



EMPLOYMENT TRIBUNALS

Claimant JK

Respondent Ealing Council

Heard at: London Central (by CVP)

On: 18 April 2023

Before: Tribunal Judge McGrade acting as an Employment Judge (sitting alone)

Appearances

Claimant: Mr C Barklem, counsel

Respondent: Mr B Williams, counsel

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal is out of time and it was reasonably practicable to present it in time and it is therefore dismissed.
2. The Claimant's claims of direct sex discrimination are out of time, but it is just and equitable to extend the time and accordingly they shall proceed to a full merits hearing.
3. The Claimant's claims of disability discrimination, victimisation and harassment are out of time and it is not just and equitable to extend time and accordingly they are dismissed.

REASONS

1. This hearing was fixed to determine the following issues identified at a case management hearing held on 1 February 2023:-
 - a) there being no dispute that the claimant's complaint of constructive unfair dismissal was presented outside the normal time limit, whether the tribunal is satisfied that it was not reasonably practicable for the claim to be presented before the normal time limit; and

- b) whether the claim was presented within such further period as the tribunal considers reasonable
 - c) there being no dispute that the claimant's complaints of discrimination and victimisation were presented outside the normal time limit, whether they were presented within such other period as the tribunal thinks just and equitable in accordance with section 123(1) (b) of the Equality Act 2020.
2. The claimant adopted a very detailed statement prepared by her and was cross examined at some length by Mr Williams. I heard oral submissions from counsel for both parties.
 3. In the note issued following the case management hearing on 1 February 2023, Employment Judge E Burns listed the dates of presentation of the claims and allegations. These were as follows:-

The original ET1 presented on 23 May 2022 referenced the constructive unfair dismissal claim and sex discrimination claims included the facts of the allegations numbered 5.7, 5.8, 5.9, 5.10, 5.15 and 13.2 – 13.5

The amendment application of 22 June 2022 was the first reference to claims of disability discrimination and included the facts of the allegations numbered 5.1, 5.2, 5.3, 5.4, 5.5, 5.11, 5.13 and 5.15.

The further and better particulars dated 8 November 2022 referenced the victimisation claims for the first time and was also the first time that the facts found in the allegation numbered 5.6 were set out. I treated this as a further amendment application.

Factual background

4. The claimant commenced employment with the respondent as a locum social worker in June 2013. She later applied for and was offered the role of permanent social worker with effect from 14 March 2014. In 2016, her working hours were changed to 33.5 hours per week, as she had tendered her resignation due to the pressure of work and her employer had proposed this, to persuade her to remain. On 31 July 2017, she was appointed to the role of interim senior social worker.
5. In June 2019, the claimant began fortnightly psychological therapy sessions with Eva Roussou, a clinical and counselling psychologist. These continued until February 2022. She was certified as unfit to attend work from around February or March 2020 until October 2020, because of depression and anxiety. She was assessed by the respondent's occupational health service and a phased return to work plan was agreed. It was also suggested that she should be well supported and have the opportunity to discuss her workload and any areas of concern.
6. The claimant was assessed again by the respondent's occupational health service on 14 December 2020. She reported that she felt obliged to increase her hours to full-time more quickly than recommended because of the pressure her team was under. She also indicated she was having regular supportive meetings with her line manager.

