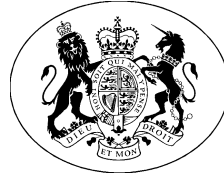


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# EMPLOYMENT TRIBUNALS

## *Claimant*

Miss S Palihakkarta  
Miss S Palihakkarta

**AND**  
**AND**

## *Respondents*

Robertson Bell Limited  
The English Sports Council

**Heard at:** London Central

**On:** 14 February 2019

**Before:** Employment Judge Brown

## **Representation**

**For the Claimant:** Ms E Hearn, ELIPS

**For the Respondents:** Robertson Bell Limited: Mr M Fellow, Solicitor  
The English Sports Council: Ms K Gallafent, Counsel

## **JUDGMENT AT A PRELIMINARY HEARING**

1. The Claimant's claim against Robertson Bell Limited was presented out of time and the Tribunal has no jurisdiction to hear it. It is struck out.
2. The Tribunal does not give the Claimant permission to amend her claim against The English Sports Council to add Robertson Bell Limited as a Respondent and/or to add further claims against Robertson Bell Limited.

## **REASONS**

### **The Applications**

1. By a claim form presented on 7 April 2018 the Claimant brought complaints of direct race discrimination and victimisation against The English Sports Council, Case Number 2201929/2018.
2. At a Preliminary Hearing in front of Employment Judge Glennie on 2 August 2018, the complaints in that claim were agreed as follows:

2.1. Direct discrimination because of race; on 9 November 2017 the Claimant was called in to a meeting with Serena Jacobs and Rachelle Morton and told that her contract was to end.

2.2. Direct discrimination because of race; on 10 November 2017 the Claimant was called in to a meeting with Serena Jacobs and a member of HR and was told that she had to leave immediately.

2.3. Direct discrimination because of race and/or victimisation. The potential protected acts are the Claimant's email of 13 November 2017 and 16 January 2018 and the contact via the Respondent's website between those dates. The detriment is dealing with the Claimant's grievance as if it had been raised by a member of the public rather than as a grievance raised by a worker or employee. In particular, there was no grievance hearing, the individual involved decided that the grievance should be dealt with in that way.

3. The Claimant had been placed by Robertson Bell Limited, a recruitment agency, at The English Sports Council (which is also known as "Sports England"). The Claimant made a Subject Access Request to The English Sports Council and, in May 2018, was given disclosure of electronic documents pursuant to that SAR. She was given disclosure of hard copy documents in the ET proceedings against The English Sports Council on 28 August 2018. The Claimant did not review the electronic documents disclosed on the Subject Access Request, but did review the hard copy disclosure. Both the hard copy disclosure and the Subject Access Request electronic disclosure contained two emails between Harry Peasnell of Robertson Bell Ltd and Serena Jacobs of The English Sports Council. The first was on 13 November 2017, when Harry Peasnell emailed Serena Jacobs in the following terms:

"I have received another lengthy email this morning from Sam who wants to speak to HR, happy to tell her they do not need to speak to her just wanted to get your thoughts."

4. Further, in January 2018, Serena Jacobs had emailed Harry Peasnell in the context of the Claimant's grievance, setting out her chronology of events in relation to the Claimant's employment and asking if Mr Peasnell agreed with it.

5. On 4 October 2018, following Early Conciliation which started and ended on 26 September 2018, the Claimant made an application to add Robertson Bell Ltd as a Respondent to her existing claim against The English Sports Council. She also presented a new claim to the Employment Tribunal against Robertson Bell. The terms of the amendments sought and the particulars in the new Employment Tribunal claim against Robertson Bell were in almost identical terms. There were as follows, insofar as is material:

"The direct discrimination and victimisation by the agency would be in respect of:

a) the termination without any communication to me at all, and their conduct in that process

b) and then also afterwards, where within a few days they just ceased all dealings and contact, though never actually stated this, via my agency consultant Harry Peasnell, who simply ignored me. Rather than what an agency should do i.e. assist me find another contract at the very least, as well as speak to me to hear my side of matters properly. Instead it seems I was instantly terminated from them too and with no support, communication, etc to find alternative work which amounts to direct discrimination then, and goes hand in hand with the treatment from the English Sports Council personnel...

c) I have been unable to get to the bottom of what really occurred between Sport England personnel and the agency, as when I requested my data from the agency, despite alerting them immediately to a problem and that I logged it as a grievance, they told me they had destroyed all my records ...

d) Example below that I have now seen the agency's involvement, this was the Monday morning after being walked out of the office on Friday 10 November 2017 and the HR lady I spoke to by phone on the Friday said she would arrange to catch up with me on Monday. However, I was unaware of this behind the scenes by my agency and SE, and why are temporary workers not allowed to speak to HR?"

6. Robertson Bell Ltd made an application to strike out the new claim on the grounds that it was presented out of time and had no reasonable prospect of success. It also opposed the Claimant's application to amend her claim. These applications came before me today.
7. I have heard evidence from the Claimant, who was cross examined by Robertson Bell's representative, Mr Fellow. I made the following findings of fact, having heard her evidence.

### **Findings of Fact**

8. The Claimant was very distressed following the termination of her contract by the Sports England. As a result, she has had treatment from her GP. The GP wrote a letter in this regard on 2 November 2018,

"She came to see us on 24 November 2017 worried as she felt she was about to have a stroke. We advised her to have an MRI scan and full rest. She was also suffering flash backs for about two months she advised. In November 2018 she was also then referred for counselling at that time (and allocated sessions up to 12 months).

Also, she advised us that she is under an immense amount of stress due to the ongoing employment stressor and I can confirm it was affecting her mental wellbeing in August 2018 and is ongoing.

Our patient also advised us that she has been suffering migraines during the last 1.5 weeks”.

9. The Claimant told me, and I accepted, that she has had some mental health problems since her contract with The English Sports Council ended. I accepted that she had been receiving counselling and that her mental health issues are continuing. However, she was able to present her claim against The English Sports Council on 7 April 2018 and set out her complaint against it in detail. In that claim, at paragraph 6, the Claimant specifically referred to her agent at Robertson Bell ceasing contact with her a few days after the termination of her contract by Sports England, ignoring requests to call her back. She was therefore able to put those facts in the claim on 7 April 2018, although, at that time, she made no separate claim in respect of them.
10. The Claimant has not worked since her contract with The English Sports Council was terminated, but has continued to look for work, making job applications. I concluded that, since the contract with The English Sports Council came to an end, the Claimant has considered that she would be well enough to work, if she were offered work.
11. The Claimant had been in email correspondence with Stuart Bell, CEO of Robertson Bell Ltd, in April 2018. She made a complaint about Mr Peasnell on 22 April 2018; saying that Mr Peasnell spoke to her on the termination of her employment by The English Sports Council, but then proceeded to ignore her emails and calls and that he had never once helped her to get a new role, which she said was a totally unfair way to be treated. She said that he ignored her and it was appalling.
12. On 30 April 2018 Mr Bell wrote to the Claimant providing detail of The English Sports Council’s concerns about her work for them. This included a statement by The English Sports Council, “10 November - ... after discussions with Mike Roaner, HR and the agency we agreed to ask to leave SE (*Sports England*) with immediate effect”. In other words, The English Sports Council had stated that, on 10 November 2017, after discussions with Robertson Bell Ltd, amongst other people, it had decided to ask the Claimant to leave with immediate effect.
13. The Claimant did not read the SAR electronic disclosure documents provided to her in May 2018, but she did read the disclosure hard copy documents provided on 28 August and noted two emails on 13 November 2017 and in January 2018 between Mr Peasnell and Ms Jacobs. She considered that these showed evidence of collusion between The English Sports Council and Robertson Bell Ltd and that she should issue a claim against Robertson Bell Ltd. She sought advice from ACAS in this regard.
14. The Claimant was unfortunately involved in a car accident on 20 September and attended her GP in respect of headaches, whiplash and flashbacks, in the weeks immediately following.
15. The Claimant presented her claim against Robertson Bell Ltd on 4 October 2018 and made an application to amend her claim against The English Sports

Council on that date, at the latest. The Claimant told me that she was aware that Robertson Bell Ltd had destroyed her documents when she requested her documents from the agency.

## Relevant Law Amendment

16. In deciding whether to allow an amendment the Employment Tribunal is guided by the principles set out in *Selkent Bus Company v Moore* [1996] IRLR 661 and considers *the Presidential Guidance on General Case Management (2014): Amendment to the Claim and Response Including Adding and Removing Parties*.
17. In deciding whether to grant an application to amend, the Tribunal must balance all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment: applications to amend range, on the one hand, from correcting clerical and typing errors and the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded, to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters, or a substantial alteration pleading a new cause of action.
18. Other factors include the applicability of time limits: if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended. Other factors to be considered include the timing and manner of the application: an application should not be refused solely because there has been a delay in making it, as amendments can be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made, for example the discovery of new facts or new information appearing from the documents disclosed on discovery.
19. Even if there is an entirely new claim presented out of time, the Claimant may still be allowed to amend, taking into account the balance of injustice and hardship. In considering whether to allow an amendment, the Tribunal should analyse the extent to which the amendment would extend the issues and the evidence, *New Star Asset Management Holdings Limited v Evershed* [2010] EWCA Civ 870.
20. The *Presidential Guidance on General Case Management (2014): Amendment to the Claim and Response Including Adding and Removing Parties* sets out the *Selkent* principles. It states, at paragraph [14], "Asking to add a party is an application to amend the claim. The tribunal will have to consider the type of amendment sought... The amendment may if allowed make new factual allegations which change or add to an existing claim. The considerations set out above in relation to amendments generally apply to these applications."

## Time Limits and Continuing Acts

21. By s123 *Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of
- 21.1. the period of three months starting with the date of the act to which the complaint relates or
  - 21.2. such other period as the Employment Tribunal thinks just and equitable.
22. By s123(3) *EqA 2010*, conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.
23. Where a claim has been brought out of time, the Employment Tribunal can extend time for its presentation where it is just and equitable to do so. In *Robertson v Bexley Community Centre T/a Leisure Link* [2003] IRLR 434 the Court of Appeal stated that there is no presumption that an Employment Tribunal should extend time unless they can justify a failure to exercise the discretion. Quite the reverse; a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In exercising their discretion to allow out of time claims to proceed, Tribunals may have regard to the checklist contained in s33 *Limitation Act 1980* as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336. Factors which can be considered include the prejudice each party would suffer as a result of the decision reached, the circumstances of the case and, in particular, the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any requests of information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

## Discussion and Decision

24. Applying the law to the facts as I have found them, I have decided that the amendment sought in this case it is not simply an application to add Robertson Bell Ltd to an existing claim, for example, relying on s.110 or s.109 *Equality Act 2010*. The factual allegations against Robertson Bell are different to the allegations relied on in the claim against The English Sports Council. The allegations in the new/amended claim are: first, that the termination was made without communication with the Claimant and Robertson Bell's conduct in that process; second, Robertson Bell ceasing all dealings with the Claimant within a few days and denying her access to other opportunities; three, Robertson Bell destroying records of the Claimant. These are not the same allegations as are made against The English Sports Council Sports as set out at the 8 August 2018 PHC in front of Employment Judge Glennie.
25. The facts relied on are different and the Respondent is different; I consider that it is a substantial alteration, to which the time limits would apply.

26. The Claimant contends that her contract was terminated in November 2017. Her grievance about Mr Peasnell was presented to Robertson Bell in April 2018 and the destruction of her records must have occurred before then. Robertson Bell's failure to contact the Claimant started, at the latest, in November 2017; as the Claimant said, it started within a few days of the termination of the contract with The English Sports Council.
27. I consider, on the Claimant's pleaded case, that the last act complained of, the destruction of her records, occurred by April 2018 when she submitted her grievance against Mr Peasnell. Three months from April 2018 is July 2018. When the Claimant commenced Early Conciliation through ACAS in September 2018, she did so at least two months after the expiry of the relevant time limit. The Claimant's claims were therefore out of time.
28. The Claimant contended that there was a continuing act by the Respondent in failing to offer her further opportunities. However, in April 2018 the Claimant made a complaint about Robertson Bell's decision to stop offering her work. She must have believed that the decision to stop offering her work had already been made. I conclude that the decision amounted to an act with continuing consequences, rather than a continuing act. Time therefore ran when the decision to stop offering work was made - this was, at the very latest, in April 2018, but probably in November or December 2017.
29. I have considered whether it would be just and equitable to extend time for the Claimant's race discrimination and victimisation claims against Robertson Bell. I conclude that, while the Claimant has been ill, she was able to present a claim against The English Sports Council in April 2018 and was therefore capable of bringing complaints to the Tribunal. She was not prevented from bringing a complaint against Robertson Bell by her illness. Furthermore, with regard to knowledge, I consider that the Claimant knew, on 30 April 2018, that Robertson Bell had been contacted and consulted before the decision to terminate her contract by The English Sports Council. Furthermore, in May 2018 she was given SAR electronic disclosure of the emails on which she relies in bringing her claim, although she did not read them at the time. She ought to have known about the emails in May 2018, although she did not read them until August 2018. I find that the Claimant was at fault in not reading those documents earlier. In any event, the Claimant was aware of Mr Peasnell's failure to contact her in November 2017 and December 2017, when it happened, and referred to this in her ET1 against The English Sports Council. She was also aware that Robertson Bell said that it had lost or destroyed her documents. The Claimant was therefore aware of the facts on which she relies much earlier than her claim was submitted to the Employment Tribunal. I do not accept that she did not have the relevant knowledge and that this was a reason to extend time.
30. With regard to hardship and injustice, taking into account those matters, I consider that there is no good reason to allow the amendment in this case. The claim is out of time, time limits are to be applied to prevent stale claims against Respondents. The Claimant, in any event, still has a claim against The English Sports Council which she is able to pursue.

31. I do not allow the amendment. For the same reasons, I strike out claim number 2206320/2018 against Robertson Bell Ltd because it was presented out of time and I do not extend time for it.

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Employment Judge Brown

Dated: 1 March 2019

Judgment and Reasons sent to the parties on:

7 March 2019

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For the Tribunal Office