



EMPLOYMENT TRIBUNALS

Claimant
Miss Y Tucker

-v-

Respondent
South Derbyshire District Council

PRELIMINARY HEARING

Heard at: Nottingham **On:** Wednesday 26 April 2017

Before: Employment Judge Evans (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Mr Arora of Counsel

JUDGMENT

1. The Tribunal has no jurisdiction to hear the claim of race discrimination except insofar as it is detailed in Allegations 11, 13, 14 and that part of Allegation 1 which relates to 22 October 2015 (“the Remaining Allegations”) because the claim was presented out of time and it would not be just and equitable to extend time. Accordingly the claim of race discrimination is struck out apart from the Remaining Allegations.
2. The Respondent is to make an application within 7 days of receiving this judgment for a closed Preliminary Hearing (by telephone) to be held at which Case Management Orders will be made in order that the Remaining Allegations may progress to a final hearing.

REASONS

Background

1. The Claimant brought claims of race and sex discrimination and for unfair dismissal on 8 December 2015. The Respondent denied all of those claims in its Response of 13 January 2016. There was then a Preliminary Hearing before Employment Judge Britton on 5 February 2016 following which the claims of sex discrimination and unfair dismissal were withdrawn. In addition, a deposit order was made at that Preliminary Hearing in respect of the claim of race discrimination.
2. The deposit was paid. The Respondent then made an application for the claim of race discrimination to be struck out as having no reasonable prospect of success. I heard that application at an open Preliminary Hearing on 25 July 2016. I declined to

strike out the claim of race discrimination but concluded that further particulars were needed of it. The Claimant has throughout these proceedings been unrepresented and at the hearing on 25 July 2016 some time was spent identifying from her ET1 form/the agenda that she had prepared before the Preliminary Hearing of 5 February 2016 the acts of less favourable treatment in respect of which she would need to provide further particulars. It was agreed that in each case the Claimant was arguing that the discrimination to which she had been subjected was direct discrimination.

3. The Claimant provided a 19 page document setting out what she said were further particulars of the 16 allegations comprising her claim following the hearing on 25 July 2016 ("the Further Particulars"). The Respondent then filed and served an amended Response ("the Amended Response").
4. There was then a closed telephone Preliminary Hearing on 28 February 2017 before Regional Employment Judge Swann. At that hearing Mr Arora noted that the Further Particulars included 16 separate allegations spanning the period March 2012 to December 2015. Mr Arora submitted that: (1) most of those allegations were out of time; and (2) some of them were not contained in the original ET1. The Claimant submitted that the 16 allegations all comprised one continuing act and so no part of her claim was out of time.
5. REJ Swann ordered that there should be a further Preliminary Hearing to determine whether some of the 16 allegations should be struck out because they were out of time. He therefore listed an open Preliminary Hearing to take place on 26 April 2017:
 - a) "to determine whether or not some of the 16 allegations of direct race discrimination now relied on by the Claimant have been lodged out of time and should be struck out or whether they could be said to be part of a continuous series of acts and/or whether time should be extended on a just and equitable basis to allow them to proceed to final hearing";
 - b) "to consider whether or not any new matters that have been raised by the Claimant in pleadings since the lodging of the ET1 Originating Claim in December 2015 should be struck out as not being part of the original claim or whether they should also be allowed to proceed to final hearing."
6. This was therefore the basis on which this matter came before me at the Preliminary Hearing on 26 April 2017. Mr Arora accepted that issue b) would fall away if the Respondent was successful in relation to issue a).

The Preliminary Hearing on 26 April 2017

7. Mr Arora for the Respondent provided a skeleton argument prior to the Hearing. The Claimant provided in response to this as ordered by REJ Swann a document headed "Argument in Response to South Derbyshire County Council", which I refer to below as "the Claimant's skeleton argument".
8. There was no agreed bundle of documents for the Hearing. I had before me the Tribunal's file which contained amongst other documents the original ET1 and ET3, the various Records of Preliminary Hearings and orders made to date, the Further Particulars, and the Amended Response.
9. The Claimant gave oral evidence in relation to the reasons for her delay in submitting her claims of race discrimination and was cross examined by Mr Arora.

