



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**and**

**Respondent**

**Miss S Sually**

**HM Revenue and Customs**

## PRELIMINARY HEARING

**HELD AT London South**

**ON 17 January 2020**

**EMPLOYMENT JUDGE BALOGUN**

### Appearances

**For Claimant: Mr D Sually, Brother**

**For Respondent: Mr A Henderson, Counsel**

## JUDGMENT ON PRELIMINARY ISSUE

1. The claims of victimisation are struck out on grounds that they have no reasonable prospect of success.
2. The allegations of direct discrimination at paragraphs 1oo, pp and qq of the draft List of Issues are struck out on grounds that they have no reasonable prospect of success.
3. The allegations of harassment at paragraphs 8uu, vv and ww of the draft List of Issues are struck out on grounds that they have no reasonable prospect of success.
4. The allegations of direct discrimination and harassment at paragraphs 1nn and 8tt, respectively, of the draft List of Issues are subject to a deposit order (see separate order)

## REASONS

1. By a claim form presented on 16 January 2018, the Claimant complains of constructive dismissal; direct sex and disability discrimination; failure to make reasonable adjustments; harassment and victimisation.
2. This hearing was listed by Employment Judge Freer, on the application of the Respondent, in order to consider the following:
  - i. Whether all or any of the claims should be struck out of on grounds that they have no reasonable prospects of success;
  - ii. Whether a deposit order should be made against the Claimant as a condition of her being allowed to continue with any of her claims on grounds that they have little reasonable prospect of success;
  - iii. Whether any of the claims should be struck out on grounds that they are out of time.
  - iv. Whether the Respondent should be granted leave to amend its response.
  - v. Further case management
3. The constructive dismissal claim is in time and is not part of this application.
4. There is a long history of case management in this matter. The current hearing is the 4<sup>th</sup> preliminary hearing. Following on from the last hearing before EJ Freer, the Respondent prepared a draft list of issues in the case. The Claimant has been provided with a copy but has not yet agreed it. This is because she contends that the draft list does not accurately reflect her further and better particulars. However, when we went through the draft issues and cross checked them with the further particulars, they were a reasonably accurate reflection of the allegations, save for in a few instances. I was therefore content to use the draft list of issues as a reference document for the purposes of deciding this application, and the further particulars, where appropriate.
5. Have heard oral submissions on behalf of the Claimant and the Respondent, I have reached the following conclusions:

### **Direct Discrimination and Harassment claims**

#### *Time Points*

6. The claim was presented on 18.1.18. ACAS conciliation opened on 19.10.17 and closed on 20.10.17. Therefore, any acts that occurred before 18.10.17 are, on the face of it, out of time.
7. Turning to the list of issues, there are 43 separate allegations of direct discrimination and only 4 of them occurred on or after the 18.10.17 (allegations 1nn – qq). There are 49 separate allegations of harassment and of these, only 4 occurred on or after 18.10.17 (allegations 8tt-ww) – the same factual allegations as 1nn-qq.
8. The question that arises is whether the allegations of direct discrimination and harassment pre-dating the 18.10.17 are out of time or whether they are part of series of continuous acts extending over a period ending with those identified above as in time. This is a complex case with multiple allegations of discriminatory conduct over a lengthy

period. This is a fact sensitive case and it would be impossible for this tribunal to determine the issue of continuity without hearing a lot of evidence. In my view, this is a question best left to the final hearing to decide, having had the benefit of hearing all of the evidence. It is therefore not appropriate for me to strike out the pre - 18.10.17 allegations at this stage.

No reasonable prospect of success

*Allegations 1nn/8tt*

9. The Respondent contends that the direct discrimination allegations at 1nn of the List of issues and its counterpart allegations of harassment at 8tt are not capable of amounting to direct discrimination or harassment and therefore have no reasonable prospect of success. This is one of the allegations that the Claimant says has not been accurately set out in the list of issues. I have therefore set out below verbatim the Claimant's version at paragraph 142 of her further particulars:

*“On 19<sup>th</sup> Oct 2017, Mr Hamer blocked the Claimant from having the assistance of Mr Jonathan Aldcroft who was the lead for Bullying Harassment and Discrimination stating that he would speak to Mr Aldcroft instead of allowing the Claimant to speak to him, as was her right for a facility provided by HMRC. This was a breach of section 26 of the Equality Act (2010) and sections 44 and 100 of ERA (1996)”.*

10. If I take the Claimant's case at its highest and assume that the allegation is factually correct, it doesn't explain why the conduct of Mr Hamer amounts to direct discrimination (which is not referred to in the text but was identified as such at the last preliminary hearing) because of sex/disability or harassment related to sex/disability. The only explanation given was that there had been issues between the Claimant and Mr Hamer in the past in that he had refused to respect reasonable adjustments that the Respondent had put in place for her. A meeting was due to take place between the Claimant and Mr Hamer on 19 October 2017, to discuss her continued sickness absence and she wanted Mr Aldcroft's assistance, seemingly, as protection against Mr Hamer.
11. Whilst I considered this particular allegation weak, I felt that there was a chance, albeit very slim, that an inference of discrimination might be drawn from the background facts (if accepted). I was therefore not prepared to strike out the allegation but felt that the Claimant should pay a deposit as a condition of being allowed to continue with it as I considered it to have little reasonable prospect of success.

