EMPLOYMENT TRIBUNALS

Claimant:	Mrs Katia Segor
First Respondent:	Secretary of State for Justice
Second Respondent:	Mr Michael Spellman
Heard at:	Watford
On:	13 March 2023
Before:	Employment Judge Andrew Clarke KC

Appearances

For the claimant:	Mr B Malik (Counsel)
For the first respondent:	Ms K Balmer (Counsel)
For the second respondent:	Mr L Harris (Counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's application to amend the claim form is refused and that application is dismissed in its entirety.

2. The claims for harassment brought against the first and second respondent were presented outside the primary limitation period found in section 123 of the Equality Act 2010. The claimant having failed to persuade the tribunal that it would be just and equitable to extend time for the presentation of those claims, they are dismissed against both respondents.

3. All claims against the second respondent having been dismissed, the second respondent is no longer a party to these proceedings.

4. As set out in separate case management orders, the hearing listed to take place over 8 days in November 2024 is vacated and the claim of victimisation against the first respondent will be heard on 09 and 10 October 2023.

REASONS

1. This open preliminary hearing was set down by Employment Judge Alliot at a preliminary hearing on 27 January 2023. In the case management summary four matters were listed to be dealt with at this hearing. These were:

   (1) The claimant's application to amend,

   (2) Any strike out or deposit order application made by the first respondent,

   (3) The strike out application made by the second respondent to be followed by a deposit order application, if appropriate and

   (4) Any further necessary case management.

2. It is agreed between the parties that the intention of the Employment Judge as expressed on 27 January was that the issue of whether the claims for harassment were presented in time was to be dealt with substantially at this hearing, rather than being dealt with by way of a strike out application. Although the order does not say that, it provided for witness evidence on the part of the claimant and (if so advised) either respondent and for disclosure relevant to the claim in time issues. Given that all material evidence on those issues is before me and having regard to the understanding with which all parties proceeded towards this hearing, I am content to deal with the out of time issue substantively today.

3. It was agreed between the parties that they would prefer to deal with the application to amend first before turning to the claim in time issues as this would enable the tribunal to understand precisely to which claims the claim in time issues would relate. That appeared to me to be a sensible and just approach and it is the one adopted.

4. In those circumstances I turn first to deal with the application to amend the claim form. The claim was presented on 11 May 2022. The claimant was employed by the first respondent on 22 May 2017, eventually being promoted to the post of a Band 4 Supervising Officer. From November 2021 to May 2022 she was acting up in a Band 5 post. On 31 January 2022 she raised a complaint of sexual harassment by the second respondent. It was suggested to her that she raise her complaints with the police and she did this in February 2022. The CPS has now concluded that the matter should not be taken any further. Internal investigations, which appear to have been paused while the police investigation took place, are now continuing to a conclusion.

5. The claim as presented to the tribunal in May 2022 alleged sexual harassment (against both respondents) and victimisation. The harassment allegations relied upon an incident in June 2019, one in July or August 2020

and one in August 2021. The claimant now seeks to add further incidents in December 2019, July 2020 and August 2020 and to base claims upon them.

6. So far as the victimisation claim is concerned three protected acts were originally relied upon. These took place in May 2019, January (or possibly February) 2022 and in February 2022. There was only one alleged detriment, namely the withdrawing of her temporary promotion in March 2022 (effective in May 2022). The proposed amendment adds four more alleged protected acts (taking place in December 2018, November 2020 and January 2022, when two acts are alleged). It also seeks to add five more detriments; these are said to have taken place in February and April 2022, over the period of March to June 2022 and in July and August 2022.

7. The claimant was legally represented at the time her claim form was submitted and, save for a very short period after the January preliminary hearing, has been legally represented throughout. I was provided with no explanation (either in her witness statement, or in submissions) as to why these proposed new claims did not appear in the original claim form.

8. I should make clear at this point that although this issue was considered in her cross examination, I heard the claimant's evidence after I had made my decision as regards the application to amend. However, I note that no explanation was provided in that oral evidence either.

9. It was noted by Mr Malik on the claimant's behalf that several of the matters upon which she now seeks to rely were referred to in a letter sent to the employment tribunal in August 2022 in response to an order to particularise her claim. It was not explained why no application was made to amend at that time or why the application to amend intimated to Employment Judge Alliot was in respect to the addition of direct sex and race discrimination claims and not in relation to these matters. I note that Mr Malik made clear at the outset that there was no application to amend to add direct sex and race discrimination claims and, indeed, none are set out in the proposed amended particulars of claim.

10. Although the proposed amendments were all contested by the respondents, the parties have helpfully produced a draft list of issues which are agreed between them to reflect both the claim as originally pleaded and the proposed amendments. The proposed amendments are identified (where reflected in that list of issues) by the text being underlined. This has proved to be a very helpful document in analysing the impact on the case of the addition of the proposed new factual allegations and claims.

11. Ms Balmer, for the first respondent, produced a written skeleton argument dealing both with the application to amend and with the time issues. In that document she briefly summarised the relevant law concerning applications to amend. Neither Mr Harris, nor Mr Malik, took issue with that summary.

12. So far as material the agreed position with regard to the applicable law can be summarised quite shortly. I begin by noting the comments of the then president of the EAT (Langstaff J) in Chandhok v Tirkey [2015] IRLR 195

regarding the role of pleadings in an employment tribunal context. He said the following, at paragraph 16:

> "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond."

13. I have reminded myself of the well-known dicta with regard to amendments found in Selkent Bus Co v Moore [1996] IRLR 661. The then president of the EAT noted that whilst the tribunal has a general discretion to grant leave to amend a claim under its case management powers. This is a judicial discretion to be exercised "In a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions." In that case the president produced a non-exhaustive list of relevant factors that a tribunal might be expected to consider with regard to amendments. These are (1) the nature of the amendment, (2) time limits, (3) the timing and manner of the application and (4) the balance of hardship and injustice to the parties.

14. I note that in Vaughan v Modality Partnership [2021] IRLR 97, HHJ Tayler described the core test as being the fourth of those matters. However, of course, he did not seek to say that the other matters had in some way ceased to have relevance. Hence, in due course, I shall consider all four of those matters, but conclude with my analysis of the balance of injustice and hardship in allowing or refusing the application.

15. I was also reminded of what Underhill LJ said at paragraph 48 of Abacrombie v Aga Rangemaster Ltd [2014] ICR 2009 with regard to the importance of looking to see the extent to which an amendment would change the basis of an existing claim or raise new causes of action. He said that this requires:

> "[a] focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and the legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

16. It is trite law now that a claimant may apply to amend a claim form to include a claim which did not exist at the time the claim form was originally presented.

17. Against that legal background, I turn first to consider the nature of the amendments sought. They raise a whole series of new factual allegations, being new alleged instances of harassment by the second respondent, new protected acts and new detriments. The scope of the factual enquiries required will be greatly increased if the amendments are allowed. In particular, a great many more witnesses will have to be involved.

18. I turn next to the timing and manner of the application to amend. The application was made in February 2023, some nine months after the claim

form was originally filed. There is no explanation (despite prompting) for why matters taking place prior to May 2022 were not included within the claim form itself and no explanation why the new detriments said to post date the presentation of the claim form were not the subject of prompt applications to amend.

19. The presence of some of the new allegations (at least in outline) in the letter of August 2022 does not, in my view, assist the claimant. Rather, it begs the question as to why permission to make amendments was not sought at that stage. I reiterate that the claimant was then (as at almost all material times) legally represented.

20. I now turn to the matter of time limits. The claimant accepts that the last act of harassment took place on 09 August 2021 and that matters sought to be added into the claim which took place later on in time are not alleged to be acts of harassment, but to form part of the background narrative. I was not pressed, at this juncture, to see the acts of harassment as being part of a continuing series of acts (for the purposes of section 123 of the 2010 Act). This was, no doubt because of the acceptance that the last act in the sequence took place on 09 August 2021. Hence, the claim, even if based on a series of interrelated acts, would still have been presented outside the primary limitation period.

21. So far as the new allegations of harassment are concerned, the claims in respect of them are sought to be added very substantially outside the primary limitation period. It was not suggested to me that I should consider the impact of the secondary limitation period (based on justice and equity) at this stage. However, had I formed the view, when considering the claim in time points, that the secondary limitation period could properly be invoked, I would have revisited this aspect of my reasoning and conclusions in order to see whether that would have any impact upon the final conclusion reached. In the event, this was unnecessary.

22. With regard to the victimisation claim, the claimant seeks to add not only additional protected acts, but also additional detriments. It is the timing of the acts of detriment to which I must look in order to determine the application of the time limits and not to the timing of the additional protected acts relied upon. However, the dates of the new protected acts (and the evidence required in respect of them) is relevant when looking at the balance of injustice and prejudice.

23. It is to the balance of injustice and prejudice that I now turn. So far as the harassment allegations are concerned there are no documents relied upon. This will be a matter for oral evidence from those concerned. The events took place some years ago and I bear in mind that parliament chose to provide a three month limitation period as found in section 123. A respondent (perhaps, especially an individual respondent) is entitled to know of the claims being brought whilst maters remain fresh in the minds of those concerned. Where incidents such as those relied upon here are in issue, the passage of time makes it much more difficult for the witnesses to recollect not only what happened, but the context in which it happened. For

example, whether the relevant actors met on the day in question will need to be considered and, if so, what happened. I bear in mind that the relevant actors are people quite likely to have had routine dealings on a regular basis. If they did meet (or are likely to have done) the passage of time makes it much more difficult to investigate whether others might be able to provide relevant circumstantial evidence, such as evidence of the behaviour of the parties immediately after their meeting.

24. So far as the harassment and victimisation claims are concerned the factual ambit of the case is very greatly increased by the amendment. This includes the evidence necessary to establish the new protected acts and their link to the allegedly associated detriments . The fact that eight further individuals are named as being participant emphasises that point. I also note that the allegations of detriment are, in the main, put in very general terms even now. For example, the issue which appears at paragraph 13(i) of the draft agreed list of issues relates to named individuals who are said to have interfered in and influenced the police investigation, but no particulars are given of what each of them is said to have done.

25. I consider that the prejudice to the respondents of allowing these amendments will be considerable, conversely the prejudice of the claimant will be much less. She will still have both harassment and victimisation claims (subject, in the former case, to the out of time points I have yet to consider). Indeed, so far as victimisation is concerned, she will be left with her principal detriment which is already set out in the claim form, namely that her temporary promotion was brought to an end. The respondents submitted that this appeared to be her principal detriment, especially when viewed in financial terms, and Mr Malik did not dispute this.

26. In the circumstances, I am not persuaded that it is just to allow the claim to be amended in any of the ways sought and the application to amend is refused.

27. I now turn to the issue of whether the claims for harassment were presented out of time.

28. There is no issue as to their being presented outside the primary limitation period of three months found in section 123. The last incident is agreed to have taken place (if it took place at all) on 17 August 2021, so the claim ought to have been brought by 16 November 2021. It was not brought until 11 May 2022.

29. The claimant is relying on three individual incidents between 21 June 2019 and 17 August 2021. As already noted, the middle incident was in July or August 2020. The alleged incidents involve requests to sleep with the second respondent, slapping the claimant on the bottom, grabbing her bottom and asking to touch and (without consent) touching her breast. I doubt that this could be described as conduct extending over a period (for the purposes of section 123) given the roughly 12 month intervals between incidents. However, I have heard limited evidence with regard to the incidents themselves and their impact on the claimant and so I will proceed

on the basis that the claimant might be able to establish that this was conduct extending over a period. Even then the claim is one presented six months outside of the primary limitation period.

30. Each of the parties recognised that the exercise of the tribunal's discretion to extend time in discrimination cases is the exception rather than the rule (see Robertson v Bexley Community Centre [2003] IRLR 434). Hence, the burden is on a claimant who has presented her claim out of time to convince the tribunal that time should be extended into the secondary limitation period. That secondary limitation period can only be invoked if the tribunal is satisfied that it is just and equitable to extend time in the circumstances of that case.

31. In exercising that "just and equitable" discretion tribunals are encouraged to consider the circumstances of the case generally and, in particular, the factors set out in section 33 of the Limitation Act 1988, in so far as they are relevant to the particular case in question. Those factors are as follows:

    1. The length and reasons for the delay
    2. The extent to which the cogency of the evidence is likely to be affected by the delay
    3. The extent to which the party sued has cooperated with any requests for information
    4. The promptness with which the claimant acted when she knew of the facts giving rise to the cause of action, and
    5. The steps taken by the claimant to obtain appropriate professional advice when she knew of the possibility of taking action.