The Law

10. Section 123 of the Equality Act 2010 provides where relevant as follows.

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 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 other period as the employment tribunal thinks just and equitable...

...(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

11. The discretion given to the Tribunal to extend time is a wide discretion to do what it thinks is just and equitable in the circumstances. It entitles the Tribunal to take into account anything which it judges to be relevant. The discretion given to the Tribunal is as wide as that under section 33 of Limitation Act 1980. The Tribunal is therefore required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances. In particular the Tribunal should take into account:

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

13. Although the discretion is wide there is no presumption that it should be exercised so as to extend time.

14. Turning to section 123(3)(a) of the Equality Act 2010, there is "conduct extending over a period", often referred to as a "continuing act", when 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 those acts being a series of unconnected or isolated incidents (Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686). The focus of the Tribunal should be on the substance of the complaint not on whether there was a discriminatory policy, rule, practice, scheme or regime – these are just examples given in the authorities of when an act extends over a period of time.

15. The Court of Appeal considered the correct approach for the Tribunal when the question of whether there was a continuing act comes before it at a Preliminary Hearing in Aziz v FDA [2010] EWCA Civ 304, CA. The Court of Appeal stated "the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs".

Submissions and the Claimant's oral evidence in relation to the issue of delay

16. The Respondent's case was set out in Mr Arora's skeleton argument which he augmented with oral submissions.
17. In summary, Mr Arora argued that the Claimant had not put forward a reasonably arguable basis for her contention that the 16 allegations comprised a continuing act for the following reasons:
 - a) The allegations as pleaded in the Further Particulars were "clearly one-off incidents, separated by significant gaps of time – from 2012 to 2015, and involving different people".
 - b) The Claimant had not explained in the Further Particulars how the allegations comprised a continuing act. This was notwithstanding the fact that she clearly understood what a continuing act was: she had identified Allegation 7 as a continuing act with an identified start date and an identified finish date.
 - c) The allegations had been made against a variety of different employees of the Respondent with no particular connection between them.
 - d) The Claimant had had the benefit of a full internal grievance and appeal process on 3 occasions. However some of the issues raised in the Further Particulars had not been raised in the course of those grievances and the issue of race had not been raised until the third grievance in February 2015. Further, in that final grievance the Claimant did not cite any new instances of what she alleged to be discrimination.
 - e) The Claimant's skeleton argument failed to deal with how a number of the 16 allegations were part of a continuing act and so she could not have discharged the burden of proof on her to show that they were.
18. In relation to the question of whether the Tribunal should extend time on a "just and equitable" basis in the event that it found that all of the 16 allegations did not comprise a "continuing act", Mr Arora's submissions can reasonably be summarised as follows:
 - a) Because the Claimant's ET1 had been presented on 8 December 2015, all of her allegations as set out in the Further Particulars were out of time even on her own case apart from Allegations 11, 13 and 14 plus that part of Allegation 1 which related to 22 October 2015.
 - b) The key issue in deciding whether to extend time was that of prejudice. The only employee of the Respondent who was relevant to the allegations who was still employed was Mr McArdle, the CEO. Mr Ledger, Mr Nott, Ms White, Mr Haines, and Mr Prasad had all left the Respondent's employment and Mr Carter was on long term sick. The Respondent's ability to gather evidence and call witnesses would be significantly affected by these departures.
 - c) Further, the passage of time would substantially affect the cogency of the evidence. The former employees of the Respondent were unlikely to have a clear recollection of events which occurred up to five years ago. The Respondent would be further disadvantaged by the fact that the Claimant, being very personally involved, was more likely to have a clear recollection of events than the former employees.
 - d) There was no good reason for the Claimant's delay. She had been aware of the possibility of bringing a race discrimination claim throughout the whole

period from 2012. She had had diversity training. The oldest incident (a complaint about a potential supplier's car registration number which included the letters KKK) was clearly racial. Despite her knowledge, the Claimant had failed to take appropriate advice in a timely and proper manner.

- e) The burden was on the Claimant to justify why the Tribunal should exercise its discretion in her favour and she had failed to establish why the Tribunal should exercise it.