7. In March 2021, the claimant was advised that she had been successful in her application for a permanent senior social worker role. She was advised her working pattern would change from 33.5 hours over four days to 35 hours over five days. She was also advised that she would move from a grade 12 to a grade 11, with a corresponding reduction in salary. She discussed this matter with her trade union representative. Her trade union representative requested that her employer consider her health condition and absence from work, before imposing revised working hours.
8. The claimant met with Andrew Chapman around May 2021 and expressed concerns regarding her workload. She spoke to her trade union representative immediately after this meeting, who expressed concerns regarding the language used by Andrew Chapman when referring to her mental health problems.
9. The claimant had a difficult working relationship with Mercedes Quire. She proposed that a meeting be arranged with her line manager Andrew Chapman, Mercedes Quire and Jan Wlasienko to discuss these concerns. Jan Wlasienko and Andrew Chapman indicated they were unable to attend and therefore the meeting did not take place.
10. The complainant had a further assessment with the respondent's occupational health service in July 2021. She expressed the view that the mental health problems that she had experienced over the previous year were caused by a variety of factors, including doing a university course, supervising staff, the high turnover of staff, picking up work from her predecessor and working long hours.
11. The claimant attended a supervision session with Andrew Chapman on 16 August 2021. She resigned following that session. She submitted a short email tendering her resignation, in which she advised her employer that "the situation is not working for me at the moment."
12. The claimant attended a meeting with Andrew Chapman, Jan Wlasienko and Mercedes Quire on 16 August 2021, after she submitted her resignation, to discuss what the claimant considered to be a difficult working relationship between her and Mercedes Quire. During the course of that meeting, Mercedes Quire referred to concerns raised by another member of staff regarding the claimant's conduct at a meeting on 22 July 2021. Mercedes Quire also described the claimant as "not collaborative," but declined to provide any further information.
13. On 26 October 2021, the claimant advised her trade union representative that she was considering making a formal grievance and was preparing this. On 27 October 2021, she carried out online research and obtained information from the Citizens Advice Bureau website regarding her rights relating to notice. She also sought and obtained advice from a free legal clinic regarding the issue of notice.
14. The claimant was advised against submitting a formal grievance by Lydia Ahmed of Unison in early November 2021, as she only required to attend work for a period of one week, and she was no longer working with Mercedes Quire. On 8 November 2021, the claimant submitted what she described as a pre-grievance complaint. She outlined in that document that she did not wish to "progress to the grievance stage at this time as I am leaving my employment and I believe the Council's time will be best invested in our residents."

15. The pre-grievance complaint raised three main issues. Firstly, a dispute as to what was to be her last date of employment. Secondly, a dispute regarding her holiday entitlement. Thirdly, her difficult working relationship with Mercedes Quire and the lack of progress and support in resolving this issue. The claimant specifically acknowledged the positive support she had received from her managers in managing her casework and supporting her supervisees. She made no reference to any discriminatory treatment.
16. Jan Wlasienko investigated the claimant's complaints and spoke with a number of members of staff regarding the issues raised. On 15 November 2021, the claimant received a detailed report prepared by Jan Wlasienko regarding her concerns. She also met with Jan Wlasienko and Andrew Chapman on 18 November 2021 to discuss the terms of the report.
17. The claimant had accrued a substantial number of holidays, which she wished to take prior to the termination of her employment. She last attended work on 25 November 2021. She was then on holiday until 16 January 2022. She travelled to Spain in December 2021 and spent seven weeks there, before returning to take up her new role as a social worker on 17 January 2022. She carried out her duties until May 2022, when she submitted the application, without any absences.
18. In January 2022, the claimant explored the possibility of submitting an application to the employment tribunal. She became aware at this time of the possibility of submitting a claim for constructive dismissal. However, she did not do so.
19. The claimant emailed Jan Wlasienko on 30 January 2022, advising she had returned her home kit and mobile phone. She also provided very detailed comments on the report provided to her on 15 November 2001. She indicated she could not accept the findings of the report. In addition, she remained concerned regarding an allegation made against her by Daniella Meekings and indicated that she would at least like that to be clarified.
20. On 10 April 2022, the claimant emailed Jacky Yates raising her concerns that she had not received a response to her email of 31 January 2022. She indicated that she found it appalling "that Ealing Council allowed an investigation to be made about me by staff member DM, and no formal investigation ever took place." She emailed Jacky Yates again on 10 May 2022, requesting a response. Jacky Yates responded on 11 May 2022, advising she had met with Jan Wlasienko and had reviewed the investigation report. She also provided the claimant with the names of those individuals with whom Jan Wlasienko had spoken. She indicated to the claimant that it was open to her to submit a formal grievance, following notification of the outcome of the pre-grievance complaint, but that she had chosen not to do so. She also explained that she considered the matter was now concluded and no further investigation was required.
21. The claimant began early conciliation on 16 May 2022. She lodged a claim on 23 May 2022. In late May/early June 2022, the claimant's psychological health deteriorated. She referred herself to a psychological support service on 20 June 2022 and asked her GP to increase her medication. She also spoke with her employer regarding her psychological health, and was offered the additional flexibility regarding managing her

hours. She was seen by a psychiatrist on 4 August 2022, who increased her medication and indicated she was suffering from impulse phobia. He agreed to see her again in September 2022. She was also seen by a cognitive behavioural therapist on 10 August 2022.

The law

22. Section 111 of the Employment Rights Act 1996 provides as follows:

- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
- (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
 - (a) before the end of the period of three months beginning with the effective date of termination, 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

23. Section 123 of the Equality Act 2010 provides as follows:

- ...proceedings on a complaint within section 120 may not be brought after the end of—
- (a) the period of 3 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.

24. **Southwark London Borough Council v Afolabi 2003 ICR 800, CA** identifies two factors which will almost always be relevant in deciding whether to extend time in a discrimination claim. Firstly, the length of, and reasons for, the delay. Secondly whether the delay has prejudiced the respondent.

25. The Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**, outlined that the tribunal has a very broad general discretion and that the best approach when considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.

26. The discretion conferred on tribunals is wide. In **Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132**, the EAT has held that, when considering whether it was just and equitable to extend the time limit for presenting discrimination complaints, or to grant an application to amend to add a further out of time discrimination complaint, the tribunal was entitled to weigh in the balance the weakness of the claim.

27. When determining the applications to amend, I have considered the factors outlined in **Selkent Bus Co Ltd v Moore [1996] ICR 836** and the judgment in **Abercrombie v Aga Rangemaster Ltd [2014] ICR 209**. I recognise that ultimately, I am undertaking a balancing exercise, as set out in **Vaughan v Modality Partnership [2021] ICR 535**.

UNFAIR DISMISSAL CLAIM

28. Both parties referred me to **Schultz v Esso Petroleum Company Ltd [1999] IRLR 488, CA**. The claimant's counsel suggested it was not reasonably practicable for the claimant to lodge her unfair dismissal claim, as she was prevented from doing so by reason of illness. He also submitted that she was not knowledgeable about the subject.
29. In her statement, the claimant indicates that she learned that the circumstances of the termination of her employment could give rise to a claim for constructive dismissal in January 2022. Although it is slightly surprising that the claimant would not have been aware of the possibility of making a claim for constructive dismissal before January 2022, given she is a very experienced social worker and had specifically sought employment advice from her trade union regarding issues of concern in 2021, I am willing to accept that the claimant was not aware of the possibility of pursuing a claim for constructive dismissal until January 2022.
30. The claimant relies primarily upon her deteriorating mental health, in support of the argument that it was not reasonably practicable for her to begin early conciliation within three months of the termination of employment. She also refers to the lack of support and misleading advice from her trade union.
31. I accept the claimant has had mental health problems for some time and those mental health problems continued during the three months period following the termination of her employment. However, I am not persuaded that her mental health was so poor that it was not reasonably practicable to begin early conciliation or pursue a claim for unfair dismissal. She moved to another post as a social worker immediately after her employment with the respondent came to an end. She was clearly capable of coping with the demands of that role. She was also corresponding with the respondent regarding issues related to the pre-grievance complaint (31 January, 10 April and 10 May 2022).
32. There is evidence before me that the claimant's trade union advised her against pursuing a formal grievance, as she had tendered her resignation. The claimant suggests that this in some way contributed to the delay in submitting the claim. I do not consider this advice prevented her submitting an unfair dismissal claim. On her own version of events, she knew of the possibility of pursuing a claim from January 2022. She had sought advice initially from her trade union and later from a legal advice clinic regarding the dispute over her notice period. She was therefore only too well aware of possible sources of advice. In all the circumstances, I do not accept that it was not reasonably practicable for the claimant to submit an unfair dismissal claim within three months of the termination of her employment.

SEX DISCRIMINATION CLAIMS

33. The claimant complains of direct sex discrimination as a result of being forced to reapply for her role at a lower level of pay i.e. grade 11 in March 2021, and her employer persisting with this decision, despite being told in June 2021 of a male comparator who was on grade 12.
34. Taking the claimant's case at its highest and assuming a second decision was made in June 2021, which triggers a fresh time limit, early conciliation should have been started in September 2021, whereas it was not started until 16 May 2022 and the claim was not lodged until 23 May 2022.
35. The claimant relies upon her ill health, and her inability to deal with issues relating to her employment with the respondent, to explain why no claim was submitted at an earlier stage. I have accepted that the claimant was suffering from ill health, albeit I do not accept her ill health was as disabling as she has suggested.
36. The respondent did not deny that the claimant was on Grade 12, while she acted up as a senior social worker and that she was told the salary for the substantive role was Grade 11. It has outlined that the claimant's Grade 12 salary was an historic issue, and that no other senior social workers were engaged on this salary level when the post was advertised, as Mr Birch, who had also been on Grade 12 for historic reasons, had left in November 2020. Finally, it is stated that she remained on Grade 12 until her employment ended.
37. I have some concerns as to the strength of the claim. However, at this stage, I am taking the claimant's case at its highest and cannot rule out the possibility that the claimant's sex may have been a material factor in the respondent advising her that her salary would be reduced in her new role.
38. Given the terms of the response, and in particular the explanation provided by the respondent as to why it suggested the claimant should move to Grade 11, I consider the respondent will suffer very little prejudice by reason of the fact that the claim was submitted late. In particular, I see no reason why the cogency of the evidence should be impacted. I therefore consider it is just and equitable to allow the claim to proceed, albeit it is late.

DISABILITY DISCRIMINATION CLAIMS

39. The claimant has sought to introduce claims of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability in her amendment application submitted on 22 June 2022. A significant number of those complaints relate to incidents that took place between November/December 2020 and July 2021. The vast majority relates to the conduct of Andrew Chapman. I accept that some of her complaints relate to the behaviour of Mercedes Quire towards the claimant. The respondent was aware of those concerns in November 2021 as they had received the pre-grievance document submitted by the claimant on 8 November 2021. However, that document did not give any indication that the claimant believed she had been discriminated against by Mercedes Quire.

40. The claimant is seeking to introduce a very substantial number of claims of disability discrimination regarding events that took place over a period of slightly over a year from around November or December 2000 until January 2022. The original application made no reference to disability discrimination. All of the disability discrimination claims are out of time, as the amendment application was not submitted until 22 June 2022. The claimant has suggested that her poor psychological health prevented her from submitting this claim. She has also suggested in cross examination that she did not understand that her health enabled her to pursue a claim for disability discrimination. I do not accept the appellant's health was so poor that she was not well enough to lodge a claim, for the reasons I have given in paragraph 31 above. I also do not accept that the claimant would have been unaware that her condition could provide her with the protection afforded to those with disabilities, given her lengthy period of absence, the involvement of occupational health and other health professionals and the request by her trade union for the respondent to take account of health, when determining her working hours (cf para 157 of her statement)
41. If I refuse the application, the claimant will obviously lose the right to pursue a very substantial number of claims of disability discrimination, which relate to the period of her employment with the respondent. If I allow the application to amend, the respondent will have to investigate and respond to a very substantial number of allegations of disability discrimination relating to events that took place some time ago. Given the number and the nature of those allegations, and in particular the fact that many of the allegations relate to comments made by individuals at meetings that took place between January and June 2021, I consider it is likely to be very difficult for those individuals to recall now what was said at those meetings.
42. There is also nothing in the documentation before me to suggest that the respondent was aware that the claimant was likely to pursue disability discrimination claims. The pre-grievance complaint includes a complaint that another member of staff had alleged that the claimant had discriminated against her. However, there is no suggestion of any discriminatory conduct towards the claimant. The claimant made a point of recording the positive support she had received from her managers. She continued to correspond with the respondent until May 2021, yet did not at any point allege discrimination. She also made no reference to disability discrimination when she lodged the claim.
43. The respondent's counsel indicated that I should take into account the weakness of the claimant's claim, when deciding whether to grant the amendments. I am not in a position to conclude that all of the complaints submitted by the claimant are weak. I consider some of the later complaints are weak, such as the allegations regarding being locked out of her account, as the documentation suggests that she had been locked out, as she had completed her last working day.
44. I consider the potential hardship to the respondent in having to respond to a very significant number of claims of disability discrimination, stretching over a period of more than a year and involving a number of witnesses, all of which are out of time, is so significant that it outweighs the prejudice that the claimant will suffer, if she is not permitted to pursue these claims. In all the circumstances, I am not persuaded that it is just and equitable to allow the disability discrimination claims to proceed.

