



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104572/2020

10

Preliminary Hearing Held via Cloud Video Platform (CVP) on 18 August 2021

Employment Judge: A Strain

15

Ms Jeanette Findlay

**Claimant
In Person**

20

University of Glasgow

**Respondent
Represented by:
Mr Neil MacLean
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25

The Judgment of the Tribunal is that the application to amend the claim is allowed under exception of the part of the amendment which seeks to include a new claim of Victimisation.

Background

30

1. The Claimant presented an ET1 on 24 August 2020, through her solicitors. The claim asserted was indirect sex discrimination. On 21 October 2020 the Claimant's agents amended the claim to include a claim of direct sex discrimination.

35

2. A 7 day hearing was listed to commence on 5 July 2020. The Claimant applied for a postponement on the basis that she had dismissed her

agents and wished to lodge further and better particulars. The postponement was granted.

3. On 19 July 2021 the Claimant submitted further and better particulars and “to amend my claim if and where amendment is necessary.”
4. The Respondent opposed the application to amend on the basis that it sought to introduce new claims which were out of time. It did not oppose the application in so far as it added particularisation of existing claims
5. The issue for the Tribunal to determine at the Preliminary Hearing was whether or not the application to amend should be allowed.
6. The Parties had lodged an agreed Joint Bundle of Documents with the Tribunal. The Claimant had also lodged an additional bundle extending to 142 pages.
7. The Claimant gave evidence and made submissions on her own behalf.
8. No evidence was led from the Respondent.

Findings in Fact

9. Having heard the oral evidence of the Claimant and considered the documentary evidence before it the Tribunal made the following findings in fact:
 - (1) The Respondent is a University;
 - (2) The Claimant is a senior lecturer with the Respondent.
 - (3) The Claimant had applied for promotion in January 2020. She was advised that her promotion application had been unsuccessful on 30 April 2020.
 - (4) The Claimant instructed her legal advisors to lodge an ET1 on her behalf asserting indirect sex discrimination in respect of the promotion application. The ET1 was lodged on 24 August 2020.

- 5
- (5) The Claimant had served as President of the University Union (UCU) Glasgow Branch and was currently President of UCU Scotland.
- (6) The Claimant had previously presented a discrimination claim against the Respondent in or around 2004.
- (7) The Claimant had the benefit of advice and support of her trade union prior to lodging the current ET application.
- (8) The Claim was amended by the Claimant's legal advisors on 21 October 2020 to include a direct sex discrimination claim.
- 10 (9) The Claimant had access to a copy of the Report by Professor Mason in October 2020.
- (10) The Claimant had legal advice and support throughout her tribunal claim until 21 June 2021.
- (11) The Claimant dismissed her legal advisors on 21 June 2021 and
15 subsequently represented herself.
- (12) The Claimant submitted the amendment application on 19 July 2021.

The Relevant Law

- 20 10. The Claimant seeks to amend her application to include potentially new grounds of claim which date back to the failure to promote her on 30 April 2020.

Overriding Objective

- 25 11. The starting point for the Tribunal in considering any such application is the "overriding objective" which provides:

Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

5 (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

10 A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

15 **Applications to Amend**

12. In the context of applications to amend the Tribunal should have regard to the case of ***Selkent Bus Company Ltd v Moore [1996] IRLR 661*** (which was followed by the EAT in Scotland in ***Amey Services Ltd and another v Aldridge and others UKEATS/0007/16***). The EAT held that, when faced with
20 an application to amend, a Tribunal must carry out a careful balancing exercise of all the relevant circumstances, weighing up the balance of injustice or hardship that would be caused to each party by allowing or refusing the application. This would include the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

25

Time limits

13. The time limit for a discrimination claim to be presented to a Tribunal is 3 months starting with the act complained of (section 123(1), Equality Act 2010). Section 123(3)(a) of the Equality Act 2010 provides for continuing
30 acts of discrimination, where acts of discrimination extend over a period

are treated as having occurred at the end of that period. The question a Tribunal should ask is whether the employer is responsible for an “an ongoing situation or a continuing state of affairs” in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686***). There must be facts and circumstances which are linked to one another to demonstrate a continuing discriminatory state of affairs. The Tribunal should consider the nature of the conduct and the status or position of the person responsible for it.

10 *Just and equitable extension of time*

14. If a claim is out of time the Tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (section 123(1)(b)).

15 15. ***British Coal Corporation v Keeble & Others [1997] IRLR 336*** sets out a checklist of factors which a Tribunal should consider when deciding whether to refuse or grant an application to extend the time limit:

- 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.
- 20 c. The extent to which the party sued had co-operated with any requests for information.
- d. The promptness with which the Plaintiff acted once he or she knew of the facts giving rise to the cause of action.
- e. The steps taken by the Plaintiff to obtain appropriate professional
25 advice once he or she knew of the possibility of taking action.

Knowledge of the Claimant

16. In the case of *Mensah v Royal College of Midwives UKEAT/124/94*, Mummery J said that knowledge is a factor relevant to the discretion to extend time. Tribunals are therefore entitled to ask questions about a Claimant's prior knowledge, including: when did the Claimant know or suspect that they had a claim for discrimination; was it reasonable for the Claimant to know or suspect that they had a claim earlier; and if they did know or suspect that they had a claim, why did they not present their complaint earlier.

Submissions

17. Both Parties made submissions orally although written grounds of opposition had been lodged by the Respondent and the Claimant had made written submissions in support of her application to amend within the application.
18. The Claimant submitted that the amendment in relation to indirect sex discrimination in mentoring and career development and care commitments was further particulariation of her existing indirect sex discrimination claim failing which, if they were new claims, they had been presented in time as matters had only come to light in May 2021. If they were out of time then it would be just and equitable to extend time for the presentation of such claims.
19. The claim of victimisation was a new claim which had only come to light in May 2021. It was accordingly presented in time which failing it was just and equitable to extend the time for presentation of such claim.
20. The Respondent submitted all 3 claims were new heads of claim, had been presented out of time, the Claimant had access to all relevant information and documentation at the latest by January 2021 and it would not be just nor equitable to extend the time for presentation in all the circumstances.

Discussion and Decision

21. The Tribunal heard evidence from the Claimant.
22. The Tribunal considered the evidence and submissions of the Claimant only in relation to the question before it which was whether or not to allow the application to amend.
- 5 23. In this context the Tribunal adopted and followed the approach of the EAT in **Selkent**.

Nature of the Amendment

24. According to the Claimant her amendment seeks to add in additional particularisation or specification of her complaint of indirect sex discrimination contained within her Amended Statement of Claim in respect of (1) mentoring and career development and (2) her care commitments and a new claim of victimisation.
- 10

Mentoring and Career Development

25. The Claimant asserts that it only came to her attention in or around 12 May 2021 that male applicants in the disputed promotion round were offered development opportunities and informal mentoring in the period prior to the promotion round (and since).
- 15
26. The Claimant further asserts that she has never been offered such mentoring, support or developing opportunities and that this has continued and is ongoing.
- 20
27. The Claimant further asserts that “men have easier, more frequent and more beneficial access to mentoring and development opportunities and that practice operates as a detriment to women.”
28. It is asserted that this practice (PCP) is a detriment to women and to herself personally.
- 25
29. The Claimant submitted that the Respondent was aware of her concerns due to her raising the issue in relation to her promotion application in an

email to John Finch of 7 January 2020 (page 102 of the Claimant's Bundle)); referring to the issue of mentoring in her Amended Statement of Claim at paragraph 9 (page 51 of the Joint Bundle); referring to the issue in her statement of grievance (page 235 of the Joint Bundle) and the Respondent's response at paragraph 23 of the Grounds of Resistance.

30. The Tribunal also noted that there was reference to the lack of mentoring and career development in paragraph 16 (c) and (d) of the Amended Statement of Claim (Page 52 of the Joint Bundle).

31. The Claim of indirect sex discrimination as currently pled is in the following terms (the Tribunal observes that the numbering is clearly incorrect):

Indirect sex discrimination

28. *The Respondent discriminated against the Claimant by applying to the Claimant a provision, criterion or practice (PCP) which was indirectly discriminatory in relation to her sex contrary to section 19 of the Act.*

29. *The PCP are:*

a. *The Esteem criteria; and/or*

b. *The guidance which accompanies the Esteem criteria set out in Academic Promotion Criteria Section E Esteem; and/or*

c. *The shadow requirement to be published at a requisite minimum level and/or have a long track record of publications as the Respondent uses examples of esteem which come from publications; and/or*

d. *The Academic Promotion criterion applicable to the Grade 10 Professor post at large; and/or*

e. *The practice of existing Grade 10 Professors being asked for their view of promotion to Grade 10 applications.*

30. *The PCP set out in paragraph 26 above applies or would apply to persons with whom the Claimant does not share their protected characteristic (i.e. men).*

5 31. *The PCP puts or would put women at a particular disadvantage when compared with men because female academics, including (but not limited) to those who work in Economics, are more likely to have careers that are heavier in teaching and administrative requirements; they are also more likely to undertake a disproportionately high share of the administration of their home and familylife (in terms of parental and caring responsibilities) allowing them less time than their male colleagues to undertake work that is traditionally prized namely less time to: be published; undertake research; and speak at conferences. It is therefore harder for women to meet the PCP set out in paragraph 26 above.*

10 32. *In terms of the PCP at paragraph 26(e) above, this is also harder for women to meet both for the reasons set out in paragraph 28 above and because the vast majority of those employed at Grade 10 are men; this input is also not properly documented nor subject to clear guidance introducing a significant risk of unconscious bias.*

15 33. *The PCP in paragraph 26 above put the Claimant at that specific disadvantage described in paragraph 28 and 29 above; consequently she was not promoted. As a result of the application of the above PCP, the Claimant was informed by the Respondent that she did not meet the requirements to be promoted to the role of Grade 10 professor.*

20 34. *The Respondent cannot show that the PCP were a proportionate means of achieving a legitimate aim.*

25 32. As currently pled the claim of indirect sex discrimination contains no reference to the lack of mentoring and career development. There is, however,

30

reference to the lack of mentoring and career development within the pleadings currently as referred to by the Claimant and noted above.

- 5 33. If allowed, the amendment would add a new indirect sex discrimination head of claim as it would include a new PCP. It would also include additional facts and circumstances. The Respondent would require to respond to it.

Care Commitments

- 10 34. The Claimant asserts that the Respondent indirectly discriminated against her on the basis of sex in that they did not specifically invite the provision of information about care commitments in the promotion application process and that this was a practice that operated to the detriment of women who have the burden of care commitments. Further, the lack of mentoring, guidance and support (which was asserted as a gendered practice) led to the failure to specify care commitments in her promotion application. This practice (PCP) operates as a detriment to women and to her personally.

- 15 35. The Claimant contends that she only became aware of other applicants in the promotion process raising special circumstances relating to childcare and domestic responsibilities as part of their application as documents were disclosed in preparation for the hearing in the current case.

- 20 36. The Tribunal once again referred to the claim as currently pled and note that there is some mention of care commitments as a basis of the indirect sex discrimination claim. There was reference to care commitments in paragraph 31 of the Amended Statement of Claim (Page 53) in the following terms:

25 *“they are also more likely to undertake a disproportionately high share of the administration of their home and family life (in terms of parental and caring responsibilities) allowing them less time than their male colleagues*

to undertake work that is traditionally prized namely less time to: be published; undertake research; and speak at conferences.”

This is in the context of the PCP asserted to be indirectly discriminatory towards women in paragraph 28 of the Amended Statement of Claim.

5 The Claimant’s proposed amendment was clearly asserting a new PCP and indirect sex discrimination head of claim but it did have some foundation in the existing claim as pled.

37. If allowed, the Respondent would require to respond to the new claim.

Victimisation

10 38. The Claimant accepted that the claim of victimisation was an entirely new claim and that she only became aware of the facts and circumstances surrounding the claim in May 2021. The basis of this was the influence and involvement of Professor Muscatelli in the promotion process. The Claimant had lodged a previous discrimination claim which she asserted had been
15 resolved extra judicially with an undertaking that Professor Muscatelli have no future involvement in any future promotion application made by her.

39. Professor Muscatelli is an economist and chairs the Board of Review which considers promotion applications.

20 40. Further, the Claimant had agreed to an external review of the Respondent’s promotion process utilising her promotion application by Professor Katy Mason of Leicester University. The Claimant understood that this was not an external review of her promotion application. The Claimant asserts that Professor Mason critiqued her promotion application and that critique was now being used in defence of the current tribunal proceedings. The Claimant
25 had not known this until May 2021.

41. The Report by Professor Mason was addressed to and commissioned by Professor Muscatelli.

42. If the amendment was allowed this would introduce a new head of claim and the Respondent would require to respond to this.

Claims out of time

43. Having found that the amendment proposed to introduce 3 new heads of claim the Tribunal considered the issue of potential time bar.

44. The new claims of indirect sex discrimination on the basis of mentoring and career development and care commitments did have some foundation in the pleadings and in the productions referred to above. The specific PCPs and claims now sought to be added by amendment had not, however, been raised in terms.

Mentoring and Career Development

45. In so far as mentoring and career development was concerned the Claimant's amendment and evidence was to the effect that this was an ongoing state of affairs. If she is able to establish that then there is no issue of time bar. If not, then the claim will be out of time as it should have been presented within 3 months of the discriminatory act complained of (the failure to promote the Claimant).

Care Commitments

46. The Claimant particularises this claim on the basis of the failure to invite, explicitly, information on care commitments in the promotion round the Claimant participated in. There is no express assertion that this is an ongoing practice within the amendment however when read together with the assertion that lack of mentoring, guidance and support (which was asserted as a gendered practice) led to the failure to specify care commitments in her promotion application, it appeared to the Tribunal that this is also an alleged ongoing state of affairs given the Claimant's assertion regarding an ongoing failure to provide mentoring and career development.

47. If the Claimant is able to establish that then there is no issue of time bar. If not, then the claim will be out of time as it should have been presented within 3 months of the discriminatory act complained of (the failure to promote the Claimant).

5

Victimisation

48. The claim of victimisation is not mentioned at all in the case as currently pled. The Claimant accepts that this is a new claim under explanation that the facts and circumstances surrounding it have only just come to light. The Tribunal did not accept the Claimant's explanation that the facts and circumstances only just came to light in May 2021. The explanation proffered by the Claimant was that it was the use made of the Report by Professor Mason in the current proceedings which only brought the facts and circumstances supporting the victimisation claim to light in May 2021. The Report was shared with the Claimant in October 2020. The Tribunal did not accept the Claimant's explanation and concluded this claim was presented out of time as the latest it should have been presented was 3 months from October 2020 when the Report was shared with her.

49. Having found that the proposed amendment introduced a claim of victimisation that was out of time, the Tribunal then went on to consider whether or not it should extend the time limit for presenting such claim on just and equitable grounds.

Just and equitable extension of time

50. The Tribunal followed the checklist of factors ***British Coal Corporation v Keeble*** a Tribunal should consider when deciding whether to refuse or grant an application to extend the time limit in respect of the victimisation claim:

i. length of and reasons for the delay

ii. Promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action.

30

iii. Steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

51. The Claimant had access to advice and support from her trade union prior to
5 the initiation of the current proceedings. She had access to legal advice,
support and representation prior to the initiation of the current proceedings
and throughout until her dismissal of her legal advisors on or around 21 June
2021. The Claimant did not present the proposed amendment until 19 July
2021. Her explanation for the delay was that her legal advisors had not
10 prepared the claim in accordance with her instructions and matters had not
been included which she felt should have.

52. The claim she raised in her proposed amendment had only come to light in
May 2021 as documents were produced and information became available in
the context of the tribunal proceedings and the joint bundle was prepared. In
15 support of this the Claimant contends the use of the Report by Professor
Mason in the context of the current proceedings became known to her.

53. The Respondent contended that the Claimant had all of the information
available to her at the time of presenting her claim and that no reasonable
explanation has been provided in support of her contention that information
20 or documentation only became available to her in May 2021. The Report by
Professor Mason was available to the Claimant in October 2020 and referred
to in their ET3.

Knowledge of the Claimant

25 54. The Tribunal considered the case of ***Mensah v Royal College of Midwives***
UKEAT/124/94, where Mummery J said that knowledge is a factor relevant to
the discretion to extend time. Tribunals are therefore entitled to ask questions
about a Claimant's prior knowledge, including: when did the Claimant know
or suspect that they had a claim for discrimination; was it reasonable for the
30 Claimant to know or suspect that they had a claim earlier; and if they did know

or suspect that they had a claim, why did they not present their complaint earlier.

55. It was clear that the Claimant had knowledge of the prospect of a discrimination claim from prior to 24 August 2020 when her legal advisors lodged the claim on her part. The Claimant knew or ought to have known of the time limits by 24 August 2020 (or at the latest by October 2020 when the Report was shared with her) and did not present the proposed amendment until 19 July 2021. Her legal advisors had lodged an amended statement of claim on 21 October 2020. A claim of victimisation was not included within this. The Tribunal concluded that it could not be argued that she was ignorant of the time limits that applied in such claims.

56. In further support of that the Claimant has experience of a previous discrimination claim before the tribunal, has served as President of the UCU Glasgow Branch and is currently President of UCU Scotland.

57. The Tribunal did not consider that there was any satisfactory explanation for the considerable delay in presenting the proposed amendment to include the claim of victimisation in the circumstances.

The extent to which the cogency of the evidence is likely to be affected by the delay

58. The Tribunal considered that the passage of time would be unlikely to have a detrimental impact on the cogency of the evidence in relation to the matters contained in the proposed amendment given that they related to matters from January 2020 onwards.

59. The Tribunal considered that the Claimant had access to all of the information to enable her to present the claim proposed in the amendment at the latest by October 2020 when the Report by Professor Mason was shared with her.

60. The Tribunal did not accept the Claimant's explanation that there was information or documentation that only came to light in May 2021. The Claimant did not state what documentation relevant to the victimisation claim (other than the use of the Report) she was unaware of until then.
5 The references to the Report by Professor Mason in the ET3 also serve to undermine the Claimant's evidence that she was unaware of the use to be made of the Report until May 2021 and the alleged victimisation.

61. In all the circumstances the Tribunal did not consider that it would be just and equitable to extend the time limit for presentation of the proposed claim of victimisation.
10

Overriding Objective

15 62. The Tribunal carried out a careful balancing exercise of all the relevant circumstances, weighing up the balance of injustice or hardship that would be caused to each party by allowing or refusing the application to amend.

Victimisation

20 63. Having determined that the victimisation claim proposed in the amendment has been presented out of time and it would not be just and equitable to extend the time for presentation the Tribunal considered that refusal of the application to amend to include that claim was in
25 accordance with the overriding objective.

64. The proposed amendment to include a victimisation claim is substantial. The Tribunal considers that there would have been considerable prejudice to the Respondent in allowing the amendment given the
30 passage of time, the volume of information that would be required to respond, the extensive further preparation and witnesses that would be required and the further case management the case would be subject to.

There would undoubtedly have been delay and considerable further expense.

65. Whilst there may be prejudice to the Claimant by not permitting this part of the amendment this is outweighed by the prejudice to the Respondent.

5

66. The application to amend in so far as the amendment seeks to introduce a new claim of victimisation is accordingly refused.

Mentoring and Career Development and Care Commitments

67. The Tribunal considered that the timing of the amendment was unfortunate given that it came so late in the process. However, no final hearing date has been allocated and the Respondent had, to an extent, been put on notice of some of the assertions made in support of the new claims in the current pleadings. There had been no significant passage of time that could effect the cogency of the evidence. Whilst there would be further time and cost incurred in responding to the new claims by the Respondent this was outweighed by potential prejudice to the Claimant if the amendment was not allowed.

10

15

68. The Tribunal accordingly determined that the remainder of the proposed amendment (under exclusion of the victimisation claim) be allowed and that it was in accordance with the overriding objective to do so.

20

69. The case will now need further case management in respect of the amendment process.

5 Employment Judge: Alan Strain
Date of Judgment: 15 September 2021
Entered in register: 20 September 2021
and copied to parties

10