EMPLOYMENT TRIBUNALS

Claimant: Miss S Greaves

Respondents: 1. North West Ambulance Service NHS Trust
2. Tara Kenworthy-Dowdall

Heard at: Manchester **On:** 9 February 2022

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr A Shellum, Counsel
1st Respondent: Ms L Kaye, Counsel
2nd Respondent: Mr P Norbury, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The second respondent continues to be joined to these proceedings.

2. The claimant's claim is allowed to proceed out of time, on the exercise of the tribunal's just and equitable discretion.

REASONS FOR RESERVED JUDGMENT

Issues

1. Should the second respondent be joined to the claim.

2. Was the claimant's claim out of time, if so was it just and equitable to extend the time.

Witnesses

3. The claimant gave evidence and was cross-examined by the first respondent and the second respondent. There was an agreed bundle.

Tribunal's Findings of Facts

4. The Tribunal's findings of facts are as follows.

5. The claimant has worked for the respondent since 26 August 2003 and was on modified duties when on 22 January 2021 she was advised by a colleague that the second respondent had made an offensive racist remark about her on 4th or 5th December 2020. The next day the claimant reported the matter to the Section Manager and made it clear she wanted to complain about the matter. She submitted a formal grievance on 23 January 2021

6. On 25 January she spoke to NC her union Branch Secretary, UNITE. The claimant explained that although she was described as a Branch Secretary this was in name only, that NC was the lead officer and did the branch secretary work for both branches in the respondent's area, the claimant's role was more akin to being convenor for Greater Manchester UNITE the union.

7. The claimant explained that she had a lot less experience than NC who had been Branch Secretary for six years and she had never been involved in a Tribunal case before. Further that whilst employment rights and going to a Tribunal may have been covered in a shop steward course she had not attended that course for ten years and although she had attended a Branch Secretary's course more recently it did not cover those issues.

8. On 28 January the second respondent wrote an apology letter to the first respondent "to the investigating officer and whoever it may concern , following the concern raised about inappropriate language I used in the communal area I would like to take this opportunity to apologise, due to the passing of time since the incident and the following complaint I am unable to recall specifically the context in which I used the unacceptable language, however it was never my intention to cause any colleague offence or distress and I can only offer a full unreserved apology, I feel I have let down myself, my colleagues and the Trust I so enjoy working for, I do not dispute the possibility I have used the offensive word, my home life includes two teenage daughters who are in long term relationships with ethnic minority partners, they regularly pay topical rap museum and watch topical stand up colleagues which includes this word, it is quite common for them to use this word to describe themselves in a comedic self-referral fashion due to the popular way it is used within this comedy and music settings however this is no excuse for me to have used it in a work setting and I personally refute any racist connotations as unacceptable and repugnant to me. Therefore I unreservedly apologise to anyone affected and promise to use my best efforts to never use such language again knowing the deep upset and distress it could possibly cause people directly and indirectly".

9. On 1 February the claimant heard from colleagues that in fact R2 had used the same expression before and by mid-February/early March became aware that this earlier incident had been witnessed by managers.

10. In fact today the claimant advised us that she had in fact heard the use of this term because she had recently spoken to the second respondent who had asked her what she was doing and she had told her she was on a union zoom

call. The second respondent then went outside and she overheard her using the offensive word. The claimant went outside to try and find out what had happened but could not find the second respondent and no comments were made by the other people present. However she has since learnt that *allegedly* a member of management who was there did take the second respondent to one side and warned her about her unacceptable language. She was told that she was never to use that word again but no other action was taken. Because the there had been no reaction from those present she assumed because of the unacceptable nature of the comment made that she must have misheard, she could not believe that if she had heard it that the members of management present outside and her colleagues would not have acted more vigorously.

11. The claimant agreed that she kept in touch with NC throughout this period but that after she referenced a second incident he advised her to speak to GO ,the regional officer,**,** the claimant accepted that GO advised her of the time limits for a Tribunal, telling her that it was three calendar months less one day, that she could join the second respondent and that she needed to speak to ACAS.

12. The claimant had no recollection of any discussion regarding when that time limit would expire and she assumed that it would run from the date she found out about the comment i.e. 22 January.

13. The claimant also said that in terms of her health she was not in a good place and it was difficult to get motivated, she was taking anti-depressants and was on adjusted duties at the time of the incident**.** She said she needed' her head to be in the right space' in order to progress matters with the Tribunal claim. In relation to ill health she was able to speak to her union officials, present a grievance and communicate with the grievance investigator. There was advice from Occupational health in the bundle which did not suggest she would be unable to engage with the tribunal process although it was obviously not produced specifically to address this issue. Contemporaneous notes said she was getting better in the relevant period.

14. The claimant applied for early conciliation with Acas on 4 April**.** This was a month after the time limit would have expired based on the originally reported remark being made on 5 December She spoke to ACAS on 4 April and it is the claimant's evidence that they advised her there was no point in adding the second respondent as in these situations the first respondent would take responsibility for any discrimination. However I do not accept this as practitioners will know that ACAS does not give legal advice, no doubt something was said regarding the issue but the claimant would not have been advised that she need not add the second respondent.

15. The claimant agreed that subsequently she spoke to GO and that he advised her that he thought she should add the second respondent. An ACAS certificate was discharged on 16 May and on 21 May she presented her claim form.

16. It was evident from the claim form that the claimant thought that the relevant date was when she became aware of the comment as she said "I raised the

matter with my UNITE regional official … in our discussion I was unsure of the specific time I became aware of the comment and so he advised I commence ACAS EC due to the likely looming limitation. I commenced this on 4 April 2021 (when the limitation would have in fact been 21 April 2021, three months less one day from the date I became aware of the alleged comment namely 22 January 2021). I have provisionally named only my employer as the respondent but hope this can be extended to include the individual concerned TKD in any subsequent proceedings that might be lodged. My employer is yet to conclude his actions and decisions into this matter (which it commenced in late January 2021) and that due to the absence of a critical colleague that any disciplinary action is not now expected to be concluded within the next four weeks (so until that leaves the 14th June which coincidentally around the same time as the ET limitation mindful of the ACAS EC certificate date. I am still waiting the investigation report which was completed approximately the end of April 2021".

17. The first respondent's defence was received (ET3) on 25 June. In its ET3 the first respondent indicate it would rely on the reasonable steps defence which allows a respondent to escape liability if they have done everything reasonable to try and ensure such discrimination does not occur. I am not aware of the matters the respondent seeks to rely on but generally it is a high bar, although it would be highly unlikely that if training was undertaken on discrimination the use of offensive racist language was not covered. Of course other issues would arise such as when the training was undertaken and how often. It could possibly be argued by not tackling the alleged first use of the offensive word the first time round (if that is established)the reasonable steps defence may struggle**.**

18. Meanwhile the claimant had applied for legal assistance from the union but this had not yet been decided. On 27 July 2021 R2 was dismissed by the respondents in respect of the same incident the claimant complains of.

19. By 24 August 2021 she had been granted legal representation and the legal advice to the claimant was that she needed to add the second respondent and she made an application to do so the next day on 25 August. This was accepted by NW REJ who also stated it would be examined at the subsequent preliminary hearing.

The Law

Addition of a respondent

20. Under Rule 34 of the Employment Tribunal Rules and Procedure 2013 (the rules) state "under addition/substitution and removal of parties" the Tribunal may under its own initiative or on the application of a party or any other person wishing to become a party add any persons to a party by way of substitution or otherwise if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings and may remove any party apparently wrongly included".

21. In **Vaughn -v- Modality Partnership 2021 EAT** the focus should be on the real practical consequences of allowing or refusing the amendment including consideration of the following questions:-

    a. If the application is refused how severe will the consequences be in terms of the prospect of success of the claim;

    b. If the application is permitted what would be the practical problems in responding.

22. In **Enterprise Liverpool Limited -v- Jonas and Others EAT 2009** the substitution of trade unions for individually named claimants was held by the EAT to be an amendment altering the basis of an existing claim without raising a new head of complaint. The claimant's counsel described this as a relabelling exercise and stated that this situation was identical to Enterprise Liverpool although Mr Norbury pointed out that in his opinion where a respondent was added this was a different scenario.

Applicability of time limits

23. Time limits fall to be considered on or where the amendments seeks to add a brand new course of action, and where an amendment sought is the addition of a respondent. In this case the time limit in respect of the original claim is also an issue.

24. The relevant date for assessing time limits is the date on which the ET1 is first presented, **Cocking -v- Sandhurst (Stationers) Limited and another 1974 NIRC** affirmed in **Ryan -v- Bennington Training Services Limited EAT 2008**. However, it has to be emphasised that time limits are just one factor to take into account and that the overall test was the balance of hardship and injustice in all the circumstances. **Ladbrooks Racing Limited -v- Trainer EAT 2006** sets down guidance in relation to the timing and manner of the application and Tribunals should consider:-

    (i) why the application is made at the stage at which it is made and why it was not made earlier i.e. the reason for the delay;

    (ii) whether the amendment is allowed delay will ensue and whether there are likely to be additional costs because of delay or because of the extent to which the hearing will be lengthened if a new issue is allowed to be raised, particularly if the costs are unlikely to be recovered by the party who incurs them;

    (iii) whether a delay will put the respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier.

Time Limits generally

25. Under Section 123 of the Equality Act 2010 the time limits are for a discrimination claim (subject to Section 140(b) proceedings on a complaint within Section 120 may not be brought after the end of:-

(a) a period of three months starting with the date of the act which the complaint relates; or

(b) such other period as the Employment Tribunal thinks just and equitable.

26. The discretion under just and equitable is a wide discretion **Adedeji -v- University Hospitals Birmingham NHS Foundation Trust 2021**, a mechanistic approach should not be adopted, all the factors need to be assessed which are relevant in any particular case.

Merits of the claim

27. It is permissible to consider the merits of the claim such as has it got a reasonable prospect of success as referred to in **Olayemi -v- Athena Medical Centre EAT 2010**.

Other Factors

28. Reasonable ignorance of a fact that is crucial or fundamental to a claim will in principle be a circumstance rendering it impracticable for the claimant to present her claim in time, **Machine Tool Industry Research Association vs Simpson** and **Marley (UK) Limited and another -v- Anderson 1996 Court of Appeal**. Whilst those cases refer to the not reasonable practicable test they are also relevant to just and equitable. A claim was allowed nine years after the event in a race discrimination claim, **London Borough of Suffolk -v- Afolabi 2003 Court of Appeal**. In **DPP -v- Marshall 1998** reasonable ignorance of one's rights is a factor which militates in favour of granting an extension of time on a just and equitable basis.

29. A reliance on incorrect legal advice is a relevant factor, militating in favour of the extension of the discretion, in **Chohan -v- Derby Law Centre 2004** the advisor was a Trainee Solicitor and the EAT found that the relevant legal point arising was a difficult one and the claimant should not be blamed for the fact their legal advisor "got it wrong".

30. In addition, a delay caused by awaiting the completion of internal grievance which covered all the allegations militates in favour of granting an extension on just and equitable basis especially where it has resulted in the preservation of evidence, **Wells Cathedral School Limited -v- Soot and another EAT 2020.**

31. Finally the claimant's illness may also constitute a relevant factor giving rise to an extension of time on a just and equitable basis**, Bosiat – Mansey -v- Telefonica UK Limited EAT 2012.**

Hardship and prejudice

32. It is necessary for the Tribunal to balance the prejudice to the respondent(s) and to the claimant . The Tribunal must not focus on whether the claimant ought to have submitted her claim on time, a Tribunal erred when it refused to grant an extension by failing to consider balance of prejudice, especially in

circumstances whereby the Tribunal found that the claimant's claim would have succeeded but for the limitation bar **Szmidt -v- A C Produce Imports Limited EAT 2014**

Submissions

Claimant

33. The claimant submitted that R2 had already been added to these proceedings and therefore the test should be that that decision was perverse.

34. That the balance of hardship and justice militates in the favour of retaining R2 as a respondent as R2 then stands to escape liability on "technicality".

35. In respect of the Vaughn questions R1 relies on the reasonable steps defence and whilst the bar is higher in a reasonable steps defence the defence is still available and may result in the first respondent's escaping liability.

36. That the evidence has been preserved therefore there are no practical problems arising from adding R2, that certainly the second incident was raised with her within weeks of the actual incident, six weeks, and therefore she has a good chance of recalling the actual words used, that there are other witnesses in any event who can give evidence.

37. Nature of the amendment – it is a relabelling as there are no new facts or no new cause of action.

38. Relevance of time limits – if time limits are relevant to adding the second respondent it would be just and equitable to allow the matter out of time and the claimant expressed the desire to include R2 in her proceedings when she first lodged on 21 May.

Timing and manner of the application

39. The three reasons for delay.

(i) the claimant was a litigant in person, albeit she indicated she wished R2 to be added, that she did not know until the receipt of the R1's ET3 that the respondents sought to rely on the reasonable steps defence, that she did not receive legal advice assistance until 24 August; and

(ii) adding R2 will not result in any delay in the proceedings and the length of the hearing is unlikely to be affected.

(iii) cogency of the evidence. The evidence has been retained by the respondent, the addition R2 would increase the cogency of the evidence as she has vital evidence to present to the Tribunal.

Merits

40. The case against R2 is strong, while she now seeks to deny that she used racist terms her apology letter and contemporaneous statements of the witnesses shows that there is a strong case.

Time Limits (B)

41. On the balance of prejudice firmly militates in favour of extending time in the claimant's favour.

Ignorance of Fact

42. It is not in dispute that the claimant did not know about the racist term being used until 22 January 2021 and she raised it the next day.

Ongoing Grievance

43. It is entirely appropriate for the claimant to raise a complaint first and the fact that the respondents delay in addressing the claimant's concerns contributed to the delay in the claimant seeking external resolution.

Ignorance of rights time limits

44. The claimant was told there was a time limit of three months less one day on 29 March 2021 but it was her understanding this ran from when she heard about the complaint, it is not unusual that a litigant in person would make this mistake. It is not a straightforward legal question **Chohan.**

45. Regarding the claimant's status as a Union Official her evidence was that she had not been involved in Tribunal proceedings before, she did not recall receiving training on Employment Tribunal time limits, that the only specific training there might have been that she might have attended was ten years previously.

Ill Health

46. The evidence shows that the claimant was not well at the time, she had high blood pressure, impaired sleep, work related stress and anxiety and was taking anti-depressants.

Balance of prejudice

47. Regarding the balance of prejudice, there is no prejudice to R1, it has retained all its records, it made a full investigation of the incident. It has its own evidence regarding the reasonable steps defence.

48. Prejudice to R2. There is prejudice to R2 in that she will have to respond to a claim that she was unaware of until August but she has responded to in the investigation. She has brought an unfair dismissal claim and therefore her own evidence will be in play in that claim.

49. Prejudice to the claimant. The claimant may be left without a remedy if the reasonable steps defence succeeds but it is also important that the claimant has a remedy against the actual person who used the most appallingly racist term against her and who she worked with for many many months following the first racist terminology unaware that she was working with somebody who would use that word to describe her.

First Respondents Submissions

Re-joining the second respondent.

50. The second respondent needs to show that REJ Franey's decision to add her was a perverse decision as the actions had already been taken.

51. If the respondent's reasonable steps defence succeeds the claimant will be left without any remedy.

Time Limits

52. The reason the claimant was late submitting her claim boils down to the claimant's mistaken belief that the time limit would run from the date she discovered about the racist incident rather than from the actual incident itself. She agreed that she had advice regarding the time limit on the 29 March and she made no further effort to discover how the time limit operated.

53. In respect of her health the entry in OH notes in February 2021 said she felt better and in March the occupational health report did not say that she was suffering from a lack of motivation or mentioned that she had been prescribed anti-depressants or that it was affecting her communication ability, she had been able to contact ACAS subsequently to this, therefore the first respondents submitted that her health was not the reason for her delay.

54. From her position as a Trade Unionist she understood she had an actionable ride of discrimination and that such remark would be considered race discrimination.

55. She knew all the facts on the 22 January and it was incumbent upon her to make further enquiries, likewise, regarding the time limits she made no further enquiry. The union itself had a website with legal summaries on and a helpline that she could have rung to ascertain the correct time limit. She knew on 29 March that there was a time limit of three months and yet still delayed for five to six days before approaching ACAS. In respect of prejudice and hardship there was prejudice to the respondent in having to meet the claim, when the claimant had failed to comply with the Tribunal's requirements.

Second respondent submissions

56. The second respondent submitted that substituting a claimant as in the Enterprise case was entirely different from adding a respondent. The respondent would be unaware of the claim until the date the application was made and there were a number of things that might prejudice the respondent

in that situation such as for example, poor recollection of what occurred or the failure to keep relevant documents.

57. The claimant was aware from the 29 March that she could add the second respondent as a respondent and relies on the advice allegedly given by ACAS when the situation is (assuming general knowledge of people using the Tribunal system) that ACAS did not give advice in these terms. In any event, the claimant was then given different advice she advised by GO that she should add the second respondent and she was fully aware of this as she flagged this up in her claim form but still did not make any application to add the second respondent until she received legal advice over two months later. The claimant chose not to name the second respondent.

58. In respect of merits the second respondent submitted that the words were not admitted and the apology did not comprise of admission of using the actual expressions referred to. Even by the end of January it would be difficult for the second respondent to recall what was said on the 4th or 5th December, particularly when the context that she was given at the time of the investigation was erroneous, i.e. she was told it was in a mess room when in fact it was in an ambulance with only the person she spoke to.

59. In respect of hardship there would be massive hardship on the second respondent, she would have to now look to obtain and pay for legal representation for at least a three-day hearing. If she had known the claimant was contemplating bringing a claim she may well have taken a different view of the disciplinary hearing but the disciplinary hearing took place before the claimant sought to add her as a second respondent. In the event that the respondent's reasonable steps defence succeeds, the claimant will be the only person to which any remedies hearing could be made and the financial burden of that on top of having to pay for a lawyer is a massive prejudice to the claimant who has nothing else to gain from this litigation compared to the claimant.

60. The claimant has a reasonable case against the first respondent and the bar for a reasonable steps defence is very high, therefore it is not correct to say that there is a high likelihood that she will fail against the first respondent. If the other parties want the second respondent to give evidence they can seek a Witness Order.

Conclusions

61. This was not an easy case to decide the submissions of all parties were excellent and thorough and the second respondent was particularly ably represented by Mr Norbury's compelling and eloquent submissions.

Adding the second respondent

62. On balance I have decided that it is correct to add the second respondent. I have not approached this on perversity grounds but on first principles.

63. The reasons for my decision is that until August the claimant was a litigant in person, whilst it is disappointing that the lay union officials including the

claimant herself had limited knowledge it is not determinative. There is often a negative view taken of naming individuals in tribunal and a preference to rely on the employer. This is the reality and it is not based solely on financial considerations. Possibly it is felt that the employer should have made their policies clearer or that until proven that the individuals did something discriminatory it is rather harsh for that the individuals who may not have been aware of the right behaviours .Whatever the reasons although I did not accept that Acas would have advised the claimant not to add the second respondent it is something that is often said – that the respondent will take responsibility, so why add the individual and increase the personal element (particularly if both parties are still employed);and the employer is a 'better bet' to pay any compensation.

64. However this is not the case here as the reasonable steps defence is relied on. and the claimant would not have known this until the first respondent's grounds of resistance were received on or around 25 June 2021 that they were intending to rely on the reasonable steps defence. So even though the possibility was raised with her by GO in March they were early days and the claimant would not be aware of why it might be more important than not to add the individual.

65. Neither would I expect a litigant in person to really grasp the significance of a reasonable steps defence contention before obtaining legal advice which was not available until 24 August 2021. The claimant then acted quickly making an application the next day

66. In addition the claimant had flagged up the possibility of adding the second respondent in her claim form in May, although this of course would not be known to the second respondent so she had no advance knowledge and the tribunal on receipt would not step into the arena and advise the claimant to issue against the second respondent in case she became out of time or for any other reason.

67. I therefore do not count the issues of timing against the claimant in respect of the addition of the second respondent. It was only 3 months after she issued proceedings and 2 months after the second respondent had been dismissed by the first respondent.

68. This also is relevant to the practical issues, having just dealt with a case where a respondent was added a year late and where all the relevant personnel had left and were not contactable, I appreciate what a real problem this can be however in this case the second respondent had been involved only recently in a disciplinary where she would have had to make her position clear so it is not a persuasive argument that it is now so long ago that the second respondent will not be able to remember. Neither is she been asked to remember anything complex, it is one word, a well-known offensive word, which she is alleged to have used twice. Accordingly, I cannot see that the passage of time will have had a necessarily negative effect on the second respondent's ability to remember what she said. In any event that would be apparent when she was first asked about it and certainly by the time of the letter of apology. What she said will also be recorded in the disciplinary hearing.

69. In addition the second respondent brings her own claim of unfair dismissal.

70. Accordingly I find no practical difficulties of the type envisioned in Vaughan arise.

71. Finally considering the hardship question again this is not so obvious as in many cases as here the claimant has another claim. It is relevant that the first respondent is relying on the reasonable steps defence, it is true also that is a high bar to overcome by the first respondent. However there is a risk there to the claimant and she could suffer hardship. there is also always hardship to a respondent in these or similar amendment situations but where there is no particular hardship (such as no witnesses being still employed) the prejudice is still greater to the claimant.

72. The hardship here is that an individual is involved rather than a corporation. However if parliament had intended tribunals to consider the greater difficulty an individual is in they would have set out the relevant provisions differently. Neither is there any case law which directs me to treat an individual more favourably or even reflects that proposition. Whilst Mr Norbury says it is absurd to allow a claimant to add a party as a result of the contents of a response form that is precisely what happens everyday in the tribunal, often at the behest of the tribunal itself where there is a TUPE transfer for example or an agency agreement involved.

73. Accordingly, on balance I have decided that the second respondent should be added to the proceedings.

Time limits generally

74. The claim is that the second respondent used a racially offensive word about the claimant in July (probably) and then 4 or 5 December 2020. the claimant gave new evidence at the Tribunal that in July she thought she had heard the second respondent use this word but then thought she had misheard due to the lack of reaction from the other people present outside. Nevertheless the issue is that the second incident was on 4/5 December 2020 at the latest and the claimant went to ACAS on 4 April 2021 so at best she is one month out of time with that incident. Obviously with the earlier incident she is further out of time.

75. The claimant's reason for the delay is that she thought time would run from when she heard about the incidents, the December one she heard about on 22nd January 2021 and the earlier one after that date. Whilst this is incorrect legally it has long been accepted and established in case law that these are acceptable reasons for being late and the proper approach is to consider whether that factor is a good reason for exercising the just and equitable discretion, particularly in a case where a claimant did not then act as quickly as possible. Here there were approximately 2 and half months before the claimant went to ACAS after the January information . Again this was based on her erroneous assumption, not corrected by any of the union officials that the 3 months ran from when she heard about the incident (s). On this basis she would be in time.

76. I find it is a reasonable error for a litigant in person to make – sadly it is made time and time again. The correct position is that a claim should be brought as soon as possible where someone learns about an earlier incident which means they are already out of time or if in time by the relevant date which would have been the 4 March 2021.The claimant was therefore 1 month late in seeking conciliation from ACAS.

77. In respect of the earlier incident this was not brought to her attention at the time and therefore the same considerations apply as above and there is a prospect that the claimant could establish continuous conduct given the allegation of two incidents using the same word.

78. I also find it entirely reasonable of the claimant to raise the matter internally first before considering going to tribunal. Although by itself it would not be enough.

79. I do not find the claimant was so ill as to be unable to understand what advice she was being given or unable to progress matters with the tribunal.

80. As referred to above the prejudice to the claimant in not being able to pursue this matter and seek some compensation (not just financial) outweighs that to the respondents who have been aware of the issues throughout. I also refer to the factors I have taken into consideration in relation to the joining of the second respondent, above.

81. Accordingly, I also exercise my just and equitable discretion to allow this claim out of time.

Employment Judge Feeney
5 May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
27 May 2022

FOR THE TRIBUNAL OFFICE