



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Borg

**Respondent:** Liverpool University Hospitals NHS Foundation Trust

## JUDGMENT AT A PRELIMINARY HEARING

**Heard at:** Liverpool (in private; by CVP)      **On:** 2 March 2021

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

### Representatives

For the claimant: Mr Halson Solicitor

For the respondent: Mr Loftus Solicitor

1. The claimant's claims in respect of discrimination arising from the event on 17 September 2019 were presented out of time.
2. The Tribunal extends jurisdiction considering it was just and equitable so to do to under section 123 Equality Act 2010 to allow the claims for direct discrimination/ harassment presented on 28 September 2020, to proceed.

## REASONS

### Introduction

- (1) This was a preliminary hearing to determine whether the Tribunal has jurisdiction to consider the claimant's case in respect of discrimination claims.
- (2) This was a remote hearing by Video / Telephone conference call in which the parties participated. A face -to -face hearing was not held because both parties are professionally represented and able to deal with jurisdictional issues remotely. It was intended to be by CVP but the parties agreed to Mr Loftus for the Respondent joining by telephone when the CVP connection was unreliable during the course of the hearing.

**(3) The case summary set out in the CMO of 11 December 2020 is repeated to assist.**

(a) The claimant complains that she was inappropriately touched on her leg by a colleague on 17 September 2019. The respondent does not deny that the claimant was touched on her leg ( *by him*), but will present evidence that the touching was done innocently, by a colleague with autism (or a similar condition) when he was seeking to describe the source of pain in his own leg. On this basis the respondent will deny that any such touching was related to the claimant's gender or was sexual in nature. In addition, the respondent will seek to argue they should not be held vicariously liable should it be found that the touching was sexual in nature or related to the claimant's gender.

(b) The claimant does not seek to make any claim against the individual who touched her. Her claims are against the named respondent, her former employer, only.

(c) The claimant reported the incident immediately, and has described in her statement the impact it had on her. The respondent conducted an investigation into the incident. The claimant was not satisfied with the handling of the investigation or the outcome, which was not fully divulged to her for "confidential reasons".

(d) The claimant will say she raised concerns regarding the investigation, but these were not satisfactorily considered. The claimant resigned from her employment on 29 April 2020.

(e) The claimant approached ACAS to commence early conciliation on 28 July 2020, that early conciliation concluding on 28 August 2020. The claimant presented her ET1 on 28 September 2020.

The following were identified on 11 December 2020-Complaints and Issues

(f) The claimant seeks to make three claims:

- (i) Unfair Constructive Dismissal;
- (ii) Sex Discrimination (understood to be direct discrimination); and
- (iii) Harassment.

(g) The discrimination claims are out of time arising out of the same event on 17 September 2019 and the jurisdictional point arises as to whether they should be allowed to proceed for the Tribunal to determine today.

(4) The Tribunal has before it and had pre read the pre hearing bundle, the further and better particulars as ordered at the CM hearing, the claimant's statement of 2 March 2021 and the written submissions on the time limit point from both the Claimant and the Respondent, which are incorporated by reference and not repeated.

(5) The parties agreed that it was not necessary for the claimant to give evidence. The Tribunal heard supplementary oral submissions from both advocates and considered those before determining the matter.

### **The Law**

(6) The time limit for presentation of a claim is set out in section 123(1) EA 2010, which provides:

“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.”

(7) The Tribunal was referred in submissions to several authorities including Robertson v Bexley Community Centre 2003 IRLR 434 the provisions of s33 of Limitation Act 1980 as identified in both parties submissions.

(8) The Tribunal was also referred to the following authorities of CC of Lincolnshire Police v Caston 2010 Miller v MOJ 205, Bahous v Pizza Express 2011 and British Coal Corp v Keeble 1995 and Adeji v University Hospitals Birmingham NHS Foundation Trust 2021 by the claimant.

(9) The Tribunal was referred to Palmer v Southend on Sea 1984 IRLR 119 and Meikle v Notts CC 2004 EWCA Civ 859 by the Respondent. The Tribunal noted Palmer referred to failure to bring an unfair dismissal claim in time due to internal procedures- applying the different test for extension to a discrimination claim.

### **Discussion and Conclusions**

(10) The date of the unwanted touching of the claimant by another male employee was 17 September 2019. The claimant had until 16 December 2019 (three months from the act to which the complaint relates, less one day) to notify ACAS of Early Conciliation in order to ‘stop the clock’ running on the time limit for presentation of her discrimination claim(s) to the Employment Tribunal.

(11) The Claimant did not notify ACAS of Early Conciliation until 28 July 2020. The Early Conciliation certificate was issued by ACAS on 28 August 2020. The Claimant presented her claim to the Tribunal on 28 September 2020. It is therefore clear that the Claimant’s claim(s) as they relate to the incident on 17 September 2019 are out of time. The Claimant did bring such claim until 12 months after the event.

(12) The Tribunal has a wide discretion to consider whether it would be just and equitable to extend time, the burden to demonstrate such being on the claimant. The claimant was late in presentation of a claim due to being signed off from work after the event and not fully returning to work. She accepts she knew of the time limit in March 2020 and asserts she delayed due to internal processes. The Respondent may have “wrong footed” the claimant in this regard in the late November

email where they themselves requested her not to act. The Tribunal accepts the claimant was "blogging" at this time. The claimant remained employed through all this time.

- (13) The claimant resigned from her employment on 28 April 2020 and the claim in respect of unfair constructive dismissal was presented in time, but the key event in the chain emanates from what happened on 17 September 2019. The particular factual matrix of this case leads back to consideration of that event.
- (14) The Claimant did not act promptly as she explains she was considering her position in respect of her employment continuing leading to her resignation in April 2020. However the Tribunal weighs in the balance in April 2020 the country had entered the first lockdown of the covid pandemic from late March and it is accepted her " main focus was how her employer had dealt with the issue".
- (15) The tribunal accepts on the particular facts of this case there was one single incident which had a significant effect on the claimant and caused her to suffer anxiety and it was therefore reasonable that how her employer had dealt with the issue had become her focus.
- (16) The claimant indicates at paragraph 62 of her witness statement, "I couldn't shake off the intrusive thoughts about work and it decided that delaying my resignation was also delaying my recovery so I made up my mind to resign in April."
- (17) The respondent asserts that the claimant could have brought a claim and sought a stay, the tribunal considers that that would be unlikely as the claimant was expressing intrusive thoughts and had only resolved to resign in April and normal life was not in existence in the spring of 2020 such that she could have been expected to bring a claim and sought a stay before a resignation.
- (18) The Tribunal considered prejudice to the claimant and to the respondent. So far as prejudice to the respondent is concerned there is clear prejudice if an out of time claim is allowed to proceed and so far as the claimant is concerned there is clear prejudice if the discrimination claim fails at the first hurdle. There is no substantial prejudice to either party in respect of evidential matters as the particulars required in relation to this discrimination case traversed the same areas of information and chronology as the constructive unfair dismissal case and that case is listed for hearing and evidence gathering took place at the time and for some months of the Respondent's investigation.
- (19) It was a fact that the claimant was subjected to unwanted touching in her workplace and a chain of events followed from that event. The Tribunal accepts that extension of time is the exception not the rule but here the Tribunal considers that the factual matrix of this case is

exceptional. The question arises is it just to prevent the claimant's claim relating to harassment/direct discrimination relating to events on 17 September not to go forward when the unfair dismissal claim proceeds? Despite the delay in making the discrimination claim to the Tribunal it is just and equitable on the particular facts of this case to extend time to allow the claimant's claim to proceed.

- (20) The Tribunal considers there is jurisdiction to hear the direct discrimination/ harassment claim.
- (21) The parties did not seek any further case management orders as extensive orders were made on 11 December 2020. It is likely the claimant will give evidence at the final hearing and the Respondent will call 4 witnesses.
- (22) For the avoidance of doubt the Respondent clarified that the Respondent's name is Liverpool University Hospitals NHS Foundation Trust not Royal Liverpool and Broadgreen Hospital Foundation Trust and the Tribunal amended the name of the Respondent accordingly.

Employment Judge Grundy

23 March 2021

ORDER SENT TO THE PARTIES

ON 24 March 2021

FOR THE TRIBUNAL OFFICE