



EMPLOYMENT TRIBUNALS

Claimant

Dr A Ahari

Respondent

v Buckinghamshire Healthcare NHS Trust

OPEN PRELIMINARY HEARING

Heard at: Watford

On: 15 August 2019

Before: Employment Judge Foxwell

Appearances:

For the Claimant: Did not attend nor represented

For the Respondents: Mr S Sudra - Counsel

JUDGMENT

1. The claimant's claims are struck out under Rule 37 of the Tribunal's Rules of Procedure 2013 because they stand no reasonable prospect of success.

REASONS

The parties and claims

1. The claimant, Dr Abdolreza Ahari, was employed by the respondent, the Buckinghamshire Healthcare NHS Trust, at Stoke Mandeville Hospital as a Specialist Registrar in Anesthetics between 21 February 1998 and 30 January 2000.

2. Having gone through Early Conciliation between 30 October 2018 and 1 November 2018, on 5 November 2018 the claimant presented a claim of direct race discrimination and/or victimisation to the tribunal. The claim form attached at least 47 documents. Employment Judge Robin Lewis did not accept the attachments as part of the grounds of claim as he considered them to be evidence rather than particulars of the claim. He directed that the claim form be accepted with grounds of claim dated 5 November 2018 and it is those proceedings which were served on the respondent.

3. The grounds of claim dated 5 November 2018 run to 14 pages and are in the form of a letter to the Employment Tribunal at Glasgow (close to where the claimant

now lives). In this the claimant asserts two protected acts as the basis of a claim of victimisation, Employment Tribunal proceedings brought against the respondent in 1997 and again in about 2001. He alleges various forms of conduct, which he described as detriments, over the following years starting in 1998 as a result of those protected acts and, as I understand it, as independent allegations of race discrimination. The connection of the individual alleged discriminators with the respondent is not clear from the grounds of claim but I have assumed for present purposes that they are all employees or agents of the respondent (or former employees or agents).

4. All the allegations in the grounds of claim, except for one to which I shall come, occurred on or before 4 May 2016. The one exception is an allegation at page 12 that Mr Dardis and/or Ms Adams subjected the claimant to a detriment by failing to attend to his complaint contained in his letter dated 27 October 2018. This appears to be the only allegation which falls within the primary time limit for complaints of discrimination or victimisation (three months plus any time spent in early conciliation) contained in section 123 of the Equality Act 2010 (as modified by section 18A of the Employment Tribunals Act 1996).

The preliminary issue and the application to postpone

5. Following service of the proceedings the respondent filed a response challenging the tribunal's jurisdiction on the basis that the claims had been presented substantially out of time and amounted to an abuse of process to the extent that they seek to relitigate matters determined in earlier cases.

6. In view of the terms of the response, Employment Judge Lewis directed that this public preliminary hearing be listed to decide whether the claimant's claims should be struck out on the basis that they appeared to have been presented out of time. Notice of this hearing was sent to the parties on 21 April 2019. There is no evidence to suggest that the claimant did not receive the notice at the time.

7. On 8 August 2019, the respondent's solicitors submitted a written skeleton argument to the tribunal in support of the application to strike out the claim. This was copied to Dr Ahari in accordance with Rule 92 of the Tribunal's Rules of Procedure.

8. Shortly after that, on 10 August 2019, the claimant made an application for today's hearing to be postponed for a period of three months. The essence of his application was that he did not have the financial resources to travel from his home in Lanarkshire to the Watford Employment Tribunal for the hearing. He provided reasons for his present lack of funds (relating to a benefits claim) and described difficulties he was having with his neighbours. The respondent objected to a postponement, drawing the tribunal's attention to the fact that the claimant had had notice of this hearing some months ago.

9. The application was referred to me as the Acting Regional Employment Judge and I refused it. I considered that the claimant had had ample notice of today's hearing and, therefore, time in which to make appropriate arrangements to travel. His present financial problems did not seem to be recent and yet he had waited until 2

working days before the hearing to make his application. I considered Rule 30A of the Tribunal's Rules and did not find that postponement was in accordance with the overriding objective or that there were exceptional circumstances.

10. The claimant subsequently emailed the tribunal to say that he would not attend today and that his reasons for not attending would follow.

11. At the commencement of this hearing I had to decide whether to proceed in his absence. I took the view that it was proportionate and just to proceed in his absence having regard to the issues arising in this case and the factors which had led me to refuse his application for a postponement.

Materials considered and the relevant legal principles

12. In determining the respondent's application, I considered the skeleton argument it submitted on 8 August 2019 and Mr Sudra's supplemental oral submissions. I also considered the claimant's grounds of claim dated 5 November 2018 and further particulars of his claim which he submitted on 20 December 2018. I also had regard to other pieces of correspondence he has sent to the tribunal subsequently, although these relate to matters of procedure rather than raising further potential claims.

13. In considering these materials I have borne in mind that claims of post-employment direct discrimination and/or victimisation can be brought in the tribunal and that the Equality Act 2010 and the predecessor legislation (in this case the Race Relations Act 1976) places no limit on the time which has elapsed between the ending of employment and the alleged unlawful discrimination or victimisation (the time limit in section 123 of the 2010 Act runs from the date of the alleged act of discrimination or victimisation).

14. Section 123 of the Equality Act 2010 provides as follows:

“(1) proceedings on a complaint within section 120 may not be brought after the end of –

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) such other period as the employment tribunal thinks just and equitable*

.....

- (3) For the purpose of this section –*
 - (a) conduct extending over a period is to be treated as done at the end of the period;*
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.”*

15. If a claim is presented out of time the tribunal may extend time for bringing it if it considers that in all the circumstances it is just and equitable to do so. In *Robertson v Bexley Community Centre* [2003] IRLR 434 the Court of Appeal emphasised that time limits are usually exercised strictly in employment cases and that there is no presumption for exercising the tribunal's discretion in a claimant's favour unless there

are grounds for not doing so, rather the Court thought that this would be the exception rather than the rule. In *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 the Court of Appeal held that the *dicta* in *Robertson* did not fetter the tribunal's judicial discretion when considering this point.

13 Rule 37 of the Tribunal's Rules of Procedure provides as follows:

37. (1) *At any stage of 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) *that it is scandalous or vexatious or has no reasonable prospect of success;*
- (b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
- (d) *that it has not been actively pursued;*
- (e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

14 The respondent asserts that the claimant's claims stand no reasonable prospect of success and that is the only ground for striking out that I am concerned with.

15 In *Ayanwu v South Bank Student Union* [2001] ICR 391 the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious of cases as they are generally fact-sensitive and require full examination to make a proper determination. In *Balls v Downham Market High School and College* [2011] IRLR 217, the Employment Appeal Tribunal emphasised that the test is a stringent one; no reasonable prospect of success and not simply that a claim is likely to fail. More generally, I have borne in mind that striking out a claim is a draconian step which should only be taken in the clearest of cases and having considered that party's case at its highest.

Discussion and analysis

16. With the exception of the claim arising from the claimant's letter of 27 October 2018, it is readily apparent that all of the claimant's claims have been presented substantially outside the primary time limit; the last being an allegation against the respondent's solicitors dated 4 May 2016. Apart from conveying a general sense that he has been treated unjustly, the claimant has not demonstrated how the series of allegations spanning 1998 to April/May 2016 can be regarded as an act continuing over a period and culminating in his letter of 27 October 2018. The claimant has not

advanced any reason in his materials why these claims could not have been presented sooner; in some cases, the allegations are 20 years old. Even the most recent tranche of allegations relates to correspondence sent in March and April of 2016, some two and a half years before these proceedings were begun.

17. In these circumstances I have no hesitation in concluding that these claims stand no reasonable prospect of success because they have been presented outside the statutory time limit. In doing so I have reminded myself that the power to strike out a claim should be exercised with the utmost caution and sparingly but in my judgment this is an obvious case for striking out historical allegations presented long after the relevant time limit has expired.

18. The same analysis does not apply to the allegation relating to the letter of 27 October 2018: this claim was presented in time. I find however that this is an obvious claim for striking out on the basis that it stands no reasonable prospect of success on the merits. I reach this conclusion having regard to the date of the alleged act of discrimination or victimisation and the timing of the presentation of this claim. I find wholly implausible the allegation that the claimant was subjected to a detriment because of Mr Dardis' or Ms Adams' failure to attend to a complaint dated Saturday, 27 October 2018 (and I assume for these purposes sent that day) in a case where the claimant then commenced Early Conciliation in respect of this allegation (amongst others) on Tuesday, 30 October 2018 and presented these proceedings the following Monday, 5 November 2018. Given that timeframe, I find it impossible to imagine any tribunal concluding that there was a failure to or delay in dealing with this letter amounting to a detriment. In my judgment, therefore, the one in-time complaint stands no reasonable prospect of success either.

19. The claimant set out further allegations arising in 2018 in his letter to the tribunal dated 20 December 2018. These allegations all post-date the presentation of this complaint. In principle claims arising after the presentation of a complaint can be added by amendment and the claimant has mentioned in correspondence a wish to apply to amend his claim (his email of 7 February 2019). By letter dated 15 March 2019, the tribunal informed him that he would need to present a written application to amend with the text of the proposed amendment. No such application has been made. I do not find therefore that there are grounds for permitting an amendment which has not been applied for in the manner directed by the tribunal. Accordingly these proceedings do not include these later post-presentation allegations of discrimination or victimisation.

20. In those circumstances there is nothing left in these proceedings and they stand dismissed.

Employment Judge Foxwell 15.08.19

Sent to the parties on:

.....05.09.19.....

For the Tribunal:

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