EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs J McClure	v	**Specialist Crafts Limited**

RECORD OF AN OPEN PRELIMINARY HEARING HELD BY CLOUD VIDEO PLATFORM

Heard at: **Nottingham**

On: **Wednesday 31 March 2021**

Before: **Employment Judge P Britton (sitting alone)**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr P Mitchell, Barrister at law**

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGEMENT

1.The two claims relating to age and direct sex discrimination in February 2020 are dismissed them being out of time and it not being just and equitable to extend time.

2. The remaining claims will proceed as being in time.

3. Directions are hereinafter set out.

Introduction

1. This Preliminary Hearing was ordered to take place by my colleague Employment Judge Clark sitting at a case management hearing on 14 January 2021. The first item on the agenda, and which is the one I confine myself to for reasons which I shall come to, was as to whether elements of the claim presented to the

Tribunal by the Claimant were out of time. This engages the claims that she brings relating to:-

1.1 Age discrimination in relation to the management buyout (MBO) which crystallises latest 20 February 2020.

1.2 The claim based upon direct sex discrimination in relation to events on 24 February 2020.

2. The overall claim in this matter (ET1) was not presented to the Tribunal until 16 October 2020. That is because there is a second limb to her case which commences circa 3 June 2020 when the Respondent embarked upon a reorganisation exercise, in part driven by the impact of Corona and the loss of business. Cross referencing to the Response (ET3), it identified various people at risk of redundancy including the Claimant. There was a consultation process commencing on 3 June and with individual consults with the Claimant on 8 and 19 June and thence the 25 June. The Claimant in the context of this redundancy exercise then issued a grievance which was on 3 July. There were further meetings, which in effect linked up the handling of the redundancy and the grievance, all of which were heard by Mr D Edwards who was by now the Managing Director of the Respondent. The outcome of all of that is that the Claimant's grievance was dismissed. As to why is set out fully in the letter of Mr Edwards to the Claimant of 20 July 2020. In that letter he also dismissed her by reason of redundancy. The Claimant appealed that grievance. The appeal was heard by Paul Corlett who is a member of the management team. The outcome was that the grievance appeal was dismissed. This was circa 24 September 2020. The Claimant then went to ACAS for early conciliation, but for only one day on 13 October 2020, and she issued her claim to Tribunal on 16 October 2020.

3. So the third limb of her claim is that her dismissal was unfair. Also in that context direct sex discrimination in that she was paid less in severance pay than a male comparator had been given the year before, namely Mr Clure.

Time limits and my adjudication

4. As to these issues, which centre on events ending with the dismissal on 24 September 2020 (the EDT), applying the 3 month time limit they are in time. But as to the first two claims, as they relate to February 2020 they are out of time unless there is a continuing act which also engages the line of authority encapsulated in ***Hendricks v Commissioner of Police for the Metropolis (2002) IRLR 96 CA*.** The Claimant did not plead in her claim and the particulars thereof that there was such a continuing act. She did not raise the matter in a very carefully handled TCMPH before Judge Clark who clearly did his utmost to deal with what her claim is about. It has not subsequently been pleaded and there is no application to amend. It follows that I am not dealing with a continuing act.

5. That therefore brings me back to time limits. In relation to these two discrimination based claims of age and sex discrimination Section 123 of the Equality Act 2010 stipulates that such complaints :

> "…*may not be brought after the end of:-*
>
> > *(a) the period of three months starting with the date of the act to which the complaint relates, or*
> >
> > *(b) such other period as the Tribunal thinks just and equitable."*

7. It is obvious that both claims were presented considerably out of time. Taking the latter as the trigger point from which time runs on the basis that it links to the MBO issue, the last date for presentation to the Tribunal, subject to compliance with ACAS early conciliation, would have been 23 May 2020. It follows that the claims were almost five months out of time when the ET1 was presented on 16 October 2020.

8. In dealing with whether or not it is just and equitable to extend time there has been considerable jurisprudence. It is encapsulated in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 per Underhill LJ.

9. It is for the Claimant to persuade me on the balance of probabilities and from the standpoint that the Tribunal starts with that time limits should be applied strictly, that in all the circumstances it is just and equitable to extend time. An absolute essential in that process is to consider the length of the delay, in this case substantial, and therefore the reason for that delay. And as to how that engages is accurately set out by Mr Mitchell in his written opening submissions.

10. So I am going to focus what were the reasons for the delay. From the evidence that the Claimant has given to me today, also that of Nick Beavon, the documentation before me, and also the written submissions including that of the Claimant, I make the following findings of fact.

Findings of fact

11. Circa 20 February 2020 the Claimant had found out that Nick Beavon and his sister, who were the then owners of the business, had sold it by way of transfer of shares (the MBO) so that the control went over to four senior members of the management team including Mr Edwards. It is obvious to me that the Claimant was very upset about all of that. She had been employed by the business very much from its inception as at 9 September 2008, and had become the Head of Marketing. I have no doubt that she saw herself as an integral part of the senior management team. She says she was not aware that these negotiations were going on about selling the shares, which would be through the vehicle of a new company, and that in turn that new company, because it would now own the shares, would control the Respondent. Her point of course being that she was likely to lose out in terms of her seniority in the business and the degree of influence that she had if there was this tier of manager shareholders, all of them considerably younger than her, running the business. Also still involved was going to be Nick Beavon.

12. So as at 20 February when she found out about it her first thought was that is was age discrimination. I am not getting into the merits today other than to say that it is obvious from the documentation I have seen today and the evidence of Mr Beavon, that in fact there were male members of the management team who also excluded from the MBO. One of those was in the same age group as the Claimant but three were younger. Well of course that begs the question as to how this could be direct discrimination by virtue of Section 15 of the EqA because there are direct comparators who have been treated no more favourably. I can if necessary consider the merits of a claim in considering whether it is just and equitable to extend time.

13. On 24 February she had a meeting with Mr Beavon and Mr Edwards. I would suspect from now having seen the note that the Claimant took of that meeting that they perhaps predicted this would not be an easy meeting. One reason being that Mr Beavon was no longer going to be the Managing Director but was now going to be the Director of Sales and Marketing. For the purposes of today, looking at the line charts, he would now be above the Claimant in the marketing hierarchy as her report. Him in turn reporting to the Managing Director. Prior to the MBO the Claimant had reported direct to the MD.

14. The meeting did not go well. In the context the Claimant pleads as per her ET1 that the observation was made by one of them to her as follows: “Could you work in the new structure?” That remark is therefore pleaded as a claim of direct sex

discrimination on the basis that a hypothetical male comparator would not be addressed in the same way. I again observe for the purposes of today that in my judicial experience and in the context of MBOs, that these kind of tensions can occur and thus I query why would a male manager in the same position as the Claimant have been treated more favourably? I can think of at least one example of a male casualty of an MBO. So those are more details of the out of time claims.

Back to the explanation for being out of time

15. From both the additional particulars she gave for the purposes of today and her sworn evidence before me, she had at the time of discovering about the MBO started to take advice from a friend, Isobel Thompson. The Claimant described how Isobel has a long, distinguished history, of working at the highest level of HR including acting as HR Chief of a major retail company and thence high level consultancy for "blue chip companies". She explained to Isobel that she thought that what was happening to her was age and sex discrimination. Isobel advised her there and then to put in a grievance. The Claimant's explanation for not doing so before me today was that she did not know if there was a grievance procedure, and even if there was she was not convinced that it was a neutral procedure because the HR person was the wife of Mr Beavon. Mr Beavon has countered to the effect that they have always had a grievance policy. It is in the documentation new employees are given. Maybe it was not there when the Claimant started all those years ago. But that grievance procedure has been applied and followed on many occasions, albeit the Respondent has never experienced a Tribunal case before. I can deal with this point quick. I know that when the Claimant did raise her grievance in relation to the wider issues and particularly the redundancy situation as at 3 July, it was handled by not HR but Mr Edwards. It also follows that she must have known she could raise a grievance. I have already pointed out that she then had her appeal heard by a different manager. That of course all meets ACAS best practice. So it just does not square with the Claimant saying she could not bring a grievance back when she had been advised to do so by Ms Thompson because she had no confidence that it would be handled neutrally. It follows that I did not find her convincing on that point.

16. There are other matters which I have also noted. First is that the Claimant says that in the period post the meeting on 24 February and getting advice from Isobel she could not do anything about it at that stage. Initially she said this was because the impact of Corona. But then we established that this did not start to bite in terms of such as lockdown to circa 19 March: so three weeks or so later. Furthermore, the Claimant has said in the documentation before me today that she was not immediately furloughed.

