EMPLOYMENT TRIBUNALS

Claimant: Mrs J Lamb

Respondent: Sheffield City Council

HELD AT: Sheffield by CVP **ON: 29 March 2021**

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimant: **In person**
Respondent: **Ms R Mellor, Counsel**

JUDGMENT having been sent to the parties on 7 April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are provided at the request of the claimant.
2. Before presenting her claim form to the Tribunal (which she did on 9 June 2020) the claimant entered into a period of early conciliation through the offices of ACAS. In the majority of cases that come before the Employment Tribunal, early conciliation is a mandatory step as required by the Employment Tribunal's Act 1996. The claimant commenced early conciliation on 16 March 2020. The period of early conciliation ended on 28 April 2020. The claimant was issued with an early conciliation certificate that day (reference number R129254/20/32).
3. On 6 July 2020, the respondent presented their notice of appearance. When the claimant's claim form was sent to the respondent it was accompanied by a notice that there was to be a preliminary hearing for the purposes of case management to be held on 13 August 2020.

4. The matter came before me that day. It was identified that the claimant was bringing the following complaints under the Equality Act 2010:

   4.1. Direct discrimination upon the grounds of the protected characteristic of age; and

   4.2. Harassment related to the protected characteristic of age.

5. The respondent took a point that the Tribunal has no jurisdiction to consider the claimant's complaints because they were presented outside the time limits provided for in section 123 of the 2010 Act. The respondent's case was that at the height of the claimant's case the discriminatory course of conduct ended on 18 November 2019. The claimant said that the course of conduct upon which she relied only ended on 21 January 2020 and hence her claim had been presented in time.

6. I therefore listed the case for a public preliminary hearing to decide the issues set out in paragraph 2 of the Order which I caused to be sent to the parties on 20 August 2020. It is worth reciting the wording of paragraph 2 in these reasons.

   6.1. Upon the assumption (without making findings of fact that such is the case) that there was a continuing course of conduct up to and including 18 November 2019, did that course of conduct extend past that date to 21 January 2020.

   6.2. If the answer to the first question … is "no", then is it just and equitable for the Tribunal to extend time to vest the Tribunal with jurisdiction to consider the claimant's complaints under the 2010 Act?

   6.3. *Is the communication and correspondence between the parties referred to upon page 14 of the claimant's claim statement between 26 November 2019 and 21 January 2020 excluded from evidence because it attracts without prejudice privilege and may only be admitted in evidence if each side consents to disclosure.*

7. The significance of 18 November 2019 is that it was upon that date that the respondent communicated the outcome of an appeal raised by the claimant against the respondent's findings upon a grievance which she lodged on 26 September 2018. The outcome of the grievance investigation was communicated to the claimant on 22 August 2019.

8. For today's purposes, the Tribunal assumes (but without finding it to be the case) that there was a discriminatory course of conduct up to and including 18 November 2019. If the respondent is correct to say that nothing which occurred after that day constitutes discriminatory conduct (or harassment) then they will be correct in their submission that the claim was presented outside the relevant limitation period in section 123 of the 2010 Act.

9. By section 123 of the 2010 Act, proceedings may not be brought after the end of the period of three months starting with the date of the act to which the claim relates or such other period as the Employment Tribunal thinks just and equitable. Conduct that extends over a period is to be treated as done at the end of the period. For the purposes of this preliminary hearing, therefore, it is to be assumed in the claimant's favour that the conduct of which she complains (which she contends to be direct discrimination upon the grounds of age and harassment related to age) lasted until 18 November 2019 at the earliest.

10. If the respondent is correct to say that nothing which occurred after that date constitutes further conduct that extends the period, then the claim has been presented outside of the relevant time limit. The claimant needed to have commenced early conciliation by 17 February 2020 and then entered her claim form within three months of 18 November 2019 (together with the addition of the period of time spent in early conciliation).

11. The question that arises therefore is whether the course of conduct which the claimant complains as constituting discrimination or harassment contrary to the 2010 Act continued after 18 November 2019. The claimant's case is that the course of conduct continued beyond 18 November 2019 and went on until 21 January 2020.

12. I interpose here to observe that in the hearing bundle presented to me today, there was an email from the claimant's trade union representative to the respondent dated 29 January 2020 (page 354). This email was sent on behalf of the claimant and communicates to the respondent the rejection by the claimant of an offer to settle her case. The respondent is told that the matter would then proceed through the respondent's managing attendance process. The claimant commenced a period of long term sickness absence from work on 2 January 2019 due to work related stress. Her absence was being managed under the respondent's managing attendance policy.

13. I invited submissions from the parties as to whether the letter from the claimant's trade union representative of 29 January 2020 in fact extended, on her case, the continuing act beyond 21 January 2020. Ms Mellor, the respondent's counsel, maintained that 21 January 2020 was the correct date, that being the last act on the part of the respondent over the course of the relevant period between November 2019 and January 2020. The email of 21 January 2020 is at page 348.

14. I agree with Ms Mellor that 21 January 2020 is the correct date which has been identified as the end point of the continuing course of conduct (upon the claimant's case). The respondent did nothing further after 21 January 2020. I cannot see how the claimant can extend the period of the continuing act by reference to something that she or her representative did (as opposed to an act or omission on the part of the respondent).

15. Having considered what transpired between 18 November 2019 and 21 January 2020 I am satisfied that there was nothing which may constitute an act of discrimination or harassment upon the part of the respondent. Ms Mellor drew my attention to the case of ***South Western Ambulance Service NHS Foundation Trust v King*** [UK EAT/0056/19]. HHJ Choudhury (President) said, at paragraph 36, that it was for the claimant to *"establish constituent acts of discrimination or instances of less favourable treatment that evidence discriminatory state of affairs. If such acts or instances cannot be established, either because they are not established on the facts or are not found to be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs".*

16. Earlier, at paragraph 33, he said, *"if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act. If a Tribunal considers several constituent acts taking place over the space of a year and finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over the year. To hold otherwise would be … to render the time limit provisions meaningless. This is because the claimant*

could allege that there is a continuing act by relying upon numerous matters which either did not take place or which were held not to be discriminatory".

17. In this case, the conduct between 18 November 2019 and 21 January 2020 consisted only of correspondence aimed at settling the dispute between the parties. It is not necessary for me to go into any great detail about the content of the correspondence. The claimant's case was that the correspondence was not properly classed as without prejudice because it had not been marked as such. However, the absence of the words *"without prejudice"* will not be fatal if there are negotiations going on between parties with a view to resolving an existing dispute.

18. I am satisfied here that a dispute has arisen between the parties about the claimant being passed over for two job opportunities and acts of allege harassment and that genuine efforts were being made on both sides to resolve the matter. That the correspondence was not marked 'without prejudice' does not mean that the correspondence does not have that characteristic. In fact, some of the correspondence was marked *"protected conversation"*. This is a reference to the language to be found in section 111A of the Employment Rights Act 1996. This was a misnomer because the claimant was pursuing complaints under the 2010 Act to which section 111A of the 1996 Act does not apply. Whatever labels may or may not have been attached to the correspondence the fact is that it is clear that the parties were in negotiations over an existing dispute and therefore the correspondence attracts without prejudice privilege.

19. Where without prejudice doctrine applies to communications, it is possible for the parties to agree to waive the privilege. Waiver requires the agreement of both parties. In this case, the respondent does not agree to waive privilege. Therefore, the correspondence is inadmissible. *(I observe that I, of course, have seen the without prejudice correspondence. It is, in my judgment now correct for me to recuse myself from any subsequent hearings in this case. The parties must ensure that reference to without prejudice correspondence and copies of that correspondence are not before the Employment Tribunal upon future occasions).*

20. There is an exception to the general proposition that a Tribunal will generally refuse to hear evidence where the without prejudice rule applies. The protection of the without prejudice rule may be removed in cases where the rule otherwise serves as a cloak for unambiguous impropriety. In short, the court will not protect a party who has abused the privilege usually afforded by the without prejudice rule. In employment cases, an unambiguous impropriety is most commonly asserted where the without prejudice rule would otherwise exclude evidence of alleged discrimination or victimisation. However, nothing in the correspondence between 18 November 2019 and 21 January 2020 comes close to being unambiguous impropriety upon the part of the respondent.

21. It follows therefore that the course of conduct of which the claimant complains ends on 18 November 2019. That being the case, the claim was presented outside the time limit provided for by section 123 of the 2010 Act. The claimant should have acted, as I have said, on or before 17 February 2020. She did not commence mandatory early conciliation until 16 March 2020 by which time the claim was already out of time. If she had commenced mandatory early conciliation on or around 17 February 2020 then, assuming the same six weeks' period spent in early conciliation, the claimant's complaint should have been presented to the Employment Tribunal around 28 April 2020. (I calculate this by reference to early conciliation lasting for 42 days from 17 February 2020 until 28 March 2020. The

claimant would then have until 28 April 2020 to present the claim to the Employment Tribunal). Upon this basis, the claimant's claim was presented approximately six weeks out of time. (That is to say, 42 days from 28 April to 9 June 2020).

22. Employment Tribunals have a wide discretion to allow an extension of time under the *"just and equitable"* test in section 123. However, this does not necessarily mean that the exercise of the discretion is a foregone conclusion. Indeed, the Court of Appeal made it clear in ***Robertson v Bexley Community Centre trading as Leisure Link*** [2003] IRLR 434, CA, that when Employment Tribunals consider exercising the discretion to extend time there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, the Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. The onus is therefore on the claimant to convince the Tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

23. Section 123 of the 2010 Act does not set out any list of factors to which a Tribunal is instructed to have regard in exercising the discretion whether to extend time for just and equitable reasons.

24. In ***British Coal Corporation v Keeble and Others*** [1997] IRLR 336 EAT it was suggested that in determining whether to exercise discretion to allow the late submission of a discrimination claim, Tribunals would be assisted by considering the factors listed in section 33(3) of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached and to have regard to all of the circumstances of the case, 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 for information; the promptness with which the claimant acted once they knew of the facts giving rise to the course of action; and the steps taken by the claimant to obtain appropriate advice once they knew of the possibility of taking action.

25. Jurisprudence following ***Keeble*** has emphasised that there is no requirement for the Tribunal to slavishly adhere to the section 33(3) factors. There will be no error of law by failing to consider the matters listed in section 33(33) when considering whether it is just and equitable to extend time provided the Tribunal leaves no significant factor out of account in exercising its discretion. The checklist in section 33(3) should not be elevated into a legal requirement but should be used as a guide. The factors in section 33(3) serve as a valuable reminder of what may be taken into account but the relevance of them depends upon the fact of each individual case.

26. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23 Underhill LJ cited with approval the Judgment of Leggatt LJ in ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640. Here, Leggatt LJ said (in paragraph 19) that, "*the factors which are almost always relevant to consider when exercising any discretion whether to extend time are:*

(a) The length of, and reasons for, the delay and

(b) Whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

27. In ***Abertawe*****,** the Court of Appeal rejected the proposition that in the absence of an explanation from the claimant as to why they did not bring the claim in time and an evidential basis for that explanation, the Tribunal could not properly conclude that it was just and equitable to extend time. The Court of Appeal held that the discretion under section 123 of the 2010 Act for a Tribunal to decide what it thinks to be just and equitable is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard. However, there is no requirement for a Tribunal to be satisfied that there was a good reason for the delay before it can conclude that it is just and equitable to extend time.

28. A Tribunal will fall into error when considering whether it is just and equitable to extend time if the focus is simply upon whether the claimant ought to have submitted their claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent. Of course, some prejudice will always be caused to the employer if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than that.

29. I agree with Ms Mellor's submission that the respondent's letter of 8 November 2019 (in fact received by the claimant on 18 November 2019) had such finality about it that the claimant should have been placed on notice that time started to run should she wish to pursue the matter further. The air of finality was because of the words towards the end of the letter informing the claimant that the decision upon the grievance appeal *"is final and there is no further right of appeal".*

30. Upon receipt of the letter, the claimant instructed her trade union to seek to negotiate a settlement of the dispute with what is commonly known these days as an exit package. As we have seen, the negotiation concluded with the claimant's rejection of an offer from the respondent. The date of the claimant's rejection was 29 January 2020.

31. The negotiations therefore failed at the end of January 2020. At that point, the claimant's claim was still in time, the course of conduct ending on 18 November 2019.

32. The claimant was asked by Ms Mellor what action she took from the end of January 2020 and whether she sought advice from the trade union about what to do next. The claimant said that she contacted ACAS for advice. Although the trade union's help was still available, the claimant did not seek to avail herself of further trade union advice and assistance with the pursuit of the matter before the Tribunal. It appears very much as if the trade union's involvement fizzled out at this stage. The claimant said that she was "*not functioning like I normally would do".*

33. In her witness statement (in the first bundle commencing at page A1) the claimant said that she approached ACAS on 25 March 2020. She says that she was told

that her claim was still in time. Presumably, ACAS gave her this advice upon the basis of the claimant's contention that the course of conduct only ended at the end of January 2020 and not, as I have determined, on 18 November 2019. On the facts as I have found, the claimant contacted ACAS after the expiry of the limitation period.

34. It follows therefore that the claimant cannot, and does not, seek to blame either her trade union or ACAS for the late filing of her claim. An Employment Tribunal's discretion to extend time in discrimination cases may extend to a consideration of incorrect advice given to the claimant. There have been cases where a complainant's reliance upon incorrect advice has been found to justify an extension of time upon the basis that the advisor's fault should not be visited upon the complainant. There is authority for the proposition that the claimant should not be disadvantaged in such a circumstance because of the fault of the advisors for otherwise the respondent would be in receipt of an unjustified windfall. That situation does not arise in this case.

35. The claimant's view of matters, and the time that she had to present her case, was predicated entirely upon her mistaken belief that the correspondence after 18 November 2019 formed part of the continuing course of conduct. In my judgment, the claimant's ignorance of the fact that time started to run against her on 18 November 2019 was reasonable. The question of when time starts to run is not an easy one to discern even for skilled lawyers. What is and is not a continuing act of discrimination is not straightforward dichotomy. One only has to look at the extensive jurisprudence upon this issue which has vexed employment tribunal, the Employment Appeal Tribunal and the Court of Appeal down the years. Indeed, the matter came before HHJ Choudhury in the case of ***King*** which I mentioned earlier. His Judgment, following a detailed and careful consideration of the jurisprudence, was that there was in fact no continuing course of conduct upon which the complainant in that case could rely such as to bring the complaint within time. Nonetheless, he remitted the case to the Employment Tribunal to consider whether it would be just and equitable to extend time to vest the Tribunal with jurisdiction to consider the case.

36. I also take into account the claimant has been on long term sickness absence since January 2019. This has, as she accepted, impaired her ability to deal with matters as diligently as she otherwise may have done.

37. There is nothing to suggest that the cogency of the evidence would be affected by the claimant's delay of around six weeks. A key witness, Michelle Houston, left the respondent's employment in September 2020. Maxine Stavrinakos, the respondent's head of neighbourhood intervention and tenant support (from whom I heard evidence) told me that the respondent is in touch with Michelle Houston. She is contactable and remains local. Understandably, there was some reluctance upon the part of the respondent to contact Michelle Houston but this arises from issues which are nothing to do with the claimant. That sensitivity is not something which should be weighed in the balance against the claimant upon a consideration of whether it is just and equitable to extend time.

38. The evidence of Ms Stavrinakos and Kim Beckett, HR consultant, is that the respondent's operations have been rendered more difficult by reason of the pandemic. Therefore, demands upon the respondent's management are significant and limits the time which may be devoted to dealing with additional work generated by the claimant's Employment Tribunal claim.

39. I do not find this a convincing reason to refuse to extend time. I, of course, accept the difficulties created by the pandemic. Nonetheless, the respondent may face an Employment Tribunal claim at any time. That is a vicissitude of the respondent's operation as a large employer.

40. Absent any specific evidence of prejudice, I am not persuaded by this argument which in my judgment amounts to a little more than an assertion that it will be inconvenient for the respondent to deal with the claimant's complaint.

41. I take into account that the respondent took from 26 September 2018 to 18 November 2019 to deal with the claimant's grievance and grievance appeal. The six weeks' delay in the claimant's presentation of the claim is therefore relatively insignificant. Had the internal process been undertaken quicker then it may have been possible for the case to be heard before the pandemic struck.

42. In conclusion, therefore, the length of the delay upon the part of the claimant is short. The delay after 18 November 2019 was attributable entirely to her not appreciating that the continuing course of conduct of which she complains did not extend beyond 18 November 2019. In my judgment, it was reasonable for her to think that the without prejudice communication up to 21 January 2020 was part of the continuing course of conduct. While the claimant did not perhaps exhaust the enquiries which she could have done (particularly with her trade union) I take into account her mental state at the time as evidenced within the medical materials within the bundle. The cogency of the evidence is unaffected. There was a significant delay upon the part of the respondent in pursuing the internal processes.

43. To refuse to extend time would be to drive the claimant from the judgment seat. In these circumstances, this would be a harsh result. In reality, the only prejudice to the respondent is having to meet the claim. When taking into account the claimant's explanation for the delay and the balance of prejudice, it is just and equitable to extend time to vest the Tribunal with jurisdiction to consider the claimant's claims.

44. Accordingly, the Tribunal extends time to 9 June 2020.

Employment Judge Brain

Date 29 April 2021