IN THE EMPLOYMENT TRIBUNAL

Case N° 21 of 2019

MARIA ALECIO

Claimant

–and–

GIBRALTAR HEALTH AUTHORITY

Respondent

DECISION

Background

By a Claim Form received by the Employment Tribunal on the 4th June 2019, the Claimant filed a complaint of bullying pursuant to the provisions of the Employment (Bullying At Work) Act 2014 (hereinafter referred to as "the Bullying Act") against the Respondent. In the Claim Form it is alleged that on the 19th January 2019, the Claimant was informed by her line manager, that she (the Claimant) would not be considered for promotion to a higher post since this would expose her (the Claimant) to bullying by other staff members due to her (the Claimant) having successfully defended herself against a spurious allegation brought by a fellow employee who had as a consequence received a warning from the Respondent. It was further alleged that her line manager made similar comments at another subsequent meeting. The Claimant therefore alleges that she has been bullied pursuant to section 4(2)(b) and (c) of the Bullying Act.

By way of a Response Form filed by the Respondent on the 19th day of June 2019, the Respondent contends that (1) the Tribunal does not have jurisdiction to hear the Claim since it was presented out of the 3 month period prescribed by section 8(2) of the Bullying Act, (2) the Claimant has incorrectly recounted what her line manager said to her and (3) the Respondent had never refused to consider the Claimant for the post in question, which after all had not been and is not open for application, and that should it ever be advertised, the Respondent would consider any application submitted by the Claimant.

The case first came before me on the 16th day of January 2020, and at said directions hearing I ordered that the issue of whether or not the Tribunal had jurisdiction to hear the claim filed be dealt with as a preliminary point. Counsel for the parties made their submissions on the preliminary point on the 3rd day of March 2020.

The Law

Section 8 of the Bullying Act provides as follows:-

"8(1) Without prejudice to his right to remedies for breach of contract and any other right of action, a complaint by an employee ("the complainant") that another person ("the respondent") has contravened this Act may be presented to the Tribunal.

(2) The Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal within the period of three months beginning when the act complained of is alleged to have been done.

(3) The Tribunal may nevertheless consider any such complaint or claim which is out of time, if, in all the circumstances of the case, it considers it is just and equitable to do so.

(4) For the purposes of this section any act extending over a period or any persistent or recurrent contravention of sections 6 or 7 shall be treated as done at the end of that period or at the date of the last such act".

There has been to date no reported case as to the interpretation to be given to the provisions of sub-section 8(2), as read with sub-section 8(3), of the Bullying Act.

Counsel for the Respondent has referred me to the following English cases where the question of filing a complaint with the Tribunal in discrimination cases within the requisite three month period was considered.

In the case of Calder v James Finlay Corporation Limited (1989) IRLR 55 the applicant made a number of requests to her employer for a mortgage subsidy. These requests were refused on the ground that such subsidies were not made available to female employees. Her last request was made in May 1981. She left the employment of the company in October 1981, and then within three months of the termination of her employment issued her complaint. The Court of Appeal held that the rule of the employers scheme constituted a discriminatory act extending over the period of her employment and was therefore to be treated as having been done at the end of her employment. Browne – Wilkinson J said at page 56:-

"By constituting a scheme under the rules of which a female could not obtain the benefit of the mortgage subsidy in our judgement the employers were discriminating against the applicant in the way they afforded her access to the scheme. It follows, in our judgment, that so long as the applicant remained in the employment of these employers there was a continuing discrimination against her".

In Barclays Bank PLC v Kapur and others (1989) IRLR 387, the complainants, all of asian origin, were employed by the bank in Kenya and were part of the pension scheme operated by the bank in that country. The complainants, as a result of the Africanisation policy operated by the political establishment in Kenya lost their work permits and had to leave the country. The Bank offered them employment in England and were afforded the right to enter the English pension scheme but on the understanding that the complainants could not be given credit for their service with the bank in

Kenya. Despite requests for reconsideration, the Bank refused to alter this condition. Years later the complainants complained that the Bank's failure or refusal to credit them with their previous service was unlawfully discriminatory in that the previous service of employees of European origin was reckoned as pensionable service with the Bank. The Court of Appeal held that to maintain a continuing regime which adversely affects an employee is an act which continues so long as it is maintained. A right to a pension forms part of the overall remuneration of an employee, and if his pension entitlement can be shown to be less favourable than that of other employees this disadvantage continues throughout the period of his employment.

In Amies v Inner London Education Authority (1977) 2 AER 100 the complainant was in 1971 appointed as deputy head of a school art department by an education authority. In 1975 the complainant applied for the post of head of the department but, on the 13th October 1975, a man was appointed to that post. The relevant part of the Sex Discrimination Act 1975, which made discrimination on the grounds of sex unlawful, came into operation on the 29th December 1975. On the 1st January 1976 the complainant complained on the grounds that in appointing a man to the post, the education authority had discriminated against her, by reason of her sex contrary to the provisions of the 1975 Act. The tribunal dismissed her complaint but she appealed contending that the appointment of the man, who still occupied the post of head of the department after the 1975 Act had come into force constituted a continuing discrimination against her. The Court of Appeal held that although the appointment of the man to the post of head of department was an act with continuing consequences, the act alleged to be discriminatory was the appointment itself and not the state of affairs which resulted from the appointment. Bristow J in the course of his judgment stated as follows:-

> *"Mrs Amies's complaint here is that by not appointing her, and by appointing a man with lesser qualifications, the ILEA has unlawfully discriminated against her. She herself has in our judgement given the right definition of the 'act of discrimination' of which she complained to the tribunal under S63(1). Like any other discrimination by act or omission, the failure to appoint her, and the appointment of him, must have continuing consequences. She is not head of the department, he has been ever since 13th October 1975. But it is the consequences of the appointment which are the continuing element in the situation, not the appointment itself".*

and later on:-

> *"So if there was an ILEA rule that the position of head of department was open to men only, for as long as that rule was in operation there would be a continuing discrimination and anyone considering herself to have been discriminated against because of the rule would have three months from the time when the rule was abrogated within which to bring the complaint.*
> *In contrast, in Mrs Amies's case clearly the time runs from the date of appointment of her male rival. There was no continuing rule which prevented her appointment. It is the omission to appoint her and the appointment of him which is the subject of her complaint'.*

In Basildon Academies Trust v Polius – Curran (UK EST/0055/15/RN) the claimant had expressed interest in being appointed head of the maths department prior to and whilst still employed with Basildon Academies Trust, the respondent. The claimant was employed as from the 16th April 2012 until she resigned on the 30th April 2013. The post of head of department was filled on the 1st September 2012. The claimant claimed that as she continually raised the issue of the other persons' appointment during her employment and because the respondent had not followed its own recruitment policy, there was an act of continuing discrimination. In giving judgement Judge Peter Clark stated:-

> *"I agree that this was a one-off act with continuing consequences. The fact of the complainant complaining about it does not create a continuing act. Nor does a failure to regularise his appointment in the sense of undergoing a proper recruitment policy. However, I agree with Mr Young that the appointment decision was not completed until 1st September 2012. In my judgement time began to run from that date, as the tribunal found at para 161. The relevant claim was out of time".*

In the case of Commissioner of Police of the Metropolis v Hendricks (2003) ICR 530, the applicant, a police constable since 1987, was away from work on full pay on grounds of stress from March 1999. In March 2000 she complained to an employment tribunal of institutional and continuing racial and sexual discrimination in the form of harassment over a period of 11 years carried out against her by fellow officers and a failure of management to prevent that treatment. The commissioner contended that the tribunal had no jurisdiction to hear the first originating application because the allegations had taken place outside the statutory three-month time limit, the applicant not having been in active duty for more than a year prior to the presentation of the application. The Court of Appeal in allowing the appeal held that the focus should be on the substance of the complaint that the commissioner was responsible for an on going situation or a continuing state of affairs in which female ethnic minority officers were treated less favourably; that the fact that the applicant was absent from the working environment from March 1999 did not necessarily rule out the possibility of continuing discrimination against her for which the commissioner might be held liable, since she remained a serving officer and her complaints extended to less favourable treatment by the force in the course of that continuing relationship; and that the employment tribunal had been entitled to find that it had jurisdiction to consider the appellant's allegations of discrimination, on the basis that the burden would be on her to prove that the numerous alleged incidents were events of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

