



EMPLOYMENT TRIBUNALS

Claimant: Mr I Hill

Respondents: 1. The Chief Constable of Lancashire Constabulary
2. M Morley
3. D Oldfield

PRELIMINARY HEARING

Heard at: Manchester

On: 5 + 6 December 2023

Before: Employment Judge Batten (sitting alone)

Representation:

For the claimant:

in person

For the first, second and third respondents:

V Von Wachter, Counsel

For the Police Federation of England and Wales:

N Caiden, Counsel

JUDGMENT having been sent to the parties on 12 December 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This preliminary hearing was listed following a case management preliminary hearing before Employment Judge Shergill, on 31 August 2023. The primary issue to be determined was whether the claim or any part of it should be struck out on the

basis that the claimant has no reasonable prospect of success in establishing any or all of the following:

- a. That the alleged actions of the former fourth and fifth respondents are actions for which the first respondent is liable under the Equality Act 2010 or the protected disclosure provisions of the Employment Rights Act 1996;
 - b. That the alleged actions of the former fourth and fifth respondents are actions for which they can be personally liable under the Equality Act 2010 or the protected disclosure provisions of the Employment Rights Act 1996;
 - c. That the alleged acts or deliberate failures to act said to constitute whistleblowing detriments prior to 29 November 2022 formed part of a series of similar such acts or failures under section 48(3) Employment Rights Act 1996, that series ending on 29 November 2022;
 - d. That the alleged acts or deliberate failures to act said to constitute age discrimination prior to 29 November 2022 formed part of a course of conduct under section 123(3) Equality Act 2010 ending on 29 November 2022.
2. In the alternative, the Tribunal was asked to impose a deposit order if it considered that the claimant has little reasonable prospect of success in any of those matters listed a. to d. above.
 3. Issues a. and b. above involve a consideration of liability for the actions of officials of the Police Federation of England and Wales ("PFEW"). To that end, on 11 December 2023, pursuant to rule 35 of the Employment Tribunals Rules of Procedure 2013, Employment Judge McDonald had ordered that Counsel for the PFEW be entitled to attend and participate in this preliminary hearing on the basis that the PFEW had a legitimate interest in the determination of those issues a. and b.

Documentation

4. At this preliminary hearing, I did not hear any oral evidence. I was provided with a bundle of documents amounting to 399 pages. I heard oral submissions from both sides, and also from Counsel for the PFEW. In addition, I had the benefit of written submissions prepared by the claimant, amounting to 26 pages together with a list of legal authorities and statutory provisions upon which he relied.
5. By consent of the parties, the first day of the preliminary hearing was taken up with issues a. and b.

6. The second day of the preliminary hearing addressed the application for strike-out/deposit orders, issues c. and d.

Issues a. and b: the actions of PFEW officials

7. Issue a. concerns whether the first respondent can be liable for the actions of the former fourth and fifth respondents in their capacity as PFEW officials. The first issue to be determined therefore was what is the status of PFEW officials such as the former fourth and fifth respondents, during working time which is spent on PFEW duties.
8. On 4 December 2023, the fourth and fifth respondents in this case, Anthony Bradley and Stuart Parry, were dismissed from the proceedings following a withdrawal by the claimant. Nevertheless, they are relevant to a number of the allegations of detriment pursued by the claimant. Both are Police Constables or serving officers of the first respondent and they carry out policing duties under the direction and control of the Chief Constable. In addition, the former fourth and fifth respondents were, at the material time, PFEW representatives elected by the members of the PFEW in the Lancashire Constabulary.
9. The PFEW is a representative body of Police Constables and other Police officers in England and Wales, which has a statutory basis under section 59 of the Police Act 1996. It is a separate body to each of the Constabularies or Police Forces in England and Wales. The first respondent Chief Constable is not a member of the PFEW.
10. The representative duties of PFEW officials are carried out during working time; that is to say, during working shifts as opposed to personal time off or holidays, or non-working time. PFEW officials are paid by the first respondent for all of their working time regardless of whether or how much of it is spent on policing duties or PFEW work. In addition, on occasion, officials receive additional payments from the PFEW. Therefore, such duties as are undertaken by PFEW officials are performed during time which is paid for by the local Constabulary albeit that, when undertaking representative duties for members, PFEW officials are not carrying out any part of the function of the Police Force itself nor are they working under the direction or control of the Chief Constable.
11. The claimant argued that, because PFEW officials are paid and engaged by the first respondent, this means that the first respondent is vicariously liable for anything they do during their working time including activities undertaken in their capacity as PFEW officials.
12. The respondents argued that the PFEW representative duties are outwith employment, and that none of the work done by or for the PFEW could be said to be in the course of exercising any powers or privileges of the office of Police

Constable; such representative duties are entirely separate to the first respondent; and that such a situation is not unusual for workplace representatives.

My decision

13. The power to represent an individual employee at work, against their employer must be a position where there is independence. It cannot be otherwise because nobody would wish to be represented by an official who is not independent of the employer. Police Constables are workers who exercise the powers and privileges of the office of the Police when they are under the control and direction of the Chief Constable. In contrast, at times when an individual police officer is engaged on PFEW business, they are not in effect exercising the powers and privileges of a police officer. I therefore consider that, when acting in the capacity of PFEW officials, the former fourth and fifth respondents were not under the direction or control of the first respondent. The claimant has been unable to provide any examples to show otherwise and could not substantiate his suggestion that the first respondent controlled what PFEW officials did.
14. The claimant sought to argue, and I do not disagree with his contention, that police officers are at all times subject to the Police Code of Ethics. As a result, complaints must be brought to the Chief Constable under the relevant disciplinary and complaints procedures and, thereby, the Chief Constable assumes liability. I do not agree with the claimant's contention that such a route for complaints made the Chief Constable liable for anything and everything that PFEW representatives did when acting in that capacity as opposed to acting on policing duties. Rather, I accepted the explanation of the respondents, that disciplinary issues relating to PFEW officials would first be sent by the Chief Constable to the PFEW for consideration in circumstances where the disciplinary matters arose from or in the course of carrying out PFEW duties. The claimant was unable to show that this was not in fact the case and his submissions simply do not make sense. Just because a complaint shall be made to, and/or may end up with the Chief Constable, does not mean that the Chief Constable can be vicariously liable, from the beginning, for all matters which arrive on his/her desk. I find there is an essential independence here. There is a statutory basis for the PFEW, and for the duties which the former fourth and fifth respondents undertook. The statutory provisions do not create any form of vicarious liability on the part of the Chief Constable for work done outwith employment albeit in working time and where such work is for the PFEW and not a function of the police force itself.
15. Issue b. concerns whether the former fourth and fifth respondents could be personally liable for their actions as PFEW representatives. The claimant has withdrawn against these 2 respondents and so this issue no longer needed to be determined.

Issues c. and d: the time points

16. Issues c. and d. are expressed to be about a continuing course of conduct ending on 29 November 2022. As that date related to an allegation about acts carried out by the former fourth and/or fifth respondents, I revisited the scope of issues c. and d. with the parties at the beginning of the second hearing day. The need for this was because the claimant's withdrawal of the claims against the fourth and fifth respondents and my decision that the first respondent is not liable for acts carried out by the former fourth and fifth respondents as PFEW officials, materially affects the end date of the pleaded course of conduct. Effectively, it was agreed by the parties that the 'course of conduct' argument was no longer required. The relevant last act(s) had changed and the matters to be addressed in order to consider statutory time limits had changed as well.
17. We identified, firstly, in relation to the age discrimination and harassment complaints, that the last of those acts pleaded was on 16 October 2020, taken from the claimant's undated further and better particulars of claim which appear in the PH bundle, page 93. For the protected disclosure detriment claim, the last matter pleaded was 31 October 2020, which was the last possible date of termination of the claimant's employment, although this may have been a few days earlier (on 28 or 29 October 2020).
18. The ACAS certificate relied upon by the claimant in respect of the claim against the first respondent shows that ACAS was first contacted on 30 January 2023 with the certificate being issued on 13 March 2023. For the second and third respondents, ACAS was contacted, and a certificate was issued on the same day, on 24 March 2023. The claim form was presented on 11 April 2023.
19. In light of the last dates identified (16 October 2020 and/or 31 October 2020) the claimant conceded that his claims are, on the face of it, out of time, having regard to the 3 months' time limit, absent any extension of time being granted.
20. In those circumstances I afforded the claimant additional time to review his submissions and to add to them or amend them before addressing me on the time points. The claimant indicated that he understood what was now to be addressed in respect of issues c. and d. and he therefore took time during an adjournment to review his submissions. I also explained the applicable law to the claimant in order to ensure that he was clear as to the legal tests involved.

The applicable law – time limits

Protected disclosure detriment

21. The time limit for a complaint of detriment for making a protected disclosure appears in section 48(3) of the Employment Rights Act 1996:

- (3) *An employment tribunal shall not consider a complaint under this section unless it is presented –*
- (a) *before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure to act is part of a series of similar acts or failures, the last of them, or*
 - (b) *within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
22. Two issues therefore arise: first, whether it was not reasonably practicable for the claimant to present the complaint in time, and, if not, secondly, whether it was presented within such further period as is reasonable.
23. Something is “reasonably practicable” if it is “reasonably feasible” - see *Palmer v Southend-on-Sea Borough Council [1984] ICR 372 Court of Appeal*. Ignorance of one’s rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: *Trevelyan (Birmingham) Ltd v Norton [1991] ICR 488 EAT*.
24. In *Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293* the Court of Appeal reviewed the authorities and confirmed, in paragraph 20 of its judgment, that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

Discrimination complaints

25. The time limit provision appears in section 123 of the Equality Act 2010 as follows:-
- (1) *Subject to Section 140A proceedings on a complaint within Section 120 may not be brought after the end of –*
 - (a) *the period of three months starting with the date of the act to which the complaint relates, or*
 - (b) *such other period as the Employment Tribunal thinks just and equitable.*
 - (2) ...

- (3) *for the purposes of this section –*
- (a) *conduct extending over a period is to be treated as done at the end of the period;*
 - (b) *failure to do something is to be treated as occurring when the person in question decided on it.*
26. The case law on the application of the “just and equitable” extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the EAT confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in *Keeble*:-
- “that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –*
- (a) the length of and reasons for the delay;*
 - (b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
 - (c) the extent to which the party sued had cooperated with any request for information;*
 - (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
 - (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.”*
27. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434* the Court of Appeal recognised that the Employment Tribunal has a “wide ambit”. At paragraph 25 of the judgment Auld LJ said:-
- “it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”*

28. Subsequently in *Chief Constable of Lincolnshire –v- Caston* [2010] IRLR 327 the Court of Appeal, in confirming the *Robertson* approach, confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

Conclusions

29. I have applied relevant findings of fact and the applicable law to determine the time limit issues in the following way.

The protected disclosure detriment complaint

30. The claim and the complaints therein relate to events before and leading up to the termination of the claimant's employment by way of his retirement in 2020. I considered first whether or not it was reasonably practicable for the claimant to present his claim in time, in late 2020, and found that it most certainly was reasonably practicable for him to do so. The claimant had access to advice over a long period of time from PFEW representatives and also from a solicitor at Slater & Gordon which is a large and reputable law firm which specialises in employment law.
31. The claimant was well aware that he could bring a claim at the material time or within the 3 months' deadline and he was aware of the deadline by which he should present his claim. In fact, the claimant had first commenced ACAS early conciliation on 12 October 2020. However, the claimant candidly told me that he had been advised at the time that his claim did not have reasonable prospects of success and he admitted that he was told that the time limit might expire on 18 October 2020, a date apparently contained in written advice sent to him on 21 September 2020. In the PH bundle, at page 132, is a letter from the claimant to the Tribunal in which he provides submissions to oppose the late filing of responses by the respondents and in that letter the claimant states that he had obtained an ACAS certificate on 12 October 2020 and contends that, because he knew then about his complaints, the respondent should have known about them as well, at that time.
32. In any event, thereafter the claimant decided not to present a claim to the Tribunal when he has admitted that he knew he could. I accept the first respondent's submission to the effect that, from then on, nothing changed save that, in December 2022, the claimant went to the Citizens Advice Bureau where somebody advised that he might have a claim. I have no idea of the basis for that advice, and it is not appropriate for me to know, and I cannot imagine how the Citizens Advice Bureau determined the applicable time limit or what time limit they advised of, because the claimant's complaints arose from the termination of his employment some 2 years previously and thereafter his complaint comprised of criticism of the PFEW's dealings with his case and the nature of their advice. The PFEW is not the

claimant's employer and the matters about which the claimant complains in relation to the PFEW are not matters within the Tribunal's jurisdiction in any event.

33. I have therefore concluded that it was reasonably practicable for the claimant to present his complaint of whistle-blowing detriment in time, and I strike it out for being out of time in circumstances where it was reasonably practicable for the claimant to have presented it in time.

The discrimination complaints

34. The date of the last act relied upon by the claimant for his complaint of age discrimination was 16 October 2020. The ET1 was presented on 11 April 2023. The 3 months' time limit had clearly long expired, although that is not absolute. Tribunals do have a discretion (and it is a broader discretion than under the "reasonably practicable" test above) whereby if the Tribunal considers it is just and equitable to do so, the applicable time limit can be extended on that basis.
35. In this case, the discrimination complaints are approximately 2 and a half years out of time. The claimant told me that this was because he did not know he had a claim of age discrimination; he had been waiting for advice from the PFEW. The claimant said that he only found out that he had an age discrimination claim when the Citizens Advice Bureau advised him of such, in December 2022. This contention is however contradicted by the fact that, in the bundle at page 132, the claimant seeks to argue in his letter to the Tribunal that the respondents should not be able to present their responses late because they knew all about his claim in October 2020 when the first ACAS early conciliation process went on. As Mr Caiden said, "That cuts both ways". If the respondents knew all about the claimant's claims it was likely because the claimant communicated them to the respondents, whether orally or in writing, or via ACAS in the early conciliation procedure in October 2020.
36. I have considered the claimant's contentions carefully but reject all of those contentions in light of what the claimant has told me about his efforts to obtain advice in general and in light of the documents I have seen. The claimant told me that he had in fact received advice from 3 sources: the PFEW; and also from an independent solicitor; and thereafter from the Citizens Advice Bureau. In relation to the first 2 of these sources of advice, the claimant was advised that his claim did not have reasonable prospects of success. The facts and events relied upon by the claimant would have been analysed by such legal advisers. On a balance of probabilities, I consider that either the claimant must have made enquiries about all potential complaints or that a reasonably competent solicitor would in any event have considered all potential complaints and advised accordingly. What the claimant received was advice on the merits but it was not advice that satisfied him enough for him to decide to bring a claim. He did not present any claim within the applicable time limits despite having the benefit of legal advice and despite having commenced ACAS early conciliation. In those circumstances, I consider that the

claimant had the opportunity to make a claim and he chose not to do so. He only changed his mind when he received a different analysis from the Citizens Advice Bureau over 2 years later.

37. The claimant has given no explanation for why it took him over 2 years to seek alternative advice or what he did in the interim, if anything to pursue a claim. The claim presented does include certain complaints about the claimant's dealings with the PFEW after the termination of his employment. The matters raised are outwith the jurisdiction of the Tribunal and I do not consider them to support the extension of time on a just and equitable basis. It is not clear, from what I have heard and read today, that the PFEW have in fact done anything wrong or untoward, but the claimant has a remedy against them, if he thinks they did so, outside of this jurisdiction.
38. In conclusion, I consider the claimant's argument that he did not know he had a discrimination claim to be without foundation. The discrimination complaints are therefore struck out, for being long out of time, there being no just and equitable basis to extend time for such complaints.
39. In light of my above conclusions, the claim is at an end and the final hearing listed on 24 March to 14 April 2025 shall be cancelled.

Employment Judge Batten

Date: 15 March 2024

REASONS SENT TO THE PARTIES ON:

21 March 2024

FOR THE TRIBUNAL OFFICE