THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port-of-Spain (Virtual)

Claim No. CV2019-04372

Between

Neisha Hyatali

Claimant

And

The University of the West Indies

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on: August 23, 2021

Appearances

Mr. Anand Singh and Ms Nisha Persad, Attorneys-at-Law for the Claimant

Mr. Ravi Nanga and Ms. Elena Araujo, Attorneys-at-Law for the Defendant

RULING

A. Introduction

1. This Ruling considers the implications of statutory limitation on a Claim in relation to illness that the Claimant says resulted from her employer's negligence. The Claimant's primary position is that the Claim has been brought within the time period of four years permitted under Section 5 of the **Limitation of Certain Actions Act, Chap 7:09** ["the Act"].

2. However, during the pre-action stage of the proceedings, the Defendant's position was that the Claim is statute barred. Accordingly, by the Application before the Court, the Claimant seeks a Ruling, waiving the limitation period prescribed under Section 5, but only if necessary. The Claimant filed her Application "out of an abundance of caution."

3. Having considered the pleaded timeline of events in the Claimant's Statement of Case, the Affidavits filed by both sides and the parties' written submissions, my conclusion is that the Claim commenced four months after the limitation period. It is statute barred.

4. However, the circumstances outlined in the Application, the Affidavits and the Statement of Case are such that a waiver of the limitation period, as provided for by Section 9 of the Act, is justified.

B. Issues

5. The issues that arise on the Application are two-fold:
    a. When did the limitation period commence for purposes of deciding whether the Claim was filed within the permitted time?
    b. If the Claim was filed after the end of the limitation period, is waiver of the limitation bar to pursuing it justified?

C. Background Facts

6. The Claimant's work location, as an Administrative Assistant employed by the Defendant, was in the library. Her case is that around the week of July 7, 2014 the air-conditioning unit in her office at the library malfunctioned and remained in disrepair for around one month. Fans were used instead. The Claimant described air quality as poor as she observed mold and dust multiplied during the period.

7. The Claimant says she developed a cough that worsened during the first week of this new circumstance and persisted thereafter. On or about August 12, 2014, she

visited a Doctor at the Defendant's Health Services Unit ["HSU"]. Her condition was diagnosed at that time as allergies, and she received medication for the same.

8. On August 13, 2014, the Claimant completed an Accident/Incident/Near Miss Report Form in relation to her illness and she also submitted a report to the Defendant's "OSHE Unit" on September 17, 2014 which was forwarded to the Human Resource Unit.

9. She continued to experience symptoms and after several weeks of visiting the Defendant's HSU, the doctor there referred her to a specialist, Professor Seemungal. She visited him on September 27, 2014 and he decided to monitor her for four months. Thereafter, by detailed medical report dated April 29, 2015, Professor Seemungal diagnosed her as having Occupational Asthma arising from exposure to an unknown agent present in the workplace. The report recommended that for recovery the Claimant must not face further exposure. As such, she must be removed immediately from the offending environment.

10. The medical report was addressed not to the Claimant but to the Defendant's HSU doctor who had referred her to Professor Seemungal. The Claimant's pleaded case is that she did not receive it until early November 2015. However, in Affidavits filed by witnesses opposing the Application they contend that the report was emailed to the Claimant in June 2015.

11. The Claimant then admitted in her Affidavit in response that this was so. However, what she received was a draft unsigned copy of this report in June 2015 and she received the official signed report "on or about October or November 2015." She emailed the draft report to her Union in July 2015 and continued thereafter to send emails repeatedly to the Defendant requesting the finalized version of the medical report.

12. From April 2015 to September 2015, the Claimant was moved to another work location. The cough persisted. In October 2015, she was moved back to work in

the library and remained there until November 2017 despite the specialist's recommendation that such exposure be avoided.

13. According to the Claimant, after becoming aware of her diagnosis she made efforts to alert the Defendant about her medical concerns. She wrote letters in 2017 to no avail. She also tried to have her Union seek redress on her behalf. She arranged meetings with persons in the Defendant's Human Resource Department. These efforts are reflected in emails attached to the Claimant's pleadings and affidavits. The efforts from 2015 to June, 2019 bore no fruit.

14. Thereafter, in July 2019, the Claimant sought legal advice. Her Attorneys sent a pre-action protocol letter to the Defendant outlining the Claimant's claim. The Defendant requested several extensions of time to respond and after being granted same, indicated by letter dated September 27 2019 that the matter was statute barred.

15. Attorneys for the Claimant responded by letter dated October 8, 2019 indicating that the limitation period commenced when the Claimant first acquired knowledge of the accrual of the cause of action. That time, according to the Claimant, was the date when she received the formal medical report. That date, as later pleaded in her Statement of Case, was in early November 2015. As aforementioned, however, the Claimant now admits that she received a draft of the medical report in June 2015 and sent it to her Union representative.

16. There was no further response from the Defendant and the Claimant filed her case a few days thereafter on October 30, 2019.

D. Legislation and Cases

17. The relevant provisions of the Act are as follows:

Section 5

5. (1) Subject to subsection (6), this section applies to any action for damages for negligence, nuisance, or breach of duty whether the duty exists by virtue of a

contract or any enactment or independently of any contract or any such enactment where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) Subject to subsection (3), an action to which this section applies shall not be brought after the expiry of four years from—

(a) the date on which the cause of action accrued; or

(b) ***the date on which the person injured first acquired knowledge of the accrual of the cause of action****…*

Section 7

7. (1) In this Act, a person first acquired knowledge ***when he first became aware*** *of any of the following facts:*

(a) ***that the injury in question was significant****;*

(b) that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;

(c) the identity of the Defendant;

(d) where it is alleged that the act or omission was that of a person other than the Defendant, the identity of that person and the additional facts supporting the bringing of an action against the Defendant; and knowledge that any act or omission did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant

(2) For the purposes of this section ***an injury is significant if the person would reasonably have considered it sufficiently serious to justify his instituting proceedings against a Defendant*** *who did not dispute liability and was able to satisfy a judgment.*

(3) For the purposes of this section a person's knowledge includes ***knowledge which he might reasonably be expected to acquire****—*

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him ***with the help of such medical or other expert advice as it is reasonable for him to seek****,*

but there shall not be attributed to a person by virtue of this subsection, knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain that advice and where appropriate to act on that advice

Section 9

9. (1) Where it appears to the Court that it would be inequitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 5 or 6 prejudice the plaintiff or any person whom he represents; and

(b) any decision of the Court under this subsection would prejudice the Defendant or any person whom he represents, the Court may direct that those provisions shall not apply to the action or to any specified cause of action to which the action relates.

(2) The Court shall not give a direction under this section, in which the provisions of section 6 are not applied except where the reason why the person injured could no longer maintain an action was because of the time limit established by section 5.

(3) In acting under this section the Court shall have regard to all the circumstances of the case and in particular to—

(a) ***the length of, and the reasons for, the delay*** *on the part of the plaintiff;*

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the Defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 8 or, as the case may be, section 9;

(c) ***the conduct of the Defendant after the cause of action arose****, including* ***the extent to which he responded to requests*** *reasonably made by the plaintiff for*

information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the Defendant;

(d) ***the duration of any disability*** *of the plaintiff arising after the date of the accrual of the cause of action; or*

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the Defendant's act or omission to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the ***steps, if any, taken by the plaintiff*** *to obtain medical, legal or other expert advice and the nature of any such advice he may have received. [Emphasis added]*

18. Court Judgments have clarified that sections 9 (1) and 9 (3) contain drafting errors. The word "inequitable" in section 9 (1) is a drafting error as the legislature must have meant "equitable"[1]. The reference to sections 8 and 9 of the Act in section 9 (3) (b) is another drafting error as it is intended to refer to Sections 5 and 6 of the Act[2].

19. As it relates to the first issue, the date when the limitation period commences to run is clear from Section 5 of the Act. That date is "the date on which the person injured first acquired knowledge of the accrual of the cause of action" in the sense explained at Section 7 of the Act.

20. In order to justify waiver of the limitation bar to this Claim, if in fact it was filed after the permitted period, the relevant consideration generally is whether such waiver would be equitable taking into account a number of factors set out at Section 9 of the Act.

[1] See Civil Appeal 32 of 2015 Hagley and another v Babwah, para 44 last line and Civ App P364-2017 Mohan v. Prestige Holdings Limited. The substituted word "equitable" is necessary as "inequitable" renders the meaning of the section absurd and irrational.

[2] See Civ App P364-2017 Mohan v. Prestige Holdings Limited, para 55 last line

21. Counsel for the Claimant, in his written submissions, usefully summarized the three leading authorities[3] on the court's exercise of its discretion are as follows:
    - The discretion in Section 9 (1) is an unfettered one[4]. The court is required to look at the matter broadly (as made plain by the words the court shall have regard to all circumstances of the case) and the matters set out in 9 (3) is not intended to place a fetter on the discretion[5].
    - The criteria used for Relief from Sanction principles do not apply[6].
    - The fundamental question is whether it is fair and just in all the circumstances of the particular case to expect the Defendant to meet the claim on the merits, notwithstanding the delay in commencing the proceedings. It is therefore particularly relevant whether, and to what extent, the Defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents[7].
    - The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice, and the burden is on the Claimant to show that his or her prejudice would outweigh that to the Defendant: Refusing to exercise the discretion in favour of a Claimant who brings the claim outside the primary limitation period will necessarily prejudice the Claimant, who thereby loses the chance of establishing the claim[8].
    - There is no high watermark[9] or the burden on the Claimant is not necessarily a heavy one[10].

[3] Civ App P364-2017 Mohan v. Prestige Holdings Limited Per Mendonca JA, The Chief Constable of Greater Manchester Police v Robert Carroll per Sir Etherton MR at paragraph 42 and Cain v. Francis 2008 EWCA Civ 1451
[4] Civ App P364-2017 Mohan v. Prestige Holdings Limited para 45
[5] Civ App P364-2017 Mohan v. Prestige Holdings Limited paras 46-47
[6] Ellis v Heart of England [2018] EWHC 3505 para 33
[7] Civ App P364-2017 Mohan v. Prestige Holdings Limited para 70; similar statements can be found in Sanderson v. City of Bradford City [2016] EWHC 527 (QB) citing Smith LJ in Cain v Francis 2008 EWCA Civ 1451
[8] Civ App P364-2017 Mohan v. Prestige Holdings Limited paras 45 & 70; The Chief Constable of Greater Manchester Police v Carroll [2017] EWCA Civ 1992 para 42.3
[9] CV2014-03834 Ayesha Abrahim v T&TEC, per Mr. Justice Robin Mohammed para. 30: "*From the observations of Lord Hoffmann and Lord Bingham, it must be observed that the watermark for falling under section 33 does not appear to be high. The most important factors emphasized are whether the Defendant suffers prejudice in presenting his defence, the length of the delay and the concern not to give the Defendant a gratuitous windfall defence*.
[10] The Chief Constable of Greater Manchester Police v Carroll [2017] EWCA Civ 1992 para 42.4

- Whilst the ultimate burden is on a Claimant to show that it would be equitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the Defendant is, or is likely to be, less cogent because of the delay is on the Defendant[11].

E. Analysis

When did the limitation time start to run?

22. In **Halford v. Brookes and another [1991] 3 All E.R. 559**, at p. 574, the English Court of Appeal considered section 14 of the Limitation Act, 1980 which is similar to section 7 of the LCAA:

> *"The word ('knowledge') has to be construed in the context of the purpose of the section, which is to determine a period of time within which a plaintiff can be required to start any proceedings. In this context 'knowledge' clearly does not mean 'know for certain and beyond the possibility of contradiction'. It does, however, mean 'knowing with sufficient confidence to justify embarking on the preliminaries to issue the writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence".*

23. The Defendant's contention that the Claim is statute barred, as detailed in the Affidavit of its Legal Officer, Ms Ramcharan, is based on the fact that the cause of action accrued in July 2014. That was when the Claimant first felt ill. The Claimant however, relies on Section 5(2)(b) of the Act. She contends that in the circumstances of this case the relevant date, for purposes of time running, is when the Claimant first had knowledge that the cause of action accrued.

24. There is merit to the Claimant's submission that the date of awareness of the cause of action is the relevant date. This could only have been when the medical diagnosis of occupational asthma, which she is complaining of, was brought to her

[11] Civ App P364-2017 Mohan v. Prestige Holdings Limited para 57; The Chief Constable of Greater Manchester Police v Carroll [2017] EWCA Civ 1992 para 42.5

attention. There is no longer a dispute as to when that was. The Claimant now admits it was in June 2015 that she received the draft report with that diagnosis.

25. Accordingly, the limitation period commenced from June 2015. It was at that time, with the Draft medical report in hand, that the Claimant knew the illness caused by the Defendant's alleged negligence was serious enough to justify instituting proceedings against the Defendant.

26. The Claim should have been filed by June 2019. When it was filed in October 2019, it was statute barred. However, the period of delay beyond the limitation period was four months and not over one year as contended by the Defendant.

Should the Court waive the limitation bar?

Section 9 (a)-The length of, and the reasons for, the delay on the part of the Claimant.

27. In considering the length of delay on the part of the Claimant, the focus is primarily on the time that elapsed after the limitation period expired. In light of the finding herein that the limitation period expired in June 2019, the period that elapsed before the Claim was filed was around four months.

28. That period cannot be considered lengthy bearing in mind that up to June 2019 the Claimant and her union were seeking responses from the Defendant to requests for remedial action, including compensation. In fact, there was a meeting with the Defendant's Human Resource Director on June 25, 2019.

29. The time taken by the Claimant thereafter to seek legal representation was just a few days, as by July 22, 2019, the Attorneys sent the pre-action protocol letter to the Defendant. Thereafter, the Defendant's repeated requests for extended time to respond caused further delay up to the end of September 2019.

30. The period of one month after September 2019 was reasonably spent by the Claimant's Attorneys in writing to refute the Defendant's contention as to the date when the cause of action arose and awaiting a response. The Claimant's Attorneys were of the view that time for limitation purposes commenced when the Claimant received the finalised medical report in October of November 2015.

31. Although I have found against the Claimant in that regard, it was not unreasonable for the Claimant or her Attorneys to have discounted the relevance of the draft medical report in calculating the limitation time. Overall, the length of time that elapsed after the limitation period expired was negligible.

32. In assessing the Claimant's application in the round, it is also relevant to consider the length of any delay in her pursuit of the Claim before the limitation period expired. My finding is that there was no real delay on the part of the Claimant as within a few weeks of falling ill she made an Occupational Safety and Health report about it. She sought treatment through the Defendant's HSU and the Defendant's own documentation of her visits clearly reflects that her complaint was about illness due to workplace conditions.

33. The Claimant sought assistance from her Union in mid-2015, even before a medical report confirming her diagnosis was finalised. After receiving the finalised report, her case is that efforts to seek remedial action on her behalf commenced. She went so far as to take matters into her own hands in 2017 by writing to the Defendants Human Resource Department.

34. There is a clear paper trail of these efforts appended to both her Statement of Case and her Affidavit in support of this Application. She wrote on April 28, 2017, the Union wrote on July 7, 2017 and the Claimant wrote again on November 3, 2017. In all the correspondence, the Claimant was seeking *inter alia* compensation to cover the past, present and future medical expenses arising from the illness. Her efforts continued up to June 2019 when the limitation period expired.

35. The Claimant chose alternate dispute resolution ["ADR"], methods with the help of her Union, rather than commencing litigation. The length of time before she brought the matter to the Defendant's attention, albeit by non-litigious means, was not lengthy. She also pursued the matter over the four years in a way that could not have led the Defendant to believe that there would be no litigation.

36. The Defendant was kept abreast of the potential Claim from 2014 before the cause of action accrued to June 25, 2019 when the Claimant held her final meeting with the Human Resource Department about it. This is not a case where the Defendant was unaware of the alleged incident of injury to that Claimant until after the limitation period expired. In the instant case, the Defendant knew from the outset the details relevant to the potential Claim.

37. The Defendant knew of the seriousness of the matter based on the medical report of Professor Seemungal, the OSH report by the Claimant, the involvement of the Union and the Claimant's frequent correspondence. The Defendant could, therefore, have been alert to the need to be prepared for litigation.

38. The Claimant's overall reason for delay is that she had sought to resolve the matter by discussions with the Defendant first through her Union and then by herself. The Claimant's pleadings allege that lack of full co-operation by the Defendant contributed to delays in attempts to resolve the matter without litigation.

39. The evidence in support of this application proves on a balance of probabilities that the Defendant failed to respond to and address all the matters raised by the Claimant. Specifically, while movement to another location and a job change were dealt with, compensation was not addressed.

40. In seeking to shed doubt on the Claimant's reasons for delay, the Defendant's submissions sought mainly to persuade the Court that she is a dishonest witness. As such, they argue that the reasons given are not genuine. For example, the submissions suggest that the Claimant initially deceived her own Attorneys and

the Court by not disclosing that she received a draft medical report in June 2015. Having considered the evidence on both sides there is, in my view, no basis for finding that the Claimant always knew the significance of the June 2015 date of receipt of the Draft medical report vis-à-vis the limitation period.

41. Having considered the length of and reason for the delay, the Court finds that the Claimant has not approached the matter in a way that would render it unreasonable for her now to be permitted to commence litigation.

Section 9 (b)- the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the Claimant or the Defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 8 or, as the case may be, section 9.

42. In Civ App P364-2017 **Mohan v Prestige Holdings Limited**, Mendonca JA explained at para 57 that:

> "*the evidential burden of showing that the evidence that the defendant is likely to adduce is likely to be less cogent having regard to the delay is on the defendant (see Burgin v Sheffield City Council [2015] EWCA Civ. 482 at para23)*."

43. Focusing on the period of delay after the June 2015 expiration of the limitation period, there is no indication on Affidavit from the Defendant that from then to four months later when the Claim was filed, evidence to be adduced became less cogent. The Defendant's argument as to being less able to adduce evidence based on delay focusses more on the period of four years before the limitation period expired.

44. The Defendant's Affidavit suggests that because five years elapsed from the time the Claimant became ill until the filing of the Claim, the Defendant will have difficulty obtaining information to respond. She says this is so because:

    a. persons involved are no longer with the Defendant

b. obtaining documentation will be difficult
c. people's recollections of the matter may not be the best and
d. The Defendant cannot confirm whether the air-conditioning unit in the Claimant's work location at the library was malfunctioning in 2014.

45. The Affidavit gives no details, however, as to what persons were involved, when they left the Institution and whether they can be located. There is no indication as to the record keeping procedures followed by the Defendant, such as the length of time documents pertaining to occupational health complaints are kept. As such, the Defendant has not provided useful information on why it will be difficult to locate records.

46. Importantly, no information is given as to whether any particular potential provider of information is unable to recall the details of the incident. It is not clear what efforts the Defendant made to determine whether persons and documents are available or why such information could not have been included in the Defendant's affidavits.

47. It is clear, from the documents disclosed by the Claimant, that the Defendant's HSU and Human Resource Department employees were intricately involved in the matter over the years. More information on which of these persons cannot recall the details would have been required to establish the extent to which, if at all, the delay has prejudiced the Defendant's ability to adduce evidence.

48. The Defendant has not proven in any respect that the delay in commencing this Claim has prejudiced its ability to adduce evidence in defence of the Claim.

Section 9 (c)- the conduct of the Defendant after the cause of action arose, including the extent to which it responded to requests reasonably made by the Claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the Claimant's cause of action against the Defendant.

49. On the case presented by the Claimant, she has provided documented proof of correspondence with the Defendant. She also refers to oral communications and meetings. There is sufficient evidence in the affidavits in support of her application that the correspondence included a request for payment of her medical expenses arising from the illness she alleges was caused by exposure at the workplace.

50. The Affidavit evidence is that there was no response to that aspect of her requests. The Defendant's Affidavits have not refuted this by affidavit evidence of oral or documented responses addressing the claim for compensation.

Section 9 (3) (e) -the extent to which the Claimant acted promptly and reasonably once she knew whether or not the Defendant's act or omission to which the injury was attributable, might be capable at that time of giving rise to an action for damages

51. In considering the length of delay and the Claimant's reasons, the Court determined that the Claimant acted promptly and reasonably by seeking to address the matter with her Union's assistance and by ADR. She started this process promptly in mid-2015.

Section 9 (f)- the steps, if any, taken by the Claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

52. Again, in considering the length of the delay, the finding of the Court has been set out above that the Claimant was seeking medical and Union advice and assistance. This was done simultaneously with attempting ADR to advocate her claims for *inter alia* compensation over the years up to when the limitation period expired.

F. Conclusion

53. For the reasons set out above, the Claimant's application succeeds.

54. **IT IS HEREBY ORDERED that**

a. Pursuant to Section 9 of the Limitation of Certain Actions Act, Chap 7:09 ["the Act"] Section 5.2 (a) of the Act shall not apply to this Claim.

b. The limitation period for commencement of this Claim is extended to the date when the Claim was filed on October 30, 2019.

c. An extension of time is granted for the Defendant to file a Defence within 28 days of this Order.

d. Costs of this application will be costs in the cause.

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Eleanor Joye Donaldson-Honeywell
Judge