17.In fact she then home worked from early in April. She says that she could not have put together a grievance from home. But she is an intelligent person who clearly has the internet at her fingertips. It follows that I found her explanation unconvincing. If anything preparing the grievance at home away from the office and where others might pry would be easier and less stressful. It follows that she has not provided a viable reason why she could not have gone down the grievance route much earlier than she did.

18. A third point that she raised was that she really did not know about ACAS before she went to early conciliation. But when confronted with certain aspects of her evidence she changed her mind on that and accepted that she knew about ACAS well before then. Indeed at Bp 156[1] she referred in her appeal on 24 July to the ACAS

[1] Bp=bundle page

code of practice and quoted from it verbatim ie as to her note of the meeting circa 19 June and indeed that on 24 February.

Conclusion

19. Thus I have now in particular focused on the length of and the reasons for the delay because it is such an important point in terms of whether it is just and equitable to extend time. There is then of course an element of prejudice to the Respondent, because if it has to deal with these earlier issues, and which also gets into the sophistications of the MBO, it will obviously put it to the additional expense of having to do so. But I consider that to be a secondary point. The crucial point is that with the time limit to be applied strictly and the burden of proof being upon the Claimant and given the findings that I have made, the Claimant does not persuade me that she could not have brought these claims to Tribunal well before she did. It follows I am dismissing those claims as being out of time it not being just and equitable to extend time. That leaves the claim of unfair dismissal and of direct sex discrimination relating to the redundancy package.

21. I shall therefore move on to give directions in respect thereof for the main hearing.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Claimant will provide a revised schedule to the Respondent's solicitors and the Tribunal by **Friday 16 April 2021** taking into account my judgement**.** In relation to the remaining sex discrimination claim, which is of limited scope, she will set out the amount claimed falls within the Vento bands. She has been made aware today by me of the updated Presidential Guidance and that it can be found on the internet. It will also give her time to reflect upon the viability of the current, very substantial amount of compensation that she claims stretching over several years. Loss of earnings for unfair dismissal is capped at 52 weeks and subject to the statutory cap as I explained to her. She cannot claim a basic award as she received inter alia a statutory redundancy payment. The surplus on that exit package will normally be an offset from the loss of earnings compensation otherwise claimed.

2. At present given the very substantial amount claimed I do not consider this case is suitable for Judicial Mediation. But that can be revisited if necessary in due course should the Respondent change its position post the revised schedule of loss.

3. The parties will exchange copies of the documents that they consider to be relevant and necessary for the determination of the issues by **Friday 28 May 2021**.

4. The Respondent will then send the Claimant the draft index for the main bundle by **Friday 18 June 2021**. If the Claimant has any revisions to make to that index, that is to say she requires in further documentation, she will reply to that effect by **Friday 9 July 2021.**

5. The Respondent will then prepare a final index and send a copy to the Claimant by **Friday 30 July 2021**.

6. By not later than **Friday 3 September 2021**, the Respondent will prepare the bundle for the Hearing. It is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the Tribunal and the parties, notices of hearing, location maps for the Tribunal and other documents which do not form part of either parties' case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

7. By not later than **Friday 24 September 2021**, the parties shall mutually exchange the witness statements of all witnesses on whom they intend to rely on. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The Tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. Witness statements should not routinely include a précis of any document which the Tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the Tribunal to draw from the document as a whole.

The main hearing

8. This is currently listed at Leicester on the three days commencing 14 March 2022. In order that the case does not go part heard that is **now extended to run for a further two days. In other words it will therefore run between Monday 14 March and Friday 18 March 2022 inclusive.**

9. The **first morning up till 12 noon** will be a reading in time for the Tribunal. The parties need to be in attendance ready for a prompt start of the live hearing at 12 noon.

10. For the purposes of the reading in period there will be delivered via the Respondent to the Leicester Tribunal not later than **three working days** before the start of the main hearing four copies of the following:-

10.1 The trial bundle.

10.2 The combined, indexed witness statement bundle.

10.3 A chronology, a copy of which will of course have been sent to the Claimant. Similarly a cast list[2].

11. The Tribunal will first deal with liability and will only go on to thence determine remedy if the Claimant succeeds.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':

https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/

[2] On reflection I have added this requirement.

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

_____

Employment Judge P Britton
Date: 22 April 2021

Sent to the parties on:

29 April 2021

For the Tribunal: