



EMPLOYMENT TRIBUNALS

Claimants: Mrs A Jankularova
Respondents: Wilson James Limited (R1) and Optime Group Limited (R2)
Heard at: London South Hearing Centre (by CVP)
On: 11 July 2023
Before: Employment Judge Byrne

Representation

Claimant: Mr R Lodwick (McKenzie Friend)
Respondents: Mr P Chadwick, Employment Law Consultant (for R1) and Ms J Leach, Solicitor (for R2)

The Employment Judge having reserved his decision because of lack of time at the Public Preliminary Hearing now gives judgment as follows :-

RESERVED JUDGMENT

The Claimant has not established a basis for extending time in relation to any of the claims and the claims are therefore STRUCK OUT.

REASONS

Introduction

1. The Public Preliminary Hearing was listed to consider the following matters, set out originally in the case management orders of EJ Byrne of 20 April 2023:

1.1. Did the Claimant present all of her claims in time as set out in section 123 of the Equality Act 2010? In relation to each claim for discrimination:

- Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - If not, was the claim made within a further period that the Tribunal thinks is just and equitable?
2. The hearing was scheduled for three hours. The hearing commenced at 10am and concluded at 1.20pm. In the course of the hearing, reference was made to a hearing bundle running to some 279 pages as well as a witness statement prepared by the Claimant and a witness statement prepared by Mr Anthony Young, director of R2. The Tribunal heard evidence from the Claimant and from Mr Young for R2. The Tribunal then heard helpful closing submissions from Mr Chadwick, Ms Leach and Mr Lodwick.

Findings of Fact

3. The Claimant was employed by OCS Group UK Limited as a concierge based at Gatwick Airport from 26 March 2012 until the termination of her employment with effect from 8 May 2019. OCS Group UK Limited is not a Respondent in the instant proceedings.
4. The Claimant commenced a period of ordinary and then additional maternity leave on or around 8 March 2018. On 2 April 2019 the Claimant applied for a job with a different employer, namely R1, via an agency, namely R2.
5. On 5 April 2019, shortly before she was due to return to work from maternity leave, the Claimant had a meeting with OCS Group UK Limited. She discovered that the shift pattern that she was expected to work had been changed. She raised a grievance in relation to that, and other changes to her role, on 12 April 2019.
6. R1 sought a reference from OCS Group UK Limited on 17 April 2019. The Claimant returned to work with OCS Group UK Limited on 18 April 2019.
7. On 25 April 2019 the Claimant attended a grievance meeting with OCS Group UK Limited.
8. On 25 April 2019 the Claimant was told that her job application to R1 had been successful and that on 30 April 2019 she would begin her induction and training for the new job would start on 9 May 2019.
9. On 1 May 2019 the Claimant told OCS Group UK Limited about her new job and they agreed to her early release on 8 May 2019 so that she could start her induction/training with R1 on the next day.
10. The Claimant attended an exit interview with OCS Group UK Limited on 7 May 2019. On the morning of 8 May 2019 the Claimant was informed that her job offer from R1 was being withdrawn. She immediately asked OCS Group UK Limited to continue working for it after 9 May 2019 but it refused.

