Case Number: 2301561/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MARTIN**
Members

BETWEEN: **Miss O Uglor** **Claimant**

and

Transport for London **Respondent**

ON: **29 March 2018**

APPEARANCES:

For the Claimant: **Mr A McKenzie - representative**

For the Respondent: **Mr G Baker – Counsel**

PRELIMINARY HEARING

RESERVED JUDGMENT

The decision of the Tribunal is that the Claimant's claims are struck out on the grounds that they have no reasonable prospect of success and failure to comply with the Tribunal's order of 7 February 2018.

RESERVED REASONS

1. The Claimant presented as claim on 23 June 2017, claiming race discrimination, sex discrimination, victimisation, equal pay and unlawful deductions from wages. At a hearing on 8 November, 2017 before Employment Judge Elliott all claims were struck out, save for the Claimant equal pay claim

and the claims for direct sex and race discrimination based on a failure to promote or return the Claimant to a band 2 role and also for victimisation based on being told that the Claimant could not take out a grievance and failure to promote after 3 February, 2017. Judge Elliott order noted that the equal pay claim was at a very early stage, and although the Claimant had identified her comparators at that hearing there was nothing before her to identify their job roles or their pay. Judge Elliott said. *"On the information currently before the Tribunal. It is impossible to say that this equal pay claim has no reasonable prospect of success and I declined to strike it out in".*

2. As a consequence of the decision reached, Judge Elliott listed a preliminary hearing for 1 December 2017 to identify the issues, list the matter and agree directions. The Claimant was "*reminded that it is sensible to particularise the remaining claims voluntarily before the next telephone hearing and that they do not need to wait for an order to be made*".

3. That telephone preliminary hearing was in the event, held on 7 February 2018 before me. I recorded "*This hearing was listed to agree issues, directions and list the hearing. The issues had not been agreed and the Respondent did not understand the claims being made. Therefore, after discussion it was agreed that the Respondent will set out a list of issues as it believes them to be, with requests for further information and particularisation contained in it with in accordance with the orders below*." Those orders required the Respondent to send the said draft list of issues with requests for further information particularisation to the Claimant no later than 20 February 2018 with the Claimant responding no later than 6 March 2018 and the Respondent to notify the Tribunal many applications it wishes to be considered no later than 22 March 2018. The reason for this order was to help the Claimant who was clearly having difficulty particularising her claims so that the matter could be progressed.

4. The Respondent submitted that despite attempts by Respondent to contact and liaise with the Claimant's representative before the telephone preliminary hearing, the Claimant had not set out the facts that she relied on in support of her remaining claims. The Respondent submitted that it complied with the order made by sending the Claimant a document which required her to explain her remaining claims. The Claimant responded on 15 March 2018 and those responses were then amalgamated in a list of issues by the Respondent. The Respondent's position is that the responses made by the Claimant did not particularise her claim as ordered. Their position was that her case remained unclear and vague and had no reasonable prospect of success due to them being time-barred.

5. The Respondent submitted that the factual basis on which Judge Elliott allowed the claims to continue did not appear to be pursued by the Claimant. For example, the Respondent submitted that the Claimant's reply to the draft issues only listed events that took place in 2016, and that all claims in the reply were clearly out of time with no good reason being given as to why time should be extended pursuant to section 123 (1) (b) of the Equality Act 2010. The Respondent submitted that the reasons given by Judge Elliott striking out some of the claims apply equally to the surviving claims in that the rejection for

promotion is a single, rather than a continuing act (Sougrin v Haringey Health Authority [1992] ICR 650 and Wilson v The London Fire and Civil Defence Authority [1995].

6. The Respondent relied on North Glamorgan NHS trust v Ezsias [2007] IRLR 603, which held that there is no bar on striking out discrimination claims where there is not a "*crucial core of disputed facts*". Finally, the Respondent submitted that the Claimant has failed to explain why it is just and equitable to extend time and that there is no basis for extending time in order to hear complaints (British Coal Corporation v Keeble [1997] IRLR 336).

7. The Respondent submitted that the Claimant has had five opportunities to set out her claim, despite having received advice since 2016. Those five occasions were:

    i. The ET1 - June 2017.

    ii. Before or at the telephone preliminary hearing on 5 September 2017.

    iii. Before or at the strikeout hearing before employment on 7 November 2017.

    iv. Before or at the telephone preliminary hearing on 7 February 2018

    v. On paper, subsequent as ordered to be provided by 20 March, 2018.

8. The Respondent noted that the Claimant had not made any application at any time to amend her claim to add new facts which had not been relied on informal proceedings.

9. The Respondent noted that strikeout is a Draconian remedy and referred to Blockbuster Entertainment Ltd v James [2006] PwC CID 684. It submitted that the length of time it has taken thus far, without being able to establish the issues was significant and had an impact both on the Respondent and also other litigants who were waiting for their claims to be heard. The Respondent submitted that in addition to this, a considerable amount of judicial resource has been taken up on these claims to date, and cited Harris v Academies Enterprise Trust, [2015] IRLR 208.

10. The Respondent also relied on the judgment in Chandock v Tirkey [2015] IRLR 195, in which the EAT (Lanstaff P) commented on the importance of full pleadings in the Employment Tribunal.

11. The Claimant submitted that she was aware of the numerous occasions the parties had to come to the Tribunal and attend telephone hearings, but submitted that the Respondent cannot say that they did not know what case they had to meet. She submitted that there the preliminary matters had been gone through with the final issue being the last hearing and the judgment of Judge Elliott, paragraphs 58-62, 66,67,69.

12. The Claimant submitted that the Respondent submitted a list of issues in accordance with the order and the Claimant replied to the questions in that document. The Respondent then made application to strike out, they seem to accept in that application to accept that parts of the Claimant's claim are live, and it was submitted that the time spent doing this could have be spent submitting draft list and questions p75-77.

13. On that basis, it was submitted that the Respondent has not made out a claim for strike out, as there are live issues, which can be dealt with, or adjudicated on at a full merits hearing. It was submitted that the claims for sex discrimination and race discrimination were continuing acts which should be heard. (I asked the Claimant at this point with reference to the ETI and particulars of claim where the Claimant has pleaded a continuing act. The Claimant referred to paragraph 10 of the particulars of claim which says "*The Claimant would like the Tribunal to consider that she was and is continuing to be victimised contrary to section 27 of the Equality Act 2010".* There is no other particularisation).

14. It was submitted for the Claimant that if the Tribunal was not satisfied with Responses given by the Claimant it should not strike out this matter and should allow the Claimant to provide that evidence by way of disclosure. Alternatively, if the Tribunal was minded to order a deposit the amount should be minimal, if at all.

15. The Respondent responded by pointing out that it was clear that some facts were put forward to Judge Elliot which persuaded her not to strike out all the claims. However, the facts given orally at a strike out hearing are not pleadings and cannot be taken into account in identifying a pleaded case which has a reasonable prospect of success. It was submitted that if the Claimant had explained her case in a clear document as ordered it may be different, but this was not done. The Respondent noted that there was no application to amend to include new facts.

16. I have considered this matter carefully. I have noted the number of hearings, the pleadings, orders and other documentation. Having held the last telephone preliminary hearing I am surprised that the Claimant has not set out her claim as required. I do not accept that the Claimant was just answering questions put by the Respondent. It was clear from the previous hearings (including that of Judge Elliott) that the problem was the Claimant had not set out her claim in a way that the Respondent could sensibly respond to it and prepare for a hearing. The reason the previous order was made in the way that it had been made was to assist the Claimant and give one more chance for her to particularise her claim.

17. It was made clear to the Claimant that the objective was to help her formulate her claim. The Claimant is represented, albeit Mr McKenzie is not legally qualified. However, he is experienced in Employment Tribunal claims and I am satisfied he knew what was required. Even at this hearing the Claimant has not provided full information despite knowing that this was a hearing to consider

striking out her claim and the Claimant did not make any application to amend her claim.

18. Taking all this into account and noting the draconian nature of a strike out order, I consider that the Tribunal has invested a considerable amount of judicial time in this matter and tried to assist the Claimant in formulating her claim. Notwithstanding this, we are no further forward. Indeed the responses to the draft issues and questions provided by the Respondent indicate a claim that is substantially out of time and the Claimant has not provided anything to try to persuade me that it is just and equitable to extend time.

19. I am mindful that discrimination cases should be heard where ever possible so that the evidence can be tested. However, in this instance I am striking out the Claimant's claim on the basis of failure to provide the information as ordered, resulting in a claim that has no reasonable prospect of success. In coming to this decision I am mindful of the pressures on the Employment Tribunal system currently and the amount of judicial time already expended. The Claimant has had several opportunities to put her claim in a way that it can be understood and responded to but has failed to do so.

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Employment Judge Martin
Date: 24 April 2018