



EMPLOYMENT TRIBUNALS

Claimant: Ms K Hargreaves

Respondents: Ian Ambrose & others

Heard at: Manchester (by cloud video platform)

On: 30th August 2023

Before: Employment Judge Sharkett

REPRESENTATION:

Claimant: In person

Respondent: Mr K Swindlehurst (R5)

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. It would be just and equitable to extend time for the claimant to bring her claim against Mr K Swindlehurst (R5).
2. The application by Mr K Swindlehurst (R5), to have the claim against him struck out on the grounds that it has no reasonable prospects of success is refused
3. The claimant's claims of age and sex discrimination against all respondents are dismissed upon withdrawal by the claimant.
4. All remaining claims will proceed in accordance with the case management orders already in force.

REASONS

1. Having established that the claimant no longer wishes to pursue claims of age and sex discrimination, the claimant now pursues a claim of unfair dismissal and discrimination on the protected characteristic of disability. She pursues the complaints where relevant against five named respondents all of whom

she had been either employed by, or worked with, prior to the events that led to this claim. She initially pursued claims of age and sex discrimination on the protected characteristics of age and sex but these have today been dismissed upon withdrawal by the claimant.

2. This application is made only on behalf of Mr Swindlehurst, who is R5 in these proceedings. Hereon, I will refer to him as R5 in this Judgement. None of the other respondents appeared today nor were they represented.. I was satisfied that each of the respondents had received notice of this hearing which had been sent to all named respondents.
3. The part of the claim that relates to R5 is of one allegation of unlawful discrimination on the protected characteristic of disability under s13 and s26 Equality Act 2010.
4. Disability is not conceded and a preliminary hearing is listed to take place on 18th September 2023 to determine the same.
5. The application is made on two grounds, the first that the claim is out of time and it would not be just and equitable to extend time to allow the claim to proceed, and the second, that the claim has no reasonable prospects of success.
6. The claimant's employment terminated on 23 May 2022 by reason of redundancy. The alleged act of unlawful discrimination occurred in November 2021. The claimant will say that this was an act that formed part of a course of conduct. The claimant commenced Early Conciliation (EC) on 9th June against all respondents other than R4 which was commenced on 15th June 2022. Early Conciliation Certificates (ECC), were issued as follows:
 - a. R1- 20th July 2022,
 - b. R2- 20th July 2022
 - c. R3 – 20th July 2022
 - d. R4 – 26th July 2022 and,
 - e. R5 – 26th July 2022
7. In respect of all but R5 the effect of the stop the clock provisions meant that the time limit for submitting a claim to the Employment Tribunal was extended to 2 October 2022. The time limit for lodging the complaint against R5 was only extended to 18th September 2022. One ET1 was lodged against all 5 named respondents on 26th September 2022, which means that the claim against R5 is 8 days out of time.
8. I heard submissions from both the claimant and R5. Mr Swindlehurst had prepared a witness statement for the purposes of this hearing and sets out the circumstances of the event relied on. It is his position that it is inappropriate for him to be named as a respondent in these proceedings as he is unable to comment further in respect of allegations against the other respondents. He submitted that his response to the claimant in respect of the allegation was

entirely appropriate in the circumstances and, that he was not aware that the claimant was suffering from poor mental health. He also confirmed that he is no longer employed by First Legal Solicitors which is named as the 4th Respondent but that he had been informed that a complaint had been made against him.

9. In respect of time limits the claimant explained that because of her mental health condition she was unaware that the claim against R5 needed to be submitted on an earlier date. She was attempting to deal with matters internally and thought that all the claims would be submitted together. She submitted that the allegations raised against R5 forms part of a course of conduct instigated by, and carried out by the other name respondents. She submitted that R5 has known of her complaint since November 2022 and that he would not be prejudiced by the claim being allowed to proceed because it is more than probable that he would be asked to attend as a witness anyway because even if it was not allowed to proceed as a claim she would still wish to rely on it as background to the remainder of her claim.
10. She further disputes that R5 was unaware that she was suffering with poor mental health at the time, because although she did not tell him directly, it was widely known throughout the office of which he was part. The claimant accepts that she has a remedy in respects of other parts of her claim but considers that it is important that her full complaint is heard because it forms part of the way in which she will say she was treated and ultimately dismissed as a result of her confiding to her employers information about her mental health. It is her case that once she had told her employers about her problems, she was perceived as weak and there was a move to remove her from the business.

