EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Jones**

Respondent: **Bredon School**

Heard at: **Bristol** **On: 22 February 2018**

Before: Employment Judge Maxwell

Representation
Claimant: in person, assisted by Mrs Lesley Hirons
Respondent: Mr Famutimi, Consultant

JUDGMENT

1. The claimant's claim of victimisation is dismissed on withdrawal.

2. The following claims were presented outwith the relevant statutory time limit, the Tribunal has no jurisdiction to determine the same and they are dismissed:

    2.1. protected disclosure detriment, with respect to alleged failure to maintain the claimant's health and safety;

    2.2. direct discrimination, with respect to the alleged behaviour of Mr Williams between September 2014 and September 2015.

REASONS

Introduction

3. By a claim form presented on 27 August 2017, the claimant brings claims against the respondent of discrimination, protected disclosure detriment and part-time worker less favourable treatment, as more fully identified in the order of EJ Livesey on 20 November 2017. On 4 February 2018 the claimant presented a constructive unfair dismissal claim. By order of REJ Harper on 13 February 2018, the claimant's claims are joined.

4. Further to the order of EJ Livesey, several issues were listed for determination at this preliminary hearing:

    4.1. whether the claimant was a disabled person at material times;

    4.2. whether any of the claimant's claims have little reasonable prospect of success and ought to be made the subject of a deposit order;

    4.3. whether the claims were brought in time and the Tribunal has jurisdiction to hear them;

    4.4. whether an order should be made under rule 50 not to disclose the name of children at the school;

    4.5. case management orders for a final hearing.

5. In addressing the claimant's various individual claims, I will do so by reference to the order of EJ Livesey and his paragraph numbers, preceded by the abbreviation CMO (case management order).

Disabled Person

6. By an email of 12 January 2018, the respondent admitted the claimant was a disabled person by reason of depression. The respondent denies, however, having knowledge of the same.

Rule 50

7. The claimant relies upon having made protected disclosures at a meeting on 10 October 2016, including with respect to the respondent admitting a pupil in contravention of its admissions policy.

8. Whether or not the claimant made a protected disclosure within section 43A of the **Employment Rights Act 1996** ("ERA") can be properly determined without naming the pupil, and the to the extent that it is

necessary to refer to any particular pupil in connection with the claimant's protected disclosure claim or otherwise, the parties will not identify that pupil or the parents by name, but instead will agree a key to be used at the final hearing of this matter, in the form Pupil A, Pupil B etc. Any reference to the pupils in witness or documentary evidence will be redacted accordingly.

ORDER

Pursuant to Rule 50, it is ordered, that no pupils or parents shall be identified by name in the course of these proceedings. Where necessary, any witness statement or documentary evidence must be redacted to remove such names.

Time

Law

9. All of the claimant's claims were subject to a requirement they be presented to a Tribunal within a period of 3 months, as extended by ACAS early conciliation. The claimant contacted ACAS on 28 June 2017 and a certificate was issued on 28 July 2017. She presented her claim on 27 August 2017. Accordingly, a complaint about any matter which occurred on or after 29 March 2017 would have been presented within a period of 3 months.

10. Time for these purposes runs from the date of the act or omission complained of, save where it is established that there is conduct extending over a period, or a series of similar acts, in which case time runs from the end of the period or last act.

11. An otherwise out of time ("OOT") claim may be considered, however, where the Tribunal is satisfied:

    11.1. in connection with discrimination and part-time worker claims, it is just and equitable to do so;

    11.2. in connection with protected disclosure detriment claims, that it was not reasonably practicable for the claimant to have presented the claim before the end of the period of 3 months and it was presented within a further reasonable period.

12. The question of what amounts to a "continuing act" was considered by the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, per Mummery LJ:

    52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending

over a period'. [...]Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

13. The onus is upon a claimant to prove that is was not "reasonably practicable" for a claim to have presented within the specified time period. This represents a high hurdle to a late claim; see **Saunders v Southend on Sea Borough Council [1984] IRLR 119 CA**, May LJ giving the judgement of the Court said:

22. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However we think that one can say that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' is to take a view too favourable to the employee. On the other hand 'reasonably practicable' means more than merely what is reasonably capable physically of being done – different, for instance, from its construction in the context of the legislation relating to factories: compare Marshal v Gotham (1954) AC 360. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word 'practicable' as the equivalent of 'feasible' as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic – 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' – is the best approach to the correct application of the relevant subsection.

14. The discretion of the Employment Tribunal to hear OOT claims was addressed by the Court of Appeal in **Robertson v Bexley Community Centre [2003] IRLR 343**, per Auld LJ:

25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.

Facts

15. The matters about which the claimant now complains began in April 2014. She did not make an early complaint as she thought that would have been premature.

16. The claimant was signed off work with stress between September 2015 and January 2016. In January 2016 she commenced maternity leave,

during which time, understandably, she was preoccupied with her baby. The claimant returned to work on 27 June 2016.

17. Between July 2016 and November 2016, the claimant did not bring a claim because she was a senior manager within the school and hoped to find an internal resolution.

18. On 10 October 2016, the claimant had a meeting with the respondent's senior managers, Ms Carr and Mr Alano, at which she raised various concerns (relied upon by her as amounting to protected disclosures).

19. By November 2016, the claimant had begun to suffer with depression and was supported by her GP with medication and counselling. The respondent admits she was a disabled person from this point. She was signed off work by her GP from 11 November 2016.

20. The claimant was able to return to work on 9 January 2017. The claimant found it difficult to cope at this time, in particular dealing with a redundancy process.

21. An email written by Helen Archer-Smith of the respondent on 20 March 2017, includes:

Debbie came into work this morning directly to see me and she is not well again–we completed the scoring, and she has gone home. She is mentally very unwell (sorry if not using the correct PC terms) –she was even too upset all day Sunday to attend her best friends wedding.

22. The claimant was signed off work by her GP again from 28 March 2017.

23. A report from C's GP of 9 May 2017 included:

    23.1. the claimant sought support with low mood in October 2016;

    23.2. on 31 October 2016, she scored 22/27 for depression and 21/21 for anxiety, reporting sleep disturbance, poor concentration and struggling to cope at work ;

    23.3. she was prescribed fluoxetine on 4 November 2016;

    23.4. she was seen again on 11 and 14 November 2016 with very low mood, significant anxiety and negative thinking, and was referred for consideration of CBT;

    23.5. she was signed fit with a phased return to work beginning on 6 January 2017;

    23.6. Her medication was changed in January 2017, she was seen in person on 23 February 2017 and her medication was increased following a telephone consultation on 7 March 2017.

24. With respect to the period from 23 March 2017, the GP wrote, and I accept as accurate:

> **Deborah came to see me on 23 March 2017. I noted that the sertraline dose had been increased at the end of February 2017 because she was feeling low at that time. Ever since, though, her mood had been deteriorating. She told me she was having five bad days per week, was having early morning awakening and intermittent anxiety. She had had to present at a conference in Newcastle the previous weekend, which she found difficult. Because she had felt worse she had come in to see me that day. My impression was that she had depression, worsening due to stress at work, with anxiety. I increased the dose of sertraline further to 150mg once daily, started diazepam 2mg three times a day, I asked Donna Hewer to review her again, issued a medical certificate to say that she was not fit for work from 23rd March 2017 until 8th May 2017, I organised to see Deborah again in two weeks time and advised her to call the crisis team if she was worse.**
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> **I reviewed Deborah again on 6 April 2017. She was no better. In addition, she was complaining of dizziness on the increase doses of medication. I therefore did some blood tests (full blood count, urea and electrolytes, liver and thyroid function tests, C-reactive protein and calcium), all of which were normal.**
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> **Deborah was reviewed again by Donna Hewer on 11 April 2017. It seems that the worsening in her condition was partly precipitated by having to make some staff redundant. Initially, Deborah requested a change in her medication, but at the end of the consultation she decided to stay on sertraline for the time being.**
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> **I reviewed Deborah again on 4 May 2017, where she said that she was rather better now, on sertraline 100 mg once daily, that will still not back to normal. We get agree to increase her sertraline 150 mg once daily and we planned to meet again at the beginning of June 2017. I seemed another medical certificate, this time lasting from 4th May 2017 to 4 September 2017.**

25. I am satisfied that from the beginning of November 2016, through to mid-January 2017, and from mid-March 2017 until late May 2017, the claimant was very ill with depression and this operated as a substantial impediment to her presenting a claim. Between those points, whilst her mood was low, she was nonetheless able to attend for work and carry out her duties, and mental illness did not operate as a substantial impediment to commencing Tribunal proceedings. Prior to November 2017, the reason the claimant did not present a claim was that she was, at earlier times she was not sufficiently concerned, and at later times she hoped to obtain redress internally.

<u>Protected Disclosure Detriment - CMO [3]</u>

26. CMO [3.5.1] and [3.5.2] are in time complaints.

27. CMO [3.5.3] is a compliant by the claimant that on 18 February 2017 Mr Ward indicated he intended to review her home working arrangement. She might have been presented a claim in this regard, or commenced ACAS early conciliation, at any point in the period to 17 May 2017. When actually presented, this claim was, accordingly, over 5 weeks late. The claimant has not satisfied me that it was not reasonably practicable for her to have presented an in-time claim. Whilst she may have been unable to present a claim in the latter part of the limitation period, she was not prevented by illness from presenting a claim in February or during the first half of March. The claimant has not established that it was not reasonably practicable for her to have presented her claim in time. The Tribunal has no jurisdiction to determine her claim CMO [3.5.3] and this is dismissed.

Direct Discrimination, Sex, Pregnancy or Maternity - CMO [5] & [6]

28. The latest matter about which the claimant complains under this heading, is Mr Ward requiring her to undertake a full role on 0.8 hours and to work on her day off, which she says continued up until 27 March 2017 - CMO [6.1.1] and [6.1.2]. Although the claim was late, I am satisfied that it is just and equitable to extend time, for the following reasons:

    28.1. the claim was only late by 2 days;

    28.2. the claimant was very ill for most of the primary limitation period;

    28.3. while the respondent argues it is prejudiced, because Mr Ward is no longer an employee, the respondent would have been in the same position had the claim been presented in time;

    28.4. the claimant would be prejudiced if time were not extended as her entire direct discrimination claim would fall away;

    28.5. the claimant has now resigned and pursues a constructive unfair dismissal claim, based upon the same matters she relies upon in these proceedings, with the result the claimant will be required to address her factual allegations in any event.

29. As to the claimant's other complaints of direct discrimination, CMO [5.1.1], [5.1.2], [5.1.3], [5.1.4], [5.1.5], [5.1.6], [5.1.7] save for the first of those, the claimant says they were either acts perpetrated directly by Mr Ward, or carried out by staff under his influence. Whether in fact they constitute a continuing act will require findings of fact by a Tribunal having heard evidence. Given the connection of Mr Ward's alleged involvement, a continuing act is arguable.

30. The first complaint, however, does not concern Mr Ward and nor is it said to be something done under her influence. CMO [5.1.1] is a complaint about the actions of Mr Williams. The alleged behaviour of Mr Williams ended in September 2015. A complaint in this regard is, therefore, very

late. The claimant elected not to bring an earlier claim and was not prevented by illness from doing this. Furthermore, Mr Williams has long since left the respondent's employ. I accept that the respondent would be substantially prejudiced in seeking to answer this late claim. I am not satisfied it is just and equitable extend time for this complaint. The Tribunal has no jurisdiction to determine her claim CMO [5.1.1] and this is dismissed.

Indirect Discrimination - CMO [7]

31. The complaint at CMO [7] concerns the same factual matter as at CMO [6.1.1] and [6.1.2], and for like reasons as given in that regard, it is just and equitable to extend time.

Discrimination Arising - CMO [8]

32. The complaint at CMO 8.1-8.4 refers to the same work (redundancy scoring) required of the claimant up to and on 27 March 2017. The same time considerations apply as for CMO [6.1.1] and [6.2.2] above. It is just and equitable to extend time for this claim.

Victimisation - CMO [9.1-9.2]

33. CMO [9] is an in-time complaint.

Reasonable Adjustments - CMO [9.3-9.6]

34. CMO [9.3-9.6] concerns the requirement made of the claimant (which she says should not have been) to carry out the redundancy selection process and scoring, up to and including on 27 March 2017. For like reasons as given in connection with CMO [6.1.1] and [6.1.2], it is just and equitable to extend time.

Part-Time – CMO [10]

35. The complaint at CMO [10] concerns the same factual matter as at CMO [6.1.1] and [6.2.2], and for like reasons as given in that regard, it is just and equitable to extend time.