In the case of South Western Ambulance Service NHS Foundation Trust v King (UKEAT/0056/19/00) the claimant was employed by the respondent from the 21st November 1991 until her resignation on the 5th October 2017. In October 2016, the claimant lodged various complaints about alleged sexist remarks, bullying, harassment, victimisation and other allegations about her manager's treatment of her. The respondent commissioned an external consultant to investigate the complaints. The result of the investigation was that there was no evidence that the respondents' anti-harassment and bullying policy had been breached. The claimant appealed against the result of the

investigation and subsequently resigned claiming she was constructively dismissed. In the course of the judgement Choudhury J stated:-

"Hendricks demonstrates that there are several ways in which conduct might be said to be conduct extending over a period (or, as it is sometimes called, a "continuing act"). One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment. Another example given in para 48 of Hendricks is were separate acts of discrimination are linked to one another and are evidence of a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected and isolated acts. In both these examples, the continuing act arises because of the link or connection between otherwise separate acts of discrimination.

If the time issue is raised at a preliminary stage, the Claimant merely needs to establish a prima facie case that there is such a continuing act. That was the situation in Hendricks. However, as Mummery LJ makes clear at paragraph 49 of the Judgement, once the Tribunal has made full findings of fact at a substantive hearing, the conclusion may be that there was no continuing act at all.

Given that the time limits are such as to create a jurisdictional hurdle for the claimant, if, ultimately the acts relied upon are found not to form part of conduct extending over a period so as to enlarge time, then the claim would fail, unless, that is, the Tribunal considers that it would be just and equitable to extend time in respect of any acts that are proven but out of time".

In the case of Owusu v London Fire and Civil Defence Authority (1995) IRLR 574 Mr Owusu was employed as from 1986 as a fire safety caseworker with the grade of MG12. In February 1991, he submitted a complaint under the Race Relations Act alleging that he had been discriminated against. He gave the date when the action complained of took place as "presently", and responded to an application for further and better particulars by alleging that his failure to advance beyond the grade of MG12 was due to racial discrimination. An industrial tribunal dismissed the complaint on the ground that it was out of time. On appeal it was held that an act extends over a period of time if it takes the form of some policy, rule or practice, in accordance with which decisions are taken from time to time. A succession of specific instances can indicate the existence of a practice, which, in turn, can constitute a continuing act extending over a period. In the Owusu case, what was alleged was a continuing act in the form of maintaining a practice which resulted in consistent discriminatory decisions excluding the claimant from regrading or opportunities to act up, and if on the evidence, such a practice existed, it would be for the tribunal to hear the case on its merits to determine whether the practice was racially discriminatory. Mr Justice Mumnery in the course of his judgment stated as follows:-

"The position is that an act does not extend over a period simply because the doing of the act has continuing consequences. A specific decision not to up grade may be a specific act with continuing consequences. The continuing consequences do not make it a continuing act. On the other hand, an act does extend over a period of time if it takes the form of some policy, rule or practice, in accordance with which decisions are taken

from time to time. What is continuing is alleged in this case to be a practice which results in consistent decisions discriminatory of Mr Owusu.

It would be a matter of evidence for the tribunal as to whether such a practice as is alleged in Mr Kibling's argument in fact exists. It may be that, when explanations are given by the respondents, it will be shown that there is no link between one instance and another, no linking practice but a matter of one-off decisions with different explanations which cannot constitute a practice.

We emphasise that, even if it was established that there was some practice built up of denying Mr Owusu up grading or the opportunity to act up, it would still have to be proved that it was a discriminatory practice. It may be that the respondents can satisfy the tribunal, when they hear the case on the merits, that there are alternative explanations for the treatment of which Mr Owusu makes complaint. But those are all matters for investigation on the merits."

As stated above, section 8(3) of the Bullying Act permits the tribunal to consider a complaint filed outside of the three month period *"if, in all the circumstances of the case, it considers it is just and equitable to do so"*. Such a power to grant an extension of time is found under various different Acts and has been considered in a good number of cases; some of which I have been referred to by counsel. As far as I can see the following are the principles that can be distilled from the authorities; namely:-

(a) there is no presumption that a tribunal should exercise its discretion to extend time on the just and equitable ground unless it can justify failure to exercise the discretion;

(b) the exercise of the discretion is the exception rather than the rule since time limits should be enforced strictly;

(c) whether a claimant succeeds in persuading a tribunal to grant an extension is not a question of either policy or law as it is a question of fact and judgment to be answered case by case;

(d) the claimant has to satisfy two questions:-

- why is it that the claim was not filed in time; and
- why is it that after the expiry of the time limit the claim was not brought sooner than it was.

(e) the tribunal should consider the prejudice which each party will suffer as the result of the granting or refusing of an application to extend the time limit, including:-

- the length of and the 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 respondent has co-operated with any requests for information;

- the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action;

- the steps taken to obtain legal advice once they knew of the possibility of taking legal action;

(f) the prejudice a respondent suffers is the two fold one of having to meet a claim which would otherwise be defeated by the limitation defence and by having to deal with a case which will be extended for an unbeknown period with the knock on effects of fading memories, loss of documentation and witnesses being lost;

(g) the tribunal can take into account anything which it judges to be relevant when making its decision; and

(h) it is for the Claimant to persuade the tribunal to exercise its discretion.

That then is the law on the points raised by counsel during their submissions.

The Facts

In her Claim Form the Claimant makes the following statement:-

> *"In January 2019 (Jan 19th) I was told by my line manager Alex Baglietto in a meeting with Evelyn Cervan, and again separately in a meeting with Alex Baglietto, that he would not consider me for the job of deputy manager because as he stated, I have suffered enough by the bullying from other staff members against me, and because of the personal grievance I have suffered.*
> *As a result of being told I would not be considered for the position I was made to feel ashamed, intimidated, distressed and further humiliated. The employer by continuing to refuse to consider me for the role is extending the act of bullying to date".*

I pause to point out that there is no indication in the Claim form as to the date when the separate meeting after the 19th January between the Claimant and Mr Baglietto took place. Mr Brunt has informed the Tribunal that the Claimant cannot recall the date of the meeting but that it did not occur within a period which would bring it within the three month period prescribed by section 8 (2) of the Bullying Act. What is known is that the first meeting occurred on the 19th January 2019 and that the Claim form was filed on the 4th June 2019; some four months and two weeks later and therefore outside the time provided for by section 8(2) of the Bullying Act.

The Claimant does not deny that on the face of it the Claim was filed outside the three month prescribed period and offers the following explanation as to why the claim was not filed before the 4th June 2019:-

> *"I was back and forth to the UK due to my grandson being born with transposition of the great arteries on the 7th April 2019. I travelled to London where he was sent to be born at St Thomas Hospital by the GHA. I*

was also there to support my son (the father) through this traumatic time as we were not aware of the outcome due to the fact that his congenital heart defect was not compatible with life, meaning he would be stabilized

until he was able to have open heart surgery. He arrived on the 10th of April 2019 and had open heart surgery on the 18th April there were many complications which resulted in my grandson having another major open heart surgery".

I have no doubt that April 2019 must have indeed been traumatic for the Claimant and her family and it is no wonder that her mind was on things other than this claim. But, I note that no explanation is offered, and Mr Brunt has not been able to confirm to me the reason, as to why the Claimant did not file her claim between the 20th January 2019 and, lets say, the 31st March 2019, for example.

It is also to be noted that the Claimant has not provided any explanation as to why she did not instruct counsel or file a claim with this tribunal during the month of May 2019. All this has to be seen in the context that she admits to being engaged with the Respondent in discussions to resolve matters; no information being given as to what exactly transpired or when.

The Respondent does not deny that a meeting occurred between the Claimant and Mr Baglietto but does dispute what it is alleged Mr Baglietto stated. The Respondent further states, firstly that the post of deputy manager had been open since August 2018 and continues to be unfilled to date since it has not been "open for application", and secondly, that if advertised, the Claimant, together with any other individual that wishes to do so, will be allowed to apply since the Respondent has never refused to consider the Claimant for the post.