VICTIMISATION CLAIMS

45. The claimant complains of victimisation in the further and better particulars submitted on 8 November 2022. The incidents of victimisation upon which she relies are the same incidents upon which she relies for her claims of discrimination arising from disability and harassment related to disability. Those complaints therefore relate to incidents that took place between November/December 2020 and January 2022.
46. Many of the same considerations apply to the victimisation claims as apply to the disability discrimination claims. If I refuse the application, the claimant will obviously lose the right to pursue those claims. If I allow the application to amend, the respondent will have to investigate and respond to a very substantial number of allegations of victimisation relating to events that took place some time ago. The further and better particulars referring to victimisation, which have been treated as an amendment application, were not submitted until 8 November 2022, some time after the original claim and first amendment request. I am not satisfied that any satisfactory explanation has been provided for the delay. In all the circumstances, I do not consider it is just and equitable to allow the claims of victimisation to proceed.

ANONYMITY ORDER

47. The claimant has sought an order prevent her identity being disclosed to the public, by way of anonymisation or otherwise. She has indicated the information disclosed in the preliminary hearing relates to her disability and is of a very personal nature. She describes how it will cause her significant distress and embarrassment if this is reported and /or disclosed to the public.
48. Rule 50 of Schedule 1 of Employment Tribunals (Constitution and Rules of Procedure Regulations 2013 provides:
- (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers it necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.
 - (2) In considering whether to make an order under this rule the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
 - (3) Such orders may include
- (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public by use of anonymisation or otherwise, whether in the course of the hearing or in its listing or in any document that is on the Register or otherwise forming part of the public record”

- (6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998

49. I have considered **Broadcasting Corporation v Roden [2015] ICR 985** and recognise that the principle of open justice is of paramount importance and derogations from it can only be justified when strictly necessary to secure the proper administration of justice. I recognise that in making this decision, I am balancing the claimant's convention rights and the principle of open justice. I have also considered the remarks made by Simler J at paragraph 50 of Roden:

"The default position in the public interest is that judgments of tribunals should be published in full, including the names of the parties. That principle promotes confidence in the administration of justice and the rule of law. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle and withholding a party's name is an obvious derogation from it, requiring cogent justification for its restriction. ... The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment, as the authorities make clear."

50. I recognise that the claimant considers disclosure of information of a personal nature, including information relating to her disability, will cause her significant distress and embarrassment, if disclosed to the public. However, I do not consider the fact that this judgment involves the publication of information of a personal nature, including limited details of the claimant's medical condition, is sufficient to outweigh the principle of open justice and entitle me to impose an anonymity order or a restricted reporting order.
51. This case will now be listed for a two hour case management hearing on **28 June 2023 at 2pm** to make arrangements for the final hearing in respect of the sex discrimination claims.

Tribunal Judge McGrade

Date 25 May 2023

JUDGMENT SENT TO THE PARTIES
ON 25 May 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.