THE EMPLOYMENT TRIBUNALS

Claimant: **Ms S Kelly**

Respondent: **(1) Providence Row Housing Association**
(2) Single Homeless Project

Heard at: **East London Hearing Centre**

On: **20 November 2019**

Before: **Employment Judge Gardiner**

Representation

Claimant: Ms M Oghanna, Solicitor

Respondent: (1) Ms L Hatch, Counsel
(2) Ms V Brown, Counsel

JUDGMENT

1. The Tribunal has no jurisdiction to consider the claim against the Second Respondent on the grounds that it was issued outside the statutory time limit and it would not be just and equitable to extend time. Accordingly, the claim is struck out.

2. The Tribunal has no jurisdiction to consider claims against the First Respondent apart from the unfair dismissal claim under Section 94 Employment Rights Act 1996 and the claim that the Claimant's dismissal was an act of victimisation contrary to Section 27 Equality Act 2010.

3. No deposit order is made as a condition of the Claimant continuing to advance the remaining claims.

REASONS

Introduction

1. On 15 July 2019, Employment Judge Warren listed an open Preliminary Hearing for 20 November 2019. He directed that the issues to be considered were

whether any of the Claimant's claims should be struck out for being out of time or whether a deposit order should be made in respect of any of the Claimant's claims on the grounds that they have little prospect of success.

2. At this Preliminary Hearing, the Claimant was represented by Ms Oghanna, Solicitor. The First Respondent was represented by Ms Hatch of Counsel and the Second Respondent by Ms Brown of Counsel. All three representatives had prepared skeleton arguments setting out their respective contentions on the time limit issues and on whether a deposit order was appropriate. The Tribunal has considered the points made in those documents, and the cases referred to.

3. Although the hearing was listed for a short Preliminary Hearing, there was a bundle of documents that ran to 846 pages. The Tribunal's understanding was that this had been prepared in anticipation of a Final Hearing on all issues. Limited reference was made to the contents of this bundle in the course of argument.

4. At the Preliminary Hearing the Claimant gave oral evidence, confirming her 11 page long signed witness statement, dated 13 November 2019, and answered questions in cross examination.

Overview of claims

5. The First Respondent provides social housing and support services to the homeless. The Claimant, described in the ET1 claim form as a Black British woman, was employed by the First Respondent as a Criminal Justice Link Worker from 8 May 2014 until her dismissal with effect from 4 January 2019. She was seconded to the Second Respondent from 4 June 2014 until 18 October 2017. The Second Respondent is a registered charity working to prevent homelessness.

6. These proceedings were issued on 27 March 2019. In the proceedings, the Claimant alleges that her dismissal was an unfair dismissal by the First Respondent. It is common ground that this unfair dismissal claim has been issued within the statutory time limits and will need to be determined on its merits, although the First Respondent argues it should be the subject of a deposit order.

7. So far as the discrimination claims are concerned, similar legal complaints are made in relation to both Respondents, although the factual details vary.

8. In relation to the First Respondent, the Claimant alleges one act of racial harassment contrary to Section 26 of the Equality Act 2010 because of her colour. That alleged act of harassment relates to a meeting on 17 August 2017 with the Second Respondent when the Claimant says that the First Respondent failed to provide her with support. In addition, relying on the same incident, she alleges that it amounts to direct race discrimination, contrary to Section 13 of the Equality Act 2010. Further, she advances a claim of victimisation contrary to Section 27 of the Equality Act 2010. The two acts of detriment alleged against the First Respondent as acts of victimisation are said to be a comment made at some point between 12 October 2017 and 18 October 2017, and her dismissal

decision communicated to her either in the meeting on 13 November 2018 or in the subsequent outcome letter on 18 November 2018. The First Respondent argues that all complaints, are outside the statutory limitation period; and therefore that that the tribunal has no jurisdiction to consider those complaints.

9. In relation to the Second Respondent, the Claimant advances three allegations of racial harassment because of her colour, contrary to Section 26 of the Equality Act 2010. The same allegations are also said to be acts of direct race discrimination. The last of the allegations relates to what was said at a meeting on 14 August 2017, although the date of that meeting is disputed, with the Second Respondent putting the date of the meeting as 21 August 2017. In addition, the Claimant advances one allegation of victimisation, which dates from October 2017.

The discrimination issues in detail

10. The issues were agreed to be as follows:

Harassment – Section 26 of the Equality Act 2010

1. Did the Respondents engage in unwanted conduct related to the Claimant's race which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant ?

2. The Claimant alleges that the following conduct occurred and amounted to harassment :

a. Allegation 1 : the Claimant was racially abused by a client (PV) of the Second Respondent, who called the Claimant "*a stupid fucking nigger*" and informed management of this on the day of the incident, on 4 January 2017. Management did not take action for several months.

b. Allegation 2 : the Claimant alleges that PV was invited into the main part of the office on several occasions, where the Claimant was working, despite the Claimant being told that PV would not be invited there, one such occasion was recorded on 30 March 2017;

c. Allegation 3 : at a team meeting allegedly held on 14 August 2017, the Claimant alleges that an employee of the Second Respondent and the Link Worker for PV (RG) stated "*God forbid she has a brown baby*". The Claimant immediately informed RG whilst at the meeting that the comment has offended her and made her feel uncomfortable. Employees of the Second Respondent who were more senior to the Claimant (namely, Alison Bearn, Lucy Watson, Aoife Drury and other members of the Claimant's team working for the Second Respondent) did not respond to the Claimant's statement. The Claimant then stated to management in the meeting that she felt unsupported when raising issues of harassment, similar to the lack of support she received following the incident of 4 January 2017. The manager of the Second

Respondent (AB) then stated to the Claimant "*what more do you want us to do about it*".

d. Allegation 4 : the Claimant arranged a meeting with Angela Williams, Senior HR Adviser of the First Respondent, and Katie Hymas, Interim HR Adviser of the First Respondent, to discuss her complaint in relation to events alleged to have taken place on 14 August 2017 and the Second Respondent's failure to respond appropriately. A meeting was held on 17 August 2017 (with the First Respondent). However, the HR team of the First Respondent failed to provide any support to the Claimant at this meeting in relation to the Claimant's original complaints. The meeting instead focused largely on how the First Respondent no longer required the role that the Claimant was originally hired for, with the First Respondent offering an alternative employment option, which was not comparable to the Claimant's original role.

Race Discrimination – Section 13 of the Equality Act 2010

3. Did the First Respondent and/or the Second Respondent treat the Claimant less favourably than they treat or would treat others because of her race by the treatment detailed in 2(a)-(d) above ?

Victimisation – Section 27 of the Equality Act 2010

4. Did the First Respondent and/or the Second Respondent subject the Claimant to a detriment because of the complaints raised by the Claimant on 4 January 2017 and 14 August 2017 which the Claimant relies upon as protected acts. The Claimant alleges that the following matters constituted detriment:

a. The Second Respondent's decision to investigate alleged misconduct (inter alia false expenses claims and falsification of records) and in particular :

i. By inviting the Claimant on 12 October 2017 to a disciplinary meeting on the 18 October 2017 allegedly without prior explanation that it was a disciplinary meeting and serving on the Claimant an oral notice of termination at the meeting on 18 October 2017;

ii. When the Claimant contacted the First Respondent in advance of that meeting, the First Respondent's denial of said meeting and the reason for it, made on or about 17 October 2017. In particular, the First Respondent's denial of prior knowledge of the Second Respondent's disciplinary investigation denied the Claimant any assistance in relation to the meeting on 18 October 2017.

Law on time limits

11. Section 123 of the Equality Act 2010 is worded as follows :

1. Proceedings on a complaint brought 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
2. ….
3. For the purposes of this section _
    a. Conduct extending over a period is to be treated as done at the end of the period;
    b. Failure to do something is to be treated as occurring when the person in question decided on it.

12. Under Section 123 of the Equality Act 2010, proceedings on a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. The three-month time for bringing Tribunal proceedings is paused during early conciliation such that the period starting with the day after early conciliation is initiated and ending with the day of the early conciliation certificate does not count (Section 140B(3), Equality Act 2010). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (Section 140B(4), Equality Act 2010).

13. Where there is more than one early conciliation certificate, the act of initiating early conciliation a second or subsequent time does not affect the time limits that apply, because the second certificate has no validity (see *Commissioners for HM Revenue & Customs v Garau* [2017] ICR 1121 at para 51).

14. Conduct extending over a period is to be treated as done at the end of the period (Section 123(3) Equality Act 2010). There is conduct extending over a period if there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts. If so, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (*Metropolitan Police Commissioner v Hendricks* [2003] ICR 530). However, if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act (*South Western Ambulance Service NHS Foundation Trust v King* UKEAT/0056/19 at paragraph 33).

15. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers just and equitable. Considering a claim brought outside the three-month time limit (as extended by the early conciliation provisions) is the exception rather than the norm. Time limits are exercised strictly in employment and industrial cases. The onus is on the Claimant to establish that it is just and equitable for time to be extended (paragraph 25 of *Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] IRLR 434, CA).

16. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced

the Respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at paragraph 19). However :

> There is no … 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 of 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 (*Abertawe* at para 25)

17. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

18. It will frequently be fair to hold Claimants bound by time limits which they could, had they taken reasonable steps, have discovered. If the delay in issuing proceedings has been caused by the fault of an adviser, this is a potentially relevant factor that potentially excuse a failure to issue proceedings in time, or a delay in issuing proceedings thereafter (*Hunwicks v Royal Mail Group plc* EAT 0003/07; 20 March 2007 per Underhill J at paragraphs 9 and 13). However, to be a relevant factor, the bad advice must have been the reason for the delay.

19. Awaiting the outcome of an internal grievance procedure before making a complaint is just one matter to be taken into account by a tribunal considering the late presentation of a discrimination claim (*Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713, CA per Peter Gibson LJ at p719).

Time limits in relation to the Second Respondent

20. It is appropriate to deal with the claim against the Second Respondent first, given that the last of these claims is earlier in time.

21. The acts of harassment and direct discrimination alleged against the Second Respondent occurred (1) in January 2017 (2) during the period from January 2017 until the end of the secondment in October 2017 and (3) at the team meeting said to have occurred in August 2017. The only act of victimisation dates from October 2017.

22. Early Conciliation in relation to the Second Respondent was initiated on 8 November 2017 and the Early Conciliation Certificate was issued on 22 December 2017.

23. Assuming in the Claimant's favour (for the purposes of this issue, without deciding the point) that there was conduct extending over a period until 18 October 2017 in relation to the harassment claims, the three-month time period in relation to a complaint about that period would 17 January 2018. By reason of Section 140B(4), it is extended to the date one month after the end of Early Conciliation. This extends the deadline for issuing proceedings until 22 January 2018. When proceedings were issued on 27 March 2019, the proceedings were over 14 months out of time.

24. Therefore, the Tribunal can only consider the claims against the Second Respondent if it would be just and equitable to do so.

25. Applying the legal principles set out above, the Tribunal's conclusion is that it would not be just and equitable to extend time to enable the claims against the Second Respondent to be determined on their merits, for the following reasons:

a. In her witness statement, the Claimant states (at paragraph 5.11) that she first began to feel she was being treated less favourably by the Second Respondent following the 4 January 2017 and the 14 August 2017 incidents. The tribunal infers therefore she did or ought to have realised that she had a potential discrimination claim at the time, or at least sought advice about this;

b. She did seek advice in relation to potential claims from the Mary Ward Clinic in late 2017, who advised her about time limits before the time limits were due to expire;

b. The Claimant subsequently had some assistance in April 2018 from a volunteer legal adviser (see witness statement, paragraph 9.1), who was sufficiently involved in the Claimant's affairs that she attended the Claimant's second grievance meeting conducted by the First Respondent in July 2018;

c. The only explanations provided by the Claimant in her witness statement to excuse the delay in issuing Tribunal proceedings against the Second Respondent are:

i. that she chose to follow the internal grievance procedure against the First Respondent (witness statement, paragraph 12.3);

ii. that the alleged misconduct investigation concerning his secondment with the Second Respondent was not concluded until February 2018 (paragraph 12.4);

iii. that the subsequent deterioration in her health that had commenced in early 2018 precluded her from issuing her tribunal claim before 27 March 2019 (paragraph 12.4);

iv. she did not have access to legal advice until after 17 January 2018 and the focus of the legal assistance was on the internal grievance procedure. The legal adviser advised her about bringing a claim in the employment tribunal against the First and Second Respondents only after she was dismissed (paragraph 12.5). In evidence she clarified that she went to the Whitechapel Citizens Advice Bureau for this advice at that point, where her adviser was Kevin Jones.

d. These explanations are some explanation to justify a delay in issuing proceedings, although not sufficiently persuasive reasons here, given the extent and the impact of the delay. The lack of positive encouragement by her legal adviser at the Whitechapel CAB that she should issue immediate

tribunal proceedings is a modest factor in her favour, although made less significant by her earlier involvement with the Mary Ward Clinic;

e. Prompted by advice from the Mary Ward Clinic, she had contacted ACAS in late 2017. She had obtained an ACAS Early Conciliation Certificates naming the First Respondent and Second Respondents as prospective Respondents on 22 December 2017. Under cross-examination, she accepted that she knew there was a timeframe for contacting ACAS in order to bring subsequent employment tribunal proceedings. She had been told this by someone at the Mary Ward Clinic, a few weeks after her secondment ended;

f. Even in relation to the subsequent advice from the Whitechapel CAB, her priority appears to be on getting help with the internal processes rather than issuing legal proceedings. There is no evidence from the Claimant that she was misled by her adviser as to the impact of pursuing internal proceedings on time limits for employment tribunal proceedings. This is therefore not a case where the Tribunal can find that the delay was caused by wrong legal advice as to time limits;

g. If the misconduct investigation against the Claimant ended in February 2018, and this was a factor in the delay, then this ended over a year before proceedings were issued;

h. No or no sufficient evidence has been provided to the Tribunal to support the Claimant's assertions about the state of her health during this period of time, as a reason for her delay. She had been off sick for only 12 weeks from 7 February 2018 until May 2018. Her health did not prevent her from engaging in the internal grievance process and the First Respondent's redundancy process. In cross-examination, she accepted that she had been able to continue and complete studies at evening classes at the same time as her job, missing only a couple of lectures, and that these studies had been completed in July 2019;

i. Whilst there is no requirement that the Tribunal must be satisfied that there was good reason for the delay *(Abertawe*), the onus is on the Claimant to establish it would be just and equitable to extend time (*Robertson)*. Here that onus has not been discharged, given the significant delay in bringing proceedings against the Second Respondent, and its impact;

j. The significant extent to which these allegations are out of time will inevitably have a detrimental impact on the recollection of the witnesses, and therefore prejudice a fair trial.

k. In terms of the balance of prejudice, it is common ground that the Claimant still has claims against the First Respondent that will need to be determined on their merits. This reduces the extent of the prejudice caused to the Claimant if the claims against the Second Respondent are struck out as being out of time.

26. For these reasons, the Tribunal does not have jurisdiction to consider the various claims now advanced against the Second Respondent. Those claims must accordingly be dismissed.

Time limits in relation to the First Respondent

Harassment, direct discrimination and non-dismissal related victimisation

27. The Tribunal does not consider that there is conduct extending over a period in relation to the harassment, direct discrimination and non-dismissal related victimisation claims brought against the First Respondent. Those claims relate to discrete events :

    a. An alleged failure to provide support at a meeting with the Second Respondent on 17 August 2017, said to be harassment and direct discrimination; and

    b. An alleged failure by the First Respondent to assist the Claimant in relation to the Second Respondent's scheduled meeting with the Claimant on 18 October 2017, said to be victimisation.

28. Whilst there were subsequent conduct and grievance processes conducted by the First Respondent, the existence of those processes does not translate those one-off acts or failures in relation to the Second Respondent's meetings into continuing acts with the First Respondent's processes. Furthermore, the fact that there are two acts of victimisation does not make them into a continuing act. The subject matter of the two acts is very different - the first being an alleged failure to help the Claimant at the meeting on 17 August 2017, held by the organisation to which the Claimant had been seconded, and the second being dismissal by the First Respondent. Those two acts cannot constitute a continuing discriminatory state of affairs.

29. The last of the complaints alleged against the First Respondent, apart from the acts which are admitted to have been in time, took place on 18 October 2017. The dates of Early Conciliation in relation to the First Respondent were the same as Early Conciliation in relation to the Second Respondent, with the same consequence – that the extended time limit expired on 22 January 2018. Proceedings were only issued on 27 March 2019, over 14 months later. Allegations relating to August 2017 were 16 months out of time.

30. For the same reasons as in relation to the claims against the Second Respondent, it would not be just and equitable to extend time to enable these claims to be determined on their merits. The Claimant has failed to discharge the onus of showing it would be just and equitable for those claims to be determined on their merits, given the significant delay in instigating proceedings and the extent of the extension required. Although the in time claims against the First Respondent will require a hearing in any event, it would not be just and equitable for the earlier matters to be the subject of the tribunal's determination. The first complaint relates to the extent of the support that took place for a meeting held August 2017, almost 20 months before proceedings were issued, and two and a half years before the date scheduled for the Final Hearing.

Witness recollection in relation to that meeting and the preparation for that meeting will inevitably be significantly weakened by the passage of time. The same is true of the meeting on 18 October 2017, convened by the Second Respondent.

31. No sufficiently satisfactory reason has been advanced by the Claimant to explain her failure to bring her earlier allegations against the First Respondent within the primary limitation period. The Tribunal recognises that this is not determinative, and in appropriate cases a Tribunal will extend time notwithstanding the absence of a satisfactory reason. However, in the present case, the balance of prejudice favours not extending time in relation to the out of time claims, given that the Claimant still has claims for unfair dismissal and victimisation against the First Respondent which will need to be determined on their merits.

Dismissal as an act of victimisation

32. The decision to dismiss the Claimant was taken on around 13 November 2018 at or following the meeting with the Claimant. It was subsequently communicated to the Claimant by letter dated 16 November 2018, although the dismissal did not take effect until five weeks later, once notice had expired.

33. Proceedings in relation to this alleged act of victimisation ought to have been issued within three months, save as extended by Early Conciliation. Here there is a dispute as to whether the second Early Conciliation Certificate in relation to the First Respondent is valid to any extent, given the first Certificate dated 22 December 2017. Even if the second Certificate is valid for limitation purposes, its effect on the time limit is limited to a one day extension. This is because the certificate was issued on the same date as conciliation was started, namely 29 January 2019; and that day was not a day on which limitation would otherwise have expired. Time expired on 13 February 2018 if the dismissal decision was taken on 13 November 2018 and the second early conciliation certificate was effective and 12 February 2018 if it was not effective. Given that these proceedings were not issued until 27 March 2019, they were outside the primary limitation period.

34. However, the Tribunal considers it would be just and equitable to allow the victimisation claim to be determined on its merits. The extension required is relatively short, being a period of six weeks. The delay in partially explained in that the unfair dismissal proceedings were brought within the necessary time limit and the Claimant would have assumed that the same time limit would apply to both that claim and her victimisation claim in relation to the same dismissal decision. No or no significant prejudice will be caused to the Respondent in having to deal with that claim, given that the fairness of the dismissal will need to be determined in any event.

Conclusion – jurisdiction to consider claims against the First Respondent

35. In those circumstances, all but the unfair dismissal claim and the second victimisation claim advanced against the First Respondent must be dismissed, given that the Tribunal does not have the jurisdiction to consider them on their merits.

Deposit Order – the legal test

36. Rule 39 of the Employment Tribunal Rules 2013 is worded as follows:

> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requesting a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

37. There are two stages to consideration of whether to order a deposit – firstly to evaluate whether the Claimant's case against the First Respondent is one that has only little reasonable prospects of success; if so, now that the Tribunal's jurisdiction to make such an order is engaged, whether it would be just to exercise the discretion to do so. The First Respondent contends that the Claimant has little reasonable prospect of success in relation to the claim for unfair dismissal and the second act of victimisation, namely in relation to the Claimant's dismissal. The onus is on the First Respondent to establish at this preliminary stage that the Claimant's claims do not cross the relatively low threshold of having at least little reasonable prospect of success.

38. The tribunal considers that the First Respondent has not established that the claim has little prospects of success, for the following reasons:

    a. The focus of the First Respondent's Skeleton Argument was on the time limit issue rather than on the deposit issue;

    b. The focus of cross-examination of the Claimant from the First Respondent's counsel was also on the time limit issue, rather than the deposit issue;

    c. No detailed closing submissions were made by the First Respondent's counsel at on the deposit issue;

    d. The First Respondent's counsel accepted that there were factual disputes as to what was said in consultation meetings and the extent to which there was consideration of all available suitable vacancies;

    e. No detailed reference was made to the contemporaneous documents to show that those documents were only capable of one interpretation which undermined the points advanced by the Claimant.

39. In any event, given that the focus of the First Respondent's submissions was on the time limit issue, it would not be a just exercise of the discretion to order a deposit here. Therefore the Tribunal does not make a deposit order.

The Final Hearing

40. It would be appropriate for the hearing to be reduced from the current eight day time estimate to a time estimate of three days. It is said that there may need to

be five witnesses in relation to the circumstances leading to the Claimant's dismissal. The Tribunal will issue a separate case management order identifying the remaining issues and giving directions for the progress of the case to the scheduled final hearing at the end of March 2020.

14 January 2020

Employment Judge Gardiner