Case No: 2200108/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss I Kapusta

Respondent: Linkedin Technology UK Ltd & Another

Heard at: London Central **On:** 28 January 2019

Before: Employment Judge Grewal

Representation
Claimant: In person
Respondent: Ms R Tuck, Counsel

JUDGMENT having been sent to the parties on 30 January 2019 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

1 In a claim form presented on 12 January 2018 the Claimant complained, among other things, of having been subjected to detriments for having made protected disclosures. Early Conciliation was commenced on 14 November 2017 and concluded on 14 December 2017. The effect of that was that any complaints about detriments that occurred before 15 August 2017 would not have been presented in time.

2 The Claimant's public interest disclosure detriment claims were set out in the list of issues at pages 195 and 196 in the bundle. They fell into the following two groups. The first group comprised the detriments to which Jason Leigh allegedly subjected the Claimant between 6 April and 19 May 2017 after she made certain disclosures to him on 6 and 10 April 2017. The detriments alleged were that he had ignored her and the concerns that she raised, had made certain negative remarks to her in a call on 2 May, had ignored her requests in April and May to change an erroneous performance review of her on the system and had not taken part in a call on 19 May 2017. The second group comprised detriments to which the First Respondent's HR personnel allegedly subjected the Claimant between July 2017 and January 2018 after she made disclosures to Neeve Guinnane in HR on 14 July and 16 August 2017. The disclosure on 14 July involved forwarding to her the email that she had sent to Mr Leigh on 10 April

2017. The detriments alleged were a delay in initiating and concluding an investigation into the Claimant's complaints and her grievance of 20 November 2017, giving the Claimant unreasonable timelines in relation to the investigation, misleading Occupational Health and ignoring its recommendations, denying that the Claimant's illness was related to her work and the First Respondent's conduct and failing to adjust her bonus for 2016 after her erroneous performance review rating was corrected in October 2017.

3 Section 48(3) of the Employment Rights Act 1996 ("ERA1996") provides that an employment tribunal shall not consider a complaint of having been subjected to a detriment for having made a protected disclosure unless it is presented -

> "*(a) before the end of 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 is part of a 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 reasonable practicable for the complaint to be presented before the end of that period of three months."*

Section 48(4) provides,

> *"For the purposes of subsection (3) –*
>
> *(a) where an act extends over a period, the "date of the act" means the last day of that period, and*
> *(b) A deliberate failure to act shall be treated as done when it was decided on;*
>
> *and, in the absence of evidence establishing the contrary, an employer … shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was done."*

4 I concluded that each of the two groups constituted a series of similar acts or failures and that the acts within each group were capable of amounting to an act extending over a period. The two groups, however, were not capable of amounting to an act extending over a period. They were two separate disparate acts. There were two separate disclosures made to two different persons, there was a gap of at least three months between the disclosures, different persons subjected the Claimant to the detriments, the detriments were of a different nature and there was a time gap between the detriments. In respect of any alleged failures in the first group I concluded that if Mr Leigh was going to do those acts he might reasonably have been expected to have done them at the latest by the end of May 2017. It followed, therefore, that the claim relating to the first group pf detriments had not been presented in time.

5 I then considered whether it was reasonably practicable for the Claimant to have presented that claim within three months and, if not, whether it was presented within such further time as I considered reasonable. The Claimant put forward two reasons why she said it had not been reasonably practicable to initiate that claim by 18 August – firstly, her ill-health and secondly, because she was trying to resolve matters internally by raising a grievance. The evidence was that the Claimant had been absent sick from work (with stress and anxiety) from

22 to 26 May 2017, she had been on holiday the week after, she had returned to work on 9 June 2017 and had then commenced a long period of sickness absence (for work-related stress, anxiety and depression) on 13 June 2017. That had continued until the following year. The Claimant said that she had been "burnt out" at the time and was unable to present a claim before she did.

6 Notwithstanding her ill-health, the Claimant sent *"two detailed emails"* to HR on 14 July and 16 August 2017 (Claimant's particulars of claim). The second of those emails had many documents attached to it. In th0se emails she complained about Jason Leigh's conduct. On 24 October 2017 she instructed solicitors to act for her in her internal grievances. On 20 November 2017 the solicitors drafted her formal grievance for her.

7 Having considered all the evidence, I was not satisfied that it had not been reasonably practicable for the Claimant to instigate proceedings (by commencing Early Conciliation) in respect the first group within three months of those acts occurring. She had been at work until 22 May 2017. She had been able to put together a detailed complaint, with supporting documents, by 16 August 2017. If she could do that, she could equally have commenced the Early Conciliation procedure at that time.

Application to amend second claim

8 The Claimant has also sought more detailed reasons of the refusal of her application to amend. I set them out here rather than in a separate document.

9 The second claim was presented on 21 March 2017. The particulars of claim comprised twelve typed pages. At paragraph 3 the Claimant referred to the emails of 14 July and 6 August 2017 and said that they amounted to protected disclosures. At paragraph 19 the Claimant said that she had raised a formal grievance on 20 November 2017 which included complaints of whistleblowing detriments, sex discrimination, sex harassment, payment shortfall and personal injury. She then set out a detailed narrative of what happened after that and concluded by saying in paragraph 61 that she was seeking compensation for whistleblowing. She did not say in the particulars that any of the matters in the detailed narrative were attributable to the fact that she had complained of sex discrimination/harassment in her formal grievance.

10 A preliminary hearing of the first claim took place on 23 April 2017. The second claim had not been served by then. Prior to that hearing the Claimant indicated that she wanted to make a number of applications to amend the first claim. At the hearing she produced another document which included an application to amend to include a complaint of victimisation. There were a number of other matters with which the Employment Judge had to deal and the applications to amend were put off to the next preliminary hearing.

11 The next preliminary hearing took place 5 June 2018. The second claim form had been served on the Respondent late the previous afternoon. There was no discussion of the second claim at that hearing. At that hearing the Employment Judge dealt with the applications to amend the first claim and refused them. She directed that by 19 June 2018 the Claimant should clarify and particularise the claims in the second claim and make any applications to amend if she wished to make any.

12 On 19 June 2018 the Claimant sent the Tribunal "clarified particulars of claim" which included a complaint of victimisation. That was treated as an application to amend as the Claimant had not previously complained of victimisation. The detriments set out by the Claimant were the delay in starting and concluding the grievance investigation, the malicious and insulting outcome of the grievance, giving the Claimant only five days to appeal, ignoring an Occupational health recommendation, implying that the Claimant's grievance was not related to her work or the conduct of the Respondent, a delay in adjusting her bonus of 2016 after correcting the erroneous performance review and telling the Claimant on 26 January that the Respondent expected her to reimburse part of her December 2017 and all of her January 2018 salary (although this was later retracted).

13 The Claimant accepted that she was seeking to add a new cause of action. At the time that the application to amend was made on 19 June 2018 the claim was about six weeks' out of time. The last detriment was alleged to have occurred at on 2 February 2018 when the Claimant received the outcome of the grievance. The Claimant's explanation for not making the claim when she presented her second claim on 12 March 2018 was that she did not know about victimisation at that time. Ignorance of the law is not per se an acceptable explanation for bringing a claim in time. The issue is whether the ignorance was reasonable. If the Claimant had genuinely believed that she had been treated badly because she had made complaints of sex discrimination, she could easily have done some research to establish whether she could complain about that. She is an intelligent woman who worked in a research role in technology. The fact that she did not indicates to me that she did not think that there was any link between the complaints of discrimination and her treatment. She had access to legal advice from 24 October 2017 to the end of the year, on 22 March and again from 29 May 2018. She was aware of victimisation on 23 April 2108 because she wanted to amend her first claim to include a complaint of victimisation. If I allowed the application the Respondent would have to defend a new cause of action which had been presented out of time for no good reason and in circumstances where it would not be just and equitable to extend time. The Claimant still have a claim before the Tribunal about being subjected to those detriments because of the protected disclosures she made in July and August 2017. In all the circumstances, I concluded that greater prejudice would be caused to the Respondent if I allowed the amendment than to the Claimant if I refused it.

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Employment Judge Grewal

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Date 13 February 2019

REASONS SENT TO THE PARTIES ON

14 February 2019

FOR THE TRIBUNAL OFFICE