



THE EMPLOYMENT TRIBUNALS

Between

Claimant: Ms M Maurice
First Respondent: HSBC Bank plc
Second Respondent: Ms Debbie Curtis

Heard at London South Employment Tribunal on 27 November 2018

Before Employment Judge Baron

Representation:

Claimant: John Neckles – PTSC Union
Respondents: Sam Harris - Solicitor

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

- 1 That the application by the Claimant for leave to amend the claim is refused;
- 2 That the Tribunal does not have the jurisdiction to consider the claims made by the Claimant and such claims are dismissed.

REASONS

- 1 This hearing was listed to determine whether the Tribunal had the jurisdiction to consider the claims made by the Claimant taking into account the statutory time limits.
- 2 The claim form ET1 was presented to the Tribunal by Mr Neckles on behalf of the Claimant on 4 June 2018. The Claimant made claims of having suffered detriments as a result of making a protected disclosure, having been subjected to less favourable treatment because of race, racial harassment, disability related discrimination and also disability harassment. I will refer to the First Respondent as ‘the Respondent’ and the Second Respondent by her name.
- 3 The Claimant alleged in the Particulars of Claim that she had suffered six detriments and/or instances of harassment or less favourable treatment summarised as follows:

- 3.1 Instituting PIP from February 2017;¹
 - 3.2 Oppressive challenge relating to taking of dependency leave from 05/03/2017;
 - 3.3 Oppressive challenge relating to sickness absence during UTI infection from September 2017;
 - 3.4 Harassive treatments leading to sickness from stress from 19/10/2017;
 - 3.5 Heady handed return to work approach from October 2017;
 - 3.6 Breach of DATA protection on 04/01/18.
- 4 In the Particulars of Claim there was a narrative giving some details at least of these allegations. The final allegation needs some explanation. The following appears to be the position. The Claimant had a telephone conference with Occupational Health on 11 December 2017. At a meeting on 29 December 2017 with Ms Curtis the Claimant asked for a copy of the OH report. Ms Curtis sent a text message to the Claimant on 4 January 2018 asking if she could send the report to the Claimant's email address. The Respondents say that Ms Curtis received express permission in that respect by text message, but the Claimant denies that she gave such permission. The Claimant alleges that the sending of the report by email was 'a breach of data protection' in that it had not first been verified that the Claimant's email address was secure, and also that there was no restriction notice with the document.
- 5 In the Grounds of Resistance the Respondents averred that the Tribunal did not have the jurisdiction to consider the various allegations on the basis that the last act of which complaint was made occurred on 5 January 2018 and consequently contact should have been made with ACAS under the early conciliation procedure by 4 May 2018, whereas contact was not made until 17 May 2018.²
- 6 The chronology which is material for the purposes of this hearing is as follows:
- 6.1 4 January 2018 The last act of which the Claimant complained in the Particulars of Claim attached to the ET1;
 - 6.2 5 April 2018 ACAS is contacted under the early conciliation procedure in respect of the Respondent;
 - 6.3 20 April 2018 ACAS issues certificate number R236441/18/20 in respect of the Respondent;
 - 6.4 17 May 2018 ACAS is again contacted under the early conciliation procedure in respect of the Respondent;
 - 6.5 4 June 2018 ACAS issues certificate number R252628/18/31 in respect of the Respondent;

¹ In section 2 of the Particulars of Claim there was a repeated reference to the PIP being in 2018, but it is apparent from the narrative in section 4 that this occurred in 2017.

² There was mention in paragraph 3.10 of the Particulars of Claim of an alleged incident on 5 January 2018 but that was not included in the list set out in paragraph 3 above.

- 6.6 4 June 2018 ACAS is contacted under the early conciliation procedure in respect of the Ms Curtis and certificate number R261594/18/41 is issued;
- 6.7 4 June 2018 The claim form ET1 is presented to the Tribunal.
- 7 My conclusions based on that chronology and taking into account the representations of Mr Neckles are as follows in relation to the claims against the Respondent:
- 7.1 Mr Neckles made a submission that the first reference to ACAS on 5 April 2018 was not made in respect of the matters raised in the claim form presented on 4 June 2018. He did not state what the alternative purpose of that reference was. I do not accept the submission of Mr Neckles. The original relevant authority is *Science Warehouse Ltd v. Mills* [2016] IRLR 96 EAT. Certificate number R236441/18/20 is therefore valid in respect of the claims made in the Particulars of Claim.
- 7.2 I further conclude that certificate number R252628/18/31 is of no relevance because of the earlier commencement of the early conciliation procedure and the issuing of certificate R236441/18/20 – see *HMRC v. Garau* [2017] ICR 1121 EAT.
- 7.3 The earliest date of any incident over which the Tribunal could have jurisdiction taking into account the three month time limit (before any extension) is therefore 6 January 2018, being three months less one day before contact was first made with ACAS.
- 7.4 As all matters of which complaint is made occurred before 6 January 2018, all allegations contained in it against the Respondent are out of time.
- 7.5 In respect of Ms Curtis it is only claims in respect of incidents occurring on or after 5 March 2018 which could be in time, and as all alleged incidents occurred before that date, they are out of time.
- 8 On the issue and service of the claim the Tribunal listed the matter for a preliminary hearing by telephone on 5 September 2018 for general case management purposes. Mr Neckles applied on 7 July 2018 for a postponement on the basis that he was to be away on a pre-booked holiday. That request appears to have been overlooked (or not dealt with due to lack of administrative resources) and it was repeated on 4 September 2018. The request was granted and the matter was relisted for 25 September 2018 for a public preliminary hearing to consider the issue of jurisdiction. That hearing had to be postponed at a late stage because of the current severe shortage of judicial resources. The matter eventually came on for hearing before me.
- 9 At the outset of the hearing Mr Neckles provided the Tribunal and Mr Harris with a copy of an email from the Claimant to Mr Murray of the Respondent dated 8 January 2018 in which she said the following in the first paragraph:

I am writing to make a complaint on the strongest possible terms that I am being and feeling very INTIMIDATED, HARASSED, BULLIED, VICTIMISED and DISCRIMINATED against as I feel I have no other option.

- 10 Mr Neckles sought leave to amend the details of the claim to add a further factual allegation that the Respondent had failed to investigate that grievance and had failed to come to a conclusion on it. Neither the Tribunal nor the Respondent had been given any warning of the application, and Mr Neckles did not produce any draft amended Particulars of Claim showing the proposed amendment.
- 11 Mr Neckles explained that the importance of the amendment was that it would result in all the previously made claims being in time (or at least potentially in time) as being a continuous act within section 123(3) of the Equality Act 2010. The basis of the application by Mr Neckles was that there had simply been an error on his part, or one of his colleagues, in not including the allegation originally. Mr Neckles said that it was a minor amendment, and the Respondent would not be prejudiced by it. It was a new claim, he said, but based on facts already pleaded.
- 12 Mr Neckles said that he had been ill from June until early October 2018 and that on his doctor's advice had phased his return to work. He had not been fit enough to make the application at any time earlier than the preceding few weeks. He did not provide any medical evidence in support.
- 13 Although logically the application to amend must be dealt with first I asked Mr Neckles and Mr Harris to deal with all facts and submissions at the same time.
- 14 The Claimant gave evidence on oath, as did Mr Neckles. The Claimant said that she had been off work sick from 17 October 2017 until 22 January 2018. She had then worked until 5 February 2018 when she ceased working due to having a planned operation. The Claimant has still not returned to work but remains employed by the Respondent. As far as the grievance was concerned the Claimant said that Mr Murray had called her and said that the grievance would be dealt with. However, she said, she had not heard anything further about it. In the Grounds of Resistance it was stated that emails had been sent to the Claimant on each of 24 January, 5 February, 15 February and 9 March 2018 about the grievance. The Claimant denied having received any of those emails.
- 15 I accept the Claimant's evidence that she was not in fact aware of time limits in the Tribunal until she met Mr Neckles on 17 May 2018. On an unknown date the Claimant was discussing her position with family and friends, and a friend (whose name was provided) recommended Mr Neckles. That friend then contacted Mr Neckles during the first week of April 2018 for the purpose of introducing the Claimant, which prompted Mr Neckles to contact ACAS on 5 April 2018 under the early conciliation procedure. The certificate was issued on 20 April 2018. The Claimant met Mr Neckles for the first time on 17 May 2018, gave him details of her complaints and handed over responsibility to him for making the claim. There was no explanation provided as to why there was such a delay between 5 April and 17 May 2018 in the Claimant contacting and then meeting Mr Neckles.

- 16 The evidence of Mr Neckles (which I accept) was that after meeting the Claimant he instructed someone else to draft the Particulars of Claim, and that he did not check them after drafting. He said he accepted that he was in error.
- 17 As no prior notice of the amendment application had been given I adjourned the hearing for a short while to allow Mr Harris to consider the position and take instructions if necessary. Mr Harris submitted that this was an entirely new claim based on facts which had not been pleaded. Further, there had been an excessive delay in making the amendment application. Any cause of action based on any delay in dealing with the Claimant's grievance must have arisen by late March 2018 and he pointed out that that was nine months ago. There was no valid reason why the amendment application could not have been made earlier, particularly as there had been two earlier listings of this hearing.
- 18 Mr Harris submitted that this excessive delay could at the very least cause prejudice to the Respondent because of the cogency of evidence being diminished, but he accepted that there was no specific prejudice, such as the unavailability of witnesses. However, he pointed out that Ms Curtis was an individual Respondent to these proceedings, and the proceedings were causing her considerable stress.
- 19 Mr Harris also submitted that for the purposes of the claims under the Employment Rights Act 1996 the Claimant had not discharged the burden of showing that it was not reasonably practicable to present the claim in time. There was no reason why the Claimant could not have enquired about applications to the Tribunal and time limits on the internet.
- 20 On 25 November 2018 after the conclusion of the hearing Mr Harris sent an email to the Tribunal (with a copy to Mr Neckles) to which were attached what were said to be copies of emails from Benjamin Hill, Employee Relations Manager, to the Claimant dated 24 January, 5 and 15 February and 9 March 2018 as referred to in the Grounds of Resistance. The emails were sent to the Claimant's work email address. The first email from Mr Hill was a request for the Claimant to let him know a good time to call her to discuss the grievance. The other three emails were reminders. Mr Harris pointed out that the Claimant had given evidence under oath that there had not been any contact from the Respondent in response to the grievance, and said that the 'email chain would tend to show that the Claimant's version of events is incorrect.' The Tribunal has not received any comment from Mr Neckles on those emails. I note that the Claimant was away ill from 6 February 2018.
- 21 It appeared to me that the appropriate course of action was to consider the amendment application before considering the pure time limit points. As Mr Neckles pointed out, if the amendment were to be allowed then potentially earlier claims could be brought within the jurisdiction of the Tribunal on the basis that together they formed a continuing act for the purposes of section 123 of the 2010 Act, the last one of which could have fallen within the three month time limit (subject to the early conciliation extension).

- 22 Each of Mr Neckles and Mr Harris referred to *Selkent* and Mr Harris in addition referred to *British Coal v. Keeble*. In my judgment this is clearly a new factual allegation. The Particulars of Claim are divided into sections. The allegations of detriments are in section 2, and I have listed them above. It is here that one would expect to see the allegation. The main narrative is in section 3. As not pleaded as a specific detriment, this is the other place where one would expect to see reference to the making of the grievance and the Respondent not having dealt with it. I cannot see anything from which one could possibly glean that the Claimant had made a complaint to the Respondent, or that it had been ignored. The narrative ends with an alleged incident on 5 January 2018 relating to the Claimant providing a fit note from Med3 for two weeks, and being told she was therefore expected back at work on 22 January 2018.
- 23 I refuse the application to amend the claim. As this is a new factual allegation the statutory time limits, and the grounds for extension of them, become important. In the case of claims under the 2010 Act based upon the alleged failure to consider the grievance the issue is one of justice and equity. In the case of the allegation being made as a detriment on the ground of having made a protected disclosure under the Employment Rights Act 1996 then the question to be resolved is whether or not it was reasonably practicable for the claim to have been brought in time, and if not, then whether it was brought within a reasonable time thereafter.
- 24 The Tribunal has a discretion under the 2010 Act based on justice and equity, and I remind myself that that is justice and equity to both parties. As a general principle any refusal to extend time may of course prejudice a claimant in that she is prevented from pursuing a claim which may have merit. On the other hand, allowing a claim to proceed out of time must necessarily prejudice the respondent to the claim in having to defend a claim outside of the statutory time limit. Otherwise the Tribunal must look at all the circumstances of the case. I have noted the points in *Keeble* but it is not simply a question of finding points for and against an extension and adding them up. One of the elements which will almost always be present is that any delay could prejudice the quality of the evidence, but that is not a point being specifically relied upon by the Respondents. It is regrettable that at present very significant delays are inherent in the listing of hearings in the Employment Tribunal in any event.
- 25 What are the circumstances in this case? The first matter to consider is the extent by which the new claim is being made after the expiry of the time limit. The allegation is a failure to respond to the grievance, and to come to a conclusion on it. In making his application Mr Neckles submitted that the Respondent should have completed the process within a month, that is by 8 February 2018. Based on ACAS certificate number R236441/18/20 the time limit expired on 7 June 2018. No mention was made of the issue until the outset of this hearing, over five months later, and even then no draft Amended Particulars of Claim were provided. Further, as recited above, this hearing had been listed on two previous occasions and the matter had not been raised in correspondence before either of such hearings.

- 26 Mr Neckles mentioned that the Claimant was not aware of the time limits in the Tribunal. That point is considered further below. However it is not a relevant factor when considering the amendment application, because Mr Neckles (or the PTSC Union) had assumed responsibility for making the claim. Any error on the part of a skilled adviser does not necessarily mean that that error automatically affects the claimant, but it may be a relevant factor when combined with the question as to further delay. No reason was given at this hearing as to why the amendment application had not been made previously and why no draft was before the Tribunal.
- 27 One of the elements of justice in these circumstances is the apparent merits of the claim in question. It is not the function of the Tribunal at this preliminary stage to make any findings, but obviously the stronger an individual's claim appears to be then the greater is the prejudice to that person in not being allowed to pursue it. Mr Harris provided the Tribunal with the emails mentioned above which appeared to show that the grievance was acknowledged, and also that the Claimant did not call Mr Hill to discuss the grievance as requested. The Claimant has not sought to challenge those emails. It therefore appears that the proposed claim has little merit.
- 28 The position is even clearer in respect of any claim under the 1996 Act. The issue is whether or not it was reasonably practicable for the amendment application to have been made in time. I accept that the Claimant herself was in fact initially unaware of time limits in the Tribunal. What is effectively conclusive against the Claimant is that the error in not originally including this element of the claims was made by a skilled adviser, and a claimant is bound by any such error – see *Dedman v. British Building and Engineering Appliances* [1974] ICR 53. The principle in that authority could be subject to exceptions, but I cannot see any reason to depart from that principle on this occasion. The further point is that even if I were to find that it had not been reasonably practicable for the new claim to have been presented in time then I must consider whether the application was made within a reasonable time thereafter. I need not repeat the point made above about delay.
- 29 I have not ignored the submission by Mr Neckles that the reason for delay was his medical condition. He said that he had been ill from June 2018 until the early part of October 2018. He did not provide any evidence in that connection. There was no information on the Tribunal file. The application made to postpone the hearing listed for 5 September 2018 was made on the basis of Mr Neckles in February 2018 having booked a holiday abroad for eight weeks from 12 July 2018. I am not persuaded by the general statement by Mr Neckles as to his health has any material relevance to the matter.
- 30 For those reasons the application to amend is refused.
- 31 I now turn to the question of time limits in respect of those claims which were include in the claim form when presented. It is not in dispute that all claims are out of time based on the chronology set out above. On the basis that the last alleged act pleaded was on 4 January 2018 the final

date for making contact with ACAS was 3 April 2018, but contact was not made until 5 April 2018.

- 32 I will deal with the issues in the reverse order starting with the claims under the 1996 Act. Mr Neckles did not seek to maintain that there was any complaint contained in the original claim form later than 4 January 2018. I am working on the basis that that is the latest date, although clearly time started running earlier in respect of other factual allegations.
- 33 The test is whether it was reasonably practicable for the claim to have been presented in time, and if not, whether it was presented within a reasonable time thereafter. I have accepted that as a fact the Claimant was not aware of time limits and Tribunal procedure until she met Mr Neckles. However the question to be considered is whether that ignorance was itself reasonable. What is quite apparent to me is that the Claimant was not proactive in seeking to ascertain whether there had been any unlawful conduct by the Respondent and what her rights were in respect of any such conduct. She said that she had discussed her position with family and friends but she did not go further than that initially. There is now a wealth of information readily available either through the Tribunal helpline or online. The Claimant had access to the internet, and she could have made enquiries which would have enabled her to ascertain the jurisdiction of the Tribunal, the procedure for making a claim and that there was a time limit.
- 34 I therefore conclude that it was reasonably practicable for the Claimant to have presented her claims within time. Further, if I am wrong on that point, the next question is whether the claims were presented within a reasonable time after the expiry of the time limit. The Claimant was obviously alerted to the possibility of her having a claim by 5 April 2018 at the latest. There was an unexplained delay until 4 June 2018. And I note that for the latter part of that period the Claimant was in the hands of a skilled adviser. I conclude that the claim was not presented within a reasonable time after the expiry of the time limit.
- 35 As already mentioned that test in respect of the claims under the Equality Act 2010 is whether it is just and equitable to extend time. I will not repeat what I have said above about the application of that principle. It is trite law that the extension of time has to be justified and the onus is on a claimant to justify an extension. The two essential matters to be taken into account in my view in these circumstances are the reason for the delay and also the relative prejudice to the parties.
- 36 I have mentioned the reasons for the delay, which I do not consider to be substantial. The merits of the claims are material. From a reading of the Particulars of Claim and the Grounds of Resistance it is certainly far from clear that the claims have a strong chance of success. I make some random points. The Claimant says that she is of black Caribbean origin. However it is difficult to see any basis in the factual allegations for a Tribunal finding that anything that occurred was because of the Claimant's race. It is wholly unclear as to what is the alleged protected disclosure which the Claimant says was the cause of the six detriments listed above. Quite apart from the difference of evidence as to whether did agree for

her OH report to be sent to her own email address I entirely fail to see what realistic prospect there is of the Tribunal finding that the action of sending the report to an email address was in any way related to any protected disclosure, the Claimant's race or any disability.

- 37 In my view there is no one reason, or combination of reasons, which would make it just and equitable to extend the time limit prescribed by statute.

Employment Judge Baron

24 January 2019