EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Franklin Davis	v	B & Q plc

OPEN PRELIMINARY HEARING

Heard at: London South **On:** 7 June 2019

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: in person
For the Respondent: Mr D Piddington of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claim based on discrimination on the ground of religion and belief is dismissed by consent.

2. The claims based on discrimination on the ground of age and the claims of victimisation, breach of contract and unlawful deduction from wages are struck out as having no reasonable prospect of success.

3. The amendment seeking to expand the Sunday working claim is allowed.

4. The amendment seeking to add claims of discrimination on grounds of age, sex and being a part-time worker and claims of victimisation and unlawful deduction of wages is refused.

5. The respondent is given leave to further amend the Grounds of Resistance should it consider it necessary by 11 January 2020.

6. The draft list of issues is to be finalised in consequence of this judgment by 6 March 2020.

REASONS

Preliminary

1. This Preliminary Hearing was listed to determine the following:

a. The claimant's application to amend his claim;
b. The respondent's application for strike out pursuant to Rule 37 ET Rules or in the alternative a deposit order pursuant to Rule 39 ET Rules;
c. In the event that any claims survive the above, case management directions.

2. The claimant has provided a document "Amended claim" in which he gives further factual information to that provided in his ET1 and sets out his claims again [34]. He lists "Sunday working detriment", part time detriment and victimisation in the manner in which his grievance was dealt with, age and sex discrimination, unlawful deduction from salary at the end of January 2018 and injury to feelings.

3. The claimant confirmed that he no longer pursues a claim of discrimination on the grounds of religion or belief.

4. **CHRONOLOGY**

26/07/49	C born, currently 69 years old
11/09/16	C's employment commenced
11/11/17	Letter from C requesting Sunday opt out
14/11/17	C signed 'Sunday Working Opt-out notice'
11/01/18	C signs employee contract change form which reduced hours to 10 per week
17/03/18	Grievance lodged
21/03/18	Email indicating manager was off duty
28/03/18	Proposed grievance meeting
08/06/18	Email asking for news re grievance
14/06/18	EC Notification
26/06/18	EC Certificate
01/07/18	Email which C refers to part-time retirees as "cannon fodder". Do not see B&Q as that
17/07/18	C repeated in another email
19/07/18	Outcome of Informal Grievance meeting
08/08/18	C informed would increase hours to 12.5 each week with effect from 01/01/18. Told would recalculate holiday
29/08/18	ET1 lodged
22/01/19	C's email to R and tribunal intimating an "intention to seek permission to amend his claim to include a further detriment claim" [30]
23/05/19	C sends proposed Amended Claim to tribunal and R [32]

5. The ET1 narrates that**:**
"… I put in a request to opt out of Sunday working…I was informed that my weekly hours would be reduced by 5 hours…was surprised by the size of the reduction." Taking the claimant's ET1 at its highest the factual allegation in paragraph 8.2 are:

a. By virtue of opting out of Sunday working the claimant's hours were reduced from 15 hours to 10 hours
b. The claimant raised a grievance regarding the reduction in hours
c. There was a delay in hearing his grievance
d. The claimant was initially told that his grievance would not be treated as such because his complaint was against a "process"

e. A meeting was subsequently held at which B&Q "offered some compensation"

6. At paragraph 8.1 of his ET1 [7] the claimant seeks to claim discrimination on the grounds of age and/or religion and belief. No further potential claims are identified in this section.

7. At paragraph 8.2 of his ET1 [8] the claimant refers to various matters. At the bottom of that box he refers to discrimination on the grounds of age, religion or belief, victimisation and/or harassment, a detriment, breach of contract and unlawful deduction from salary.

8. The claimant initially intimated an intention to apply to amend by email dated 22/01/19. His email concludes that it is his "intention to seek permission to amend his claim to include a further detriment claim".

9. The claimant advanced his proposed amendment by email dated 23/05/19 [33-34]. The claimant puts forward:

a. A claim for detriment arising because he opted out of Sunday working. This is based on the fact that following his opt-out his hours were reduced from 15 hours to 10 hours.
b. A new claim for less favourable treatment as a Part-Time Worker. This allegation appears to relate to the allegation that his hours were reduced from 15 hours to 10 hours.
c. Victimisation. The claimant has not identified what protected act he relies upon. The claimant has intimated that he relies upon his grievance and/or the commencement of these proceedings. The purported detriment relied upon appears to be:
    i. The manner in which his grievance was dealt with;
    ii. That in or around January 2019 the claimant was subjected to a number of consecutive weeks in which he was required to work from 5pm until 9.30pm Wednesday, Thursday and Friday.
d. An assertion of age discrimination. The form of discrimination is not identified. The factual basis of the allegation is not identified.
e. A new allegation of sex discrimination. Again, the form of discrimination is not identified. The factual basis of the allegation is not identified.
f. A claim for unlawful deduction of wages at the end of January 2018.

10. In relation to Sunday working, it is noted that:

a. The claimant was aware from the terms of his contract that *"whilst you have the right to opt out of a contract incorporating Sunday working, we are not obliged to accommodate these hours elsewhere during the week, therefore your basis hours and salary will be re-adjusted to reflect your new terms and conditions"*
b. The respondent was entitled to allocate the claimant to work on a Sunday prior to his opt-out.
c. The claimant confirmed when making his request to opt-out that he knew his action *"may result [in] being offered less than 15 hours per week"* [40]

d. The claimant signed a Sunday Working Opt-Out Notice which confirmed that "replacement hours may not be available" and that the respondent "has no statutory obligation to" attempt to re-rota C's hours.
e. The claimant sent a letter dated 10/11/17 in which he confirmed that his decision to opt out *"could result in me being offered less than my contracted 15 hours per week in future"* [43]
f. The claimant signed an employee contract change form consenting to the change in his hours [44]
g. The claimant confirmed in two separate emails that he did not consider that B&Q treats "*retired part-time workers as expendable 'cannon fodder'*" [48] [50]
h. Following a meeting on 18/07/19 a decision was made to change the claimant's hours to 12.5 hours per week and pay him for hours not made available to him between December and August 2018 [51] [52]

SUBMISSIONS

11. The claimant's main point was that the reduction in hours was a continuing act of discrimination. Counsel for the respondent produced during the course of the day written and amended submissions which were of great assistance to the Tribunal. The fact that they were not all acceded to is no reflection on the skilled advocacy deployed by Counsel.

Relevant Legal Framework

12. Section 45(5) Employment Rights Act 1996 (which deals with Sunday opt-out detriment) expressly excludes the following as amounting to a detriment:

> *For the purposes of this section a shop worker or betting worker who does not work on Sunday or on a particular Sunday is not to be regarded as having been subjected to any detriment by—*
> *(a) a failure to pay remuneration in respect of shop work, or betting work, on a Sunday which he has not done,*
> *(b) a failure to provide him with any other benefit, where that failure results from the application (in relation to a Sunday on which the employee has not done shop work, or betting work) of a contractual term under which the extent of that benefit varies according to the number of hours worked by the employee or the remuneration of the employee, or*
> *(c) a failure to provide him with any work, remuneration or other benefit which by virtue of section 38 or 39 the employer is not obliged to provide.*

STRIKING OUT

13. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v, St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially: -

> "(i) At any stage in the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds – (a) Where it is scandalous or vexatious or has no reasonable prospect of success…"

55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):

> "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"

56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

14. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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15. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

16. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

(i) Ordinarily, the Claimant's case should be taken at its highest.
(ii) Strike out is available in the clearest cases – where it is plain and obvious.
(iii) Strike out is available if the Claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

17. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

18. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, that:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

DEPOSIT ORDERS

19. A deposit order can be made if the specific allegation or argument has <u>little</u> reasonable prospect of success. It was noted in **Van Rensburg v. Royal Borough of Kingston-Upon-Thames** UKEAT/0095/07/MAA at paragraph 27 that:

> *"*Moreover, the test of little prospect of success in r 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in r 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

20. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order 'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails' (para 10), she stated that the purpose 'is emphatically not to make it difficult to access justice or to effect a strike out through the back door' (para 11).

21. As a deposit order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response as a whole, it is possible for a number of such orders to be made against a claimant or respondent in the same case.

Amending the claim

22. The general case management power in rule 29 of First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (amended and reissued on 22 January 2018) ("the Rules") together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments.

23. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 NIRC. Their approach was approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201 CA.

Factors to be considered in the exercise of the discretion

24. Mummery J concluded in **Selkent** at 844 B-C. that the test to be applied is essentially a balancing act wherein "…the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment." At 843F to 844C guidance is provided as to what circumstances should be taken into account in the exercise of the discretion, as follows:

> "(4) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account *all* the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
> (5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

The nature of the amendment

25. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

The applicability of time limits

26. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, s.67 of the 1978 Act.

The timing and manner of the application

27. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

28. It must be emphasised that the above is expressly stated not to be an exhaustive list and when considering whether to allow an amendment in the application of the balancing test the tribunal must weigh in the balance all the circumstances and factors relied upon by the parties and not just identify those that have tipped the balance in the judicial exercise of the discretion one way or the other, it is necessary to explain the reasoning and basis for the conclusion reached, as a failure to do so will constitute an error of law. (See Harvey at Division PI paragraph 312).

29. The position is also summarised in the Presidential Guidance issued under the provisions of Rule 7 of the Rules which the Tribunal has also considered.

30. **Selkent** held that a distinction required to be drawn between:

(i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, ie re-labelling.

(ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim.

(iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

31. Amendments falling within category (i) are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based.

32. So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded. The position is, therefore, that if the new claim arises out of facts that have already been pleaded in relation to the original claim, the proposed amendment will not be subjected to scrutiny in respect of the time limits, but will be considered under the general principles applicable to amendments, as summarised in **Selkent**.

33. It is only in respect of amendments falling into category (iii)—entirely new claims unconnected with the original claim as pleaded—that the time limits will require to be considered. Judge Hand QC in **Galilee v. Commissioner of Police of**

the Metropolis [2018] ICR 634 EAT at para 109(a) concluded that where a new claim is permitted by way of amendment, it takes effect for limitation purposes from the date on which permission to amend was given. Judge Hand held that the guidance given by Mummery J in **Selkent** and the use of the word 'essential' should not be taken 'in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues should be decided before permission to amend can be considered' (at para 109 (d)), Judge Hand held that in cases where there is alleged to be a continuing act of discrimination, or in cases in which a claimant seeks to argue for a 'just and equitable' extension of time, it may not be possible to decide the limitation point without hearing evidence; in such cases, depending on the circumstances, a tribunal is entitled either to defer the whole question of amendment and limitation to be decided after the evidence has been given, or to allow the amendment and leave the limitation issue to be decided at that later stage (at para 98).

34. But, even though it is necessary for the tribunal to consider the time limits, they are only 'a factor, albeit an important and potentially decisive one', in the exercise of the overall discretion whether or not to grant leave to amend, which remains the relative injustice/hardship test set out in **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 657B–D NIRC and in **Selkent** [1996] ICR 836 at 843F. Accordingly, the fact that a proposed amendment involving a new cause of action may be outside the relevant time limit, and an extension of time may be refused on the wording of the applicable escape clause, does not create an absolute bar to an amendment being made; even then the tribunal retains a discretion.

35. In **Evershed v. New Star Asset Management** UKEAT/0249/09 (31 July 2009, unreported), Underhill J pointed out that it is no more than a factor, the weight to be given to it being a matter of judgment in each case (para 24). When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence. In **Evershed**, the claimant claimed unfair (constructive) dismissal and later sought (after the expiry of the time limit) to amend it by adding a claim under ERA 1996 s 103A that the dismissal was due to his having made a protected disclosure, and hence was automatically unfair. An employment judge refused to allow the amendment, inter alia, on the ground that it would require 'wholly different evidence' to be given but he did not explain the basis for this conclusion. On appeal to the Employment Appeal Tribunal and the Court of Appeal, this omission by the judge was held to be an error of law. In the Employment Appeal Tribunal, Underhill J stated that it was 'necessary to consider with some care the areas of factual inquiry raised by the proposed amendment and whether they were already raised in the previous pleading' (para 16). He carried out this exercise himself and concluded that the new evidence would be substantially the same as would be given in respect of the original claim, and, accordingly, allowed the amendment. The Court of Appeal approved this approach and agreed that the amendment did not raise 'any materially new factual allegations' (**Evershed v New Star Asset Management Holdings Ltd** [2010] EWCA Civ 870 at para 50).

JURISDICTION - TIME LIMITS

Early Conciliation

36. The primary limitation period for all of the claimant's proposed claims is three months from the date of the act to which the complaint relates, or if that act is part of

a series of acts (or a continuing act in respect of discrimination) three months from the last such act (s.48(3) ERA 1996, s.23(2) ERA 1996, s.8(2) PWR 2000, s.123 EqA 2010).

37. Early Conciliation affects the time-limits for all of the claims; see s.48(4A) and s.23(3A) ERA 1996, s.8A PWR 2000, s.123 EA 2010.

38. The effect is outlined in s.207B ERA 1996, s.8A PWR 2000 and s.140B EA 2010 in the following (or almost identical) terms:

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

Continuing Acts

39. The Court of Appeal in **Commissioner of Police of the Metropolis v. Hendricks** [2003] ICR 530 CA clarified that in considering whether conduct extended over a period the tribunal should look at the substance of the complaints and determine whether they can be said to be part of one continuing act by the employer, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

40. The Court of Appeal in **Aziz v FDA** [2010] EWCA Civ 304 CA emphasised that in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents.

41. As is outlined in Harvey's on Industrial Relations and Employment Law: "*In determining the existence of a continuing act, it is important to distinguish between the continuance of the discriminatory act itself (e.g. the schemes and practices in the above cases), and the continuance of the consequences of a discriminatory act, for it is only in the former case that the act will be treated as extending over a period*

(Barclays Bank plc v Kapur [1989] IRLR 387 at 392)"… *"what [C] has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'".*

42. Harvey's also addresses the issue of an internal grievance with respect to the just and equitable extension in the following terms:

A delay caused by a claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings may justify the grant of an extension of time but it is merely one factor that must be weighed in the balance along with others that may be present: Robinson v Post Office [2000] IRLR 804, EAT, approved by the Court of Appeal in Apelogun-Gabriels v London Borough of Lambeth[2001] EWCA Civ 1853, [2002] IRLR 116.

DISCUSSION and DECISION

43. The Tribunal did not accept the respondents' submission that the Sunday working claim in the amendment was a new claim. It seemed to be a restatement of the claim originally made in the ET1. The amendment is held to be a relabelling exercise.

44. If it is taken as a re-labelling exercise, the Sunday Opt-out detriment claim is out of time; the incident took place on or before 11/01/18 [44]. In light of the date of lodging the ET1 and the period of EC notification, any act on or before 16/05/18 is outside the primary limitation period of 3 months. Applying the above Early Conciliation rules to the circumstances of this case, Day A is 14/06/18. Day B is 26/06/18. Pursuant to (3) above, the period 15/06/18 to 26/06/18 (inclusive) is discounted from any time limit. This is a period of 12 days. The ET1 was presented on 29/08/18, more than one month after Day B. Applying the above to the date of the claimant's allegation concerning a change in his hours, the latest date upon which the reduction in hours could be said to take effect is 11/01/18 (being the date the Employee Change Form is signed). Ignoring Early Conciliation, the Claim would need to have been lodged by 11/04/18. The timescale is completely unaffected by any Early Conciliation period and Day A is after that date. Working backwards, because (4) would not apply in any circumstances, the earliest date which a stand-alone act would be deemed in time would be 17/05/18 (29/08/18 less three months is 29/05/18, less the 12 days of Early Conciliation which are excluded is 17/05/18).

45. The Tribunal decided that there was not a continuing act but an act with continuing consequences. Accordingly, the original claim is out of time. The Tribunal decided to exercise its discretion in favour of the claimant on account of the delay by the respondent in dealing with his grievance.

46. In relation to the remaining claims, the Tribunal decided to strike out all of them as having no reasonable prospect of success because:

a. The claims are out of time.
b. Any deduction from wages has been repaid [51-52]
c. The claimant authorised any deduction from wages by agreeing to the reduced hours.

d. The claimant's grievance does not amount to a protected act for the purposes of any claim under s.27 Equality Act 2010. The grievance made no allegation of discrimination [45].
e. The claimant lodged a grievance which did not assert all of the allegations relied upon.
f. The claimant has not raised a grievance in relation to the alleged fresh allegation of victimisation.
g. The claimant has failed to identify any comparable 'full-time worker'. Under the Part-Time Worker Regulations, a hypothetical comparator cannot be used.
h. No specified ground under Regulation 7(3) of the Part-Time Workers Regulations has been asserted.
i. The claimant has stated that his contract originally provided for his 15 hours to be split over 3 days. Any comparator would need to be someone who is allocated their shifts over three days, as the claimant.
j. The age and sex discrimination claims are entirely unparticularised.

47. The claimant does not explain any basis for the claims based on discrimination except that these are the protected characteristics he possesses. Simply because he has certain protected characteristics is insufficient in law to sustain claims of discrimination against him on the basis of these characteristics. The Tribunal considered how the claimant might establish a *prima facie* case generally, for each characteristic and in relation to the specific allegations. The Tribunal considered the claimant's case on its own merits and took it at its highest. No comparators were identified by the claimant. The fact that he did not name comparators does not mean that his claim cannot succeed but the failure to address how he would establish his claims under each of the protected characteristics was an insurmountable problem.

48. The Tribunal then took on board the authoritative exhortation about not striking out discrimination cases and sought not to be too pedantic about the pleadings when weighing up the appropriate course of action as the claimant was a party litigant. The Tribunal exercised its discretion considering the claims in the round and also individually. The Tribunal concluded that the claims based on discrimination detailed in the judgment had no reasonable prospects of succeeding and should be struck out.

49. In relation to the remaining claims in the amendment, the Tribunal considered:
a. The nature of the amendment;
b. Timing of the application;
c. The merits of the claims;
d. The balance of prejudice / injustice or hardship that would be caused by granting or refusing the application;
e. All the circumstances of the case.

50. The Tribunal decided to strike out all claims except that based on Sunday working for the following reasons:

<u>Nature of Proposed Amendment</u>

51. The complaint of less favourable treatment because of the claimant being a part-time worker requires consideration of additional factual issues which go further than the claim originally brought, including the identification of full-time comparators.

52. The factual allegations at 7(c)(ii) are entirely new factual allegations and take place over 12 months after the reduction in hours. Whilst reference is made to the general label of victimisation and/or harassment in the original claim, the particulars included in the claim do not identify such a claim.

Timing of the Application

53. In considering the timing of the application the tribunal considered whether the claim would be in time as at the date of the application to amend, and if not:

a. whether it would be just and equitable to extend the time in respect of the discrimination claims.

b. Whether it would have been reasonably practicable for the complaints to have been brought in time.

54. Furthermore, the tribunal are to consider the reason for any delay. The actual application to amend is 23/05/19; prior to that date the claimant had simply indicated an intention to apply and the respondent was not clear what the proposed amendments intended were.

55. The Part-Time less favourable treatment claim relates to the reduction in hours. That took place from 11/01/18 [44]. That claim is clearly significantly out of time and there is no basis for asserting that it was not reasonably practicable to bring the claim in time. All these allegations are significantly out of time, even if a continuing act were alleged; the claims would have been due by 27/05/18. In fact, all three allegations relate to different individuals, are months apart and cannot be considered a continuing act in any event.

56. In respect of the new allegations of victimisation, any event on or before 23/02/19 is out of time. The last act relied upon is in relation to the shift allocation at the end of January 2019. All the proposed claims are therefore out of time. There is no basis for asserting that it would be just and equitable to extend time.

Unlawful deduction from Wages

57. The last alleged deduction refers to January 2018. The claim is therefore outside the primary time limit. For the avoidance of doubt, any deduction is a one-off deduction rather than deemed to be a continuing deduction by virtue of s.13(3) ERA 1996.

58. The claimant has failed to demonstrate why it was not reasonably practicable to commence his claim within the primary limitation period; the claimant was aware of the alleged deductions at the time and continued to be at work. Further or alternatively, the period between the end of January and 17/05/18 is a period which falls outside any reasonable extension of time.

Part-Time Less Favourable Treatment / Detriment

59. The detriment relied upon took place on or before 11/01/18. As outlined above this claim is therefore out of time even if deemed to have been included in the original claim.

Discrimination

60. In respect of the allegation concerning the reduction in hours, that took place on or before 11/01/18. That claim is therefore out of time.

61. Any suggestion that the handling of the grievance is itself an allegation of discrimination would potentially be in time if deemed to have been included adequately in the original claim. However, that allegation concerns different individuals and entirely different issues and therefore the claimant is unable to rely upon a course of continuing conduct.

62. It would not be just and equitable for the Tribunal to extend time for the reasons outlined above.

Balance of Prejudice

63. The factors outlined above are relevant to the balancing exercise. Furthermore, allowing the amendment is likely to lengthen any full merits hearing and thereby delay the conclusion of the proceedings and result in increased costs which may not be recoverable. The claimant's new claims would require significant further evidence to be produced, including an analysis of full and part time rotas. It may also be necessary to adduce significant further evidence as to why individuals are not to be considered suitable comparators.

64. The Tribunal did not consider that it should make a deposit order. The assessment of whether there was little prospect of success in the remaining claim depended on the evidence of the claimant which the Tribunal was not in a position to determine.

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Employment Judge Truscott QC

Date 17 June 2019

Sent to the parties on: