



EMPLOYMENT TRIBUNALS

Claimant: Ms M S K Sembhi

Respondent: Bournemouth Borough Council

Heard at: Southampton **On:** 14 September 2017

Before: Employment Judge Craft

Representation

Claimant: Mr G Rowell, Counsel

Respondent: Mr A Ritchings, In-house Solicitor

RESERVED JUDGMENT AND ORDER

following PRELIMINARY HEARING

RESERVED JUDGMENT

1. The Claimant's complaint of detriment under s.47B Employment Rights Act 1996 arising from the Respondent's decision notified to her on 9 October 2016 not to shortlist her job application was submitted in time and the Employment Tribunal has jurisdiction to consider it.
2. The Claimant's complaints of detriment related to the Respondent's earlier decisions, and alleged decisions, not to shortlist the Claimant's particularised and unparticularised job applications, and alleged interference with a job application the Claimant had made to Dorset County Council in 2012, are dismissed because they have been filed out of time under the terms of s.48(3) Employment Rights Act 1996 when it was reasonably practicable for them to have been filed within time and the Employment Tribunal has no jurisdiction to consider these complaints.

ORDER

1. On the application of the Claimant to amend her Details of Claim and having considered the representations made by the parties the Employment Tribunal orders that the Claimant has been given leave to amend her details of claim as follows:
 - a) To claim that the Respondent discriminated against her by reason of disability contrary to sections 15, 20 and 21 of the Equality Act 2010 in respect of its decision not to shortlist the job application which the Claimant made to the

Respondent in October 2016;

- b) To pursue a remedy of aggravated damages.
2. The Employment Tribunal refuses leave to other amendments to the Details of Claim sought by the Claimant as set out at paragraphs 21A, 27(e), 47, 48, 49, 51, 52, 53 and 54 of the amended Details of Claim.
3. The Claimant shall file her amended Details of Claim with the Employment Tribunal, and serve it on the Respondent, within 21 days of the promulgation of this Reserved Judgment and Order.
4. The Employment Tribunal shall arrange a further Case Management Preliminary Hearing which will be held by telephone with one hour allowed to give further directions for the conduct of the proceedings.

REASONS

Introduction

1. The Claimant was employed by the Respondent as an Approved Mental Health Practitioner ("AMHP") from late August 2008 to either 17 or 22 November 2010 when she was dismissed for gross misconduct. Subsequently the Claimant issued employment tribunal proceedings in which she claimed that she had been automatically unfairly dismissed for making a protected disclosure in or around March 2010. The Respondent denied this claim. The parties then settled the proceedings on agreed financial terms within a COT3 Agreement. This was completed on 18 April 2011. The Respondent made no admission of liability in respect of the claim.
2. The Claimant filed these proceedings on 21 April 2017 after making an unsuccessful application for an AMHP job with the Respondent in November 2016. The Claimant alleges that the Respondent has infringed her rights under s.47B(1) of the Employment Rights Act 1996 ("the ERA") by adopting and applying a policy, or decision, not to consider any job application made by the Claimant regardless of the merits of that application because of the alleged protected disclosure the Claimant states she made to the Respondent in March 2010. The Claimant asserts that the Respondent has rejected job applications made either directly by her, or through recruitment agencies on her behalf, on approximately 12 occasions since 2012, the last of which was 9 November 2016 and also fatally undermined her application for a job with Dorset County Council in 2012 and subsequently.
3. The Respondent filed its ET3 with detailed Grounds of Resistance on 25 May 2017. The Respondent raised two preliminary issues submitting that the claim had been filed out of time and that the Employment Tribunal had no jurisdiction to consider it and also applying to have the claim struck out on the ground that it had no reasonable prospects of success. At a Case Management Preliminary Hearing held on 29 June 2017 it was directed that there should be a further Preliminary Hearing to consider the following issues:
 - a) whether the Employment Tribunal has jurisdiction to consider the claim with regard to the time limits in s.48(3) ERA;
 - b) whether to strike out all or part of the complaint because it has no reasonable prospect of success; or

- c) whether to order a payment of a deposit not exceeding £1,000 because the complaint has little reasonable prospect of success.
4. In her Amended Details of Claim the Claimant alleges (contrary to her initial claim that the Respondent has applied a policy, or decision, not to consider any job applications made to it by her) that it did consider two direct job applications which the Claimant made to the Respondent in March and May 2012 and one direct application she made in October 2016 and that in doing so it discriminated against her by reason of her dyslexia, which she considers is a disability within the terms of s.6(1) Equality Act 2010 ("EqA"). The Claimant contends the Respondent was aware of this disability during her employment and made adjustments to accommodate the difficulties she encountered as a result of it. Therefore she wishes to amend her claim to include claims that by rejecting these applications the Respondent has discriminated against her contrary to sections 15, 20 and 21 EqA. The Respondent opposed the amendment application which had only been filed with the Employment Tribunal and received by the Respondent on the previous day and was prepared to deal with the application at the hearing notwithstanding this late notice of it.
5. It was agreed by the parties that the Tribunal should consider the amendment application first. The Tribunal duly received submissions from the representatives. However, in considering those representations, the Tribunal concluded that it should consider this application in tandem with the notified preliminary issue of whether, with regard to relevant time limits, the Employment Tribunal has jurisdiction to consider the initial claim because the time issues are also relevant to the amendment application.
6. The Employment Tribunal then received evidence from the Claimant and requested Mr Ritchings to make enquiries of the Respondent as to records available to it in respect of the job applications made to it by the Claimant, or on her behalf in the relevant period. The Employment Tribunal also received further oral submissions from the parties. It reserved its judgment and adjourned the other notified preliminary issues generally in doing so.
7. The following documents were submitted to the Employment Tribunal: amended Details of Claim (Exhibit C2); the Claimant's Bundle of Documents (Exhibit C1); the Claimant's written statement (Exhibit C3); the Claimant's Skeleton Argument (Exhibit C4); and the Respondent's Skeleton Argument (Exhibit R1).

The Law

8. A worker who is subjected to a detriment by his or her former employer having made a protected disclosure during the course of the employment relationship has standing to bring a claim under S.47B. The detriment alleged by a former worker / employee is not required to have arisen in the employment but the alleged detriment must be sufficiently connected to the former employment relationship.
9. S.48(3) ERA states as follows:

"An employment tribunal shall 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 to act, is part of a series of similar acts or failures the last of them; or*

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

10. The Employment Tribunal was also referred by the parties to the long-standing guidance given in the case of **Selkent Bus Co Ltd v Moore [1996] ICR 836** as to applications to amend pleadings in the course of proceedings. This guidance refers to a number of factors which may have to be taken into account. One of these factors is whether an application to add a new claim has been made in time. It also emphasises, taking account of the fact that each case has to be considered on its own facts, that considering whether to allow an amendment requires a careful balancing exercise which must have regard to the interests of justice and to the relevant hardship that would be caused to the parties either by rejecting the application or allowing it.

The Factual Matrix

11. The Employment Tribunal made the following findings of fact relevant to the issues under consideration after considering the oral and documentary evidence and information provided to it by the parties and the submissions made on their behalf.
12. The Claimant worked for a number of local authorities on temporary contracts after her dismissal by the Respondent in 2011. In early 2012 the Claimant applied for a permanent job with Dorset County Council. She was interviewed by Mr Kippax, the Council's Service Manager, and his colleague Mr Docul. She subsequently received an offer from the Council in March or April 2012. This offer was subject to receiving satisfactory references and other checks. Mr Kippax then asked to meet the Claimant again and following that meeting the Council withdrew the job offer it had made to the Claimant. This was because Mr Kippax and Mr Docul had concluded that the Claimant had previously lied to them about why her job with the Respondent had come to an end and withdrew the job offer which had been made to her for that reason. This was because at her first interview with them the Claimant had informed them that she had left the Respondent's employment by mutual agreement to look after her mother which the Claimant, when questioned by them at the second interview, accepted was incorrect.
13. The Claimant had also made job applications to the Respondent in March and May 2012 for jobs for which she considered she was well qualified and for which she had not been shortlisted. The Claimant says she has either applied directly, or that recruitment agencies have put her forward, for vacancies with the Respondent for approximately 12 AMHP, or related, jobs advertised by the Respondent between 2012 and 2016. She relies upon three direct applications in March and May 2012 and October 2016, and an approach by an agency in or around May 2014 but has not particularised any other direct applications or approaches made by recruitment agencies on her behalf. The Respondent has found three direct applications made by the Claimant. These were made on 29 March and 26 May 2012 and 1 October 2016.
14. Mr Ritchings confirmed to the Employment Tribunal that different recruitment managers were involved in considering the applications for these vacancies and that the Respondent does not have complete documentation for those applications made in 2012. There were two applicants, including the Claimant, for the vacancy in March 2012 and no appointment was made. The recruitment manager concerned with that vacancy is no longer employed by the Respondent. There were three applicants in May 2012 for which no application forms have been found. The Claimant was not shortlisted but no appointment was made from the two candidates who had been

shortlisted.

15. The Respondent still holds documentation in respect of the applications made in 2016. There were five applicants for that job from which three were shortlisted and one successful candidate was appointed to a lower grade job than had been advertised. Mr Ritchings was also able to confirm that in June 2014 the Claimant was put forward by an agency for a temporary post about which there was an exchange of correspondence between the Claimant and Mrs Webb, then a Principal Social Worker, now Services Manager for Mental Health, with the Respondent, who informed to the Claimant that she had been fairly considered for this job by the Respondent.
16. The Claimant contacted ACAS in 2012 when it was suggested she should consider pursuing civil rather than employment tribunal proceedings. ACAS also advised her to take legal advice as to the applications she had made, which she did. The Claimant also attended on the CAB. She told the Employment Tribunal that her financial circumstances made it difficult for her to take further legal advice although she was able to take legal advice again in June 2016 when she was provided with details of a pro bono scheme for obtaining advice and assistance from a barrister. She investigated this option after her unsuccessful job application in October 2016 and this combined with an improvement in her financial circumstances resulted in her issuing these proceedings after completing the Early Conciliation procedure with ACAS.
17. At some time between 2014 and July 2016 the Claimant alleges that a recruitment consultant with a recruitment agency called Caritas told her that Mrs Mullins, a Team Manager with the Respondent, had informed him that there was no point in putting the Claimant forward for jobs with the Respondent because she would not be considered for them. Following this disclosure the Claimant contacted Mrs Stanley who was a Recruitment Manager with the Respondent and had been the Claimant's trade union representative in the disciplinary proceedings that led to her dismissal in 2010. Mrs Stanley assured the Claimant that she had not been blacklisted by the Respondent and that job applications by her would be considered by the Respondent and that she would also speak to Mrs Mullins. The Claimant knows Mrs Stanley well and accepted her reassurance as genuine. When the Claimant applied for a job with Dorset County Council in April 2016 she was informed by a recruitment manager with the Council that he had been informed by Mr Ducol in 2012 that the Claimant should not apply for any jobs advertised by the Council.
18. The Claimant made an online application to the Respondent for an AMHP vacancy in October 2016. The applicants for it were informed that the provisional date for interviews for shortlisted candidates was 24 October and that they could check the status of their application on the Respondent's dedicated portal. By 3 November the Claimant had received no communication from the Respondent and the Respondent's portal had given her no confirmation of the status of her application so she contacted the Respondent by email on that day to try and find out what her position was. The relevant email correspondence was available to the Employment Tribunal. The email reply she received provided her with three contact points, one of which was Mrs Webb. She sent emails to those referred to. Mrs Webb replied very quickly to confirm that she was not dealing with the applications for this vacancy and referred her to the relevant Recruitment Managers. However, it was not until 9 November that the Respondent confirmed to the Claimant by email that her application had been unsuccessful. The email it sent to the Claimant stated, inter alia, as follows:

"Further to your application for the position of AMHP and your subsequent email on 3 November, I am writing to confirm to you that you have been unsuccessful on this occasion."

