EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4107811/19

Held on 13 December 2019

Employment Judge J Hendry

Mrs S Chaba	**Claimant** **Represented by: -** **Mr Gachuba**
Grampian Health Board	**Respondent** **Represented by: -** **Mr Watson, Solicitor**

Judgment

The Tribunal finds as follows:

1. **The claimant's application to amend her ET1 in terms of the Summary document tendered is refused.**
2. **The Tribunal finds that the Tribunal does not have jurisdiction to hear the claim for unfair dismissal which is dismissed.**
3. **The claims for racial and religious discrimination are struck out as a) being time barred and b) as pled having no reasonable prospects of success.**
4. **The Claimant's application for the Tribunal to extend the time limits for submitting the claims is refused.**

Reasons

1. The claimant, Mrs Chaba, raised Employment Tribunal proceedings in July 2019 seeking findings that she had been unfairly dismissed and subjected to discrimination on the grounds of her race and religion. The claims were opposed by the respondents and issues of time bar raised.

2. The case proceeded to a telephone Preliminary Hearing on the 11 October. That hearing was dealt with by Judge N M Hosie who issued a Note following the proceedings. He fixed a one day Preliminary Hearing to consider the following issues:-

    1. Time-bar.
    2. Amendment of the claim form.
    3. Whether any of the complaints comprising the claim should be struck out as *"having no reasonable prospect of success"*, in terms of Rule 37(1)(a).
    4. Whether the claimant should be required to pay a deposit as a condition of continuing to advance any of the complaints on the basis that the complaint *"has little reasonable prospect of success"*, in terms of Rule 39.

5. The claimant had, following the submission of the ET1, sought representation from Mr M Gachuba, who has some experience in employment tribunal cases, and he had lodged detailed written submissions on her behalf together with a witness statement from the claimant. Mr Gachuba also lodged two 'evidence' bundles. No submissions were made in relation to the claim for unfair dismissal for which the claimant had insufficient qualifying service.

6. The claimant had lodged Better and Further Particulars on the 1 October 9 some 28 pages) There was no indication in Judge Hosie's Note that these were accepted and they were not made in response to an Order. On the 7 October, prior to the case management hearing on the 17 October a further document headed Better and Further Particulars was lodged (some 11 pages). Judge Hosie then ordered that the present hearing take place specifically to deal with possible amendment. Mr Gachuba indicated that he had prepared the 'summary' version (the

''Summary'') to take account of Judge Hosie's views expressed to him about prolix pleadings in other separate proceedings.

7. On the morning of the hearing the respondents lodged a short Inventory of Productions along with written submissions. The respondents had attached to their written submissions a copy of the claimant's Further and Better Particulars which had been lodged on the 1 October. They had helpfully highlighted parts of the Better and Further Particulars that they believed might give rise to appropriate claims. These numbered 88 in all. The did this as they explained as these Particulars seemed to be the 'high water mark' of the claimant's case. They observed that no written application for amendment had been made not any document prepared in the form of an amendment. Towards the close of the hearing, addressing this issue, Mr Gachuba invited me to accept the Better and Further Particulars of the 7 October as being the amendment.

8. Mr Watson had not seen the claimant's witness statement prior to the hearing nor had it been ordered by the Tribunal. He had no objection in principle to it's use. Accordingly, there was a short adjournment at the outset to allow Mr Watson to consider the witness statement before commencing his cross examination of the claimant. Once this concluded both representatives addressed the Tribunal referring it to their written submissions.

Witnesses

9. I found Mrs Chaba to be an honest witness who seemed to have a detailed recollection of events. She did not speak about the merits of the case simply the process leading up to the submission of her claims and was cross examined on those matters. There is no doubt she is an intelligent and educated person. I had, however, some difficulty in understanding much of her reasoning for concluding that she had experienced discrimination and the conclusions she drew from events. As noted, I had no doubt that her

evidence was, in her perception, truthful. Indeed, much of the background was not in dispute. I now set out my findings:

1. The claimant Mrs Sumtende Andeyento Chaba is a Black African women. She is also a devout Christian belonging to the reformed tradition. She attends a number of churches but principally The Church of Scotland. She does not 'cross' herself as part of her faith.

2. Mrs Chaba went to University and qualified as a veterinarian. Following this she came to the UK and embarked on further study. She studied for a Masters Degree in Agriculture and Economics completing her MSc with distinction in 2005. She was involved in further University level study in Community Education and Development. More recently she attended the Divinity Department at Aberdeen University and gained a Degree in Divinity there.

3. The claimant has funded her studies herself through part-time work. She is an active member of an African women's group.

4. At one point in her career she worked in Scotland for approximately three months with an organisation providing advice to those who had been raped or physically abused. She provided telephone counselling to those who applied and pointed them to other sources of advice such as the police, lawyers and so forth.

5. The claimant began work on 4 September 2017 with NHS Grampian as a Healthcare Support Worker. She was summarily dismissed on the 15 November 2018. Following her dismissal she appealed and the dismissal was upheld on the 23 May 2019.

6. The claimant received the outcome of her disciplinary meeting on the 16 November 2018.

7. The claimant was not a member of a Trade Union. After her dismissal she approached a Trade Union and asked to register as a member. She

registered but the Union would not assist her with her employment issues because she had registered after her dismissal.

8. The claimant has not been involved in any Employment Tribunal process or procedure in the past. She had no direct experience of employment tribunal matters. She had not heard of Employment Tribunals. She was aware that race discrimination and other forms of discrimination are outlawed in the UK. She believed that she had been discriminated against in the course of her employment principally on the grounds of her race and believed that this was illegal.

9. The claimant had in the course of her employment lodged a written grievance about the way she believed she had been treated and did not understand why that grievance had been separated from the disciplinary process. The claimant thought that she should exhaust the internal appeal and grievance process before considering any further steps.

10. The claimant attended an Appeal Hearing in relation to her dismissal on the 21 February 2019. She asked the Appeal Panel if they had any information about her grievances. The claimant subsequently discovered that a summary of an investigation into her grievances had been emailed to her the day before the Appeal Hearing. She had not accessed the email at that time. She became aware that the grievance must have been determined because of comments made at the Appeal Hearing (Claimant's Evidence Bundle p881) and accessed it later that day (Claimant's Witness Statement paragraph 15). She wrote to the Appeal Panel with comments prior to its next hearing. The Appeal Hearing was adjourned and reconvened on the 17 May.

11. On the 25 May the claimant received the Appeal Panel's decision dated 23 May. The dismissal was upheld. Following receipt of the letter the claimant searched the internet and found **www.advice.scot** and telephoned them. They put her in touch with ACAS who she then contacted by telephone. The claimant was unaware of what ACAS did.

On the 10 July the claimant filed her current claim with ACAS. On the 18 July she lodged her claim for discrimination with the Employment Tribunal and received an acknowledgement on the 24 July 2019 from the Central Office of Employment Tribunals (Scotland) in Glasgow.

12. The claimant sought advice from Aberdeen Citizens Advice Bureau on the 25 July 2019. They could not provide her with legal representation. She was in contact with the Scottish Legal Aid Board on the 26 July. In addition, she wrote to the Law Surgery held by the University of Aberdeen and later on 3f October to the Robert Gordon's University Law Clinic. She eventually found Mr Gachuba and showed him her claim on the 5August 2019 and on his advice prepared Better and Further Particulars which were lodged with the Employment Tribunal.

13. Since losing her job with the respondents the claimant has not worked and lives on State Benefits. He financial state is parlous. The benefits are barely adequate and she often has to rely on the charity of friends. She has no capital savings or financial resources. She could not make any payment towards a deposit order without suffering hardship.

14. The claimant has had access to the internet and is well able to conduct research using it. She obtained the details of ACAS and other organisations using a search engine.