Deposit Order

Law

36. Rule 39(1) provides:

> **Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**

37. In **Van Rensburg v Royal Borough of Kingston upon Thames [2007] UKEAT/0096/07**, Elias P addressed the threshold of "little reasonable prospect of success":

> **26. Ezsias then demonstrates that disputes over matters of fact, including a provisional assessment of credibility, can in an exceptional case be taken into consideration even when a strike out is considered pursuant to rule 18(7). It would be very surprising if the power of the Tribunal to order the very much more limited sanction of a small deposit did not allow for a similar assessment, particularly since in each case the tribunal is assessing the prospects of success, albeit to different standards.**
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> **27. Moreover, the test of little prospect of success in rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in rule 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.**

Protected Disclosure Detriment - CMO [3]

38. With respect to CMO [3.5.1], the claimant accepted the reduction was in accordance with the respondent's sickness policy, her argument is that because her sickness absence had been caused by the respondent, it should have paid her in full. This is not a complaint of protected disclosure detriment. I am satisfied this claim enjoys little reasonable prospect of success and make a deposit order.

39. In connection with CMO [3.5.2], Mr Famutimi argued that the original SAR was too broad and this led to a delay in responding. He referred me to correspondence suggesting the claimant had admitted as much. On my reading of the claimant's words, her position may appear to have been otherwise. In any event, the reason why the respondent delayed in its response is a matter for evidence and argument at a final hearing.

Direct Discrimination, Sex, Pregnancy or Maternity - CMO [5] & [6]

40. Whether the respondent did what is, variously, alleged at CMO [5.1.2], [5.1.3], [5.1.4], [5.1.5], [5.1.6], [5.1.7], [6.1.1] and [6.1.2], and if so why, is a matter for evidence at a final hearing.

Indirect Discrimination - CMO [7]

41. CMO [7] is a complaint about being required to work full-time. If such a PCP was applied, it is arguable that was indirectly discriminatory on ground of sex. These are matters for evidence and submission at a final hearing, along with any justification advanced.

Discrimination Arising - CMO [8]

42. Following an explanation given to the claimant of EqA section 15, she was invited to identify the "something" arising from her disability in this regard.

The claimant said that whereas others were asked to do this unwelcome task, because of her disability she didn't feel able to refuse; this explains her action, it does not involve asserting any reason for the respondent's decision to impose the alleged unfavourable treatment. This does not appear to be a complaint of discrimination arising. I am satisfied this claim CMO [8] enjoys little reasonable prospect of success and make a deposit order.

Victimisation - CMO [9.1-9.2]

43. In the course of discussion, the claimant agreed that the reductions in her sick pay were made in accordance with the respondent's sick pay policy. Asked to explain how this amounted to victimisation, the claimant said the because her sickness absence had been caused by the respondent, it should have paid her in full. The claimant agreed this did not appear to be victimisation within EqA section 27 and withdrew this claim CMO [9.1-9.2].

Reasonable Adjustments - CMO [9.3-9.6]

44. In CMO [9.3-9.6] the claimant argues that the onerous and stressful task of redundancy selection and scoring should have been removed from her, given the mental health problems she had suffered with. This will be a matter for evidence and submissions at a final hearing.

Part-Time

45. Whether the claimant was required to discharge full-time duties despite working 0.8 hours, and if so whether this infringed her rights under the Regulations is arguable and matter for evidence at a final hearing.

Amount

46. The claimant began new employment in January 2018, working 15 hours a week, which pays considerably less than her employment with the respondent. The claimant is married and lives in the family home. Her husband is in full-time employment. The bank statements provided show regular outgoings and little by way of disposable income. The claimant has no savings beyond the small positive balance. Taking into account her very limited means, I set the sum at £100 on each of the two deposit orders.

Case Management

47. The matter to be listed for a 1-hour telephone case management preliminary hearing, to take place after time for the claimant to pay the deposits has passed.

Summary

Dismissed Claims

48. Claims dismissed:

    48.1. CMO [9.1-9-2];

    48.2. CMO [3.5.3];

    48.3. CMO [5.1.1].

Time

49. Claims found to have been presented in-time:

    49.1. CMO [3.5.1] & [3.5.2];

    49.2. CMO [6.1.1] & [6.1.2];

    49.3. CMO [7];

    49.4. CMO [8];

    49.5. CMO [9.3-9.6];

    49.6. CMO [10].

50. Claims which may be in time, subject to a determination at final hearing on the question of continuing act:

    50.1. CMO [5.1.2], [5.1.3], [5.1.4], [5.1.5], [5.1.6] & [5.1.7].

Deposit Order

51. Claims subject of a deposit order:

    51.1. CMO [3.5.1] - in the sum of £100;

    51.2. CMO [8] - in the sum of £100.

Employment Judge Maxwell

Date: 22 February 2018

JUDGMENT SENT TO THE PARTIES ON

27 February 2018

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FOR THE SECRETARY TO THE TRIBUNALS