Case Numbers: 1802988/2024

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EMPLOYMENT TRIBUNALS

Claimant: Mrs K Kaur

Respondent: The Blessed Peter Snow Catholic Academy Trust

HELD AT: **Leeds** **ON:** **26 November 2024**

BEFORE: **Employment Judge JM Wade**

REPRESENTATION:
Claimant: In person, with Mr Singh, husband
Respondent: Mr P Menham, solicitor

Interpreter: Mr Marouf

JUDGMENT

1 It was reasonably practicable for the claimant's allegations of whistleblowing detriment (25 June 2021 to 6 July 2022) to have been presented on or around April 2023. They were not presented until 19 January 2024 and are therefore dismissed.

2 I do not think a time limit of up to and including 19 January 2024 is a just and equitable period for the presentation of the claimant's allegations of race discrimination/harassment (19 and 23 May 2022), and they are also dismissed.

3 The respondent's application to strike out the claimant's unfair dismissal complaint is refused.

REASONS

Introduction, issues, hearing and evidence

1. Today's hearing was for me to decide whether the claimant's race discrimination and protected disclosure detriments were presented in time – the claimant accepted they were not, but asked me to grant a just and equitable extension. It was also arranged to consider whether to strike out or deposit her unfair dismissal claim.

2. There were two allegations of race discrimination;
   2.1. On 19 May 2022 a colleague with children in the claimant's presence repeating twice, "there is a brown cow" in the context of ostensibly delivering phonics teaching;
   2.2. On 23 May 2022 staff displaying a big image of a brown lady in the staff room, "brown bag" wording written on a lunch bag.

3. The allegations of protected disclosure detriment run from 25 June 2021 to 6 July 2022. The allegations run over 16 pages in diary form with some multiple entries in one day with time records. There are around 16 different colleagues named as treating the claimant badly or wrongly. The last allegation is the least clear, being an implication that at or before her interview at another school, "the wrong narrative was spread against me" - we are not told by whom.

4. Acas conciliation commenced on 13 December 2023 and ended on 12 January 2024. The first claim was presented on 19 January 2024 and a duplicate on 21 January 2024.

5. The periods of time beyond the relevant time limits appear to be, for the allegations of race discrimination, some sixteen months, and for the protected disclosure detriment claim, fourteen months or so. I address the reasons for delay below and I heard oral evidence from the claimant about that.

Relevant findings

6. The claimant worked as a teaching assistant at the respondent school from 2019. She had worked at other schools before 2019. She says she only experienced bullying at this school. This school has around fifty or sixty staff, with two classes in each year group I am told, and I infer around three to five hundred children. The staff cohort is diverse with people of many ethnicities and backgrounds – the claimant is not the only person of colour amongst the staff. She has experienced at least two head teachers – she complains about both.

7. The claimant says she experienced worsened bullying from around November 2021, when a teaching assistant, she alleges, lied by saying she had Covid when she did not, had gone home, and her class had then been sent home.

8. The claimant was then herself absent (from late November 2021until February 2022) The notified reason for that absence was back pain, which the claimant says was brought on by the stress of being bullied. The claimant retained her normal pay at that time.

9. From February 2022 until 6 July 2022 the claimant attended school and her case is she experienced further bullying (alleged as whistleblowing detriment and to the extent decsribed above, race harassment or discrimination). She attended an interview for another school on 6 July 2022 and thereafter remained absent from work with the respondent, certified unfit due to mental ill health – anxiety and depression. She was dismissed at a hearing on 14 September 2023, with a confirmatory letter received on or around 20 September 2023.

10. Initially the claimant tried to cope with declining mental ill health with meditation and prayers, but ultimately she was prescribed anti depressant medication by her GP, with her dose increasing from 10mg to 30mg, which she takes today. For the first six months of her long absence, she did not want to leave the house. Thereafter she began to undertake therapeutic activities, gardening, cooking, yoga and exercise. I find these activities commenced from around February of 2023.

11. The claimant had a computer at home in 2022 and at all material times. She has two adult sons (a dentist and a son in financial services on Jersey), a husband who can help her with spreadsheets and the like, another family member who is a teacher, and a supportive GP. She had various appointments made with the respondent's outsourced occupational health clinician (August 2022, January 2023, August 2023). She exhausted all sick pay and statutory sick pay – she did not make any benefits claims either before or after her dismissal.

12. In January 2023 the OH clinician considered the claimant too unwell to complete an assessment and referred her back to her GP and the claimant began to improve with increasing medication and other activities.

13. In March and July and September 2023 the claimant attended Teams meetings to discuss her absence

14. The claimant communicated with the HR advisor for the school at various points. From, at the latest June 2021, the claimant was keeping a diary of events - alleged bullying incidents - which she tells me today the family member, who is a teacher, advised her to complete.

15. The claimant believed she should have her bullying complaints addressed by school and was in dialogue with HR in 2021 and in early 2022 about that – the response says seven members of staff were spoken to at that time by way of informal investigation.

16. The claimant did not raise a formal grievance about her colleagues pursuant to the school's procedure – but she emailed a complaint/chronology of incidents on 3 January 2023 to the school, and HR covering many months before her 6 July 2022 absence.

17. The claimant was told in March 2023 that it had been left to the school to deal with her complaint. There was no formal investigation report or resolution but the claimant believed she must wait for that. HR did not tell the claimant about Tribunals or ACAS. The claimant did not know about the need for an ACAS certificate until her GP told her.

18. The claimant was told about ACAS after she was dismissed (by her GP), and her family helped her to start that process and complete her claim. She did not have the money for lawyers. She had not researched Tribunal claims before that and her family had not done so either.

The Law

19. *Section 18 A of the Employment Tribunals Act 1996 requires that a prospective claimant must provide prescribed information to ACAS before presenting an application to the employment tribunal.*

20. *There is no obligation to engage in early conciliation, merely the need to obtain formal recognition that early conciliation has been considered by the claimant Drake International Systems Limited and others v Blue Arrow Ltd [2016] ICR 445.*

21. Section 48(3) Employment Rights Act 1996 states *"an employment tribunal should not consider a complaint under this section unless it is presented-*

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them; or

(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it is not reasonably practicable for the complaint to be presented before the end of that period of three months."

22. Section 48(3) is subject to the extensions given by virtue of ACAS conciliation where they apply. Section 207B (3) and (4) provide:

"*In working out when a time limit set by a relevant provision expires, the period beginning with the day after Day A and ending with Day B is not to be counted [the stop the clock provision];*

If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period;"

23. "Reasonably practicable" means reasonably doable.

24. Section 123(1) of the Equality Act 2010: "Proceedings on a complaint within section 120 may not be brought after the end of - (a) the period of three 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."

25. The Section 123(1) period is extended by the ACAS conciliation provisions where conciliation is commenced within the relevant time either by the "stop the clock" provisions or providing a further month from the close of conciliation, in a similar way to the provisions affecting other complaints.

26. Equality Act time runs from the date of the alleged discriminatory act (but lack of knowledge is relevant to the grant of an extension) - see Mr GS Virdi v Commissioner of Police of the Metropolis and another [2007] IRLR 24 EAT.

27. The Tribunal also considers "forensic prejudice" in assessing the prejudice to each party from an extension of time - see Wells Cathedral School Ltd v Souter EA 2020 000801 JOJ.

28. Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 makes clear that the Tribunal is entitled to consider the merits of a claim in the exercise of its discretion.

29. The Act confers the widest possible discretion on the Employment Tribunal in determining whether or not it is just and equitable to fix a different time limit

Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640. That said the power of the Tribunal is a discretion, to be exercised judicially, assessing relevant factors and the weight to be given in each case. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.

30. If there are circumstances which would otherwise render it just and equitable to extend time, the length of extension required is not of itself, a limiting factor unless the delay would prejudice the possibility of a fair trial see Afolabi -v-Southwark LBC 2003 EWCA Civ 15.

31. In exercising discretion under the Section 123 (1)(b) case law has also established that the Tribunal must consider the length of, and reasons for, delay, and must consider the prejudice to both parties.

32. Section 33(3) of the Limitation Act 1980 contains a helpful list of other matters which might need to be considered (in personal injury and other claims with longer time limits), but also for the Tribunal to bear in mind if relevant:
the extent to which the cogency of the evidence is likely to be affected by the delay;
the extent to which the party sued had cooperated with any requests for information;
the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Conclusions

33. Applying the law to the circumstances above:

33.1. In assessing reasonable practicability, I consider whether it is reasonable to have no knowledge that a Tribunal can determine allegations of whistleblowing detriment or discrimination – which was one of the claimant's reason to delay.

33.2. I do not consider it is reasonable. Ordinary life is awash with education about diversity and whistleblowing and headline news items often appear on these subjects. One of the incidents the claimant describes allegedly happened after an assembly focussing on diversity. Schools are an environment where procedures on safeguarding and speaking up - whistleblowing – are typically the subject of training.

33.3. It may be that the claimant was isolated from ordinary life through her period of illness, but she was not isolated before that, when the alleged incidents were impacting her, and her family were not so isolated – her husband works in customer services and her sons in regulated environments, and another family member in teaching, all part of normal life.

33.4. The claimant's teacher family member telling the claimant to keep a diary of incidents was for the purpose of a grievance or Tribunal claim – it was not advice given in therapy for example.

33.5. If it was reasonably doable for the claimant's family to advise her to document all events, it was reasonably doable for them (or the claimant when well February to July 2022, or after her health began to improve from February 2023 to do some basic research on Tribunal claims and to know that a claim could be presented, and that time limits apply.

33.6. That is not the same as saying that it was doable for the claim to have been presented by the claimant within three months of 6 July 2022 – or that period plus an ACAS extension. The claimant needed to have capacity, both in the legal sense but also in the lay sense – the will and the energy to start a claim, had she understood it was doable and that time limits applied.

33.7. The claimant told me that for six months from July 2022 she really was unable to do very much and remained in the house. That is supported by the occupational health physician saying she was too unwell to take part in an assessment in January of 2023.

33.8. The claimant did then start to take part in teams meetings, and other activities, and she understood in March 2023 that there had been no progress by the employer on her January complaint.

33.9. The claimant's position was that the respondent's HR adviser should have told the claimant about ACAS and Tribunal claims and time limits – with the implication being that if they had done, she would have presented her claim sooner.

33.10. This is not a case where the claimant has been misled about Tribunal time limits or ACAS – the respondent not giving information does not amount to misleading, such that it was not reasonably practicable for the claimant to have understood these matters.

33.11. Contact to ACAS and submitting a claim on line are not onerous tasks, particularly when the claimant already had her diary/complaint, the like of which she had submitted to the employer.

33.12. Not having lawyers is also not a matter which renders it not reasonably practicable for the claim to have been submitted – many litigants in person do submit claims of this kind – and most are submitted within the appropriate time limits.

33.13. In all these circumstances the further period within which it was reasonably practicable to present the detriment allegations, was, at the latest, by the end of April 2023.

33.14. I have not struck out the allegation of whistleblowing dismissal. In those circumstances I should, for completeness record that it is not in dispute the claimant's dismissal was undertaken by a panel, none of whom were colleagues of the claimant against whom the claimant makes detriment allegations. There is no arguable case of the dismissal being the last act in a series of acts with that earlier colleague treatment.

33.15. The nature of the detriment complaints is that some are comprehensible and possibly arguable – a suggestion that the claimant was labelled "a snake" by some colleagues – but many appear extraordinary and unlikely. One of those discussed today highlights the nature of them – that a colleague running an art class would bring paintings smelling of breach to dry in the room where the claimant was working because the colleague knew the claimant hated bleach, and knew of the disclosures and was acting on the ground of them.

33.16. In all these circumstances the detriment complaints are dismissed for the reasons above.

33.17. In being asked to exercise discretion in for the purposes of a Section 123(1)(b) time limit, I bear in mind my findings on reasonable practicability above. The claimant believed her colleagues were bullying her mainly because of whistleblowing. She was advised to keep a diary and she included in that a number of incidents where there was some use of the word "brown" in a school context. When asked to identify which of the long diary of incidents were alleged as race discrimination/harassment, she identified the two above. For today she narrowed it to the first one, but I proceed on the basis of both being alleged.

33.18. The claimant became very unwell in July 2022, these events were in May 2022. I discount the window of opportunity for an in time race discrimination claim in June of 2022. In light of my comments on reasonable practicability above, I consider the extension of time the claimant asks of me should take into account that I do not consider she was in a position to submit a claim until April of 2023.

33.19. In deciding whether to extend time to 19 January 2023, I do take account of the forensic prejudice and whether there could be a fair trial – for the claimant and the two colleagues involved in the race related allegations above. These events occurred after the respondent had (relying on its pleading) earlier spoken to 7 colleagues informally. There is unlikely then, any evidence taken at the time about these events, and when giving evidence for a hearing all parties memories are likely to be challenged. The claimant's dismissal case included that the respondent failed to investigate her complaint when it could have done, in January 2023, and that should not be to its advantage when I assess matters. That is a fair point, which I weigh.

33.20. I also weigh the strain on teachers and teaching assistants of allegations of this kind and having them made substantially a long time after the incidents in question – which is not their fault, if the employer did not investigate when it could have done.

33.21. I also take account of the difficulties, evidentially, for the claimant in these allegations, which even if made out in fact, have likely "reasons why" they are not discriminatory or do not amount to harassment. The prejudice in not being permitted to advance a difficult claim is less than that of being able to advance a strong claim, recognises that appearances on the merits at an early stage can be unreliable.

33.22. In the round I do not consider justice and equity are served by an extension to permit this Equality Act claim – the length of the extension is one matter, but ultimately, balancing prejudice, I do not consider the prejudice to the claimant, recognising her main dismissal claim is proceeding, justifies a departure of the length required, from the time limit which parliament set and which most litigants, including those in person, are required to meet.

33.23. For those reasons these complaints are also dismissed.

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JM Wade
Employment Judge JM Wade
26 November 2024

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