EMPLOYMENT TRIBUNALS

Claimant: Ms D Mills- Acquah
Respondent: Queen Charlotte's Chelsea Hospital

AND CGS-CIMB Securities (UK) Ltd

OPEN PRELIMINARY HEARING

Heard by CVP **On**: **9 May 2024**

Before: Employment Judge Nicolle

Representation
For the Claimant: in-person
For the Respondent: Mr A Shallum of Counsel

JUDGMENT

1. The Tribunal does not have jurisdiction to hear the claims of direct race discrimination pursuant to section 13 of the Equality Act 2010 (the EQA) and harassment related to race pursuant to S 26 of the EQA as the claim was not submitted within the time period provided for by section 123 (1) (a) and nor would it be appropriate for the Tribunal to exercise its discretion on the grounds that it would be just and equitable to do so, pursuant to S123 (1) (b) of the EQA.

REASONS

2. Oral reasons were given to the parties and the Claimant subsequently requested the written reasons which are set out below.

Background and relevant chronology

1. This is an application brought by the Respondent that the claim should not proceed on jurisdiction grounds on the basis that the claim was not submitted within the relevant time period as set out in s.123 of the Equality Act 2010 (the EQA).

2. The Claimant undertook a process of ACAS early conciliation between 11 July 2022 and 13 July 2022. She submitted a claim dated 7 November 2022. She makes allegations of race discrimination and harassment. In a letter of 6 April 2023, from Capsticks the Respondent's solicitors, they included an application for strike out on the basis that all events which occurred wholly before 12 April 2022 are prima facie out of time.

3. In an email of 23 November 2021 from the Claimant to Ms Anita Nioczyporuk of the Imperial College Health Care NHS Trust she made reference to having spoken with a solicitor. Mr Shelham says that this indicates that from a relatively early stage the Claimant had the benefit of legal advice. He referred to a 4 page email of 12 May 2022 from the Claimant to Jen Simpson, and copied to others, in which she concludes by saying "I've had the opportunity to speak to a law firm last week who have been kindly helping me without my previous representative". The Claimant says that these communications related to her immigration status rather than bringing Employment Tribunal proceedings.

4. I was taken to an exchange of emails between the Claimant and various representatives of the Respondent in July 2022 following a meeting which had taken place regarding the Claimant's grievance on 15 July 2022. Ms Percival in an email of 9:02 on 18 July 2022 says "it was good to meet you on Friday, please find attached the report, let me know when you feel ready to meet again, it would be good to talk through the report and the findings in more detail with Kay and I, but importantly discuss how we can in some way put things right. The Claimant responded to that email at 13:14 on 19 July 2022 to include saying: "I will be speaking with Ashley in depth about the whole report and will address this at our next meeting". The Respondent's position is that the ball was in the Claimant's court and that Ms Percival was waiting to hear back from her. Mr Shelham further refers in this regard, albeit he says it is irrelevant anyway for other reasons, to an email from Melanie Briggs to Ms Percival at 9:04 on 28 November 2022 where she states that she had just spotted that the Claimant's grievance case is still showing as open on the ER tracker, if you let me know the outcome of the grievance outcome sent to her I can get this closed for you.

5. Mr Shelham referred me to the Claimant's sickness absence record between July and November 2022 which shows a series of individual days off for flu, influenza and gastrointestinal problems. He submits that there were no significant absence during this period which would have precluded her from initiating tribunal proceedings on a timely basis, that during this period the Claimant had submitted her grievance and attended grievance meetings.

6. In an undated letter from West London Equality Centre, received by the Respondent's solicitors on 28 December 2023, referred to there having been asked to assist the Claimant with a grievance that she wished to submit. They said that they had advised her that she needed to refer her dispute to ACAS within the relevant time limit. They went on to say that they had not advised her on the time limits following receipt of the ACAS certificate and that they had heard no more from her after that, which was not surprising as she had informed them that she was being assisted by her union.

7. There has been a somewhat unusual case history. There was a case management hearing before Employment Judge Walker on 25 January 2024. The issue of amendment and jurisdiction were not finalised at this hearing. At paragraph 18 of the Case Management Order Employment Judge Walker stated that she was arranging for the Tribunal to list a further hearing at which the Claimant's application for amendments would be considered and at paragraph 20 that once the amendment application had been addressed, so that the scope of the claim is clarified, any applicable time limits can be addressed. Notwithstanding the fact that ultimately those matters were not concluded, the Claimant gave witness evidence at the hearing on 25 January 2024. The bundle for this hearing contained a transcript of the Respondent's solicitors notes of that evidence. It appears to be relatively full, whether it is verbatim or not is not clear, but the contents were not disputed by the Claimant as being an accurate reflection of her evidence.

8. Mr Shelham's position is that the Claimant is in effect bound by the evidence she gave previously and is not in a position now to add to or depart from it. He referred me to various extracts from that earlier hearing to include at page 218 the Claimant saying the reason for her delay is that at the time of the last meeting with Ms Percival on 15 July 2022 and the union she was waiting for a further meeting to happen. She goes on to state, I tried to reach Ashely Foster who was my legal representative, they said it was immigration, I did not know of time limits and I was really stressed and did not have anyone to help me. And at page 219 a question from Employment Judge Walker, how did you file your claim at ACAS to which she replied: "on my work computer out of hours". The Claimant gave evidence that she did not have a computer at home, the only computer within the house being that of her daughter who was away at university with that computer. The Judge asked did you notice on ACAS it said time limits, the Claimant responded: "No, my mind was all over the place, I did not know what was going on, ACAS is not that helpful as I contacted them five years ago when I had a problem at work, they are not helpful as they just keep referring me back to my union representative, I filled it out and thought that ACAS was going to deal with it. She goes on to say I did receive it but I was not paying attention, I thought it would be resolved internally with HR.

9. At page 221 the Claimant was asked by the Respondent's when did you first contact The West London Equality Centre for support to which she replied: "Sometime in September 2021 as I was asked to do a BRP card". The Claimant went on to say that the union had given her a list of firms and she contacted about four or five firms and she only contacted The West London Equality Centre about the BRP card initially. She was then asked when did you find out you needed to submit an ET1 after that and the Claimant said around June or July 2022.

10. The Claimant at page 222 was asked, so she got advice in July 2022, got the report in July 2022, which the Claimant accepted, but says that once she had filled out the form she thought ACAS would deal at the same time and was hoping that it was dealt with internally. So it appears that the Claimant may have completed or started to complete the ET1 form but not actually submitted it.

11. At the bottom of page 224, Employment Judge Walker asked what led you to fill out the ET1 to which the Claimant says that it was when she spoke to ACAS. Employment Judge asked the Claimant whether when she was told about the ET1 by The West London Equality Centre, when she did the ACAS form, and she said yes.

12. The Tribunal was referred to an email from Keith Osborne of 29 January 2024 which referred to the Claimant's health and sessions of counselling which had taken place. Mr Shelham says that it related to work issues and there is no reference to the Claimant's daughter's ill health.

13. A hearing took place as proposed by Employment Judge Walker before Employment Judge Goodman on 4 April 2024 to consider the Claimant's amendment applications. In the Case Management Order of Employment Judge Goodman which was only received by the parties in the last day or so, she accepts some of those amendment applications and rejects others. She included reference in paragraph 8 to Galilee v Commissioner of Police for the Metropolis [2018] ICR 634 which concerns whether amendments which are potentially or prima facia out of time should be allowed.

14. There is no need for me to set out the details regarding those amendment applications. It is however relevant to refer to the list of claims to include those which were permitted by way of amendment for direct race discrimination as set out at s.2.1. The last matter relied on is at s2.1.10 that on 29 April 2022 Jen Simpson's behaviour towards the Claimant at an investigation meeting concerning her grievance involving her shouting and banging tables. Section 2.1.11 includes the permitted amendment that after the meeting on 15 July 2022, despite Ms Percival having promised the Claimant she would arrange another meeting to discuss possible remedies/solutions and conclude the grievance she never got back to the Claimant. Mr Shelham's submission is that the amendment being allowed does not retrospectively change the relevant date for submitting a claim. He says that any claim before 8 August 2022 was, and remains out of time, and that the date goes back to when this claim should have been included within the claim form.

15. The Claimant submitted various statements or letters regarding why she says it was not possible to submit a claim on time to include a statement from her daughter. Mr Shelham says that I should disregard this subsequent evidence as the Claimant has already given evidence at the hearing before Employment Judge Walker on 25 January 2024.

The parties' submissions

Respondent

16. Mr Shelham says that the correct legal analysis as per Galilee v Commissioner of Police for the Metropolis is that an amendment being granted does not change the fundamental position which is that a tribunal needs to look at the claim and whether it had, or had not been submitted, on a timely basis as

at 25 January 2024 and that a subsequently permitted amendment to allow an additional allegation relating to 15 July 2022 does not change that position. The effect of the amendment he says is a red herring and has no impact on what was the position prior to it being granted. He says it would be inappropriate to consider the Claimant's contentions regarding her daughter's ill health as that was not a matter she had raised at the hearing on 25 January 2024.

17. He says there is no good reason why the claim had not been filed in time. The Claimant had support from external advisers and her trade union, she had knowledge of time limits, she in reality forgot about the ET1. She failed to bring the claim expeditiously and any ignorance is not reasonable. In any event whilst he says it is irrelevant, the 15 July 22 meeting should have spurred the Claimant to take action, she failed to do so. He says that the burden is on the Claimant to demonstrate why the Tribunal's discretion should be exercised to extend time and that she has failed to discharge that burden. He says that the Respondent would suffer significant prejudice if the claim were allowed to proceed given that some of the matters date back as early as September 2021 and the cogency of the evidence would be potentially compromised.

18. He further says that prospects of success militate against discretion being exercised and that whilst the application is being brought solely on the basis of limitation on the grounds of time he says merits are a relevant factor.

Claimant

19. Much of what she said was arguably of an evidential nature but I gave her leeway to do so. However, I take that into account in weighing up the extent to which matters she referred to are relevant considerations. She referred to the meeting on 15 July 2022, she described being tearful at that meeting concluding and that her expectation was that the Respondent would take action. She referred to The West London Equality Centre, she says that someone called Paula did not get back to her, there were long gaps. She talked about her daughter becoming extremely unwell in June and July 2022 and that was her priority. She talks about trauma at work. She referred to being placed in a room in isolation between September 2021 and February 2022 when she says she did not have access to a computer. That is not a matter I take into account given that it is in effect an evidential point but also does not appear to go to the issue of whether a claim could have been submitted on a timely basis. The Claimant says that she thought ACAS was dealing on her behalf, she took a back seat.

20. Mr Shelham replied briefly to make the point that in effect I had heard evidence and not submissions. He says that the Claimant awaiting on the outcome of an internal process would not provide justification for an extension of time.

The Law

21. The relevant section is 123 of the EQA with the basic period being three months starting with date of the act which the complaint relates or under s.123(b) such other period is the Employment Tribunal thinks just and equitable.

22. It is clear from the case law that an employment tribunal's discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases. Therefore, whereas incorrect advice by a solicitor is unlikely to save a late tribunal claim in an unfair dismissal case, the same is not necessarily true when the claim is one of discrimination — Hawkins v Ball and anor 1996 IRLR 258, EAT and British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT.

23. The case law on the just and equitable test makes clear that a claimant "cannot be held responsible for the failings of his solicitors": Virdi v Commissioner of Police for the Metropolis [2007] IRLR 24.

24. The checklist of factors in s.33 of the Limitation Act 1980 is a useful guide of factors likely to be relevant, but a tribunal will not make an error of law by failing to consider the matters listed in s.33 provided that no materially relevant consideration is left out of account: Neary v Governing Body of St Albans Girls' School [2010] ICR 473. Section 33 requires the court to take into account all the circumstances of the case, and in particular the factors set out at s.33(3). Those factors which are relevant to the Claim are:

a. the length of, and reasons for, the delay by the Claimant;
b. the extent to which the cogency of the evidence is likely to be affected by the delay;
c. the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action; and
d. the steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

25. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, while the checklist in S.33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly.

26. The case law is clear an Employment Tribunal's discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases and the relevant cases include British Coal Corporation v Keeble a claimant is ultimately responsible for any failings by their legal advisers to provide timely advise or to submit claims within the relevant time period. There is a check list of factors to be taken into account under s.33 of the Limitation Act 1980 it is a useful guide only, it is not something to be followed in a rigid fashion, it includes the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected, the promptness of which the claimant acted once she knew of the facts giving rise to the cause of action and steps taken by the claimant to obtain professional appropriate advise once she knew of the possibility of taking action.

Conclusions and discussion

27. I have reached the conclusion that the Tribunal does not have jurisdiction to consider the claim. There can be no doubt that the claim has been submitted outside the requisite time period. The last act relied on, before the amendment application was considered, was on the 29 April 2022. It is therefore not relevant for me to consider whether there was a continuing course of conduct as any continuing course of conduct which may have existed prior to that date, and its existence is, in any event, disputed by the Respondent, would not enable it to be said that the claim as submitted on 7 November 2022 was in time. Therefore any acts before 8 August 2022, based on the claim submitted on 7 November 2022, were out of time and as such all acts relied on are out of time.

28. I accept Mr Shelham's submission that the subsequent acceptance of an amendment to include the meeting of 15 July 2022 did not have the retrospective effect of altering the time limit and that the admitted claim needs to be considered at the date the claim was submitted not at the date when the amendment application was granted. In any event even if the 15 July 2022 meeting were included it was still before 8 August 2022 and outside the requisite time limit.

29. Therefore the only issue I need to consider is whether it would be appropriate for me to exercise my discretion on the basis that it would be just and equitable to do so. I find that it would not. I have to be strict as to the matters it would be appropriate to take into account. The Claimant had the opportunity of giving evidence on 25 January 2024 and at no point in the transcript of her evidence, and the Claimant does not dispute this, she says her daughter's ill-health was not the primary factor taken into account as she was reluctant to refer to such a painful and personal matter, which is entirely understandable, but nevertheless it was not referred to on 25 January 2024.

30. I find it would be wholly inappropriate in those circumstances for the Claimant to in effect have a second bite of the cherry to rely on different matters namely the fact that she was in effect unable to progress the Tribunal complaint because of her daughter's ill health. In any event I do not consider that to be entirely consistent with the evidence. The Claimant has referred to various reasons why her claim was not progressed in a timely fashion. That includes the fact that she had an expectation that ACAS would progress matters, clearly they would not, no criticism is intended of the Claimant but she was labouring under a false expectation. Further, that there was an expectation that The West London Equality Centre would progress matters, they clearly did not do so, it is not for me to comment on that, I am now aware of the terms of the Claimant's engagement with them, but nevertheless it is not a consistent statement with I could not do so because I was totally otherwise preoccupied with a personal/family matter and precluded from progressing matters.

31. Further, the Claimant referred on various occasions to the fact that she had an expectation that Ms Percival, or the Respondent more generally, would come up with a solution in effect negating the requirement for her to issue tribunal proceedings. I accept the Respondent's contention that it is well established pursuant to case law that it is not open to a potential Claimant to wait on an internal process and thereby in effect pause the normal time limits. It remains

important for a claim to be submitted even if it is on a protective basis. The Claimant failed to do so and whilst she has referred to various elements of her mental health during the summer of 2022, to include her own health issues, the stress of matters at work and her daughter's ill health it nevertheless remains the case that the Claimant was attending work with a few exceptions. Further, that when she attended internal counselling it related to that work issue rather than her daughter's ill health, so whilst it may well be that the Claimant was understandably concerned and preoccupied with her daughter's health it is not consistent with her not being in a position to take the relatively small additional step of submitting a claim form within the relevant time period.

32. The fact that she had to use a workplace computer and do so after hours may have made that more difficult, but it did not preclude matters, and therefore I am not satisfied that the Claimant has satisfied the burden of putting forward reasons why I should exercise my discretion to allow the claim to proceed. I have also taken into account to a relatively small degree the merits of the claims, but merits ultimately are very much a secondary consideration, because even had the claim been one which had intrinsically good prospects of success, I would have taken the view, given what I have set out above, that the claim was substantially out of time and my discretion should not be exercised, given the factors I have taken into account, to include the prejudice the Respondent would suffer.

33. So, for all of those reasons the claim is struck out on the basis that the Tribunal does not have jurisdiction as it was not filed within the requisite time period.

Employment Judge Nicolle

18 June 2024

Sent to the parties on:

25 June 2024

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For the Tribunal Office:

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