



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mrs D Goodwin

Luton Borough Council

Heard at: Watford (by CVP)
Before: Employment Judge Cowen

On: 1 July 2022

Appearances

For the Claimant: Mr Frater (consultant)

For the Respondent: Ms Sharp (counsel)

RESERVED JUDGMENT

1. The Claimant's claims before 3 March 2020 are out of time, but the Tribunal extends time on a just and equitable basis to allow them to proceed.
2. The Respondent's application for strike out and/or deposit order is dismissed.

REASONS

Background

1. The hearing was to deal with;
 - 1.1 Whether to strike out the claim and/or a deposit order be made.
 - 1.2 Whether the claim should be dismissed because the claimant is not entitled to bring it as the statutory time limit has expired.
2. The parties provided a bundle of documents and both sides made submissions
3. The Claimant's claims are in relation to unfair dismissal and direct and indirect disability discrimination, a failure to make reasonable adjustments,

victimisation and harassment.

4. Direct disability discrimination is asserted to be the removal by the respondent of the Claimant's decision making responsibility.
5. Indirect discrimination – it is asserted that the Claimant was disadvantaged in that;
 - 5.1 Disabled employees must attend a disciplinary meeting without notice
 - 5.2 That the Sickness Absence Policy applies to all staff.
 - 5.3 All staff are required to work in the office.
 - 5.4 Disciplinary hearings are undertaken without any notice or representation.
- 6 The reasonable adjustments claims related to;
 - 6.1 The application of the sickness absence policy
 - 6.2 The failure to provide documents when requested
 - 6.3 The requirement to work in the office
 - 6.4 The requirement to work full time
 - 6.5 The failure to install Dragon software
 - 6.6 The failure to allow managers to chase the claimant if she did not respond to emails.
- 7 The victimisation claim pleaded was that as a result of disclosures which were protected acts, she was subjected to detriments;
 - 7.1 Taking excessive time to consider her grievances
 - 7.2 Whitewashing her grievances
 - 7.3 Seeking to engage performance reviews against her
 - 7.4 Unfairly criticising her, including on 30 September 2019,
 - 7.5 Allowing a manager who was not impartial to make decisions
 - 7.6 Allowing the person who was the subject of her grievance to make decisions.
 - 7.7 Failing to make determinations in respect of her grievance.
- 8 The harassment claims were;
 - 8.1 On 3 September 2019 being laughed at as she could not hear at a meeting
 - 8.2 On 30 July 2019 being laughed at when her car broke down and she could not walk to the office
 - 8.3 On 4 October 2019 when her manager took over her decision making
- 9 By way of an email dated 7 October 2021, the Respondent made an application for strike out on the basis that all but two of the claims were out of time and that time should not be extended. They also asserted that they did not have any reasonable prospect of success.

The Chronology and Facts

10. The Claimant commenced work for the Respondent on 2 January 2018. Her contractual hours were 37 hours per week, condensed into Tuesday to Friday, unless she was 'on call' , when she was also available over the weekend and on Monday.
11. The Respondent accepts that the Claimant was disabled by way of a number of conditions, including
 - a. Muscular Skeletal Conditions causing mobility issues from 8 August 2019
 - b. Stress from 21 November 2019.
 - c. Diabetes, fibromyalgia, reynaud's syndrome, hypothyroidism, angina, sleep apnoea, osteoarthritis from 25 February 2020
12. But the Respondent does not accept that it had knowledge of all these conditions prior to the dates set out, nor that they amounted to a disability.
13. In January 2019, Mis Osime became the Claimant's line manager.
14. The Claimant asserts that the Respondent failed to make reasonable adjustments to accommodate her disabilities and restricted mobility, after consultation with the Occupational Health adviser in July 2019.
15. The Claimant started her sickness absence on 1 October 2019 and did not return to work before her employment ended.
16. The Claimant issued a first grievance on 11 October 2019, but was not well enough to attend a meeting to discuss it.
17. A second grievance was started on 19 November 2019 alleging disability discrimination.
18. The Claimant first contacted her legal advisor in January 2020. He commenced communication with the Respondent on behalf of the Claimant on 9 January 2020.
19. The outcome to the first and second grievances which were dealt with together was dated 2 March 2020. The Claimant appealed the outcome on 19 March 2020. There was some delay and confusion as to whether this appeal was being pursued.
20. An ACAS EC certificate was issued to the Claimant on 20 March 2020. The Claimant chose not to issue proceedings in the Tribunal at that point as she was still following an internal appeal process.
21. The Claimant took advice from Mr Frater, a consultant and from her Trade Union in March 2020. This included advice which notified her of the time limit. However, the Claimant believed that both her trade union representative and

her solicitor agreed with her view that the internal process should be completed before issuing a claim.

22. A third grievance was started on 26 February 2020 when the Claimant made further complaints in relation to sick pay and sickness absence policy. The Claimant asserts that these are protected acts for the purposes of a victimisation claim. The outcome to this was sent on 4 September 2020. The Claimant appealed this on 9 September 2020.
23. In June 2020 that Claimant retired on ill health grounds. She did not approach ACAS at that time with regard to her claims as she was awaiting the outcome of her third grievance and believed that internal processes needed to be completed, before approaching ACAS. The Claimant said that she was advised of this by her trade union.
24. The outcome of the Claimant's grievance appeal was issued on 23 April 2021. On the same day the Claimant registered her claim with ACAS, and the EC certificate was issued on 4 June 2021.
25. The Claimant's employment ended on 30 June 2020 due to ill health retirement. The ET1 was issued on 18 July 2021.

The law

Time Bar

26. S. 123 (1) Equality Act 2010 says that a claim for discrimination 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.
- (3) For the purposes of this section
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it;
- (4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.
27. A continuing act is a “*ongoing situation or continuing state of affairs*”; see *Hendricks v The Commissioner of Police for the Metropolis* [2003] IRLR 96,

CA. To be a continuing act there must be a clearly identifiable link between the series of acts, otherwise they are unconnected.

28. Under s.123(1)(b) the Tribunal has discretion to extend the period for issuing the claim. The discretion is wide, but the use of it remains the exception rather than the rule; see *Bexley Community Centre t/a Leisure Link v Robertson* [2003]EWCA Civ 576, CA.
29. The Tribunal should consider the following when deciding whether to exercise the discretion;
 - a. The length of and reasons for the delay.
 - b. The extent to which the cogency of the evidence is likely to be affected by the delay.
 - c. The extent to which the party sued had co-operated with any requests for information.
 - d. The promptness with which the claimant acted once they knew of the possibility of taking action.
 - e. The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.
30. *Apelogun-Gabriels v London Borough of Lambeth & Another* [2002]ICR 713 states that failure to complete internal procedures is not always a sufficient reason to extend time and that it is only one consideration in the decision to extend time.

Strike out

31. Rule 37 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 states that the Tribunal has the power to strike out a claim, where the Tribunal considers it has no reasonable prospects of success.
32. Alternatively rule 39 says that where the Tribunal considers that the claim has “little reasonable prospect of success”, it may order a deposit is paid as a condition of continuing the claim.
33. *A v B and anor* 2011 ICR D9, CA, states that the where there is a ‘more than fanciful’ prospect that the Claimant could succeed, there should be no strike out.
34. In particular it has been said that where there is a dispute of fact, it would be highly unusual to strike out. During such an application, the claim should be considered ‘at its highest’; see *Cox v Adecco and ors* [2021] ICR 1307, EAT. This is particularly true in discrimination claims, where a full examination is required to make a proper determination; see *Anyanwu and anor v South*

Bank Student Union [2001] ICR 391, HL; Eszias v North Glamorgan NHS Trust [2007] ICR 1126, CA.

35. The Respondent also reminded the Tribunal of Mechkarov v Citibank NA [2016] ICR 1121 as follows:
- a. Only in the clearest case should a discrimination claim be struck out.
 - b. Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.
 - c. The claimant's case must ordinarily be taken at its highest.
 - d. If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.
 - e. A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.
36. The Tribunal should consider firstly whether one of the specified grounds for strike out applies. If it does, then it must consider whether to exercise discretion to strike out the claim.
37. If the Tribunal considers that there may be little reasonable prospect of success at final hearing, it may order (r.39) a deposit of up to £1000 per claim. It must however use its discretion and take into account the circumstances as well as ensuring that the overriding objective is met.

Decision

38. First I considered whether the Tribunal has jurisdiction to consider the claims (i.e, whether brought in time, or time extended), before considering whether any remaining claims have any prospect of success.
39. The EC certificate having been issued on 4 June 2021, the last act which would fall within the three month time limit would have been 3 March 2021. Anything prior to that date, is nominally out of time.
40. Much of the Claimant's case which forms the basis of her claim occurred before the time limit date. There are two claims which arose after this date, set out at paragraphs 34(a) and (b) of the Particulars of Claim. These relate to "*excessive period of time to consider my grievances*" and "*whitewashing my grievances*". The Respondent conceded that these two claims arose after the time limit cut off. As they are in time based on the EC certificate dates, they must be allowed to progress.
41. The remainder of the Claimant's claims are out of time on the face of it. Consideration was therefore given to whether they amount to a continuing

act, culminating in one of the two acts which are said to be in time.

42. The Claimant's evidence was that by March 2020 she was aware of the time limit for bringing claims and that she had the benefit of advice from Mr Frater, her solicitor. She admitted that she went to ACAS in March 2020 and obtained a certificate, but did not use it to commence a claim.
43. The ET1 sets out that the Claimant's issues arose as far back as May 2019. The Claimant's witness statement named a number of managers and others with whom her husband had communicated in relation to her grievances. The witness statement indicated that there were a number of managers who made decisions in relation to the claimant's grievances, as well as her absence management and reasonable adjustments. Although the Claimant did not assert in her witness statement the identifiable link between all those who made decisions or took actions in relation to her claims, it is clear that they arose in relation to her absence and her complaints about the Respondent's treatment of her.
44. It would be for the final merits hearing to decide, based upon all the evidence available at that time, whether there was an identifiable link and whether there was therefore a continuing act which would allow the Tribunal to consider all the allegations.
45. In relation to the out of time claims and whether they should be allowed to proceed on the basis of just and equitable, I have considered the evidence and I note that the Claimant asserts that she wished to complete the internal process prior to issuing her claim. She asserted that this was done with the knowledge and approval of her trade union representative and her solicitor. The Claimant had also received an EC certificate in March 2020. The length of delay was therefore related to this decision. I am aware of the decision in *Apelogun- Gabriels* (see above) and take into account that this is only one aspect of the consideration of whether it is just and equitable to extend.
46. I also take into account that there was no specific evidence before me to suggest that the cogency of the evidence has been affected by the delay in the Claimant bringing her claims. The Respondent did not assert that they would be placed at any significant disadvantage by having the claims heard, nor that witnesses nor documents had been lost due to the passage of time.
47. No relevant requests for information have been delayed and therefore this does not amount to a relevant consideration in this case.
48. As set out above, the Claimant was aware of the possible claims, but chose not to take action until the internal process was completed. This was a misapprehension on her part. It did not however affect the ability of the Respondent to reply to the claims and to defend them. A fair trial can still be achieved and is required to hear the evidence to establish whether there was, as the Claimant asserts, a continuing act in the actions towards her.

49. The Claimant was advised by both a trade union representative and a solicitor from January 2020 and her evidence confirmed that she was aware of the time limit on discrimination claims. It cannot therefore be said that the Claimant acted promptly once she knew of the possibility of taking action, despite having professional advice.
50. I also take into account the overriding objective, and the fact that if the Claimant were prevented from pursuing this claim, she would not have any further claim against the Respondent.
51. I am of the view that taking these points into account, as well as the potential for there to be a continuing act and the possible prospects of the claim (see below) and considering the fact that the Respondent has not identified any problems with their ability to defend the claims, it would be appropriate to extend time to allow these claims to be pursued and for a final hearing to test the merits of the claims.
52. With regard to the second application of whether the claims ought to be struck out on the basis that they have no reasonable prospect of success; I must consider the Claimant's evidence at its highest.
53. The Respondent asserted that the prospects of success were not realistic and said that there was no detriment to the Claimant having her decision making authority removed from her, even on a temporary basis. If the Claimant's evidence on this point is believed, then I consider it would be open to the Tribunal to potentially draw inferences from that action which were related to the Claimant's disability. I therefore do not accept the Respondent's submission in relation to the direct disability discrimination point and this claim should proceed.
54. The Claimant has identified four PCPs in relation to indirect discrimination claims. These may require some further case management, but they do convey the sense of detriment which the Claimant is trying to assert in her claim. The Respondent acknowledges in their submissions that they all give rise to a dispute of facts, which will need to be resolved by the Tribunal before a decision can be made. On the basis that it would be highly unusual to strike out a discrimination claim where there is a dispute of fact and there would appear to be no obvious conclusions in the pleaded case, these claims must be allowed to proceed to a final hearing.
55. The reasonable adjustments claims, at their highest, assert that there were matters which the Claimant requested to alter about her working pattern, responsibilities and equipment. The Respondent acknowledged in their pleading that some of these requests and equipment were not provided. There is therefore a dispute between the parties as to whether these amount to reasonable adjustments. That can only be resolved by a full consideration of all the circumstances and the evidence associated with them. If the Claimant's evidence is correct, a failure to make reasonable adjustments is a realistic prospect. For that reason, these claims cannot be struck out at this stage.

56. In relation to the victimisation claims, there is a dispute as to whether all the acts relied upon by the Claimant occurred and whether detriments occurred as a result. The Claimant asserts that these were related to the grievances raised and some referred to in the outcome. These will require scrutiny by a full Tribunal to consider whether the first of these amounts to a protected act and whether the remainder of the Claimant's claim can be proved. It would not be appropriate to strike out such a claim without the opportunity for the Claimant to prove it.
57. The alleged acts of harassment will turn on witness evidence and therefore are matters which, if the Claimant's evidence is believed, could amount to a breach of s.26 Equality Act 2010. These are not matters which can be decided on the pleadings and therefore must be allowed to proceed to a final hearing.
58. In relation to whether there ought to be any order for deposit, it must be considered whether the prospect of success is so slight as to warrant such a step. Some of the Claimant's claims rely on her own recollection of events and others, where she has supporting evidence to provide. The fact that some of her allegations are based on her subjective view does not, of itself mean that they are without realistic prospect. It cannot be said, at this stage that those prospects are so slim, that a deposit order should be made.
59. I therefore decline to make orders for deposit at this time. The claims should proceed to a full hearing where the evidence can be tested before a full panel.

Employment Judge Cowen

Date: ...8 November 2022.....

Sent to the parties on: 9 November 2022

For the Tribunal Office

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