Case No: 2400689/2020
Code V

EMPLOYMENT TRIBUNALS

Claimant: Miss N Kumari

Respondent: Greater Manchester Mental Health NHS Foundation Trust

Heard at: Manchester Employment Tribunal (by remote hearing)

On: 14 September 2020

Before: Employment Judge Dunlop

Representation

Claimant: In Person
Respondent: Ms A Rumble (Solicitor)

RESERVED JUDGMENT

1. The Employment Tribunal has no jurisdiction to hear the claimant's claim of unfair dismissal as it was presented outside the time limit prescribed by s111 Employment Rights Act 1996.

2. The Employment Tribunal has no jurisdiction to hear the Claimant's claim of discrimination on the grounds of race (including harassment) as it was presented outside the time limit prescribed by s123 Equality Act 2010.

3. The claimant is not permitted to amend her claim to rely on an additional act of alleged discrimination on grounds of race (being the content of a letter received by her on 9 December 2019).

4. The claim is therefore dismissed in its entirety.

REASONS

Introduction

(1) By a claim form presented on 27 January 2020 the claimant, Ms Kumari, has sought to bring claims of unfair dismissal and discrimination on the grounds of her race against the respondent, her former employer. She told me today that she defines her race as British Asian and that the former colleagues she considers discriminated against her are all White British.

(2) This was a preliminary hearing to consider whether the Tribunal had jurisdiction to hear the claim given the date on which it had been presented.

The Hearing

(3) This hearing was conducted by video on the tribunal's CVP platform with the agreement of both parties, due to the continuing impact of Covid-19 restrictions. I had regard to an electronic bundle of documents prepared by the respondent. The parties both presented their case with reference to these documents. The key documents in that bundle for today's purposes were the claim form, a letter dated 24 March 2019 in which Miss Kumari had set out (in response to an invitation from the tribunal) the reasons why she did not seek Early Conciliation until 16 January 2020, and a further letter dated 1 May 2020 setting out further particulars of the claim in response to a direction from the Employment Tribunal at a previous case management hearing.

(4) Although no witness statements had been prepared, Miss Kumari gave sworn oral evidence during the hearing, responding to questions from me. She was then cross-examined by Ms Rumble. There were no other witnesses.

Factual background

(5) Miss Kumari worked for the respondent from 7 August 2017 as a cognitive behaviour therapist. She worked within a unit specialising in eating disorders. Miss Kumari alleges that for the duration of her employment she was subjected to serious bullying treatment by a clinical psychologist colleague, who I will refer to as A. She alleges that there was further bullying treatment by an administrator, who was encouraged in this by A, and from certain other members of staff. She alleges that she complained about this on several occasions to the acting service manager (ASM) of the unit, that A denied the allegations and nothing was done. According to Miss Kumari, she did make it known to the ASM that she believed this treatment was related to her race. (I make no findings about these matters, which would be for a tribunal to determine at a final hearing, but set them out by way of explaining the allegations in the case.)

(6) Feeling that she could no longer tolerate this treatment, Miss Kumari resigned on notice in around May 2019. The letter of resignation was not before me, but Miss Kumari informed me that it had made no reference to the treatment she had received being related to her race. There was some confusion over the precise date of the letter and whether Miss Kumari had given nine weeks' notice or twelve weeks' notice. It is agreed, however, that there was a notice period of that sort of length and that Miss Kumari did work during that notice period.

(7) Miss Kumari did not take any steps to pursue either a tribunal claim or an internal complaint during her notice period or immediately after it. She gave evidence that she was 'burnt out' and suffering from poor mental health at this point. However, that was not referred to in the 24 March letter, nor was it supported by any medical evidence. Miss Kumari did not seek any medical advice at the time (or, indeed, at any point in the period I am considering).

(8) On either 7 October 2019 (according to the letter of 1 May) or 8 October (according to the claim form) Miss Kumari observed A driving into her street, parking next to Miss Kumari's car and waiting five to ten minutes before turning and driving off. There was no interaction. She describes her reaction to this incident as "an intense feeling of fear".

(9) On 8 October (so either the day of the episode or one day later) Miss Kumari wrote to the respondent's human resources department to seek to raise a complaint about A's actions. Again, I have not had sight of this letter. Again, Miss Kumari told me that she had not, at that point, framed the complaint as one related to her race.

(10) The complaint prompted a meeting on 5 November 2019 with Diane Press, the respondent's Head of Healthcare. Ms Press was not known to Miss Kumari prior to this point. She promised a written outcome in relation to the complaint, which Miss Kumari received on 9 December 2019. That letter is not mentioned at all in the claim form, but in the letter of 1 May 2020 Miss Kumari identifies it as "the last act of discrimination".

(11) After receiving the outcome letter Miss Kumari investigated the possibility of bringing a claim. She initially approached the Citizen's Advice Bureau, via their website. They signposted her to ACAS, which led to her initiating Early Conciliation on 16 January 2020. ACAS issued an Early Conciliation certificate on 27 January 2020 and the claim was presented the same day.

Relevant Legal Principles

(12) The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996 :

> **(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.**

(13) The provisions of section 207B provide for an extension to that period where the claimant undergoes early conciliation with ACAS (provided early conciliation is commenced within the initial limitation period).

(14) Two issues may therefore arise: firstly whether it was not reasonably practicable for the claimant to present the complaint before the time limit expired, and, if not, secondly whether it was presented within such further period as is reasonable.

(15) Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** CA). Ignorance of one's rights can make it not reasonably practicable to present a claim within time, but only if that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal ("EAT").

(16) The time limit for a discrimination complaint appears in s123 Equality Act 2010:

> **(1) Subject to sections 140A and 140B 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.**

(17) Again, the early conciliation provisions may operate to extend the limitation period, but only where early conciliation is commenced with the primary limitation period.

(18) It is well established that where the act to which the complaint relates is a "continuing act" or an "act extending over a period of time" the claim will be brought in time provided it is presented within three months of the act in question coming to an end. Where a claimant relies on a "continuing act" that may be a series of linked complaints or allegations, as well as a situation where (for example) a single discriminatory policy continues to be applied (**Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA** and **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA**).

(19) That being the case, it will often be more appropriate to leave the question of whether the requisite connection exists between the alleged discriminatory acts to a tribunal at a final hearing, which (it would be expected) would hear detailed evidence about each act which is being relied on as contributing to the putative continuing act.

(20) In some cases, however, it may be both possible and fair, to determine even at a preliminary stage that there is no continuing act which is within time (and then to go on to apply the just and equitable test to consider whether the claim should nevertheless proceed). The claimant at a preliminary hearing must demonstrate a *prima facie* case i.e. that there is a reasonably arguable basis for the contention that the various complaints are linked (**Lyfar**).

(21) In considering whether to extend time on a just and equitable basis, tribunals have a much broader discretion than under the test of reasonable

practicability. The factors set out in **British Coal Corporation v Keeble [1997] IRLR 336** may be relevant. Those include the length of, and reasons for, the delay; the extent to which cogency of evidence may be affected; the steps taken by the claimant to obtain advice. Ultimately, it is for the tribunal to weigh up the prejudice that would result to the claimant in not allowing the claim to proceed, against the prejudice to the respondent in allowing it.

(22) Given that the complaint in respect of Ms Press, and the letter of 9 December, was not referred to in the original claim, I also had regard to the '**Selkent**' test (**Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT**). This again involves balancing the hardship to the respective parties of allowing/not allowing a proposed amendment to the claim, having regard to the nature of amendment, the applicability of time limits and the timing of the application.

Submissions

(23) In respect of the unfair dismissal complaint, the respondent submitted this was out of time by over two months. Taking into account the notice period, the claimant had actually had an even longer period to prepare her claim. Ms Rumble said that there had been no obstacle to Miss Kumari submitting the claim. Although reference had been made during the hearing to her suffering from mental health concerns there had been no medical evidence of this (Miss Kumari frankly acknowledged that she had not sought medical advice). The idea, suggested today, that she was worried about obtaining a reference was also new. The only point put forward in the letter of 31 March had been that she wanted to pursue an internal complaint first. That was not sufficient to satisfy the test of reasonable practicability.

(24) Turning to the discrimination claim, Ms Rumble addressed that in three parts. She appeared to accept that (at least for the purposes of a preliminary determination) the acts of A and others during the course of employment might amount to a continuing act. However, that continuing act had ceased with the termination of employment. As such, the claim was out of time. It would not be just and equitable to extend time, for similar reasons to those put forward in relation to unfair dismissal. Ms Rumble also added to this argument that the claim appeared weak as there was nothing on the face of the claim itself or the 1 May letter to link the alleged bullying treatment to Miss Kumari's race, and that it would be increasingly difficult for the respondent to defend a claim relating to matters dating back to 2017 which remain largely unparticularised.

(25) The second element of the race claim was the episode involving A on the 7/8 October. Ms Rumble submitted that the elapse of time between this and the termination date meant it should be considered as a separate act. It was also out of time and also weak. The same considerations applied.

(26) The third element was the letter dated 9 December 2019. Ms Rumble accepted that if this had been pleaded as an act of race discrimination in the claim it would have been presented in time. However, this was absent from the claim; the claim would require amendment. It would not be appropriate to permit the claim to be amended in these circumstances, and

even if amendment was allowed, this claim should be the only one to proceed as there were no grounds for linking this act with the previous acts as Ms Press was not involved before this point.

(27) In her submissions Miss Kumari reiterated her evidence. She emphasised that she had been deeply affected by the treatment that she received and that it had took her some time to process it. She had been making notes and intending to complain to HR even before the 7/8 October incident – that was why her letter was ready immediately. She hoped that the respondent would investigate and resolve matters. When she received Ms Press's letter it was clear that they had no intention of doing so. She then acted promptly in seeking advice and going through the process of Early Conciliation and bringing her claim.

Discussion and conclusions

Unfair dismissal

(28) I am satisfied that it would have been reasonable practicable for this claim to have been presented in time. Miss Kumari is an intelligent and articulate person. Once she took the step of contacting Citizen's Advice, she was able to successfully commence Early Conciliation and then present a claim within a short period of time. There is no real evidence of anything which would have prevented her from taking exactly the same steps in summer 2019.

(29) For this reason I find the tribunal does not have jurisdiction to hear Miss Kumari's unfair dismissal claim.

Race discrimination

(30) It is helpful to consider the race discrimination claim in three distinct elements, as Ms Rumble did in her submissions. The claim in respect of pre-termination discrimination (and the termination itself) is not well-particularised at this stage. I am content, however, that for the purposes of a preliminary hearing, there is at least a cogent case that the actions of A, her associates in supporting her, and the ASM in not dealing with Miss Kumari's complaints, could be sufficiently connected to form part of a continuing act.

(31) I am also satisfied (again for the purposes of the preliminary hearing) that it is appropriate to connect that act to the incident on the 7/8 October, which (if the claimant's evidence is accepted) was a continuation of intimidating and threatening behavior A had engaged in while they were working together.

(32) However, I am content that there is no link between that 'act' and the letter sent by Ms Press, received by Miss Kumari on 9 December. As Miss Kumari acknowledged, she had had no previous dealings with Ms Press. She was unable to explain cogently why she saw Ms Press's response to her complaint as discriminatory in itself, far less why it was part of the same discriminatory act as A's conduct.

(33) That means that the final date of the continuing act is 7/8 October. Early Conciliation should therefore have been commenced by 6/7 January, but did not commence until 16 January. The claim in respect of all of those earlier alleged acts of discrimination is therefore out of time unless the time limit is extended.

(34) Would it be just and equitable to extend time in this case? Weighing in favour of the claimant is that fact that the claim is only out of time by a few days (once the 7/8 episode is linked to the earlier acts) and that, once she had received the response from Ms Press, she acted reasonably promptly. Weighing against the claimant is the fact that the claim does seem to be very weak. Even on the claimant's case, it is difficult to discern anything which links the treatment received to the protected characteristic of race. There is nothing in the lengthy 1 May letter which even touches on such a link. In contrast, there are various points where Miss Kumari describes other staff at the respondent as being in the habit of acting in a particular way (e.g. sharing personal details) which would be detrimental to a range of staff and was not targeted at Miss Kumari (or others) on racial grounds. I accept that if the claim is allowed to proceed the respondent will face the prejudice of significant time and cost as more attempts are made to try to establish sufficient details of the earlier alleged discriminatory acts for them to be able to sensibly respond. The final hearing will inevitably be some further months away, and cogency of evidence may well be affected, particularly as regards those parts of the claim which go back to 2017/18. It is clear from the 1 May letter, and from what Miss Kumari has said today, that most, if not all, of the allegations relate to verbal exchanges and that there would be little documentary evidence to assist the tribunal in reaching a decision.

(35) I still must return to the 9 December letter from Ms Press, now viewing it as a free-standing alleged act of discrimination, separate from the earlier linked acts. I agree with the respondent that allowing this claim to be advanced would require an amendment to the claim. I did not require Miss Kumari to make a formal amendment application, but considered the matter as I would have done if she had. Applying the balance of hardship, I have determined that the amendment should not be allowed. If granted, Miss Kumari would win the right to bring a claim, but it would not be the claim with which she is primarily concerned. It would also appear to me that it is a weak claim. The respondent would face the cost and inconvenience of dealing with these proceedings in circumstances where, absent the amendment, all other matters have fallen away. In those circumstances, it appears to me that the balance of hardship is clearly against allowing the claim to proceed.

(36) I appreciate that this judgment will be disappointing to Miss Kumari, who has represented herself today in an articulate and sensible way, and who plainly feels genuinely aggrieved at the circumstances which have led to her bringing this claim. However, for the reasons set out above I am satisfied that the proper conclusion is for the claim to end at this point.

(37) At the conclusion of the hearing I discussed with the parties the fact that I would set case management directions, if necessary, in accordance with the decision I reached. Plainly as the claim has been struck out, there is no requirement for further case management directions.

Employment Judge Dunlop

Date: 15.09.20

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 September 2020

FOR EMPLOYMENT TRIBUNALS