11. The Claimant applied to ACAS for an early conciliation certificate in respect of R1 on 9 May 2019 and in respect of R2 on 15 May 2019.
12. The Claimant presented an ET1 against OCS Group UK Limited on 9 August 2019 (Case Number 2303160/2019), bringing claims of: constructive dismissal; discrimination on grounds of pregnancy and maternity; victimisation; discrimination on grounds of sex; unlawful deductions; and failure to provide written reasons for dismissal. R1 and R2 were not named as Respondents in that case.
13. As part of the Claimant's Grounds of Claim in Case Number 2301609/2019, presented on 9 August 2019, the Claimant stated the following: *'8/5/19 I was suddenly informed by Jordan Leaver @ Optime Group (Agency) that I would not be allowed by Wilson James to start new job because they had received negative information about me. I was given no details about this 'negative information', which is likely to have been misleading and malicious. I quickly indicated my unexpected availability to continue working for OCS after this date but Vipula Sayer and Justyna Dzienkovska refused, without following any due diligence, to put me back on the rota.'*
14. The Claimant accepted at the preliminary hearing that it had been in her contemplation to add R1 and R2 as Respondents to Case Number 2301609/2019 at the time she presented that claim on 9 August 2019. She further accepted that she thought, at that time, that she might have valid claims against R1 and R2. She offered no clear reason for failing to bring claims against R1 and R2 at that time.
15. The Claimant accepted that she was aware, in general terms, of time limits for the bringing of claims to the Employment Tribunals.
16. On 21 May 2020 the Employment Tribunals made an order for third party disclosure in Case Number 2301609/2019 against R1 and R2 for copies of all documents relating to the Claimant's application for employment covering the period April and May 2019.
17. On 26 January 2021 the Claimant wrote to the Employment Tribunals in the context of Case Number 2301609/2019 expressing dissatisfaction with the extent of R1's compliance with the third-party disclosure order of 21 May 2020 and pointing out that there had been no compliance on the part of the order by R2.
18. On 4 February 2021 the Employment Tribunals wrote to R2 advising it that it appeared not to have complied with the disclosure order of 21 May 2020 and allowing until 12 February 2021 for compliance with that order.
19. On 10 February 2021 the Claimant again wrote to the Tribunal raising her contention that R1 and R2 were not in compliance with the third-party disclosure order, stating *'Disclosures made by the third parties or the absence of these could result in both or one of being added as Respondents themselves as per rule 34'*.
20. On 16 February 2021, the Claimant wrote to the Employment Tribunals in relation to Case Number 2301609/2019. As part of a request for new case management orders in that case the Claimant stated the following in relation to the third-party

disclosure orders concerning R1 and R2: *'The Tribunal gave these third parties a 'final warning' to comply or otherwise face the consequences. The deadline for doing this expired on 11th [sic] February. The Tribunal should now exercise its powers of enforcement. It also has the power to add them as Respondents as per rule 34.'*

21. On 19 February 2021 the Claimant, through ACAS, arrived at a settlement with the Respondent in Case Number 2301609/2019. In an appendix to the settlement with OCS Group UK Limited that was signed by the Claimant on 19 February 2021, the Claimant accepted that the proceedings in Case Number 2301609/2019 would be dismissed following withdrawal of the claim by the Claimant.
22. In an email to the Employment Tribunals sent after the settlement of Case Number 2301609/2019, the Claimant raised the following: *'No responses to the ET orders dated 4th February 2021 for full disclosure by 12th February 2021 were received from the third parties. Therefore, due to their persistent non-compliance, I ask the Tribunal to commence enforcement action forthwith against both Wilson James & Optime Group. Although the above case is going to be settled, I also ask the Tribunal to notify me about the outcomes of enforcement action.'*
23. On 20 May 2021 the Tribunal presented an ET1 in the instant case against R1 and R2 raising complaints of discrimination in connection with the withdrawal of a job offer, as follows: discrimination on grounds of race; pregnancy or civil partnership discrimination; and discrimination on grounds of sex.
24. On 11 June 2021 the Employment Tribunals responded to a reminder email from the Claimant dated 7 May 2021 concerning the email referred to at paragraph 22 above, stating: *'Your case with the Employment tribunal has been settled. Please contact the County court for enforcement actions.'*
25. On 16 February 2022 a 'dismissal following withdrawal' judgment issued in respect of Case Number 2301609/2019.
26. I am satisfied that this is not a situation where R1 and R2 roundly ignored the third-party disclosure order of 21 May 2020. There is evidence R1 provided a limited amount of information by way of compliance with the third-party disclosure order in Case Number 2301609/2019, albeit the Claimant has expressed dissatisfaction with the information provided.
27. As regards R2's approach to the third-party disclosure order of 21 May 2020, I accept the evidence of Mr Young for R2 that R2 responded to a request from OCS Group UK Limited on 28 April 2020 for information concerning the withdrawal of the job offer to the Claimant by R1. I further accept the evidence of Mr Young that it was only on 8 February 2021 that he became aware of the existence of the Tribunal's third-party disclosure order of 21 May 2020 and the related correspondence of 4 February 2021 and that he made prompt efforts to disclose the limited amount of information he was able to provide in compliance with the disclosure order in question.

28. While I accept that the Claimant takes issue with the contention of the Respondents that they were fully in compliance with the third-party disclosure order of the Tribunal in Case Number 2301609/2019, I reject that there is any clear basis for determining that there was clear non-compliance with that order on the part of R1 and R2 and I further find that the Claimant's decision to settle those proceedings on 19 February 2021 brought that case, and any order associated with it, to an end.

Conclusions

Were the claims made to the Tribunal within three months (plus early conciliation extension) of the acts to which the complaints relate?

29. Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of:

(2) “(a) the period of three 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.’

Subsection (3) further provides that:

“For the purposes of this section (a) conduct extending over a period is to be treated as done at the end of that period (b) failure to do something is to be treated as occurring when the person in question decided on it”.

30. Section 140B of the Equality Act 2010 provides an extension of time to ensure that the period between the date when the prospective claimant contacts ACAS and the date when the prospective claimant receives or is treated as receiving the ACAS Early Conciliation Certificate does not count towards the three-month primary limitation period.

31. The claim is outside the primary limitation period of three months, with the ACAS extension. The job offer was withdrawn on or around 9 May 2019. A consideration of all of the relevant dates shows that the claims against R1 and R2 were brought some 20 months out of time.

Were the claims made within a further period that the Tribunal thinks is just and equitable?

32. The Claimant seeks to bring various discrimination claims. For claims requiring a ‘just and equitable extension’, I have regard to the fact that a time extension is said to be the exception rather than the rule because there is a statutory time limit (Robertson v Bexley Community Centre [2003] IRLR 434). I also take account of the fact that there is no presumption in favour of an extension and that it is for the Claimant to persuade the Tribunal that there is a basis for extending time. I have regard to the fact that it is a question of fact and judgement on a case by case basis and there is no principle of law which dictates how generously or how

sparingly the Tribunal should exercise the power to extend (Chief Constable of Lincolnshire v Caston [2010] IRLR 327). I further take account of the fact that, in identifying where the balance of prejudice lies in relation to a decision as to whether time should be extended, the discretion is a broad one meaning that all relevant factors should be considered, including in particular the length of and reasons for the delay (Adedeji v University Hospitals Birmingham NHS Foundation Trust. [2021] EWCA Civ 23)

33. I turn first to the factors on the Claimant's side of the balancing exercise.
34. I accept that there is nothing to suggest that the claims sought to be brought by the Claimant are not arguable or that there is anything concerning the merits of the claims that should count against the Claimant.
35. I accept that there is a public interest in discrimination claims being heard.
36. I accept that if an extension of time is not granted, the Claimant will experience the prejudice of being prevented from advancing her claim.
37. I accept that it is at least arguable that there were deficiencies in terms of the compliance of R1 and R2 with the third-party disclosure orders in Case Number 2301609/2019. However, the weight I give to this matter is lessened by the fact that I have found that it has not been established that the orders were roundly ignored by R1 and R2 and also by the fact that, by settling Case Number 2301609/2019 on 19 February 2021, the Claimant made a decision to bring an end to those proceedings and the orders associated with those proceedings.
38. I turn next to the factors on the Respondents' side of the balancing exercise. While the Respondents are separate entities I find the factors to apply to both of them in materially the same way.
39. I accept that the claims are out of time and that, on the findings of fact I have made, they are very substantially out of time.
40. I find that no satisfactory explanation has been provided for the delay until 20 May 2021 in the presentation of the claims against R1 and R2. In the latter regard I take account of the following matters:
 - 40.1. The Claimant accepted in evidence that it was within her contemplation to bring proceedings against R1 and R2 at the same time that she brought proceedings against OCS Group UK Limited in August 2019 and she gave no clear explanation as to why she failed to do so.
 - 40.2. The Claimant stated that she was aware, in general terms, of time limits applicable to claims brought before the Employment Tribunals.
 - 40.3. The Claimant accepted that she had the advice and assistance of her friend and advisor, Mr Lodwick, at all material times.
 - 40.4. In evidence, the Claimant repeatedly offered the explanation that she brought the proceedings against R1 and R2 when she did because she still did not know what the 'negative information' was that resulted in the withdrawal of the job offer in May 2019. I find this explanation to lack any cogency in the face of the fact that the Claimant specifically referred

to this 'negative information' in her ET1 brought against OCS Group UK Limited in August 2019 and in circumstances where she had clearly identified at that point in time that R1 and R2 were potentially in a position to shed light on the source and nature of any such 'negative information' to the extent that it was within her contemplation at that time to bring proceedings against them as well.

40.5. The Claimant's communications to the Tribunal on 10 February 2021 and 16 February 2021 point to the Tribunal's power under Rule 34 to add R1 and R2 as Respondents. This power was pointed to in the context of the Claimant's primary complaint that it was her view that R1 and R2 were not, at that time, in compliance with the third-party disclosure order of 21 May 2020. Even if these communications are to be regarded as express requests to add R1 and R2 as Respondents, I find a lack of a clear explanation for why it took until then to make those requests.

40.6. Even if it could be said that there was a satisfactory explanation for the Claimant's delay until February 2021 in requesting that R1 and R2 be added as Respondents in Case Number 2301609/2019 (and I do not find that there is a satisfactory explanation), I find no satisfactory explanation for the further delay until 20 May 2021 in presenting the ET1 against R1 and R2.

41. I accept that the cogency of the evidence the Respondents may seek to call may be affected to some degree in the event that an extension of time is granted and that matters are not helped by the significant delay in the hearing of this strike out application.

42. I accept that, in the event of the granting an extension of time, the Respondents will be put to all of the costs associated with a full defence of the claim.

43. I accept that, in the event of the granting an extension of time the Respondents will also face the prejudice of losing the statutory defence inherent in the time limits.

44. I move next to the identification of where the balance of injustice and hardship lies in this particular case.

45. I conclude that the balance of prejudice and justice lies in favour of the Respondents and against extending time in relation to the relevant claims. I find that, on the particular facts of this case, a particularly weighty factor is the Claimant's failure to provide any satisfactory explanation for presenting her claims very substantially out of time on 20 May 2021. I conclude that this matter in particular outweighs the factors that fall in the Claimant's favour to the extent that the balance of prejudice falls in favour of the Respondents. I therefore refuse to extend time in relation to the discrimination claims brought by the Claimant and, for that reason, strike them out.

46. For the sake of completeness, I take account of the fact that the Respondents raised a res judicata/estoppel argument as an alternative to their position that there is no basis for extending time in relation to the claims. Notwithstanding that

there is substantial overlap in both the factual matrix and the specific claims sought to be brought against R1 and R2 when compared to the claims that were brought against OCS Group UK Limited, I am not persuaded that R1 and R2, as entirely distinct entities to OCS Group UK Limited, would be entitled to rely on a res judicata/estoppel argument simply because proceedings against OCS Group UK Limited were settled. However, this finding is incidental in circumstances where the Claimant has not persuaded me that it is just and equitable to extend time for the period necessary to bring her claims.

Employment Judge Byrne

Date: 21 July 2023