Time limit ground

11. S123(1) Equality Act 2010 provides that complaints of discrimination may not be brought after the end of
 - a. The period of 3 months starting with the date of the act to which the complaint relates or;
 - b. Such further period as the employment tribunal thinks just and equitable
12. S123(3) provides that
 - a. Conduct extending over a period is treated as done at the end of the period;
13. Whist Tribunals have a discretion to extend time in claims of unlawful discrimination there is no general presumption that time will be extended; rather the test to be applied is whether it would be just and equitable to extend time having regard to all the circumstances of the case. It is for the claimant to

show reason why it would be just and equitable to extend time and there is no checklist of questions to apply. Factors may include,

- a. The length and reason for the delay in presenting the claim;
- b. The extent to which the cogency of evidence is likely to be affected by the delay;
- c. The extent to which the respondent co-operated with any requests for information;
- d. How quickly the claimant acted when he knew of the facts giving rise to the claim; and
- e. The balance of hardship and injustice to the parties in either granting or refusing the extension of time
- f. It may also be appropriate, but not mandatory, to consider the relevant merits of the claim having regard to the general principle that in discrimination claims it is often necessary to hear evidence at a final hearing where there are disputes as to facts.

Prospects of success ground

14. Rule 37 Employment Tribunal Rules of Procedure provides that

(1) (1) At any stage of the proceedings either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds ...

- a. *That it is scandalous, vexatious or has no reasonable prospects of success*

15. The case of Anyanwu -v- Southbank Student Union [2001] ICR 391 provides general authority for the principle that Tribunals should be slow to strike out claims of discrimination unless it can be satisfied that the claim has no reasonable prospects of success. In particular I note the well known observation in that case that:

“Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest”

16. In Morgan v Royal Mencap Society [2016] IRLR 428 Mrs Justice Similar reminded Tribunals at paras 13 & 14 that although the threshold for strike out is high, there are cases where if one takes the claimant’s case at its highest,

and it cannot succeed on the legal basis on which it is advanced then it will be appropriate to strike out.

17. The key principles that emerge from the authorities on striking out claims are as follows:
 - a. Only in the clearest case should a discrimination case be struck out
 - b. Where there are core issues of fact that turn to any extent on oral evidence they should not be decided without hearing oral evidence;
 - c. The claimant's case must ordinarily be taken at its highest
 - d. If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with the undisputed contemporaneous documents it may be struck out; and
 - e. A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputes.

Conclusions

18. In considering whether the claimant has shown reason why it would be just and equitable to extend time to allow her complaint to proceed I have considered the submissions of both parties. In particular I have had regard to the circumstances in which this claim arose and was ultimately presented. Whilst it is true that every claimant who pursues a claim before the employment tribunal will experience stress it is clear that in this particular case there is more than just the stress of litigation or losing her job that may have affected the claimant's ability to recognise the one time limit in the 5 respondents against whom she pursues claims. I find that the length of the delay which is eight days) will not affect the cogency of the evidence, especially in light of the fact that R5 has provided a written witness statement of his recollection of events for the hearing today. The claimant raised a complaint about the matter at the time and in addition to the individual claim brought against R5 the allegation is also relied on in respect of the claim brought against his employer R4 who will be required to produce evidence in defence of the claim. An additional factor, whilst not determinative of my decision, is the fact that the R5 is no longer employed by R4 so may not have the same appetite to voluntarily appear as a witness on behalf of R4 and thus deprive the claimant of the opportunity to have her claim properly considered.
19. In the circumstances I find that the balance of hardship would fall on the claimant if I were to refuse to extend time and in addition that she has discharged the burden on her to show reason why it would be just and equitable to extend time and allow her claim to continue.
20. In respect of the prospect of her succeeding in her claim against R5 I have regard for the tests to be met in pursuing claims under s13 and s26 of the Equality Act 2010. It is not disputed that the exchange relied on by the claimant took place. What is disputed is the manner in which it took place and the knowledge of R5 in relation to the claimant's mental health. It is the

claimant's case that this exchange formed part of a course of conduct that was adopted by all the respondents once they became aware of her poor mental health. It is her case that there was a concerted effort to undermine her position and remove her from the business. This is disputed by the respondents who will say that the claimant's position was redundant, a fact that is also disputed by the claimant. In the circumstances this is the type of claim that will require a Tribunal to hear oral evidence before the claim can be determined and it cannot therefore be said that the claimant's claim has no reasonable prospects of success. For this reason I refuse the application of R5 to have the claim struck out on this basis.

Employment Judge Sharkett

Date 5th September 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
12 September 2023

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