19. The Claimant's case was set out in the Claimant's skeleton argument which she augmented by brief oral submissions. Their contents can reasonably be summarised as follows in relation to the issue of whether all the allegations comprised a continuing act:

- a) In the Claimant's skeleton argument she argued that from March 2014 she had been taken out of her office environment and away from managing her team "due to me refusing to be line managed by Lee Carter". This was a continuing act which carried on until her suspension in December 2014. Being taken out of her office environment and so isolated in this way gave rise to other acts of discrimination: Mr Ledger dismissing her complaints about it (Allegation 9) and Mr Knott failing to include concerns for her health in written notes prepared following sickness reviews (Allegation 8).
- b) From December 2014 the Claimant was suspended for 10 months. "This was a continuation of the discrimination due to being isolated, victimised and bullied". She was then dismissed (albeit she was subsequently re-instated) in October 2015 and she considered "my dismissal to be a continuation of the Councils [sic] discrimination towards me".
- c) In her oral submissions the Claimant commented that putting her in a room was a "continuation of the discrimination that I faced". She said that although she had raised this isolation it was ignored by her director and she had gone off work sick twice as a result of it.
- d) Her suspension should have only lasted for two months but in fact it had lasted for ten. This was because when her new line manager and new director had started employment in February 2015 they had left her suspended for a further 8 months rather than bringing her back to work.
- e) The Claimant said that the Tribunal office had told her to include only a summary of her complaints in the ET1 form. However, if her grievances were considered then it would be clear that all the incidents of which she complained were a continuation of what was contained in the grievances.
- f) The Claimant said that the reason she had not raised the issue of discrimination before her third grievance in February 2012 was that she had not wanted that to be her "leading argument". She wanted the Respondent to come to the conclusion that it had discriminated against her of its own accord.

20. So far as the issue of extending time was concerned, the Claimant argued that:

- a) She felt that the appropriate time to present the ET1 was following the Respondent dismissing her.
- b) A side effect of the work related stress she suffers from is a "stress rash". This caused the Claimant to take "days away" from writing about issues to do with work to get her rash under control.

- c) The delay in presenting her claim was due in large part to the Respondent taking a long time to sort out her grievances.
21. In her oral evidence the Claimant's recollections of her attempts to obtain advice were as follows:
- a) She had instructed solicitors in July 2016 and received some advice from them around then.
 - b) She had also sought and received advice from the Law Centre at Nottingham University in around April 2016.
 - c) She had sought advice from ACAS prior to her dismissal but could not remember the exact date. She had always known about ACAS and agreed that she was able to "look things up" on the internet

Findings and conclusions

The issue of whether the 16 allegations comprise a continuing act

22. I conclude that it is not reasonably arguable that the 16 allegations set out in the Further Particulars are so linked as to be a continuing act or to constitute an ongoing situation or a continuing state of affairs for the following reasons.
23. First, there is the sheer number of individuals against whom allegations are made and the lack of any explanation of how they and their alleged acts of discrimination are all linked together. Allegations 2, 6, 7, 9 and 10 are all in effect against Mr Ledger (and Allegation 2 is also against Mr Knott) and cover the period March 2012 to December 2014. Allegations 3, 4, 15 and 16 are all against Mr Carter and cover the period 7 November 2013 to 26 February 2014. Allegation 8 is against Mr Guest and is dated 11 June 2014. There are no allegations against a named individual after December 2014. Allegations 1, 5, 11, 12, 13 and 14 are all against "the Council" and occur between 13 November 2013 and 22 October 2015 - the Claimant having failed to identify who she believes to be responsible for the acts to which these allegations relate, despite my order that she do so of 27 July 2016.
24. Although the Claimant links the alleged less favourable treatment by Mr Guest (his failure to include concerns for her health in written notes prepared following sickness reviews, Allegation 8, dated 11 June 2014) to the actions of Mr Ledger relating to her alleged isolation (Allegations 7 and 9) on the basis that Mr Guest acted as he did because of advice received from Mr Ledger (a more senior manager), generally the Claimant's allegations do not link the alleged perpetrators of the various alleged acts (or omissions) which are said to be less favourable treatment in a cogent way. They are really only linked by virtue of being: (1) employees of the Respondent; and (2) managers who have had contact with the Claimant at some point during her employment. This is particularly apparent towards the end of the period in which the allegations fall: the Claimant states that her "Director", Mr Ledger, and her line manager, Mr Carter, both stopped being responsible for her around February 2015. However she then identifies further acts of discrimination between February and October 2015 (her continued suspension (Allegation 13) and her dismissal (Allegation 14)). She does not explain any link between the (unnamed) perpetrator of those alleged acts of unfavourable treatment and the perpetrators of earlier acts of unfavourable treatment beyond their common employment with the Respondent.
25. Further and separately, there is the nature of many of the alleged acts of less favourable treatment. Allegation 2 (a failure in March 2012 by Mr Mr Knott and Mr Ledger to deal with the Claimant's concern regarding a potential supplier whose number plate contained the letters KKK), Allegation 3 (Mr Lee asking the Claimant to

sign her application form and produce evidence of qualifications in November 2013), Allegation 4 (Mr Lee reminding the Claimant of the deadline he had given her to produce evidence of her qualifications when she was on sick leave in November 2013), Allegation 5 (the "Council" deliberately submitting an "altered grievance"), Allegation 6 (Mr Ledger being involved in the Claimant's second grievance on 7 March 2014), Allegation 10 (the "Council's" insistence that Mr Carter remain her manager), Allegation 12 (the Claimant being dismissed for not obeying instructions but Vicky Robb not being in April 2014), Allegation 14 (the "Council" dismissing the Claimant on 22 October 2015), Allegation 15 (Mr Lee telling the Claimant she had not followed processes properly but then refusing to provide details on 20 December 2013 and 6 January 2014) and Allegation 16 (Mr Lee asking Bimal Prasad for information about the Claimant's movements on 26 February 2014) are all in principle self-contained factual allegations either occurring on a particular date or over a short period which have no obvious thematic link other than that they were acts (or omissions) which displeased her. The Appellant does not link them together in a cogent and coherent way other than by the fact of her employment, notwithstanding the fact that they take place over a period of over 3.5 years.

26. Similarly, Allegation 1 as set out in the Further Particulars is a confusing mass of complaints about the way in which the Claimant's three grievances were dealt with by reference to five dates. There is no coherent explanation within the Further Particulars of how these various complaints are linked.
27. By contrast, Allegation 7 (the Claimant's alleged isolation from colleagues for which she says Mr Ledger was responsible) is clearly a continuing act from March to December 2014, Allegation 9 (Mr Ledger dismissing the Claimant's concerns about her isolation) is a related continuing act covering most of that period (April to December 2014), and Allegation 8 (Mr Guest's failure on 11 June 2014 to include concerns for her health in written notes following sickness reviews) is also quite clearly related to the alleged isolation. As such it quite clearly is reasonably arguable that Allegations 7 to 9 are a continuing act of less favourable treatment running from March to December 2014. These allegations are cogently and coherently linked in the Further Particulars in sharp contrast to the way the other allegations are not.
28. Equally, Allegation 13 (the Claimant's continued suspension following the appointment of a new management team) is clearly a continuing act from February to October 2015 and described as such by the Claimant. The Further Particulars do not, however, link it cogently and coherently to the allegations which precede it chronologically. New (and unnamed) individuals are responsible for it.
29. Further and separately, there is the fact that there is a long gap between the date of the first allegation (Allegation 2, March 2012) and the next allegation chronologically (Allegation 3, 7 November 2013). No explanation is given of what ongoing situation or continuing state of affairs links these two allegations.
30. Overall, the fundamental problem for the Claimant in seeking to persuade me that the 16 allegations are so linked as to be a continuing act or to constitute an ongoing situation or continuing state of affairs is that she has not coherently described the "ongoing situation" or "continuing state of affairs" in which the alleged acts of discrimination are said to have occurred. Indeed, the Claimant's skeleton argument does not address events pre-March 2014 at all and she did not rectify this failing in her oral submissions. It was notable that these focused above all on her alleged isolation and on her suspension. Further, I conclude that her argument that the details of her underlying grievances would explain how all the allegations comprise a continuing act does not assist her: whatever she may have been told by a member of the Tribunal's staff before submitting her ET1 form, there can be no excuse for her failing to include all relevant details in the Further Particulars or in the Claimant's skeleton argument.

31. I therefore conclude that whilst it is reasonably arguable that Allegations 7 to 9 are a continuing act running from March to December 2014, and that Allegation 13 is a continuing act running from February to October 2015, it is not reasonably arguable that all the Allegations taken together are so linked as to be an ongoing situation, continuing state of affair or otherwise a continuing act. The reality is that, taken together, the ET1 form and Further Particulars present a somewhat confusing mass of detail in which at various points the Appellant states that the only explanation that she can find for her treatment by a considerable number of individuals over a prolonged period of time is that she is black.
32. The consequence of this conclusion is that the all of the allegations except for Allegations 11,13, 14 and that part of Allegation 1 relating to 22 October 2015 are out of time unless I decide that it is just and equitable to extend time.

The issue of whether time should be extended

33. After weighing the prejudice that the Respondent will suffer if I permit an extension of time and the prejudice the Claimant will suffer if I do not, I have concluded that it is not just and equitable to extend time for the followings reasons.
34. First, there is the length of the delay (which ranges from around 9 months beyond the three month time limit for Allegations 7, 9 and 10 to over three and a half years for Allegation 2) when taken together with the reasons for it. I find that the Appellant has since before March 2012 been aware of the possibility of pursuing a claim of race discrimination and of how to obtain advice in relation to such a claim. I find that the reason that the Claimant delayed and did not pursue a claim at an earlier date was not that she thought that there was a continuing act and that therefore that time was not running, or that she was unaware of the possibility of such a claim, or (as she contended at the Hearing) that she did not want it to be her main card but rather hoped that the employer would of its own accord decide that it had discriminated against her on racial grounds. Rather I find that she was waiting to see how her ongoing dispute with her employer about how and by whom she was managed would play out. It was therefore only when she concluded that she had lost that dispute (having been dismissed in October 2015, albeit she was subsequently reinstated), that she began her claim. This was despite having raised the possibility of race discrimination in February 2015 (and yet at that point having taken no steps to begin a claim). This is not a reasonable explanation for delaying bringing a claim. Further, I do not accept that the Claimant's stress rash played anything beyond a very minor part in the delay in her presenting her claim. This is because she provided no details of how it delayed her claim in either the Claimant's skeleton argument or in her oral evidence. Further and separately, she did not provide any medical evidence supporting her contention that she was affected as she claimed.
35. Secondly, the cogency of the evidence is likely to be severely affected by the delay in a way which prejudices in particular the Respondent. There are various reasons for this, in particular the passage of time (some of the events took place three and a half years prior to dismissal). In addition, the potential witnesses for the Respondent are less likely to have a clear recollection of events than the Claimant, because the events will by and large have been less significant to them than they were to the Claimant. Further, as set out in Mr Arora's skeleton arguments most of the Respondent's witnesses are no longer in the Respondent's employment. They may or may not wish to co-operate with the Respondent in the preparation of witness statements given that they are no longer employed by it and a party who has to rely on witness orders to obtain its evidence will invariably be at a disadvantage when compared to one who does not.

36. Thirdly, the Claimant has failed to seek appropriate professional advice once she knew of the possibility of taking action. Her own account is that she knew in March 2012 of the possibility of bringing a race discrimination claim. By her own account she regarded the Respondent's treatment of her as less favourable treatment because of race by no later than February 2015 when she raised it as such in the third grievance. However, by her own account, although she sought advice from ACAS on a date she could not remember prior to her dismissal in October 2015, she did not consult solicitors until at the earliest April 2016.
37. The issues of the extent to which the party sued has co-operated with requests for information is not relevant because the Claimant has not alleged any such failure on the part of the Respondent in these proceedings.
38. In summary, therefore, the Tribunal has no jurisdiction to hear any of the Allegations except Allegations 11, 13 and 14 and that part of Allegation 1 relating to 22 October 2015 and accordingly they are struck out. There should now be a further Closed Preliminary Hearing by Telephone so that appropriate Case Management Orders can be made to bring the remaining allegations to a final hearing.

Employment Judge Evans

Date: 18 April 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON
20/5/17.....

.....S.Cresswell.....
FOR EMPLOYMENT TRIBUNALS