Submissions

15. Before commencing his submissions, Mr Gachuba indicated that the claim for unfair dismissal was not being proceeded with. The only issues before the Tribunal related to the claims for disability and religious discrimination.

16. Mr Watson began by considering the background and what was actually said in the pleadings. The numerous complaints made by the claimant seem to arise when she was being asked to complete certain tasks, or relate to alleged delays in receiving certain training and finally being

"standards set" in relation to her performance. There was nothing to suggest any of these events occurred because of her race or religion. The claimant has referred to incidents over a two year period starting in April 2017 when she was employed and covers in her pleadings the alleged difficulties she experienced categorizing these as discrimination. The claimant alleges that over 30 individuals either separately or in some cases collectively subjected her to race and religious discrimination. This was, he suggested, entirely fanciful.

17. The highest the Tribunal can take from the pleadings is potentially a difference in treatment and while the respondent does not accept that these matters are related there is no explanation given as to why the claimant believes that the behaviours complained of relate to her race or religion.

18. Referring the Tribunal to the case of **Chandhok v Tirkey** 2015 ICR 527 Mr Watson reminded the Tribunal that the ET1 (which in this case was clearly inadequate) was not something "just to set the ball rolling" and should set out the essential case. The claimant he continued has tried to supplement the inadequacy of the ET1 by lodging Further and Better Particulars running to 210 separate paragraphs (14 pages) and at the outset of today's hearing the claimant's representative says he is founding on what he describes as a 'summary' which itself runs to 152 paragraphs. In addition, he suggested, that there was no proper amendment before the Tribunal clearly identifying the new claims.

19. Mr Watson then considered the issue of amendment and whether it should be allowed referring the Tribunal to the case of **Selkent Bus Company Limited v Moore** 1996 IRLR 661 and the requirement for the Tribunal to balance injustice and hardship between the parties. If, he said, the Further and Better Particulars were accepted the Tribunal and the respondents would be involved in considerable case management trying to identify the claims properly. The time taken for a final hearing is likely to be in excess of 20 days costing the respondent significant sums

of money and staff time. In his view the nature and extent of the amendment militated against it being granted. It was lengthy, onerous and difficult to respond to and failed to provide specification regarding key elements such as what particular form of discrimination was being relied upon. It seeks to introduce new claims.

20. Drawing the Tribunal's attention to the ET1 he continued that the original ET1 made reference to an incident on the 26 June 2018 and to the alleged fabrication of the claimant's misconduct which she says was *"engineered, orchestrated and fabricated"* (RIP p8) *"coordinated by bullies and racists in the ward culture which I did not belong to being an African and Christian"*.

21. The Further and Better Particulars appeared to seek to introduce upwards of 88 allegations of discrimination which had been highlighted.

22. Mr Watson commented on the timing of the application. The ET1 complained about incidents in June 2018 and the claimant's dismissal on the 15 November 2018. The ET1 was submitted on the 24 July 2019 over one year after the ET1's stated last incident of discrimination and over 8 months after the dismissal. The Further and Better Particulars were produced on the 1 October over 2 months after the original claim. In Mr Watson's view time bar is an important consideration here.

23. The respondent's solicitor then went on to consider the issue of time bar in more detail and the possibility of the Tribunal granting a "just and equitable extension". He referred the Tribunal to the well- known case of **Robertson v Bexley Community Centre** 2003 IRLR 434 and to **British Coal Corporation v Keeble and others** 1997 IRLR 336. He referred the Tribunal to the more recent case of **Perth and Kinross Council v Townsley** EATS0010/10 which he submitted had some similarities with the current case. In that case a just and equitable extension was deemed to be inappropriate where the claimant was "unreasonably ignorant of Employment Tribunals".

24. The Tribunal was also referred to the case of **Apelogun-Gabriels v Lambeth London Borough Council and another** 2001 ICR 713 where the Court of Appeal held that the pursuit of an internal grievance or appeal process would not normally constitute sufficient grounds for delaying the presentation or complaint before the Employment Tribunal. Mr Watson then referred to the case of **Mensah v Royal College of Midwives** UKEAT/124/94 where it was observed by Mummery J that knowledge is a factor that is relevant to the discretion to extend time. The Tribunals are therefore entitled to ask questions about the claimant's prior knowledge including when did the claimant know or suspect that they had a claim for discrimination; was it reasonable for the claimant to know or suspect they had a claim earlier; and if they did know or suspect they had a claim why they did not present their claim earlier.

25. Mr Watson then went on to consider the applicability of section 123(3)(a) of the Equality Act and the concept of "continuing acts". He referred the Tribunal to the cases of **Hendricks v Metropolitan Police Commissioner** 2002 EWCA Civ 1686, **Sougrin v Haringey Health Authority** 1992 IRLR 416 and **Okoro and another v Taylor Woodrow Construction Limited and others** 2012 EWCA Civ 1590. He then turned to the various factors a Tribunal should consider in particular the reasons for the delay and the likely effect that delay would have on the cogency of evidence and the relative failure of the claimant to take steps to obtain professional or other advice. In his submission there was no continuing act in terms of **Hendricks** as the incidents were allegedly perpetrated by 30 plus individuals over a long period; all such individuals being of varying seniority.

26. Returning to the issue of strike out submitted that the claims should be struck out having no prospect of success referring the Tribunal to the case of **Rolls Royce Plc v Riddle** UKEAT/0044/07 to the comments of Lady Smith contained there that strike out could be appropriate in certain

circumstances. In this case he said there was no reasonable chance of success (**Balamoody v United Kingdom Central Council for Nursing** 2002 IRLR 289 at 39). The case should be struck out as even as pled at its highest there was no reasonable prospect of establishing discrimination. (**Sivanandan v Independent Police Complaints Commission and another** UKEAT/0436/14) There was no blainket ban on strike out claims in discrimination cases. (**Chandhok v Tirkey)** Tribunals should not, he submitted, be deterred from striking out appropriate claims (**Ahir v British Airways Plc** 2017 EWCA Civ 1392) In that case the comments of Underhill LJ were helpful in that he said that the test is met in a particular case depending on an exercise of judgment by the Tribunal. The Tribunal should also consider the inherent plausibility of the claimant's case (**Ahir**). A claimant must show more than the mere possibility of discrimination before the burden of proof shifts to the respondent; the primary facts should be such that a reasonable Tribunal can conclude that the respondent committed (not merely could have committed the discriminatory act). If the Tribunal accepted his submissions and then the amendment(s) should be refused and the case struck out as having no reasonable prospects of success. In the alternative, Mr Watson sought a Deposit Order in the event that strike out was unsuccessful (**Wright v Nipponkoa Insurance (Europe) Limited** UKEAT/0113/14).

27. Mr Gachuba had prepared a very detailed written submission which he spoke to. He addressed the prospects of success (Section 136 of the Equality Act) and then covered the question of what can amount to a detriment nting that the definition was a wide one. He made reference to the case of **WA Goold (Pearmak)Ltd v McConnell** (1995) IRLR 516 and the requirement for an employer to provide a prompt redress to a grievance. His client's position was that she had suffered a detriment though the respondent's failure to promptly investigate her grievances. Having defined detriment Mr Gachuba then went on to refer to the Summary Better and Further Particulars and the various incidents set out in that document starting from her initial interview. She had suffered

bullying and discrimination at work, victimisation by being denied access to grievance procedures. She also had claims against an employee called Kerry Nolan. The standard setting she was subjected to was also victimisation. She had claims for religious discrimination because she was not allowed communion Sunday's off and was falsely accused of making the sign of the cross. There were numerous other issues which were recorded in the Summary including deliberate exposure to radiation. The claimant alleged that her dismissal was orchestrated and was discriminatory. He referred to the case of **Anya v University of Oxford & Ano** (2001) EWCA Civ 405. The investigations that were carried out amounted to victimisation as did the disciplinary and appeal stages. There was 'institutional' racism in the Board. The detriments amounted to less favourable treatment.

28. Mr Gachuba then dealt with the time bar issue setting out a chronology of events which he suggested amounted to a continued course of treatment or conduct particularly on the part of Ms Nolan (**Hale v Brighton and Sussex University Hospital NHS Trust** (2017) UKEAT 0343-16-0812). It was accepted that the date of termination was the 15 November 2018 and that the appeal decision was dated 23 May 2019 and the claim intimated to ACAS on the 10 July. It was argued that the course of conduct ended when the appeal was received. In **Goold** it was accepted that the failure to provide a proper grievance procedure was a continuing act.

29. In the alternative Mr Gachuba submitted that if the claims were out of time then the Tribunal should apply the equitable power available to it and allow the claims to proceed although out of time. In assessing whether to exercise this power the Tribunal should consider a) the length of the delay, b) the reasons for the delay and c) whether the delay prejudiced the claimant by preventing them from investigating the claim while fresh (**Abertawe Bro Morgannweg University Local Health Board v Morgan** (2018) EWCA Civ 640. He then submitted that the

claimant had a genuine belief that she had to exhaust the internal processes. There was no prejudice caused by the delay. In the case of **London Borough of Southwark v Afolabi** (2003) EWCA Civ 15 a case was allowed after a delay of 9 years.

Discussion and Decision

30. Although the claimant gave evidence that focused not on the factual basis or merits the claimant's state of knowledge and the reasons for the delay in raising proceedings. Mr Watson had correctly raised the form of the pleadings. Mr Gachuba suggested that the summary he had lodged should be taken as being an amendment which he sought to have accepted and for the case to then proceed to a full hearing. I therefore as requested will treat the Summary as the proposed amendment.

31. The first issue to be determined is the question of whether the amendment should be allowed or if the strike out should apply to the pleadings as unamended namely to the case pled in the ET1. The first issue is whether the Summary document lodged by the claimant is in reality further specification of an existing case or the introduction of new claims. It is not framed in such a way as to make this particularly clear but an examination of the document, its length and the period it covers together with the claimant's contention that these were all continuing acts leaves me in no doubt that additional claims are being made and the issue is essentially one of amendment.

32. The basic background to these claims, which is not disputed and which I glean from the papers is that the claimant believes that she suffered discrimination over a long period from her recruitment. She was dismissed for gross misconduct allegedly having been aggressive and threatening. She says that these allegations were false and discriminatory. It seems that the disciplinary proceedings in July 2018 prompted her to lodge a grievance on the 18 July bout these earlier

matters. That grievance was undetermined at the date of the disciplinary proceedings in June when she was dismissed. The argument she seems to make is that the disciplinary panel should have either waited until the grievance was concluded or investigated the matters themselves as the claimant's allegations were relevant background and the incidents might if accepted have undermined the case against her or given her mitigation for her actions. The appeal panel seem to have recognised this difficulty and at the first hearing in February 2019 the hearing was adjourned to allow the grievance to be finalised. The grievance investigation found no evidence of discrimination and the appeal panel reconvened and rejected the appeal.

33. I turned to the ET1. There is very little in that document about any discrimination issues until the accusations made against the claimant on the 26 June. She writes: ''the first case (I assume incident) is from 6 September 2017 to the last incident on the 26 June 2018'' The complaint is made that the claimant was investigated and her grievances were not, at least initially. She writes: ''The Appeal panel ended up giving a verdict that did not answer my concerns but at the same time says that she was there to look out for undue process rather than be a judge'' The claimant also complains that the Appeal panel abused her (no specification is given) and there is a reference to NHS panels and institutional racism. There is some further information in the section headed 'Additional Information' but no complaint is made that the Appeal process was discriminatory just that the final outcome was not given to the claimant until the 23 May 2019. The highest the claimant goes is to say that she lost confidence in management. Any claim for religious discrimination is impossible to discern from the ET1. I would observe that the ET1 was lodged by an intelligent and extremely well-educated person and it is very surprising given that she stated in evidence that she was well aware that discrimination in various forms was illegal in this country that she did not take steps to research her rights many months before matters came to a head when she knew that action was being taken

against her which might lead to the loss of her job namely in about June/July 2018.