19. The Respondent's submission that the Claimant was informed that her application had been unsuccessful on 3 November is not supported by any evidence before the Employment Tribunal and is contradicted by the Respondent's email of 9 November. Subsequently the Claimant contacted ACAS on 8 February and her ACAS EC certificate was issued on 22 March 2017. The significance of this factual finding of the date of notification of the unsuccessful application is that this rejection is the last of the alleged detriments on which the Claimant relies in pursuing detriment claims, and by operation of the EC procedures the time for the Claimant to file her claim was extended to 22 April, and the Claimant filed her claim on 21 April. This means that this claim was filed in time and the Employment Tribunal has jurisdiction to consider it.
20. The Claimant's application to amend her Details of Claim to include a claim of disability discrimination arises from the written assessment made by those involved in considering the Claimant's job application in October 2016 which are referred to, and quoted, in the Grounds of Resistance. The Respondent states that the Claimant *"did not answer some of the questions at all..."*, *" gave some very weak answers some of which were wholly inadequate"* and *"poor use of English, spelling and grammar were also evident."* The Respondent also states that the Claimant gave poor written responses to three questions. Mr Ritchings has confirmed that the assessments to which the Respondent refers, and on which the Claimant relies to pursue her discrimination claims, were made in respect of the job application which the Claimant made in October 2016 and do not refer to her earlier applications in 2012.

Submissions and Conclusions

21. Mr Rowell submits that the Claimant's unsuccessful job application on 2 October 2016 was the last in a series of detrimental acts by the Respondent from March 2012 onwards caused by a decision by the Respondent not to consider job applications from the Claimant because she had previously made a qualifying disclosure in 2010. He referred the Employment Tribunal to the case of **Barclays Bank v Kapur (1991 ICR 208)**. He submitted that there is a sequence of unsuccessful job applications which supports the claim that there was a policy implemented by the Respondent that it would not consider any job applications which the Claimant made to it and that this has resulted in a continuing detriment to the Claimant since 2012 and that time for filing her claims (in respect of all her previous job applications to the Respondent and her job application to Dorset County Council) should commence to run from 9 November which the Claimant submits was the Respondent's last act causing detriment to her.
22. Under s.123(1)(c)EqA complaints of unlawful discrimination must be presented to an employment tribunal before the end of the period of three months beginning with the date complained of but the employment tribunal has the discretion to hear out of time discrimination claims when it is considered just and equitable to do so. Mr Rowell further submits that the Employment Tribunal should exercise its discretion in these proceedings to extend time to allow the Claimant to amend her Details of Claim to pursue claims of discrimination against the Respondent arising from the job applications which she made to it in 2012 and 2016.
23. The Employment Tribunal accept that the Claimant was not aware of the criticisms

made by the Respondent of her application until she received the Respondent's Grounds of Resistance in or around the end of May 2017. The Claimant was then in financial difficulties after losing her job and lacked funds to instruct her representative further. This led to the application to amend being filed on 13 September although, as already noted, the Claimant had confirmed that she was considering making such an application at the Preliminary Hearing held on 29 June. The Claimant claims that these comments show that the Respondent, notwithstanding its prior knowledge of her dyslexia, and the difficulties it caused, discriminated against her because it took no account of this when considering this job application.

24. The Employment Tribunal accepts that it was not possible for the Claimant to have presented her discrimination claim in time. However, this claim can only be in respect of her job application in October 2016 because the comments relied upon by the Claimant relate to that application and do not relate to the earlier applications.
25. The earlier job applications were dealt with by different recruitment managers, and the documentation in respect of these applications available to the Respondent is, for understandable reasons, incomplete. Furthermore, the Claimant also had the benefit of taking legal advice at that time and did not pursue any further enquiries or proceedings then and has disclosed no grounds on which to pursue such a claim in respect of the earlier applications. The Respondent retains the relevant documents for the job applications made in October 2016 and the Employment Tribunal's consideration of the Claimant's detriment claim arising from the refusal of her application at that time, which has been filed in time, will involve the Employment Tribunal considering all the circumstances of the applications for the vacant job which will include whether or not the Claimant's application was considered by the Respondent (which may be determinative of the detriment claim) and, if so, why her application was not shortlisted and was refused. For all these reasons, the Employment Tribunal has concluded that it is just and equitable to extend time to allow the Claimant's discrimination claim in respect of this job application to proceed but that it would not be just and equitable to extend time to allow claims in respect of the earlier job applications to proceed. Those claims are dismissed because they have been submitted out of time and the Employment Tribunal has no jurisdiction to consider them.
26. The final question for the Employment Tribunal was to consider whether the Claimant's unsuccessful job applications to the Respondent and Dorset County Council fall within s.48(3)ERA as being "part of a series of similar acts or failures" of which the Respondent's refusal of the Claimant's job application of October 2016 was the last, in which case the earlier claims of detriment would be in time and the Employment Tribunal would have jurisdiction to consider them.
27. It is quite clear from the Claimant's evidence that Dorset County Council acted independently of the Respondent when it withdrew the job offer which it had made to the Claimant in 2012. The Claimant was told why this step was taken and knew that it was because of her conduct. The Council is not a party to these proceedings and the Employment Tribunal conclude that there is no basis on which it can be submitted that their actions are part of continuing acts on behalf of the Respondent. It is also unsatisfactory that the Claimant relies on a number of unparticularised applications or approaches to the Respondent which for that reason provide no grounds to support this submission.
28. The Tribunal also knows that those applications which are particularised were separated by a number years and were for different jobs for which different circumstances may have been relevant and, more significantly, were considered by

different recruitment managers. The Respondent also responded to enquiries from the Claimant in 2014 and the Claimant was able to discuss her concerns about her position with the Respondent with Mrs Stanley in 2016. The Employment Tribunal also note the tension that now exists within the amended Details of Claim between the allegations of detriment arising from the Respondent allegedly operating a policy not to consider her job applications at all, and a discrimination claim which relies upon how the Respondent considered her applications.

29. The key questions for the Employment Tribunal were whether, considering all matters placed before it in the round, the Claimant has established a prima facie case, or has a reasonably arguable basis for the contention that the various complaints of detriment she raises were so linked as to be continuing acts. It has concluded there is no such prima facie case and no reasonably arguable basis for that contention. This means that it finds that the other claims of detriment have been filed out of time when it was reasonably practicable for the Claimant to have filed those claims in time and for that reason the Employment Tribunal has no jurisdiction to consider them and those claims are dismissed.
30. The Employment Tribunal has to deal with one or two further points in respect of the amended Details of Claim. The Claimant's application for extension of time which is at paragraphs 42 to 49 is not required and these paragraphs should be excluded. The Employment Tribunal gives leave for the Claimant to pursue a remedy of aggravated damages. This is adequately pleaded by paragraphs 30 (d) and 50 and the further representations at paragraphs 51 to 54 should be excluded for that reason.
31. The Claimant is to file her amended Details of Claim with the Employment Tribunal and to serve a copy of this on the Respondent, within 21 days of the promulgation of this Reserved Judgment and Order. A further Case Management Preliminary Hearing will then be listed for one hour for the purpose of giving further directions for the conduct of the proceedings. It was agreed with the parties that this could be held by telephone.

Employment Judge Craft

JUDGMENT SENT TO THE PARTIES ON

08 December 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS