and satellite complaint against the respondent, and there is prejudice in that, but it is mitigated by the fact that matters are out in the open, and the Tribunal has already made comprehensive findings over the same territory.
70. I know that that will not be of a comfort to the claimant and I know that she will be disappointed by this decision, but it is one in the round which seems to me to be the right decision. To the extent the claimant pursues other proceedings, this decision has no effect on those, but the proceedings against this respondent are at an end.

JM Wade

Employment Judge JM Wade

Date 20 July 2023