



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Harper

Respondents: (1) London Borough of Waltham Forest
(2) Revive Care Services Ltd.

OPEN PRELIMINARY HEARING

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 21 January 2022
Reserved Decision on 2 February 2022

Before: Employment Judge B Elgot

Representation

Claimant: Ms J Parkes (Advocate)
1st Respondent: Mr S Thakerar (Counsel)
2nd Respondent: Ms J Charalambous (Litigation Consultant)

The Employment Judge, having reserved her decision in relation to the question as to whether time should be extended so as to permit the Claimant to pursue her complaint of disability discrimination out of time, now gives judgment as follows:-

JUDGMENT

The complaint of disability discrimination under section 20-21 Equality Act 2010 is permitted to proceed even though the claim was lodged outside the relevant time limit in section 123 of the 2010 Act. I am satisfied that it is just and equitable to extend time to 8 February 2020 which is when the Claimant filed her Claim at the Employment Tribunal. The claim shall now be listed for a full merits hearing and a case management preliminary hearing by telephone for two hours' duration will be arranged as soon as possible.

REASONS

1. A brief history of these proceedings as appears from the documents in the agreed preliminary hearing bundle (in two parts) was helpful. The Claimant in conjunction with two other colleagues brought claims against both Respondents under regulation 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) alleging a failure of the duty to inform and consult in relation to a relevant transfer. The Claimant and her co-workers' contracts of employment were transferred from the First Respondent to the 2nd Respondent on 17 September 2019. The Claimant was employed by the First Respondent and/or its predecessors since 13 June 2005. It is accepted by the parties that Mrs Harper has been the lead Claimant in this case.

2. It is only this Claimant who also brought a complaint of disability discrimination which has now been clarified by her representative as being a complaint under sections 20-21 of the 2010 Act that both Respondents had a duty to make adjustments for her as a disabled person and failed to comply with that duty in relation to the conduct of the TUPE consultation which began in February 2019.

3. The Claimant resigned from her employment with the Second Respondent on 31 October 2019. She worked for the Reablement Service providing practical domiciliary care for ill and vulnerable clients recently discharged from hospital. There is a separate claim by the Claimant and others for unfair constructive dismissal under a different case number 3200650/20 which has not been consolidated with these proceedings.

4. The claims under regulation 15 have been struck out and were dismissed by Employment Judge Gardiner at an open preliminary hearing on 20 October 2020 on the ground that they were made out of time and because the claimants did not have the necessary status as 'employee representatives' to bring such claims. The relevant TUPE time limit is set out in regulation 15 (12) and it requires a tribunal, when considering whether to extend the time limit for presentation of such a claim, to decide whether or not it was 'reasonably practicable' for the complaint to be presented within the initial time limit. That is a different test to the one set out in section 123 Equality Act 2010 as I describe below.

5. Therefore the only remaining claim in these proceedings is the disability discrimination complaint brought by Mrs M Harper. She has provide further particulars of that claim which are at pages 53-57 of the bundle. She says that during the period January to September 2019 the Respondents failed to support her and make reasonable adjustments to avoid the disadvantage which she experienced as a result of her disability because she was required to participate in an on-line TUPE consultation and/or read through long and complex consultation documents which she failed to comprehend.

6. At this Preliminary Hearing Mrs Harper gave evidence on her own behalf but only in relation to the issue of disability; she did not address the out of time point in her evidence. The First Respondent had one witness, Mr Martin Rossberg, Practice Manager in the First Respondent's Reablement and Independent Living Team. In accordance with the usual practice of the Tribunal and as explained to the parties and the witnesses I read only those documents in the agreed preliminary hearing bundle to which my attention was specifically directed.

7. The first matter to be decided was whether the Claimant was at the relevant time of the alleged discrimination a disabled person as defined by section 6 of the 2010 Act. I decided that she was and is disabled because of her lifelong learning impairment of dyslexia which had and continues to have a substantial and long term adverse effect on her ability to carry out normal day-to-day activities. That decision was announced with reasons in open tribunal on 21 January 2022 and a separate judgment has been promulgated.

