EMPLOYMENT TRIBUNALS

Claimant: **Dr Linda Aloysius**

Respondent: **University of East London**

Heard at: **East London Hearing Centre (by telephone)**

On: **17 September 2020**

Before: **Employment Judge Tobin (sitting alone)**

Appearances
For the claimant: In person
For the respondent: Mr T Sheppard (solicitor)

JUDGMENT

1. **The claimant's claims are dismissed as out of time, pursuant to s123 Equality Act 2010.**

2. **The respondent's applications for a strike out (under Rule 37(1)(a) of the Tribunal Rules) and/or a deposit order (under Rule 39(1)) are dismissed.**

3. **The claimant's application to amend her claim to include additional complaints is also dismissed.**

4. **Accordingly, proceedings are dismissed.**

REASONS

The hearing

1. This has been a remote hearing which has been consented to by the claimant and the respondent. The form of remote hearing was a video hearing through the HMCTS cloud video platform and all the participants were remote (i.e. no-one was

physically at the hearing centre). A face-to-face hearing was not held because it was not practicable in the light of the coronavirus pandemic and the Government's restrictions. The hearing was listed as a Preliminary Hearing (Open) to determine the matters below.

2. The claim was summarised by me (i.e. Employment Judge Tobin) following the hearing of 22 June 2020. I also set out the purpose of this hearing in the summary and case management orders.

3. At the outset of the hearing, I set out the order that I would be dealing with the matters for determination, specifically; first the time-limit points; then the strike out and/or deposit order applications; and then, the proposed amendment to the details of claim.

4. I heard evidence from the claimant and had regard to a hearing bundle of 326 pages. This bundle included statements from the claimant and respondent's witnesses.

Is the claim out of time, pursuant to s123 Equality Act 2010 ("EqA")? If so, should the Tribunal exercise its discretion to hear an out of time claim on the basis that it is just and equitable to do so?

5. The claimant made claims of sex discrimination and age discrimination. She applied for a permanent post with the respondent in October 2018. This post was 20% of a full-time equivalent Lecturer/Senior Lecturer's role. The claimant was not offered this substantive part-time post but was instead offered largely the same job but as an Hourly Paid Lecturer ("HPL"). The HPL work had no job security (unlike the 20% substantive and permanent role) and was paid at a lower rate.

6. The claimant's claims are based on 3 comparators, as previously identified:

1. CFW had been offered the job that the claimant applied for in October 2018, although he declined this job. The claimant said she was then offered the role with less security and at a lower rate of pay (i.e. as an HPL).

2. In October 2018, DC was offered and accepted a 20% Fine Art Teaching post on a substantive contract. DC was not appointed on an HPL contract.

3. In October 2018 SK was appointed on a 20% Fine Art Print Making contract in circumstances which were kept hidden from her.

4. The claimant also contends that the respondent has discriminated against her in providing SK with specialist training for his role and that his hours were increased to 40% of whole-time equivalent hours.

7. The 3 roles where recruited to in September and October 2018 and DC and SK started their jobs on 1 November 2018 and 12 November 2018 respectively. SK's additional training took place sometime between his appointment and the spring of 2019. SK increased his hours with effect from 1 September 2019.

8. The claimant issued proceedings on 16 January 2020, following a period of early conciliation from 12 December 2019 to 12 January 2020.

9. Claims of discrimination in the Employment Tribunal must be presented *within 3 months* (i.e. 3 months less a day) of the act complained of, pursuant to s123(1) EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA goes on to say that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month time limit period if they think it *just and equitable* to do so, under s123(1)(b) EqA. The Acas conciliation period will extend time limits for the parties to attempt to resolve their differences without the need for Employment Tribunal proceedings: see s18A and s18B Employment Tribunals Act 1996 and the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014.

10. Allowing for the early conciliation time-extension, any claim occurring before *13 September 2019* (i.e. 3 months prior to the commencement of early conciliation on 12 December 2019) is prima facie out-of-time. So, all of the complaints are out of time. 1 complaint (ie the very weak claim as identified below) is out of time by 2 weeks, the others 3 claims are out of time by around 11-months.

11. As discussed at the previous hearing, *continuing acts* under s123(3)(a) EqA are distinguishable from one-off act that have continuing consequences; time will run from the date of the one-off act complaint of; see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, Aziz v FDA [2010] EWCA Civ 304 and Okoro and another v Taylor Woodrow Construction Limited and others [2012] EWCA Civ 1590. The acts that the claimant complaints of do not represent a continuous pattern or course of alleged discriminatory conduct by any specific individual; they are discreet acts with ongoing consequences.

12. The task for the Tribunal in this instance is therefore to consider whether I should exercise my discretion to extend the time limit pursuant to s123(1)(b) EqA.

13. There is no presumption that Tribunal's should extend time, the onus is on the claimant to persuade the Tribunal that it is just an equitable to do so: Robertson v Bexley Community Centre CA [2003] IRLR 434. In considering whether to exercise its discretion, the Employment Tribunal should consider the prejudice that each party would suffer as a result of granting or refusing an extension of time, and should have regard to all of the other relevant circumstances. In British Coal Corporation v Keeble [1997] IRLR 336, the court said that Tribunals should have regard to the factors mentioned in s33 Limitation Act 1980 as a useful checklist (which I address in the points below).

14. A key issue to be addressed, according to ABM University Local Health Board v Morgan UK EAT/0305/2013 is as follows:

a. Why was it that the primary time limit had been missed?

b. Why, after expiry of the primary time limit, was claim not brought sooner than it was?

15. Claimant contends that she did not know of the possible discrimination until early October 2019 when she said that she was told in passing that 2 men had been appointed to permanent roles. The claimant said that she attended the University only 1 day per week, that she did not attend staff meetings or team meetings. She said she was not invited to departmental away-days and did not meet colleagues. I did not receive a satisfactory explanation as to how the claimant was able to find out about the discrimination so late and why she did not learn of this sooner. The onus is on the claimant to explain this fully and I am not satisfied that I have been given a clear picture. Mr Sheppard contended that the university's art department was not big, 13 members of staff in the department, and it was inconceivable that the claimant did not learn of these appointments much sooner, particularly as these were jobs that she both applied for and contented she could do.

16. In any event on 18 October 2018 the claimant's trade union representative wrote to Ms Alison Bell, the respondent's HR Business Partner to request a meeting about the recruitment of October 2018 to these contentious posts (claims 1 to 3 above). So, it was at this stage, that the claimant raised her concerns formally. The claimant wrote to Ms Bell again on 30 October 2019 and a meeting was arranged to discuss this matter on 11 November 2019. Ms Bell then made enquiries with 2 colleagues and reported the outcome of this meeting on 22 November 2019. The claimant provided her detailed and cogent response that day. If I accept that the claimant was genuinely unaware of discrimination by early October 2019, then it was by this stage, at the latest, that the claimant should have been aware of the need to act promptly to pursue her out-of-time complaints of the previous year.

17. On 20 December 2019 the claimant intimated that she would be making an Employment Tribunal claim although proceedings were not issued until almost 1 month later on 16 January 2020. This is not acting promptly.

18. There is no general principle that it will be just and equitable to extend the 3 month time limit where the delay was caused by the applicant seeking to deal with the matter internally: Apelogun-Gabriels v London Borough of Lambeth CA [2002] IRLR 116. I do not criticise the claimant for taking this matter up with the respondent's HR Department, indeed I commend the claimant for making appropriate inquiries before instituting proceedings and thereby attempting to resolve matters without the need for legal recourse. However, such efforts only really relate to the period between 18 October 2019 and 22 November 2019.

19. Lack of knowledge of Employment Tribunal time limitations is not accepted as a sufficient explanation for noncompliance with s123 EqA. The claimant indicated

that her trade union representative did not advised her fully or properly about the time limit implications. The case law is clear that only in unusual circumstances is a claimant entitled to rely upon this factor. The claimant is intelligent and articulate. She is a mature and experienced worker and employee. She is capable of undertaking research and discovering the Employment Tribunal jurisdictional requirements.

20. The Tribunal is required to take into account the balance of prejudice between the parties and the perspective merits of the claim: Rathakrishnan v Pizza Express (Restaurants) Limited EAT/0073/2015. In respect of prejudice, the respondent contends that the cogency of the evidence is likely to be affected by the claimant's delay. Mr Sheppard tells me, which I accept, that the majority of the recruitment documents that would be relevant have not been retained and in particular the contemporaneous notes taken by the recruiters have been destroyed. Consequently, as these notes are not going to be available the witnesses are not likely to recall the reasons for their decisions in the type of forensic detail that the Tribunal would otherwise expect. This is a considerable prejudice to the respondent and one which outweighs the prejudice to the claimant of dismissing 3 of the 4 considerably out-of-time claims.

21. I am concerned about the merits of these claims. As previously stated, I am concerned that these claims appear to be speculative, resting on comparators who were offered different jobs to that which the claimant had applied for and was undertaking. I cannot see the merit in a free-standing claim for the more recent case in respect of additional training where needed and the increase in hours for SK (claim 4). I accept the claimant may think this is a further example of unfair or possibly preferential treatment for others, but there appears to be no basis upon which the claimant can contend this is discriminatory as her comparators are in materially different circumstances, applying the s23(1) EqA requirement. If the more recent claim was not out-of-time then I would likely strike out claim 4 above as having no reasonable prospects of success.

22. Accordingly, I dismiss these claims under s123 EqA.

Whether the claim should be struck out for having no reasonable prospects of success under Rule 37(1)(a) of the Tribunal Rules and/or a deposit order made under Rule 39(1) on the basis that the claim has little reasonable prospects of success.

23. My comments in the last case management hearing summary and in paragraph 21 above set out my concerns. As I strike out these proceedings under s123 EqA, I dismiss the respondent's applications as set out above. I will say, however, that if I allowed these claims to go forward then the claims 1-3 have little reasonable prospects of success and claim 4 has no reasonable prospects of success.

24. If the claimant was resolved to pursue these proceedings then, I fear, she could place herself at risk of a potentially large cost application, such would be the

outcome of pursuing dubious claims. To determine otherwise would give the claimant a false impression of the merits of her claims and, I fear, leave her exposed to a significant costs application at the conclusion of these proceedings.

The proposed amendment to the claim by the claimant.

25. As I have dismissed the substantive claims, it is not possible for the claimant to amend these proceedings. However, I would not allow the proposed amendments in any event.

26. The proposed amendments are vague and seemingly out-of-time also. They essentially changed the nature of proceedings to include matters more designed to assert ongoing discriminatory conduct without clear specifics. I accept Mr Sheppard's comments in his written submissions.

Employment Judge Tobin
Date: 25 November 2020