



EMPLOYMENT TRIBUNALS

Claimant: A
Respondent: (1) B
(2) C

Heard by CVP

On: 20 January 2022

Before Employment Judge: EP Morgan QC

Representation

Claimant: In Person
First Respondent: Mr Lassey (Counsel)
Second Respondent: Mr Cakali (Solicitor)

JUDGMENT

1. The following claims are dismissed on the ground that they were brought out of time and the Tribunal has no jurisdiction to hear and determine them, namely:
 - 1.1 The claim of direct discrimination on the ground disability [para 17a of the Grounds of Claim];
 - 1.2 The allegation of harassment on the grounds of sex detailed within paragraph 18 c) of the Grounds of Claim;
 - 1.3 The allegation of direct discrimination the ground of race contained within paragraphs 19 a-c (inclusive) and 19 i) of the Grounds of claim.
 - 1.4 The allegations of harassment on the grounds of race contained within paragraph 20 of the Grounds of Claim.

REASONS

Context

1. This matter was listed for determination of a number of case management issues, including the viability of the claims, whether the claims should be struck out or a direction made for the payment of a deposit. In relation to those claims permitted to proceed, consideration was to be given to whether or not they were in time. The Claimant represented herself at the hearing but was accompanied by a third party for the purposes of support. The Respondents had provided a bundle of documents for use at the hearing; extending to some 148 pages.

The Claims and Responses

2. The Claimant was employed by the First Respondent between 7 August 2019 and 26 October 2021 as a customer sales assistant. The claimant lodged her claim with 7.4C Preliminary hearing – deposit order and payment guidance note - rule 39. 01/01/14

the Tribunal on 5 November 2021. The detailed grounds of claim are set out in a document compiled with the assistance of a legal advisor [p19 et seq]. It is the Claimant's case that she was subjected to various forms of discrimination and was constructively unfairly dismissed. For this purpose, the Claimant relies upon the protected characteristics of disability, race and sex. The Claimant refers to her nationality as 'part Italian' and 'Part Romanian'. The Grounds of Claim have been compiled with professional legal assistance. They extend to 28 paragraphs. The detail of the claims is addressed below.

3. By its Grounds of Resistance, the First Respondent raised a number of substantive and procedural matters. This included time limit and jurisdictional issues [p34]. The allegation of unfair dismissal is denied [p36]. The protected characteristic of disability is not admitted [p37] and all acts of discrimination are denied.
4. The Second Respondent was formerly employed by the Respondent. He also resists the claims. It is denied that the Second Respondent harassed the Claimant. Instead, it was said that the Second Respondent became a confidant of the Claimant; with the result that they exchanged communications (including images) which were transmitted between consenting adults away from the workplace [p50]. The Second Respondent resigned from his employment with the First Respondent as a result of a number of the matters which arise within these proceedings. It is denied that any of the messages transmitted between the Claimant and the Second Respondent were not at any time linked to management decisions or the conduct of the employment relationship. The Second Respondent also sought further and better particulars of the claim.
5. By letter dated 14 December 2021, the Tribunal gave notice of a Preliminary Hearing with a listing date of 20 January 2022. It was made clear that the hearing would consider and determine whether the claim should be struck out and/or a direction should be made for the payment of a deposit. It was also recorded that the Tribunal would be required to consider time and jurisdiction issues [p52].
6. The first part of this hearing has been taken up with the claimant clarifying matters of complaint. The Claimant confirmed the position as set out in the following paragraphs.

Direct Discrimination (Disability)

7. It is said the Claimant suffers from kidney stones. The protected characteristic is disputed. The Claimant relies upon a single allegation of less favourable treatment. It is alleged to have occurred on 3 January 2021 and involves denying the Claimant an emergency toilet break. Mrs Keegan is named as the person responsible for this conduct: [Grounds of Claim para 17a].

Direct Discrimination (Race)

8. The allegation of race discrimination relates to the allocation of shifts; it being the Claimant's position that she was either not offered shifts at all, or, only offered shifts at times which were disadvantageous to her. The Claimant alleges that these events occurred between November 2019 in December 2019 and were perpetrated by Mrs Keegan. No further matters are complained of against management until October 2020; with the next incident involving Mr Hussain.
9. The Claimant also alleges that Mrs Keegan shouted for the claimant on 7 March 2021. Further complaints are made regarding lack of support in the conduct of a return to work interview in March 2021 and an alleged refusal to permit the Claimant to use a chair in June 2021. There is, around the same time, an allegation that the Claimant was deprived of the opportunity to purchase items after completion of her shift.

Constructive dismissal claim

10. It is noted that-and during the course of this hearing-the claimant confirmed that the allegation of constructive dismissal is not relied upon as an act of less favourable treatment. No time issue arises.

Harassment (Sex)

11. It is said the claimant was subjected to harassment in the period December 2019 to June 2021: [paragraph 18a-d]. Four allegations are relied upon; three of which implicate the second respondent. The third item relates to another employee (Mr Peter Smith). This allegation relies upon a conversation between the Claimant and Mr Smith in January 2021; in which he is alleged to have requested the Claimant to send him a photograph: [paragraph 18 (c)]. It is not suggested that this incident recurred and/or that it involved the second respondent. It is not suggested that the additional allegation (below) implicated or otherwise involved anyone other than the second respondent.
12. The remaining allegations [paragraph 18 a) b) and d)] are directed against the first and second respondents. The complaints comprise the assertion of a repeated Facebook communications from the second respondent in the period December 2019 to June 2021. There is also an allegation of direct physical assault in December 2020 and unwanted attendance by the Second Respondent at the Claimant's home in March 2021. It is not disputed that the Claimant and the Second Respondent communicated by means of social media. It is the Second Respondent's case that the communications were never unsolicited, unwanted or against the wishes of the Claimant.

Direct Discrimination (Race)

13. The allegations of direct discrimination on the grounds of race are clearly detailed in the Grounds of Claim [paragraph 19]. The Claimant's line manager (Mrs Keegan) is implicated in them.
14. The first allegation relates to the period November 2019 to December 2019 and relates to the allocation of shifts to the Claimant. It is alleged that during November 2019, the Claimant was not allocated shifts and during December 2019, she was allocated shifts which were disadvantageous to her [paragraph 19 a) and b)].
15. No further matters are complained of against management until 18 October 2020. This incident relates to an alleged refusal to allow the Claimant a 15 minute break to which she was entitled. The manager implicated is Mr Hussein: [paragraph 19 c)]. No further allegation is made against the Claimant's managers between October 2020 and March 2021.
16. Mrs Keegan is identified as having shouted for the claimant on 7 March 2021 (i.e. some months after the last occasion of alleged less favourable treatment in which she said to have participated): [paragraph 19 d)].
17. Further complaints are made regarding lack of support and the conduct of the return to work interview in the in March 202: [paragraph 19 e)]. and a refusal to permit the claimant to use a chair in June 2021 [paragraph 19 f)]. There is around the same time an allegation that the Claimant was deprived of the opportunity to purchase items after completion of her shift; a practice which her colleagues were permitted to participate in: [paragraph 19 g)].
18. A further allegation relied upon by the Claimant is said to have occurred in June 2021. It relates to the suggestion that the Claimant's till was down and attributing the deficiency to error or theft on the part of the Claimant: [paragraph 19 h)]. It is alleged

that this situation was handled differently to similar instances involving English colleagues. Mrs Keegan is identified as the author of the alleged mistreatment.

19. There is also an allegation that Mrs Keegan refused the Claimant permission to drink tea whilst on duty. This is alleged to have occurred 'throughout' the Claimant's employment and was in marked contrast to the permission given to English colleagues.

Harassment (Race)

20. Two matters are relied upon in support of this claim. The Claimant alleges that two Managers (Mrs Keegan and Mrs Parkinson) regularly mimicked her accent. It is also alleged that on 3 January 2021, Mrs Keegan made a negative comment regarding the tea which the Claimant had brought from Romania: [paragraph 20 a) and b)].

Victimisation

21. The Claimant relies upon the matters recited at paragraph 19 d)-h) of the Grounds of Claim as acts of victimisation consequent upon the Claimant's grievance. It is also alleged that comments were made to the Claimant by Mrs Keegan on 17 July 2021 which, according to the Claimant, were indirect references to the grievance processes: [paragraph 21].
22. The Grounds of Claim also detail criticism of the grievance process adopted by the Respondent. Two matters are relied upon: a) alleged delay; and b) breach of confidentiality: [paragraph 22 a) and b)].

Constructive Dismissal

23. The Claimant resigned her employment on 28 October 2021 with immediate effect. It is not suggested that the failure to deal with the claimants final grievance-which she relies upon as the trigger for her constructive dismissal claim-was tainted by any discrimination or constituted an act of less favourable treatment.
24. During discussion with the Tribunal, the Claimant confirmed that the claims and allegations detailed above accurately reflected the detail of the claims upon which she relied.

Time Issues

25. The first matter for consideration is whether the claims, or any consistently out of time. **Section 123 of the Equality Act 2010** makes clear that a claim "may not" be brought after the expiry of the three month period starting with the date upon which the act complained of is said to have occurred. The Employment Tribunal has a discretion to extend time where it considers it just and equitable to do so.
26. **Section 123 (3) of Equality Act 2010** provides the statutory mechanism for the calculation of the relevant date. It provides that where conduct extends over a period, it is to be treated as having concluded at the end of that period.
27. In order to determine the time issue, therefore, it is necessary for the Tribunal to identify the relevant date and by reference to that date consider the matters alleged together with whether the claimant has any reasonable prospect of persuading a Tribunal that the events are part of a series which culminated the allegations said to have occurred in June 2021.
28. On the question of time, the claimant points to what she considers to be the common denominator of her complaints, namely: a negative attitude to her in the workplace. This is said to have been perpetrated by a number of individuals. She states that it is all part of a single narrative and chain of events. It is noted in the Grounds of Claim that the Claimant was absent on account of sickness in the period

18 July 2021 to the date of her resignation on 28 October 2021. It is said that this undermined the Claimant's ability to lodge her claim in time: [paragraph 28 b)].

29. On behalf of the first respondent, Mr Lassey very helpfully pointed to the dates upon which the ACAS certificate was issued. He submitted that unless the Claimant could establish a series of actions or a continuous act, anything prior to May 2021 is out of time.
30. On behalf of the second respondent, Ms Cakali made similar submissions.
31. In the view of the Tribunal, that none of the matters relied upon by the claimant may be classified as continuing actions, as opposed to actions with continuing consequences. The next question is therefore whether the matters detailed within the claim are, or may be, considered to be part of the series.
32. Mr Lassey submitted that the timing of the alleged incidents, the variable character of the allegations and the diversity of persons against whom they are made are factors which militate against any conclusion that the events are (or are to be considered as) part of a series or course of conduct. Whilst acknowledging that these matters are significant, the Tribunal is satisfied that they may not, of themselves, be considered determinative.
33. Save for the reference to ill health in the Grounds of Claim, the claimant has not provided any substantive evidence or explanation as to why her claims were presented when they were an/or rather than any earlier period.
34. Whilst recognising that the identity of the author of less favourable treatment is not itself determinative, the Tribunal is satisfied that, in the context of these proceedings, it is significant.
35. The Tribunal was not referred to any legal authorities concerning the resolution of the time issue.
36. The Tribunal has concluded that a number of the allegations are out of time on the grounds that: (i) they matters complained of are not continuing acts; and (ii) the Claimant enjoys no reasonable prospect of persuading a Tribunal that they represent part of a series; and (iii) there is no basis upon which the Tribunal is able to exercise its jurisdiction to extend time under section 123 of the Equality Act 2010. These comprise:
 - a. Section 15 Claim re incident on 3 January 2021 [para 17 a)];
 - b. Section 26 Harassment (Sex) re incident in 'January 2021' [paragraph 18 c)];
 - c. Section 13 Direct Discrimination (Race) of November and December 2019 and October 2020 [paragraphs 19 a), b), and c)]; and
 - d. Section 13 Direct Discrimination (Race) [paragraph 19 i)]; and
 - e. Section 26 Harassment (Race) [paragraph 20 a) and b)].
37. Accordingly, the allegations detailed in paragraphs 17a), 18 c), 19 a)-c) and i) and 20 a) and b) are struck out on the grounds that they are out of time and the tribunal has no jurisdiction to hear and determine them. It remains open to the Claimant to rely upon these allegations for background information in support of her claim.
38. For the sake of completeness, it is recorded:
 - a. Harassment (Sex): The Tribunal has noted that the last recorded incident is said to have occurred in March 2021. It is acknowledges that – on the Claimant's own case- there have been intervals between the specific acts

relied upon. However, within the confines of the present hearing, the Tribunal was not able to conclude that the Claimant enjoyed no reasonable prospect of persuading another Tribunal that this alleged behaviour was part of a series and/or that it is appropriate to extend time for any claim to be heard;

- b. Victimisation: No time issue arose in connection with the victimization claim; and
- c. Constructive Dismissal: No time issue arose in connection with this claim.

Employment Judge EP Morgan QC

Date: 16 February 2022