



Reserved judgement

EMPLOYMENT TRIBUNALS

Claimant

Mrs J Stephenson

Respondent

v Perry Beeches The Academy Trust

JUDGMENT ON A PRELIMINARY HEARING

Heard at: Birmingham

On: 2nd February 2018

Before: Employment Judge Coaster

Appearances

For the Claimant: in person

For the Respondent: Mr Meichen, Counsel

JUDGMENT

1. The direct discrimination, harassment and failure to make reasonable adjustment complaints were presented outside the primary limitation period and it is not just and equitable to extend time.
2. The complaint of discriminatory pay was presented in time and may continue to hearing.
3. The claimant's claims of age and sex discrimination are dismissed.

REASONS

Background

1. The claimant was employed by Perry Beeches The Academy Trust (Perry Beeches) as a teaching assistant commencing 1st September 1972. It ended with her resignation effective on 13th January 2017. The claimant commenced new employment in April 2017.

2. The claimant brought a claim of direct discrimination. The protected characteristics were race, age and sex. It was identified by EJ Gilroy QC at the case management hearing on 29th September 2017 that the claimant was not pursuing a claim for equal pay. EJ Gilroy QC ordered a preliminary hearing to establish:

- a. whether any or all of the claimant's claims are time barred; and

- b. subject to (above) whether for the purposes of the disability discrimination claim, the claimant was a disabled person within the meaning of the Equality Act 2010 (“EqA 2010”).

3. At the preliminary hearing - case management on 2nd February 2018 the claimant accepted that she did not appear to have any claim for age or sex discrimination. She conceded that her complaints related to race. It was established and accepted by the respondent that the claimant’s allegations of race discrimination could also be labelled harassment under S26 Equality Act 2010. Her allegations of discriminatory pay form part of her allegations of race discrimination.

Evidence

4. I heard evidence from the claimant on the allegations of race discrimination and racial harassment and the circumstances leading up to her instigating employment tribunal proceedings. I also heard evidence that the claimant had been refused a reasonable adjustment because of her dyslexia on 2nd November 2016. I was provided with an agreed bundle R1 and I have referred to the documents as required.

Chronology

5. A chronology of events for the purposes of deciding whether any or all of the claimant’s claims are time barred is as follows:

September – November 2015 - Incident 1: – the claimant’s line manager was impatient with the claimant when, as a newly appointed teaching assistant, she could not find her way around the building to attend classes. The claimant’s work colleagues, also newly appointed teaching assistants who were white, were not treated in this way.

October 2015 - Incident 2: – the claimant was called out of the class room and admonished by her line manager for drinking during the class when she should have waited until a break. Other staff members have drunk tea, coffee or water in a mug or non clear flask every day without comment or action by the line manager.

October 2015 - Incident 3: – the claimant was called out of the class room and admonished for chewing gum when she was sucking a mint. Other staff have chewed gum and sucked mints and without comment or action by the line manager.

Incident 4: see below in the chronology

November 2015 - Incident 5: – the claimant’s line manager humiliated the claimant in front of students and staff by instructing the claimant to scribe for a student and ignored the claimant explanation that the student had asked to answer questions herself. Other teach assistants had similarly allowed students to write their own answers when they wished to do so without comment or action by the line manager.

November 2015 - Incident 6: – the day following incident 5 the claimant was called out of an accelerating reading class and in a slightly raised and abrupt tone told the claimant that she must scribe for the student for all her exams and ignored the claimant’s explanations for allowing the student to write answers for herself.

Incident 7: see below in the chronology.

27th January 2016 - Incident 8: - the claimant was admonished by the line manager in front of other staff members for providing revision assessment homework to a year 7 student when the student should not have been taken out of afternoon classes over

a 2 week period. The following day the line manager criticised the claimant for not realising she should not have provided afternoon classes to the student in question and ignored the claimant's explanation.

January 2016 - Incident 9: at a morning briefing meeting in front of other members of staff, the line manager abruptly told the claimant to put down her pen and listen (rather than taking a written note). The claimant was the only black person in the room. Other staff had been making written notes but were not admonished.