34. The claim for religious discrimination and what she believed constituted the religious discrimination is not stated in the ET1.

35. Even if further specification of the claims contained in the ET1 was allowed there is in the ET1 no articulated claim either that the Appeal process was discriminatory or about any discriminatory incident beyond the 26 June 2018. To add such claims these would have to be added by amendment.

36. The Better and Further Particulars contained in the Summary seem to try and considerably widen the scope of the claim to encompass both the grievance and appeal process arguing that there was some continuing act or acts and that the Board was institutionally racist. If allowed that would take the last act as being the issue of the Appeal decision/delay in completing the grievance process and the claims to be in time if there was some connection between them.

37. In the present case the claimant asserts both in the ET1 and Summary that she was treated in the way she perceives because she was Black African and the others in the ward and hospital were not. There is little more than assertion.

38. The law in relation to amendment is set out in the seminal case of **Selkent Bus Company Ltd v Moore** (1996) IRLR 661. It is worth quoting once more the passage dealing with the sort of factors the Tribunal should consider when looking at the whole circumstances of the situation and undertaking the necessary balancing exercise between parties:

''4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account <u>all</u> 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:

(a) <u>The nature of the amendment</u>

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.

(b) <u>The applicability of time limits</u>

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 eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) <u>The timing and manner of the application</u>

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".

39. The issue that the amendment must be in a form that can be responded to was raised in **Chandok** in which Mr Justice Langstaff stated at paragraph 35**:**

"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so … I readily accept

that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication … However, all that said the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it … In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suite the moment from their perspective … That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

40. It is clear then that Tribunals can properly consider the whole circumstances including the impact the amendment is likely to have on the proceedings and the prejudice of granting it especially if it causes the respondents difficulty in responding cogently to it.

41. In considering the amendment I also considered the time limits applicable to such claims and concluded that there was no good reason why the claimant did not raise all her claims in time.

42. The Summary that has been lodged does not identify clearly what the claimant's complaints other than in a general way: I complain that the NHS Grampian Board has (1) discriminated against me on the grounds of my race and religion during the hiring stage …." There are complaints of victimisation and harassment although it is not clear if the terms are being used colloquially or as statutory wrongs. Although it is pled that in relation to some incidents the action taken would not have been taken if the claimant were not Black African there are real problems identifying both the particular claims being made, the alleged disadvantage suffered and crucially why the claimant believes that the actions taken relate to her race. The documents also runs to some 210 paragraphs involving many witnesses and covering incidents that do not appear clearly connected. It is a substantial amendment. There is a real issue of prejudice to the respondent here if it were allowed in cost and staff time having to respond to these inchoate allegations.

43. I return to the fact that the claimant although a party litigant is an intelligent and educated person. I struggle both with her explanations for the delay in raising proceedings, in relation to incidents she says she regarded as discriminatory at the time, and the failure to set out these apparent additional complaints in her ET1. I regret that I am drawn to the conclusion that although the claimant was disappointed at the result of her appeal and delay in finalising her grievance she did not see these as discriminatory matters in her ET1 and I am somewhat sceptical that they are included at this relatively late stage. Having carried out the necessary balancing exercise then for the reasons I have articulated I am not prepared to exercise my discretion to allow the proposed amendment and the application is refused.

Just and Equitable Extension

44. The claims made in the ET1 are also out of time. The claimant urged the Tribunal to exercise it's discretion to allow the claims late. Mr Gachuba pointed out that the Tribunal has a wide discretion pointing to the case of **Afolabi** in which a claim was allowed after the lapse of 9 years. That is an unusual case in which the claimant remained unaware of the discriminatory behavior until following the raising of separate proceedings he examined his employer's files and concluded he had been discriminated against at the recruitment stage some years earlier. In the present case the claimant clearly acknowledged that she was aware that race discrimination was illegal as it was occurring but took no steps to either research her rights or vindicate them through Tribunal proceedings. This is not a case where new facts have been discovered by a party.

45. Parties referred the Tribunal to the case of **Robertson v Bexley Community Centre T/A Leisure Link** (2003) IRLR 434 which makes it clear that it is up to the claimant to convince the Tribunal that the power should be exercised and that the use of the discretion is the exception

rather than the rule. The rights of both parties have to be kept in mind and balanced in any consideration by the Tribunal.

46. The case of **Keeble** helpfully sets out the sort of factors that the Tribunal should consider. The claimant's position is essentially that she did not know about employment tribunal time limits not the need to set out more fully her claims. I do not believe that her professed ignorance was reasonable given my earlier comments that even a short time spent researching her position on the internet would have led to an awareness of time limits and sources of information to research her rights. It was significant that she spent some time working as an Adviser and as she put it 'signposting' people who contacted the organisation to where they could get sources of help and advice. That may have related to a wholly different aspect of life, namely domestic abuse and assault, but path to obtaining advice and guidance is broadly similar.

47. I also considered the likely effect of granting the extension on the respondents. If I did then the claims would require particularisation and I strongly suspect that something like the Summary document currently before the Tribunal would be produced containing multiple claims, numerous incidents and involving many witnesses: It would be in effect writing a blank cheque. Before finally determining the matter I also took a step back and looked at the situation again in the round and concluded that I should also consider the basis for the strike out application more generally before coming to a final view on the application for an extension.

Strike Out

48. The starting point for a consideration of the law on the possible use of strike out in this case begins with the terms of Rule 37(1)(a) of the Employment Tribunal Rules. This provides that a claim may be struck out on the ground that it has no reasonable prospect of success. It has been observed that striking out a claim is a draconian measure which

should only be taken in the clearest cases and that particular care must be taken when the claims relate to discrimination.

49. I refer to the well- known decision of the House of Lords in **Anyanwu v South Bank Student Union** [2001] UKHL 14, [2001] ICR 391and the Judgment of Lord Steyn at paragraph 24, where he said:

'For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.'

50. He also referred us to the speech of Lord Hope, at paragraph 37 wrote:

'I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence.'

51. In ***Ezsias v North Glamorgan NHS Trust*** [2007] EWCA Civ 330, [2007] ICR 1126 an Employment Appeal Tribunal case Maurice Kay LJ, said, at paragraph 29:

"It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute."

52. Mr Watson in his thoughtful and well reasoned argument referred me to the Judgment of Langstaff.P at paragraph 20 of **Chandhok** in which it is stated:

''20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions

when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):
"…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

53. Mr Watson suggests that what could be called the '**Madarassy'** difficulty applies to the claimant's pleadings namely the something more than disparate treatment is missing. Despite the warnings given by higher courts I accept that there is no absolute rule of law that discrimination cases can never be struck out but a Tribunal must very carefully examine the matter before venturing to strike out. If the strike out application is based on a jurisdictional matter or clear point of law, such as time bar in this case, and accordingly not dependent on the Tribunal hearing the full factual background, assessing credibility etc. then the matter is more straightforward (**Chanhok**).

54. Mr. Gachuba presented the argument that the claimant had a right to have her grievances dealt with and it was poor practice given the alleged inter-relationship of those grievances with the disciplinary matters. By doing so he suggested that this they created a continuing state of affairs (**Hale**) and as the grievance was only determined.