8. The second issue to be decided at this preliminary hearing is whether the complaint of disability discrimination has been made out of time and, if so, whether the complaint should be dismissed for lack of jurisdiction or whether it should be permitted to proceed and time extended by me. The 2010 Act requires discrimination complaints to be brought before the end of the period of three months beginning with the discriminatory act complained of or '*such other period as the employment tribunal thinks just and equitable*' (section 123(1)). The test is therefore not what was reasonably practicable for the Claimant but what the Employment Judge considers is just and equitable in all the circumstances.

9. The transfer occurred on 17 September 2019. Ms Parkes concedes on behalf of the Claimant that her disability discrimination claim is brought out of time. It should have been lodged no later than 16 December 2019 and in fact was not filed at the employment tribunal until 8 February 2020. The Claimant also failed to take advantage of the extension of time which flows from a timely referral to ACAS for early conciliation. The dispute between the parties was not sent to ACAS until 3 January 2020 and a certificate of early conciliation was issued in relation to the First Respondent on the same date and in relation to the Second Respondent on 10 January 2020.

10. The claim to the employment tribunal is over seven weeks late. The referral to ACAS for early conciliation was too late by just over two weeks. The Respondents apply for the claim to be struck out and the Claimant had proper notice of this application.

11. I clarified with the Claimant's representative that the acts of the Respondents post transfer are in fact the subject of the separate constructive dismissal claim against the Second Respondent and she confirmed this to be the case. I am conscious therefore that the disability discrimination complaint in these proceedings is therefore the last part of Mrs Harper's litigation which now involves the First Respondent.

12. I explored with the three representatives whether Ms Parkes' concession of a late claim is correct and whether there are pleaded any acts of continuing disability discrimination post-transfer as appears from paragraph 19 of the Claimant's witness statement where she describes an unparticularised '*subsequent negative experience*' in coping with the post-transfer processes. Any acts of continuing discrimination might extend the relevant time limit by reference to section 123 (3) of the 2010 Act. However I am convinced that such matters are not pleaded in the ET1 Claim nor in the Further Particulars of the disability discrimination claim and there is no extant application for amendment.

13. I am satisfied that the facts established by Employment Judge Gardiner in paragraphs 8- 14 of his judgment sent to the parties on 7 October 2020 accurately summarise the steps the Claimant took to obtain legal advice and assistance after the transfer. She took the lead in pursuing redress on behalf of her colleagues Ms Tongo and

Ms Gomes. In paragraph 24 he concludes that it was reasonably feasible in all those circumstances for the Claimant to issue proceedings within the three month time limit because the Claimant was well enough to obtain alternative work and , after some false starts, well enough to give detailed instructions to Ms Parkes such that she was enabled to explore a comprehensive negotiated settlement in a long letter sent on 6 December 2019 and imposing a deadline for response within ten days by 16 December 2019. The response came on 19 December 2019 (page 94), it declined any negotiation and indicated a robust defence of the claims.

14. However, as stated, my consideration must be whether it is just and equitable to extend time for Mrs Harper's remaining individual disability discrimination claim. This is a broader discretion than the 'reasonably practicable' test. I am satisfied that it is just and equitable to extend time and I confirm that I have considered the wide range of factors which constitute guidance in *British Coal v Keeble and others* 1997 IRLR 336 and in *Limitation Act 1980*.

15. First, despite the dismissal of all the Regulation 15 claims, the Claimant's remaining claim is not without merit or prospect of success. It is clear from the document at page 79 of the preliminary hearing bundle that she informed her personal supervisor Damane Newall on 12 March 2019, during the TUPE consultation period, that she needed support with e-learning and with face to face updates regarding the Reablement restructure (which led to the TUPE transfer) because of her learning impairment and he acknowledged that fact and records it in the Appraisal Objectives. A full tribunal should be given the opportunity at a full merits hearing of determining whether the Respondent knew or ought to have known of her particular disability and its effects, whether there was a provision, criterion or practice (PCP) such as the use of an online consultation process and/or document-heavy procedures which put the Claimant at a comparative substantial disadvantage, whether the section 20 duty arose, and whether it was thereafter reasonably complied with.

16. I do not accept the First Respondent's contention that the Claimant's disability discrimination complaint is an 'afterthought' nor that it is entirely unclear about what she complains. The Respondents have not sought any voluntary further information about the said claim, for example, to ask the Claimant to identify and delineate the PCP. They could have taken this step if they did not know what was being complained of.

17. Secondly, in practical terms the Claimant was obliged to take the lead in relation to her complaints and those of her two colleagues in pursuing their complaints about the restructure and the subsequent TUPE consultation. She had the task, despite her relevant disability of dyslexia and a short period of stress related illness from 30 September to 31 October 2019, of mastering and understanding the complex regulation 15 claims she wished to pursue. She was obliged to relay information and advice from legal advisors to her co-workers and I accept that her dyslexia was bound to hamper this process. I appreciate that at paragraph 25 of Employment Judge Gardiner's Judgment he records, when applying the reasonable practicability test, that the Claimant does not contend that she was hampered by her dyslexia from bringing the section 15 claims on time. However in applying the just and equitable test I am satisfied, as stated below, that the Claimant's dyslexia did contribute to circumstances whereby the disability discrimination claim became inadvertently buried under the weight of the other litigation.

18. I find that the concentration by the Claimant and her advisor Ms Parkes on the alleged failures to inform and consult on TUPE, in respect of which jurisdiction was always in doubt, meant that the individual disability discrimination complaint made specifically by Mrs Harper alone was somewhat neglected. Her disability discrimination claim was obscured by the complexity and density of regulation 15 claims which had little jurisdictional foundation and thus little prospect of success as EJ Gardiner has pointed out.

19. Therefore when, just before Christmas 2019, any prospect of a negotiated settlement on the collective TUPE claims was rejected by the First Respondent on 19 December, three days after the end of the deadline period, the Claimant and her legal advisor were by then inhibited, discouraged or simply forgot to contact ACAS promptly to pursue the discrimination claim (which was not part of the intended negotiations) as they should have done by 16 December 2019. They perhaps unwisely waited too long for the reply to settlement proposals, that reply came late and then it did not produce any fruitful result. The Christmas and New Year period undoubtedly exacerbated the delay. The Claimant obtained new employment in a different environment in a secure mental health unit commencing in early December 2019 and had to adjust to the demands of a new job which only lasted until February 2020 because she was unable to cope with its demands. I do not consider it just and equitable to deny the Claimant the chance to pursue her discrimination claim in these circumstances.

20. I have considered the length of the relevant delay. I accept that Ms Parkes contacted ACAS by 24 December 2019 a week late and was advised to continue with the claims on behalf of her clients and make an application for extensions of time. She was unable to do this until after Christmas on 3 January 2020. The early conciliation extension would have expired on 16 January 2020 if originally initiated on time. In fact the ET1 Claim was lodged three weeks after that date; I do not consider this to be a significant and unreasonable delay in all the circumstances described above.

21. I am satisfied that following disclosure, particularly of the TUPE consultation documentation and an assessment of its accessibility to persons with known learning impairments, there will be no significant difficulty of witnesses' recollection going back to February 2019. I anticipate that there will be a comprehensive set of documents which will prompt recollection. I do not consider that there is a real danger that a full hearing will be prevented from establishing the facts about this disability discrimination claim as a result of a delay of less than eight weeks in bringing the claim.

22. I have determined that the prejudice to the Claimant in being denied the opportunity to pursue her discrimination claim outweighs the prejudice to the Respondents in defending it. In any event the Respondents will be required to prepare for and defend the associated constructive dismissal claim made by Mrs Harper and her colleagues. The dismissal claim derives from at least some of the same facts. Consideration should be given at the next case management preliminary hearing to the question of whether these two sets of proceedings should be consolidated and heard together.

23. This case should now be listed for a two hour telephone case management hearing by telephone in order to fix a date for the full merits hearing, consider the question of consolidation with case number 3200650/20 and to make all necessary orders to prepare for a final hearing. The Respondents are at liberty to request voluntary provision of further

particulars of the disability discrimination claim as soon as they wish and need not wait for the next preliminary hearing to be listed. The next preliminary hearing may also consider whether there are any parties who may be removed from this case.

Employment Judge B Elgot
Dated: 7 February 2022