Incident 10: the claimant's line refused to include free periods in the claimant's work timetable to enable her to catch up on written work when other members of staff were granted free time to do so.

1st December – May 2016 and July 2016 Incident 10A: the claimant received three assessments which were unfair and not a true reflection of what was happening.

29th January 2016 - Incident 10B: the claimant's line manager called her out of a double science lesson to complain about the claimant's lack of a control of a lesson on 15th January 2016 which the claimant disputed. The claimant was felt humiliated by her line manager.

The claimant complained orally to a senior manager about her line manager's conduct towards the claimant.

June 2016- Incident 11:- when the claimant forgot that she was assigned to support a student in the exam room, the claimant's line manager said it was a disappointment and unacceptable. Another teaching assistant who was white, had similarly forgotten to support a student in an exam without any comment or action by the line manager.

2nd November 2016 Incident 12: the claimant requested and was refused more time for taking a maths re-sit despite her line manager being aware of the claimant's dyslexia.

September – November 2016 - Incident 4: - the claimant's line manager humiliated the claimant by speaking to her in an abrupt manner in front of staff and students by telling her to sit at the side of the student to following what they are reading (rather than opposite the student).

November 2016 - Incident 7: – the claimant's line manager humiliated the claimant in front of staff and students in the library by admonishing the claimant for being late to do assessments, when the claimant had been in the library before the line manager. The line manager walked off when the claimant explained she had been in the library when the line manager first walked in.

12th December 2016 – claimant makes written request for flexible working and pay review to reflect her experience and qualifications

Early December 2016 meeting with then acting head teacher Esegene Adeoye informally requesting pay rise – claimant informed of pay review process and next pay cycle.

12th December 2016 - claimant resigns

12th January 2017 – meeting with HR – part time working request to enable child care refused. Claimant confirms resignation, employment ceasing 13th January 2017.

End February 2017/March 2017 - claimant contacted CAB and was informed to go to ACAS and informed of three month time limit and need to submit tribunal claim

End February/March 2017 – claimant does her own research on line on filing tribunal claim

12th April 2017 – Early Conciliation notification

12th May 2017 - Early Conciliation certification

12th June 2017 – ET1 filed

The claimant's evidence on reasons for delayed submission of ET1 on 12th June 2017

6. The claimant confirmed that she had been unwell between 2nd November 2016 and the effective date of termination of employment on 13th January 2017. The school had been closed for about two weeks over Christmas/ New Year 2016. The claimant was not signed off sick over this period. However she was too unwell to file her ET1 during the Christmas holidays. Her son had been sick during January 2017. The claimant felt exhausted being a single parent; her work life balance was not good; she was not supported at work; she believed she was poorly paid for her work in view of her qualifications and experience and could not afford child care on her salary. The claimant felt stressed and in a bad place. She didn't have the energy. There was a lot going on.
7. After leaving the respondent's employment the claimant had been encouraged to take legal advice by her friends and family members. She approached CAB – it took quite a while to obtain an appointment but she believed she spoke to CAB in late February 2017, or as she was hazy about that date, possibly in March 2017. Following advice from CAB the claimant was aware that there was a time limit for filing a tribunal complaint. She also did some research on-line herself. The claimant contacted ACAS Early Conciliation on 12th April 2017. The EC certificate was issued on 12th May 2017. Her ET1 was filed 12th June 2017.

The law

8. Where a claim is brought under section 120 of the Equality Act 2010, time limits are contained in the relevant section of Section 123 as follows:

“(1) 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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

9. The Employment Tribunal is afforded a wide discretion in deciding whether, in all the circumstances of the case, it considers that it is just and equitable to extend time.