55. I possibly have some sympathy with the claimant in relation to question of the way in which the claimant's grievances were dealt with. If they related to alleged discrimination against her in the ward then that might have altered the disciplinary finding or at least, if accepted, provided mitigation for her behavior. This problem seems to have been recognised at the appeal stage and the panel quite properly in my view adjourned to ascertain the stage at which the grievance had reached.

56. The case of **Hale** reminds Tribunals to look at whether there is a continuing state of affairs and stressed in that case the interrelationship between the failure of the employer to deal with a grievance when the issues in that grievance impacted on that process. The Employment Appeal Tribunal held that in such circumstances there was a continuing act. Accepting that the failure to investigate the grievance here was potentially discriminatory then the claimant became aware that the grievance had in fact been determined on or about the 21 February when it was rejected. The claimant did not raise proceedings within three months of that date not in fact raising the proceedings until the 24 July. I do not accept that the claimant can rely on the intimation of the date of the appeal because the complaint was not about the appeal rather about the fact that the disciplinary took place before the appeal was determined (as the claimant says in the ET1 ‘‘I was summarily dismissed hurriedly’’), that there was a delay and so forth. The act complained of must have come to an end with the issue of that grievance. No allegations are directed against the Appeal process other than possible the vague general accusation of institutional bias. Even if I am in error in relation to this matter the paucity of information in the ET makes any claims on this basis to be problematical.

57. Turning to the claims for religious discrimination there is nothing in the ET1 to found such claims. If one looks at the Summary document there is reference to incidents to the claimant asking for Communion Sundays off in 2017 (paragraph 39) and to a colleague saying that the claimant made the sign of the cross (paragraph 153). Neither of these matters were developed in such a way in the Summary to provide a proper cogent basis for claims of religious discrimination. If someone made a false allegation that an employee had made the sign of the cross it is difficult to envisage how that alone could be religious discrimination.

58. In this case it was also argued that the claim must fail because there was nothing else pled to suggest that the difference in treatment related

to race or religion. The crucial dispute here is why certain things happened in the way they did to the claimant. The claimant's perception was that they occurred because of race or religious discrimination. Whether that is true or not sometimes is a matter often best reserved to a full Tribunal to determine once it had heard the full evidence which allows it to conclude why things had occurred as they had but matters depend of the circumstances and as we have discussed such a course of action is not mandatory.

59. This is the warning that Underhill LJ gave in in **Ahir** at para 16:

''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. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success''.

60. The Tribunal has in any such application is that it must look very carefully at these issues and in context. However, it seems clear that on the pleadings as they stand in the ETI there is no reasonable prospects of the claimant succeeding. No basis has been laid for claims for religious discrimination. The incidents involving staff and the delay in the grievance process or failure of the disciplinary panel to consider those grievances are time barred. No proper basis for claims against the respondents has been laid or anything that might suggest institutional racism. The claims have no reasonable prospects of success in my judgment.

61. Finally, I do not underestimate the problems that can be faced by someone like the claimant working in a different country where sources of legal advice and assistance have diminished over the years. Nevertheless, such resources do exist online and the claimant has carried out research for her various degrees though the years and should have readily access such information.

62. Cases involving discrimination are fact sensitive and often have a considerable lengthy background with incidents going back some time and involving many incidents and different members of staff. Such claims can often lead to difficulties for employers in identifying the incidents at issue and having staff recall what for them might be an incident that is in no way noteworthy at the time. The claimant it appears kept detailed journals and it is also a puzzle not only why she did not act sooner if she believed she as being discriminated against but did not set out why she seems to have come to the view that it was principally because of her race.

63. A balance must be struck and it is preferable that where possible issues around alleged discriminatory behavior in the workplace are aired in a public forum. But in the present case, however, having refused the amendment and considered the ET1 I have come to the view that it would be wrong to grant the request for an extension of the time limits here and considering the terms of the ET1 and the whole matter before me I strike out the claims and the proceedings are dismissed.

Employment Judge: **James Hendry**
Date of Judgment: **14 January 2020**
Date sent to parties: **15 January 2020**