*Allegations 1oo, pp & qq/ 8uu, vv & ww*

12. The matters complained about under these paragraphs of the draft List of Issues are said to have occurred after the Claimant resigned. They are:

*oo. After C resigned Mr Hamer emailed her to ask her to attend a meeting  
pp. On 20 November 2017 C received a phone call from Cara Lofthouse who said she had been appointed to investigate her “grievance letter”, and she was subsequently sent a P45 which only covered a period of 7 months  
qq. On 24 November 2017 Mr Hamer emailed C with policy documents and a form for her to sign.*

13. It was submitted by the Respondent that these acts cannot be pursued as acts of direct discrimination or harassment as they occurred post termination. However, section 108 of the Equality Act 2010 (EqA) prohibits post-employment discrimination if it arises out of

and is closely connected to the employment relationship and (my emphasis) the conduct would have contravened the Act if it happened during employment. Similar provisions apply in relation to harassment.

14. Assuming for the moment that the factual allegations are true, a full tribunal is likely to find that they arise and are closely connected to the employment relationship. However, there is no explanation from the Claimant as to why these matters amount are because of or related to sex/disability. In those circumstances, I find that there are no reasonable prospects of a full tribunal concluding that they would have constituted direct discrimination or harassment had they occurred during employment. The allegations are therefore struck out.

### **Failure to make reasonable adjustments**

#### *Time points*

15. There are 24 separate incidents of “failure to make adjustments” relied on by the Claimant and they are set out at paragraphs 7 a-x of the draft list of issues. Relying on the case of Matusovicz v Kingston Upon Hull City Council [2009] EWCA Civ 22 and Abertawe BRO Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 it was submitted on behalf of the Claimant that the allegations were in time because the failure of the Respondent to redeploy her (allegation 7v) was continuous. However, my reading of that allegation: “***In May 2017 Mr Hamer told C that he had liaised with HR and their advice was to place her in the HMRC Priority Mover Scheme***” is that it was a positive one off act rather than an omission or inadvertent failure to act as envisaged by the authorities referred to.
16. The earliest “failure” relied upon under this head of claim is said to have occurred on or around 25.4.16 and the latest on 5-6 October 2017. As they all pre-date 18 October 2017, they are all out of time. I have therefore gone on to consider whether there are just and equitable reasons to exercise my discretion to extend time. For these purposes, I have focused only on the last incident on 5-6 October 2017 (Paragraph 7x).
17. It was submitted on behalf of the Claimant that she is dyslexic and that around this time she had suffered a recent bereavement and was suffering from stress and ill health. Although I was not presented with any medical evidence, it is common ground that the Claimant was signed off work at this time. The Respondent also accepts that the Claimant is dyslexic. I find that the Claimant’s dyslexia coupled with her ill health would have had some impact on her cognitive ability to deal with matters in a timely manner, including lodging her claim. I have borne in mind that, in relation to the last incident relied upon, the delay was only 12 days, which in the circumstances was not excessive. I do not consider the Respondent to be unduly prejudiced by the delay as the same allegation forms part of the conduct relied upon in the constructive dismissal claim therefore the evidence will need to be heard in any event.
18. In the circumstances, I consider it just and equitable to extend time in relation to allegation 7x of the draft list of issues. In relation to the other allegations, the issue that again arises is whether these are part of a series of acts extending over a period, ending with allegation 7x. For the reasons stated earlier, this is a matter that should be determined by the full tribunal. Accordingly, it is not appropriate for me to strike out those claims at this stage.

Victimisation

19. The allegations of victimisation are set out at paragraph 11 of the draft list of issues. However, no protected acts have been identified in the claimant's further and better particulars. In the absence of protected acts, a victimisation claim cannot succeed. The claims are therefore struck out on grounds that they have no reasonable prospect of success.

Deposit

20. As indicated above, I have decided to order a deposit in respect of the allegations at paragraphs 1nn and 8tt of the draft List of Issues. Further details are contained in the separate deposit order accompanying this judgment.

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**Employment Judge Balogun**  
Date and place of Order  
London South  
6 February 2020