10. In the case of Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, the Court of Appeal said at paragraph 25:

“It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. “

11. In the exercise of discretion as to whether to consider a claim out of time on just and equitable grounds, due regard should be had to S33 Limited Act 1980 referred to in British Coal Corporation v Keeble & Ors IRLR 336 which include the following factors:

- Length of and reasons for delay
- Extent to which cogency of evidence is likely to be affected by the delay
- The extreme to which R has cooperated with any requests for information
- The promptness with which C acted once he knew of the facts giving rise to the cause of action
- The steps taken by C to obtain appropriate professional advice once he knew of the possibility of taking action

12. Not every item on the ‘Keeble’ list may be relevant and the list is not a tick box exercise. The exercise of discretion is essentially weighing the balance of prejudice to the claimant if the extension of time is denied against that to the respondent if the extension is granted.

Submissions

13. I have a full note of the submissions made by the parties. Have revisited the submissions in my deliberations and deal with them in the course of my conclusions.

Findings and conclusions

14. The claimant brings claims of race discrimination and racial harassment over approximately a 15 month period commencing on 1st September 2015 and ending on 2nd November 2016. She also claims that she is disabled by reason of dyslexia and that on 2nd November 2016 the respondent failed to make a reasonable adjustment. At the very latest, the handling of an alleged grievance procedure on or about 5th December 2016 which the claimant believed to have been inadequate in response to her complaint about her line manager's conduct, means that the claimant should have filed an ACAS Early Conciliation notice (EC notice) by 1st February 2017 and at the very latest by 4th March 2017.

15. Setting aside initially the question of whether the allegation of discriminatory pay is part of a continuing act incorporating the allegations referred to above, I find that the claimant's claims are out of time. The claimant had filed her EC notice on 12th April 2017 at least one month out of time on the most generous assessment. Lodging an EC notice with ACAS out of time does not render the claim form in time.

16. I then considered whether the claim for discriminatory pay could be considered part of a continuing act of discrimination (being the last in a catalogue of complaints of direct race discrimination and racial harassment referred to in the chronology above), and if so would be in time?

17. The allegations of direct race discrimination /racial harassment were made exclusively against the claimant's line manager in the course of her managing the claimant at work.

18. In about early December 2016 the claimant had a meeting with the then acting head teacher, Eseghe Adeoye, and asked for a pay review. It is clear from the claimant's written request for a pay review and flexible working dated 12th December 2016 addressed to HR, that it was prompted by the claimant losing at the start of September 2016 support with child care from a family member. As a result of her losing child care support from a family member, the claimant then found that she struggled to pay for child care, after school club and for her son to be taken to and brought from school. She needed more money and more flexible hours. When neither were not immediately forthcoming on demand, the claimant resigned.

19. In making her request for higher pay, the claimant did not raise any concern about her level of pay being discriminatory because she is black. It is clear from the written application of 12th December 2016 that the request for flexible working and higher pay had nothing whatsoever to do with the alleged treatment of the claimant by her line manager in the course of managing the claimant. Furthermore, different and more senior members of staff were engaged by the claimant's request for increased pay and flexible working. At a meeting in early December 2016 the claimant had been informed by the acting head teacher that pay reviews formed part of a pay review process. The claimant did not allege that pay reviews were within the control or gift of her line manager. The claimant did not allege at any time that the head teacher (who had appointed her to the teaching assistant role in September 2015) and the then acting head teacher Eseghe Adeoye, had treated the claimant at any time in a discriminatory manner whether relating to pay or flexible working. The claimant did not at any time suggest that Perry Beeches was an institutionally racist organisation. She did not state that she believed she was paid less than white colleagues. She had made complaints about the conduct of a single manager's conduct, unrelated to pay and flexible working.

20. The claimant stated in cross examination that the only reason why, with her qualifications and experience she was paid less than she believed she should have been, was because she is black. I do not believe that was in the claimant's mind at the time she made her request for flexible working and increased pay.

21. The claimant was given reasons by the respondent for the refusal of flexible working; she did not allege that those reasons were racially discriminatory. She just disagreed with the head teacher's decision. The claimant was disappointed and disgruntled by her failure to obtain flexible working and higher pay; she wanted to keep her job with Perry Beeches and had she been granted flexible working and higher pay she would have withdrawn her resignation.