I must admit that I am confused somewhat as to what exactly the Respondent is putting forward insofar as the following is concerned. On the one hand, it states that Mr Baglietto did inform the Claimant that *"as a responsible manager and exercising his duty of care towards her, he was not prepared to move her to St Bernard's Hospital and place her in the acting deputy manager's role there ....."* and, on the other hand, it states that the Respondent has not refused to consider the Claimant for the post and/or disbarred her from being considered for promotion as alleged. There seems to be a nuanced contradiction in these statements.

The Case for Each Party

It is the Respondent's case that the complaint filed by the Claimant should be dismissed since:-

(a) on the face of it, as the act complained of occurred on the 19th January 2019, the claim should have been filed by the 19th April 2019 pursuant to the provisions of section 8(2) of the Bullying Act but was in fact filed on the 4th June 2019 and therefore was clearly out of time;

(b) the alleged act or acts taken as alleged by the Claimant could not be said to be acts which extended over a period since they were one off incident's which did not show a policy, rule or practice on the part of

the Respondent and/or which could be said to be continuing acts and therefore the Claimant could not rely on the provisions of section 8(4) of the Bullying Act in order to bring the claim within the three month period prescribed by section 8(2) of the said Act.

With reference the question of whether the act(s) complained of by the Claimant are acts which engage the provisions of section 8(4) of the Bullying Act, Mrs Wright has referred me to the words *"any act extending over a period"* and *"shall be treated as done at the end of that period or at the date of the last such act"* found in section 8(4) of the Bullying Act, and submitted that as these words bear a great similarly to section 123(3), as read with subsection (1), of the UK Equality Act, the Tribunal should apply the principles expounded by the UK Employment Appeal Tribunal and UK Courts in discrimination cases involving applications brought out of time under the said Equality Act. In consequence of this, Mrs Wright has referred me to a number of English cases and distilled from them the principles that she submits I should apply; to these cases I have already referred to above.

Mr Brunt confirms that it is the Claimant's case that the statement(s) made by Mr Baglietto to the Claimant communicated the Respondent's decision as her employer, and was in fact akin to a policy/scheme, rather than a one off event, and therefore was a continuing act which permitted the Claimant to rely on the provisions of section 8(4) of the Bullying Act so as to bring the Claim within the three month qualifying period. In order words, it is said that the Respondent had made the decision/policy not to transfer the Claimant so as to enable her to take up the vacant post, and as this decision was for the reasons stated by Mr Baglietto it could be reasonably assumed that the Claimant would never be transferred; this it was submitted was tantamount to a policy as to where the Claimant could not work within the organisation, and therefore a continuing act which engaged the provisions of section 8(4) of the Bullying Act.

As stated above, the Claimant seeks to rely on the provisions of section 8(4) of the Bullying Act in countering the Respondent's submission that the claim has been filed out of time. I interpret section 8(4) to read as follows:-

For the purposes of this section:-

(i) any act extending over a period shall be treated as done at the end of that period; or

(ii) any persistent or recurrent contravention of sections 6 or 7 shall be treated as done at the date of the last such act.

It appears to me that in making his submissions Mr Brunt is relying on (i) above as he has not alleged persistent and/or recurrent contraventions.

It is Mr Brunt's submission that when making the statement which Mr Baglietto is alleged to have made to the Claimant, Mr Baglietto was merely confirming the Respondent's policy/practice that the Claimant would not be considered for and/or given promotion in the future. This being the case it followed that the act(s) complained of, namely bullying within the parameters of sections 4(2)(a), (b) and/or (c), was a continuing act over a period which

extended and continues to extend the three month period until such time as the policy/practice is revoked.

It is for Mr Brunt to persuade me that the allegations made by the Claimant amount to a prima facie case that there was a continuing act; the continuing

act being that the Respondent maintained a practice which when followed and/or applied resulted in the Claimant being excluded from promotion and/or the possibility of acting up. Mr Brunt seeks to show such a prima facie case by submitting that:-

(i) Mr Baglietto's statement that *"he would not consider me for the job of deputy manager"* clearly meant that the Respondent had a policy of not promoting the Claimant and/or of not considering her for promotion; and

(ii) the Respondent's admission that Mr Baglietto informed the Claimant that *"he was not prepared to move her to St Bernard's Hospital and place her in the acting deputy managers role"* was an admission that the Respondent had a defacto policy of not transferring the Claimant and that this was tantamount to a policy as to where the Claimant could work within the organisation.

I pause to point out that nothing has been produced to date to state what exactly was or was not said between Mr Baglietto and the Claimant during the course of the second conversation alluded to in the Claim Form and therefore little weight can be given to this. In any event, the Claimant has conceded this conversation also took place outside the three month period.

If the words quoted above attributed to Mr Baglietto where the only words that had been spoken then I could begin to sympathise with Mr Brunt's submissions. But they were not the only words spoken. Irrespective of which account of the conversation is believed, in both cases it is accepted that Mr Baglietto explained that the decision was based on not exposing the Claimant to the possibility of bullying by other employees of the Respondent. All of the conversation that allegedly took place has to be taken in context and not just one part focused on. It is an employer's duty to ensure that its employees are not bullied, and it is indeed ironic that the Claimant has filed a bullying claim as a result of the Respondent apparently not wishing to expose her to the possibility of bullying, which had it occurred would permit her to complain of being bullied by follow employees. Be that as it may, and even if one took the words quoted above out of context, in my view they do not show a prima facie case that the Respondent had a defacto policy/practice of not considering the Claimant for promotion or acting up and/or had a defacto policy/practice to permanently not transfer her. The most that can be said, even if it is assumed that Mr Baglietto had the authority to state as he did, is that there was a decision not to place the Claimant in a specific post in a specific department, a post that had been vacant for some time and in respect of which no advertisement had been made. Moreover, there is no succession of specific instances in this case which could indicate the existence on the part of the Respondent and/or Mr Baglietto of a practice or policy or rule to bully the Claimant by preventing her the opportunity of acting up and/or of being promoted or being considered for promotion. Thus, in my opinion there is insufficient prima facie evidence before this Tribunal to show a continuing

act and that therefore the provisions of section 8(4) of the Bullying Act have been engaged. But even if I am wrong in this and there are grounds upon which to hold that there was a practice/policy/rule to exclude the Claimant from promotion and/or acting up, the Claimant would still need to show that she had been bullied pursuant to section 4(2)(a) or (b) or (c) of the Bullying Act, and for the reasons stated below I am of the opinion that the Claimant is unable to do this. This being the case it follows that as the claim has been filed outside the requisite three month time limit I have to dismiss it unless there is just and reasonable cause to do otherwise.

Mr Brunt has, as anticipated by the Respondent, also made an application, in the alternate, for this Tribunal to extend time pursuant to section 8(3) of the Bullying Act. It is contended by Mr Brunt that it is just and equitable for this Tribunal to extend time because the delay of under 2 months will not have effected the cogency of any evidence, there were reasonable reasons for the Claimant not filing her claim in time, the claim was filed the day after the Claimant spoke to lawyers and the Claimant had unsuccessfully tried to engage with the Respondent in order to resolve the matter.

To these submissions Mrs Wright replies that it would not be just and equitable for the Tribunal to extend time since the Respondent will be prejudiced by having to defend a case which is otherwise defeated by section 8(2) of the Bullying Act, and by having to rely on witnesses whose memory of events will have faded or who will not be able to locate material documents, and that granting an extension is the exception rather than the rule.

It is for the Claimant to convince this Tribunal that it is just and equitable for this Tribunal to exercise its broad discretion to grant the extension out of time. The Claimant seeks to do this by pointing out that the delay will not affect the cogency of any evidence and that a claim was filed immediately counsel was instructed. I accept these submission but in my view they are not sufficiently good reasons in all the circumstances of the case to persuade me to exercise the discretion I have; especially in the light of the following two considerations.

Firstly, there has been no reason or explanation whatsoever provided by the Claimant as to why she did not obtain legal advice and/or file her claim between the 20th January 2019 and the 31st March 2019. The Claimant provides an explanation, and one that I accept but to a degree only, for the month of April 2019, but that only covers the last 19 days of the three month period. Moreover, she further does not provide an adequate explanation as to why during all or part of May 2019 she did not take steps to obtain appropriate legal advice. After all she was not inexperienced in these matters having undergone the previous experiences(s) referred to in her Claim Form and, indeed she has not professed ignorance of the law and/or of procedure. The Claimant has vaguely referred to being engaged in discussions with the Respondent but no particularisation was given and no statement made that these discussions caused her to forego/delay filing a claim and/or seeking legal advice.

Secondly, because it is my opinion that the claim filed by the Claimant has no reasonable prospects of success and therefore there is no countervailing argument relating to the perceived merits of the complaint and no public

interest consideration to outweigh the first reason above. In my opinion the claim filed has no reasonable prospect of success for the following reasons.

It is alleged by the Claimant in the Claim Form that:-

(a) refusing to consider her for the position of deputy manager is in reality and effect persistent unjustified criticism contrary to section 4(2)(b) of the Bullying Act; and/or

(b) refusing to consider her for the position of deputy manager is in reality and effect punishment imposed without justification in that she is disbarred from being considered for promotion contrary to section 4(2)(c); and/or

(c) persistently refusing to consider her for employment was behaviour insulting, offensive and intimidating contrary to section 4(2)(c).

Dealing first with the alleged contravention of section 4(2)(b) of the Bullying Act. The every day meaning of the word "criticism" is finding fault, censure, an expression of disapproval.

The every day meaning of the word "persistent" is constantly repeated, enduring, recurring for a long time.

So applying those definitions to the facts alleged we find the following.

According to the Claim Form, and assuming the evidence of the Claimant taken at its highest, would show that on two occasions Mr Baglietto did make the statements attributed to him, I cannot see any justification for saying that:-

(i) Mr Baglietto was finding fault with the Claimant, or censuring her or expressing disapproval of her; and/or

(ii) even if I am wrong in this and he was, that such criticism was constantly repeated, enduring or recurring for a long time.

This being so, in my opinion, there are no grounds on which the Claimant can mount an allegation that she was bullied by the Respondent within the meaning of section 4(2)(b) of the Bullying Act.

Dealing secondly with the alleged contravention of section 4(2)(c) of the Bullying Act.

The every day meaning of "without justification" is not having good reason or cause for something that exists or has been done.

Once again according to the Claim Form, and assuming that the evidence of the Claimant, taken at its highest, did show that Mr Baglietto in stating what he did was driven by the desire to prevent the Claimant from being bullied by fellow employees and/or was trying to act in the best interests of the Claimant as he saw it, then I cannot see what rationale there can be for saying the Claimant was being punished (if indeed it could be said to be punishment) without good reason or cause. The Claimant may not agree that the reason given is justified and/or fair but that does not mean that it is without

justification since it is an objective test that has to be applied. It is an employer's obligation to prevent bullying, and this on the face of it is what Mr Baglietto was seeking to do. This being so, in my opinion, and without going further and considering the provisions of section 4(3) of the Bullying Act, there are once again no grounds on which the Claimant can mount an allegation that she was bullied by the Respondent within the meaning of section 4(2)(c) of the Bullying Act.

Dealing thirdly with the alleged contravention of section 4(2)(a) of the Bullying Act.

As stated above, the allegation is that the Claimant was repeatedly, constantly, enduringly denied employment by the Respondent. Apart from the fact that the Claimant was, and continues to be employed with the Respondent and/or that no persistence appears to have occurred within the ordinary meaning of the word, it seems to me that the Claimant's interpretation of section 4(2)(a) is misconceived. The word "behaviour" given its every day ordinary meaning means the way one conducts oneself, the way in which one treats others. Refusing to consider a person for a particular post may be discriminatory and/or victimisation but in my view it was not intended to be and does not easily, if at all, come within the meaning of bullying. This being so, in my opinion, there are once again no grounds on which the Claimant can mount an allegation that she was bullied by the Respondent within the meaning of section 4(2)(a) of the Bullying Act.

In the circumstances of the above, and for the reasons stated, I am of the opinion that it would not be just and equitable to permit the Claimant to continue with this claim outside the prescribed three month period.

Conclusion

In the light of the determinations made above, I hereby find that this Tribunal does not have the jurisdiction to hear and determine the Claim filed as it has been filed outside the three month period prescribed by section 8(2) of the Bullying Act, and moreover that it is not just and equitable for this Tribunal to consider the Claim filed out of time.

Dated this 8 day of April 2020

Joseph Nunez
Chairman