

EMPLOYMENT TRIBUNALS

Claimants: Mrs M Mwarowa
Respondent: Durham County Council
Heard at: Newcastle by Cloud Video Platform
On: 14 May 2024
Before: Employment Judge Legard (sitting alone)

Representation

Claimants: In person
Respondent: Mr Brien (of Counsel)

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video.

JUDGMENT

The Judgment of the Tribunal is as follows:

1. The Tribunal has jurisdiction to hear the claim, it being both just and equitable for time for the presentation of this claim to be extended until 5th September 2023.

REASONS

1. Introduction

1.1 By a claim form presented to the Tribunal on 5th September 2023, the claimant brings complaints alleging direct sex/race/religion or belief discrimination and harassment. These complaints (together with the factual allegations that underpin them) were identified by EJ Aspden at a previous case management hearing held on 16th April 2024. On the same occasion the claimant was also ordered to provide further information as to the nature of her religion and/or philosophical beliefs (which the claimant has subsequently complied with). Finally the Judge set the matter down for a Preliminary Hearing today in order to determine whether the claim should be dismissed on the grounds that the Tribunal lacks jurisdiction to hear the claim because the same appears to be out of time.

2. Issue

2.1 The issues for determination at this hearing today therefore were as follows:

- Was the claim made to the ET within 3 months (plus EC extension) of the act(s) to which the complaint relates?
- If not, was the claim made within a further period that the ET thinks is just and equitable?

2.2 I was entirely satisfied that there was sufficient evidence before me in order to make a determination upon the above issues as opposed to leaving them to be adjudicated upon at a final hearing. Neither party was prepared for or were anticipating any further case management today.

3. Findings of fact

- 3.1 I heard sworn oral evidence from the claimant and she was cross-examined. I have also read and been referred to a number of documents in an agreed bundle comprising 202 pages. I found the claimant to be an impressive and truthful witness.
- 3.2 I set out the thrust of the claimant's case below but, in doing so, make it quite clear that I have restricted all my findings of fact to only those matters relevant to the 'time' issue. It will be for the Tribunal to make findings of fact on the substantive issues in due course at the final hearing.
- 3.3 The claimant was employed by the respondent as a Family Support Worker from 27 March 2023. Both parties agree that the claimant's employment ended with her resignation, although the precise date of termination is unclear. The claimant stated that she had attempted to resign on no less than three occasions. If one includes the final meeting, the claimant's last day of work was 19th April 2023 and, in light of the correspondence that I have read, I am satisfied that it is this date that constitutes the effective date of termination.
- 3.4 It is also agreed that all of the claimant's claims have been brought outside the statutory three month time limit. The last act of alleged discrimination occurred no later than 19th April 2023, the date of the last meeting. The claimant started early conciliation on 6 April 2023 and an early conciliation ('EC') certificate was issued by email on 15 May 2023. The primary time limit for claiming expired no later than 14 August 2023. The claim form was initially presented on 3 September 2023 but was rejected. It was then accepted with effect from 5 September 2023 after the claimant remedied a defect in the claim form.
- 3.5 The respondent takes no issue with the initial rejection and the two day hiatus (caused by the claimant failing to nominate the correct respondent) and therefore restricts its submissions to the period between 14th August and 3rd September 2023, a period of approximately 3 weeks.

3.6 As indicated above, EJ Aspden spent time at the case management hearing identifying the claims. Having done so, she summarised the claimant's factual allegations against the respondent as follows:

- Being required by her Service Manager, Jo Levie, to attend a meeting on 28 March 2023 to discuss Facebook posts she had made before her employment began;
- A requirement to attend that meeting without first giving her (a) time to arrange representation; and (b) access to workplace policies and particulars of her employment;
- At this meeting and subsequent meetings subjecting her to unfair criticism of the posts she had made on social media without giving her a fair opportunity to respond to those criticisms;
- Ms Levie accessing her social media account(s) without her consent and printing off messages that she had posted;
- Being instructed by Ms Levie to close down her social media accounts;
- That, having raised a grievance, a failure to involve HR before subsequently rejecting it.

3.7 Despite not having ticked the relevant box, the respondent conceded (at the previous hearing) that the claim form did contain complaints that the above actions were because of (or, in the case of her harassment claim, related to) her sex, colour and/or her Zimbabwean nationality (and/or that of the individual about whom she posted messages). The respondent also agreed that the claim form contains a complaint that each of these things was harassment related to

the claimant's religious or other philosophical beliefs, or direct discrimination because of her religion or those beliefs. However, because the claimant had failed to explain in her claim form what her religious/philosophical beliefs are, EJ Aspden directed her to provide further information. That has now been provided and I make no comment upon its contents.

3.8 EJ Aspden was satisfied that no claim for 'victimisation' was being advanced and that the claimant confirmed that the only claims she was pursuing were those identified.

3.9 By its response form, Respondent defends the claims, inter alia, on the ground that they are out of time and the Tribunal lacks jurisdiction to hear the same. Without prejudice to the 'time' point, the Respondent disputes a number of factual allegations and further defends the claim on the basis that it has not discriminated against the claimant because of her race or sex or religion or philosophical belief nor has she been the subject of unlawful harassment related to any such protected characteristic.

3.10 As stated above, shortly after commencing her employment, the Claimant was invited to an informal meeting to discuss a Facebook ('FB') post attributed to her (but published before she began her employment with the respondent) which, according to the respondent, appeared to suggest that she was lending support to an individual by the name of Jean Gasho, also of Zimbabwean nationality. It appears that Jean Gasho had been involved in childcare proceedings in the Newcastle Family Court which had resulted in children being removed from her care at the request of the respondent. I do not propose to examine the detail of these FB posts within the context of this judgment – suffice to say that, in the preliminary opinion of the respondent, they were deemed to oppose the respondent's position within those care proceedings and/or contravene the respondent's social media policy. Informal meetings took place on 27th and 28th March in the presence of Ms Cheesman and Levie. On 29th March, the claimant

sent a grievance by email to the respondent and, in doing so, informed the respondent that she had been subjected to 'discrimination trauma' and was registering with her GP due to 'flashing headaches' and concerns about her health.

- 3.11 The claimant was a member of Unison and, on 31st March, she emailed Mr Glew, assistant branch secretary, asking for her to be 'represented in a Tribunal case.' On 5th April she emailed her union again asking for representation at a forthcoming meeting arranged for 6th April in order to further discuss the FB post issue. Mr Glew responded by saying that he would not be available and indeed he appears to have been generally unavailable as a result of ill health thereafter. It is right to say that the claimant received very little by way of meaningful support let alone advice from her union at this critical juncture, let alone subsequently.
- 3.12 Meanwhile, on 1st April, the claimant attended her GP whereupon she was noted to have slightly raised blood pressure and suffering stress/anxiety disorder. That said, there were no obvious signs of depression and clinical observations were generally positive. On 6th April, she was noted to have become very tearful and was prescribed Amitriptyline.
- 3.13 It was the claimant herself who contacted ACAS on 6th April and that was shortly after she sent a 'second' resignation letter to Ms Levie. Indeed, towards the end of that letter, the claimant informed Ms Levie that she was 'taking necessary steps to get justice.'
- 3.14 A further (and what turned out to be final) meeting took place on 19th April. The claimant was represented on that occasion by Lilian Adani. Shortly thereafter the claimant emailed the respondent informing them that she no longer had any trust in them and inviting them to accept her resignation. That was duly accepted with immediate effect. The claimant subsequently emailed Ms Levie a second time informing her that she had 'engaged ACAS' because she felt that 'it was racially motivated.'

- 3.15 In the summer of 2023 the claimant was due a surgical procedure, having suffered previously a series of miscarriages. This was postponed at her request because, in her words, she was 'going through a lot of difficult situation [sic] at the moment' (see email dated 30th June). Her operation was not in fact carried out until March of this year.
- 3.16 In evidence, the claimant candidly accepted that, at the time of these events, she had been aware that there were time limits for bringing complaints before a tribunal (she had previously been a shop steward or equivalent) and was therefore equally aware that the clock had begun to tick once she had received her ACAS EC certificate. However she explained the reasons behind the delay in presenting her claim. She was concerned that, if she were to take tribunal proceedings against her employer, this might be viewed negatively by any future prospective employer and therefore jeopardise her ability to secure alternative employment going forward. She desperately needed employment because she was the principal breadwinner not only for her own children in the UK but also for her family (including her parents) who reside in Zimbabwe. Her immigrant status meant that she would struggle to claim benefits if registered unemployed and she would be in danger of losing a roof over her head. She had been woefully let down by her Union in terms of both representation and advice. She had few friends, few social contacts and limited family support. The stress of these events had contributed to a deterioration in her mental and physical health and had prompted her to postpone an important medical procedure. She did not received the minutes of the final meeting until 15th May and she was effectively commuting to and from Barnsley (where she had secured new employment) which contributed to the stress that she was under.
- 3.17 It was not until mid way through July that she began to regain a degree of confidence. This arose as a consequence of supervision meetings with her new manager at Barnsley during which she was reassured that there would be no stigma or adverse consequence for bringing a Tribunal claim against her former employers. Her health and emotional resilience began to improve, so much so that she started going to the gym. It was not until the end of August that she felt

sufficiently confident, well, secure and supported in order for her to contemplate proceeding in the Tribunal against the respondent.

4. Law

4.1 By reference to s.123(1) of the Equality Act a discrimination complaint 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.

By s.123(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.

4.2 In common with the unfair dismissal jurisdiction, the clock will be stopped during the period of early conciliation (i.e. the period between the Claimant contacting ACAS and receiving her EC certificate).

4.3 By comparison to the 'reasonable practicability' test, the just and equitable discretion is, of course, wider. Nevertheless such a discretion must be exercised with great care. There is no presumption in favour of an extension – on the contrary the onus is upon the Claimant to persuade the Tribunal to exercise the discretion in his or her favour. Furthermore it is important to stress

that the exercise of that discretion is the exception as opposed to the rule and the time limit will operate to exclude otherwise valid claims unless the claimant can displace it - *Robertson v Bexley Community Centre [2003] IRLR 434, CA and Chief Constable of Lincolnshire Police v Caston; Dept of Constitutional Affairs v Jones [2008] IRLR 128 and finally see para 10 and Laing J's judgment in Miller v MOD*

- 4.4 Amongst other things the Tribunal may take into consideration are the factors that are to be found in s.33 of the Limitation Act 1980 (although s.33 should not be used formulaically or mechanistically as a check list: *Adedeji v University Hospitals Birmingham NHS Foundation Trust, [2021] 1 WLR 2061*). Those include the length and reason of the delay; the extent to which evidence may have been affected by the delay; the promptness in which a Claimant has acted; the conduct of either party. The Tribunal may also take into account the balance of convenience and the chance of success: see *Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278*.
- 4.5 Another factor (although by no means a conclusive one) is whether or not an individual was seeking internal redress before issuing his claim (*Apelogun-Gabriels v Lambeth BC [2002] IRLR 116*). However, all relevant factors, including the balance of prejudice and the merits of the claim, must be considered – see *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*.
- 4.6 The perceived weakness of the claimant's case may be a relevant factor when applying the 'just and equitable' test; however, it is inherently dangerous for a Tribunal to embark upon a consideration of the substantive merits of a discrimination complaint without evidence having been fairly and properly tested before it -: *Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132* (26 April 2022, unreported).

5. **Submissions**

- 5.1 Both Mr Brien and the claimant made oral submissions and, in doing so, Mr Brien made passing reference to applicable caselaw.

Respondent

- 5.2 On the Respondent's behalf, Mr Brien reminds me that the claim is out of time and it therefore falls to the claimant to convince me that I should exercise my discretion in her favour and that an extension of time is an exception as opposed to the rule.
- 5.3 Mr Brien centred his submissions on (a) the length and reasons for the delay and (b) the balance of prejudice. He argues that the claimant is an intelligent, well-educated woman with experience as a union steward and therefore someone who ought reasonably to have known of her employment rights together with the time limits that govern the exercise of those rights. Her explanations for her failure to adhere to those strict time limits were wholly insufficient. The medical evidence was scant and unpersuasive; she could not explain why, if her confidence began to return after her Barnsley supervision meetings in mid July, she delayed a further 7 weeks or so before presenting her claim. The claimant was not relying on ignorance or negligent advice and there was no good reason why she could not have presented her claim form within the time limit laid down by parliament.
- 5.4 In terms of prejudice, Mr Brien argued that one of their crucial witnesses (namely Ms Cheesman) no longer worked for the respondent and that fact alone could affect the respondent's ability to retrieve relevant documents. The 15 month delay (thus far) which is likely to extend into next year before a hearing could be listed is bound to impact upon a witness' ability to recall events. Mr Brien concluded his submissions by inviting me to consider also the overall merits of the claim although, in doing so, conceded that the Tribunal should exercise a degree of caution before embarking upon a detailed investigation of the facts in a discrimination complaint.

Claimant

5.5 On her part, the claimant contended that she acted promptly once she had recovered both her mental and emotional well being and confidence. She drew my attention to her chronology, prepared for the purpose of this hearing. The claimant otherwise fleshed out those matters which are set out in paragraphs 3.16 and 3.17 above. The delay between the 14th August and 3rd of September was in itself relatively short (3 weeks) and she made the further point that it was not until she had received a record of the final meeting that a number of the allegations she now seeks to make were properly crystallised.

6. Conclusions

6.1 From both a factual and legal perspective, these are relatively straightforward complaints of race and sex discrimination and harassment. I confess to a degree of confusion as to how the claimant advances her complaints of religion or belief discrimination but, that said, I have not sought to assess the underlying merits of the complaint and this must fall to a separate Tribunal to consider in the course of time.

6.2 The primary time limit expired at midnight on 14th August 2023; the claim form was presented on 5th September 2023 and the claim is therefore out of time by approximately 3 weeks.

6.3 I therefore turn my mind as to whether it would be just and equitable for time to be extended.

6.4 On the one hand the claimant was aware of all relevant facts that could give rise to her complaint no later than 15th May, the date on which she received the notes of the final meeting. She had been a shop steward in the past and was well aware that there were strict time limits for the presentation of a complaint.

There is no suggestion that the respondent conducted itself in such a way whereby it would be unconscionable for them to gain a 'jurisdictional' advantage over the claimant. On the contrary the respondent has, at all times, acted with complete propriety.

- 6.5 On the other hand I am satisfied that the claimant acted promptly, once both her mental health and confidence had been sufficiently restored. There is certainly no suggestion of the claimant having dragged her feet. She contacted ACAS in a timely manner but she was woefully let down by her union (by way of lack of representation and advice) at what was a critical juncture. She was not legally represented.
- 6.6 I accept the claimant's reasons for her initial failure to present her claim between 15th May and 14th August. She was unwell, unsupported and understandably concerned about the ramifications should she initiate legal proceedings against her former employer. She feared the loss of her home; her ability to provide for the family both here and abroad and her future prospects of employment. It was not until she received reassurance following supervision meetings with her new manager from mid July onwards that her confidence and health progressively improved to the point that she felt well enough to present her claim form to the Tribunal. The length of the delay was, on any objective view, relatively short.
- 6.7 In terms of the balance of prejudice, these are not claims sprung on the respondent from the depths of history and, despite cogent argument, Mr Brien was unable to identify any significant prejudice to the respondent that might arise were time to be extended beyond the obvious prejudice of having to expend time, money and administrative resource in defending the complaint. In my judgment there is no suggestion that the cogency of the evidence had been compromised by the failure to present the claim within the primary time limit. The matters that form the substance of the complaint were the subject of a contemporaneous complaint – there are written records of the meetings and relevant email correspondence exists. This is not a factually complex case. The final hearing may not be listed for some months but that is a consequence

of the Tribunal listing difficulties for which the claimant ought not to be penalised. In any event there is no suggestion that any witnesses' recollections will have faded by then. The fact that Ms Cheesman may no longer be employed by the respondent is, of itself, not a persuasive reason militating against the exercise of my discretion. The respondent presented no evidence on prejudice and, in any event, the balance favours the claimant on this point.

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- 6.8 Mr Brien makes a number of good points but overall the factors supporting the exercise of the just and equitable discretion significantly outweigh those that militate against it. In the circumstances, I find that there are strong grounds for the Tribunal to exercise its discretion and, having taken all matters into consideration, I find that it would be just and equitable in all the circumstances to extend time in order to allow the complaints of race and sex and religion or belief discrimination and harassment to proceed to a full hearing.
- 6.9 This matter will now need to be listed for a further hearing in order for standard case management orders to be issued and a final list of issues to be identified. Noting the length of time between now and when a final hearing may take place, I would encourage both sides to consider judicial mediation in this case.

Employment Judge Legard

Date 16th May 2024