22. Stepping back and looking objectively at the issue of pay, I find that it is clearly distinct from the alleged series of specific acts of direct discrimination and/or racial harassment and/or failure to make reasonable adjustment by the claimant's line manager relating to the claimant's performance of her duties. I can find no ground to reasonably connect the allegation of discriminatory pay (or flexible working) with the conduct of the claimant's line manager up to 2nd November 2016. I therefore find that the allegation of discriminatory pay is not part of a continuing act.

23. In view of that decision, I then return to the allegations of direct discrimination and racial harassment between September 2015 – November 2016 and including the single incident of alleged failure to make reasonable adjustment. These allegations are substantially out of time. It is for the claimant to provide reasons why she failed to lodge her ET1 in time such that it would be just and equitable to extend time. The claimant explained that she had been exhausted by not only her alleged treatment at work by her line manager (the last alleged act being 2nd November 2016) but also the pressures she had been under financially and in her child care arrangements as a single mother. These latter issues had commenced in about September 2016. See paragraph 6 above.

24. I refer to the claimant's evidence at paragraph 7 above. The claimant was aware that time limits were in place. She was informed by the CAB in February 2017 that time limits applied and she also did her own research on line. The claimant conceded in cross examination that she was aware of the time limits. The claimant's evidence was hazy on whether she spoke to CAB in late February or March 2017 but she tended to lean to late February.

25. I take into account that no medical or other evidence of the claimant being unwell was provided, or that she was stressed or exhausted that she was unable to file and ET1 in time. The claimant confirmed that she had not taken any time off work between 2nd November 2016 and her effective date of termination 13th January 2017. There was no evidence apart from her statement to that effect, that her son had been unwell in January 2017.

26. In contrast to the claimant's alleged lack of capability to file an ET1 claim form, the claimant having resigned with effect from 13th January 2017 commenced a job search. She commenced new employment on 24th April 2017. Whilst this is admirable, I see little difference in being fit and able enough to undertake job searches and attend job interviews with a successful outcome, and being fit and able enough to file a single online employment tribunal application form. The claimant's family and friends had been encouraging her to initiate tribunal proceedings since she left the respondent's employment. The claimant did not contact CAB until end February 2017. I am not satisfied that the claimant attempted to complete and file an ET1 application form with any sense or urgency despite knowing from CAB by late February 2017 that time limits applied and that therefore she has not acted reasonably. Essentially the claimant was slow in seeking legal advice despite encouragement from her family. When she had obtained legal advice from CAB the claimant was then slow to act on it. I find her explanations for filing her claim for late lack credibility and are not persuasive.

27. In the circumstances in weighing the balance of prejudice of allowing or disallowing an extension of time, I find for the reasons set out at paragraphs 14-26 above, that it is not just and equitable to extend time for the claims of direct race discrimination, racial harassment and failure to make reasonable adjustments. The requirement to consider whether the claimant is disabled falls away.

28. The allegation of discriminatory pay remains 'live' as at the date of the claimant's effective date of termination, 13th January 2017. Her complaint of discriminatory pay alone therefore remains in time and is not time barred.

29. I am very mindful that in fact-sensitive discrimination cases, there must be very good reasons indeed to deny a claimant the chance to put her case. I note that the claimant referred to her complaint as an "equal pay" complaint, rather than a discriminatory pay complaint. It was explained to her at the hearing that EJ Gilroy QC had already ruled out an equal pay claim. However, for the reasons set out at paragraphs 16-21 above, I consider the claimant's complaint of discriminatory pay to be weak and to have little merit. I am minded to make a deposit order under rule 39 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 on the basis that the claimant's allegation of discriminatory pay by the respondent has little prospect of success.

30. Under Rule 39 the claimant may be ordered to pay a deposit not exceeding £1000 as a condition of continuing to advance a claim of discriminatory pay, however, I have insufficient evidence under Rule 39(2) of the claimant's current income in which to ensure that her financial situation is taken into account before any such deposit order is made. To that end I direct the claimant to provide details in writing of her current financial means, including incoming and outgoing financial commitments and her reasons why a deposit order should not be made. The case management order is attached accordingly.

Employment Judge Coaster

5 March 2018