32. I remind myself, in that context, that the starting point for the consideration of the exercise of the just and equitable jurisdiction is to identify the actual cause of the failure to bring the claim within the primary limitation period (see, for example, Accurist Watches Ltd v Wadher [2009] All ER(D) 189.

33. Hence, I turn first to examine why the claim was made outside the primary limitation period. In her witness statement the claimant identified three reasons for this. First, her health. Secondly, her children's health and the time taken to deal with their needs and problems. Thirdly, not knowing that she could bring a claim.

34. Those reasons fell away in cross examination. Her health and that of her children did not prevent her from carrying out her job and making the complaints which she relies upon as protected disclosures. Her state of health and theirs was the same (roughly speaking) at all material times during her employment and, in particular, when she did bring the claim. Her evidence trying to link the delay to those health matters was unconvincing and I reject it. I accept that both she and her children have suffered from ill health. Although the documentary evidence she has produced relates to more recent times, I accept her evidence that the problems (for her and her children) have persisted for some years. However, those problems did not significantly hamper her bringing a claim.

35. It became clear in cross examination that the claimant knew about the concept of unlawful discrimination and has complained of it herself in the past. She was aware that what she alleged amounted to a sexual assault of which she could complain to the police or in respect of which she could raise a grievance. Despite her initially indicating that she did not know how to raise a grievance, or what a grievance was in practical terms, it became clear that raising a grievance was something that she as a manager had advised others to do. I consider that at all material times she was well able to raise her complaints both internally and to the police had she so chosen.

36. She accepted that insofar as she lacked detailed knowledge of Employment Tribunal procedures, such as how to commence a claim, she could have obtained information on the internet and/or asked a solicitor, which is precisely what she eventually did.

37. In her evidence she said that she was ashamed to raise such matters and feared that raising them would damage her career. Nothing of that appears in her witness statement. I accept that she made a deliberate decision not to complain or to begin proceedings. She was unable satisfactorily to explain to me why she changed her mind and did complain and then began proceedings when she did. The respondents note that it is their case that the true explanation is that her complaints her fabricated and were made only by way of reaction to the withdrawal of her temporary promotion, which she resented. On the material before me, I am unable to reach such a finding. However, I am unable on that evidence to say that the claimant has persuaded me as to her reason or reasons for failing to act earlier or to act when she did. I found her evidence confused and inconsistent. It was insufficient to provide a basis upon which I could make the appropriate findings.

38. The delay in this case is significant. Even if there was conduct extending over a period of time the quality of the available evidence as regards each of the three links in that chain will have been compromised by the delay. As I have already noted, this is a case which will turn on oral evidence from the two alleged participants and from anyone else who might have seen or heard something relevant (for example how the two behaved in the aftermath of relevant meetings). Such evidence is notoriously more difficult to locate, and its quality is likely to be diminished, by reason of the passage of time.

39. So, I am faced here by a significant delay in bringing proceedings impacting adversely on the likely evidence and which delay the claimant cannot satisfactorily explain. She did not act promptly in this case, rather she delayed for reason she does not explain satisfactorily.

40. The claimant could have obtained professional advice much earlier than she did and acted on it. She accepted as much in cross examination. She chose not to do so for reasons she was unable to explain.

41. Parliament chose a three month primary limitation period for such cases as these. Parties are expected to get on with making their claims so as to

enable tribunals to work with the best reasonably available evidence. The claimant chose not to do so.

42. I have considered whether this is one of those cases where the evidence relating to the harassment issues will have to be heard and ruled upon in relation to other issues in the claims which were presented in time. I am satisfied that this is not one of those cases. In so far as the protected disclosures make any reference to past events relevant to the harassment issues, there will be no need for the tribunal to determine the accuracy of what was said. It will be necessary only to establish what was said.

43. In all the circumstances I consider that the harassment claims must be dismissed. The claimant has failed to satisfy me that it is just and equitable to extend time into the secondary limitation period for the claim to be presented. The result is that all claims against the second respondent have been dismissed and that respondent will play no further part in these proceedings.

Employment Judge Andrew Clarke KC

Date: 12.4.2023

Sent to the parties on: 16.4.2023

GDJ
For the Tribunal Office