



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms V Noyle

**Respondent:** HCB Widdows Mason Limited

**Heard at:** Cardiff

**On:** 16 March 2020

**Before:** Employment Judge O'Rourke

## **Representation**

Claimant: In person

Respondent: Ms L Wynn-Morgan – Counsel

# PRELIMINARY HEARING JUDGMENT

1. The Respondent's application for strike out of the Claimant's claims, on the basis of lack of jurisdiction, or for having no reasonable prospects of success, is refused.
2. The Respondent's application for a deposit order, or orders, in respect of the claims, on the basis of them having little reasonable prospect of success, is also refused.

# REASONS

## **Background and Issues**

1. Following an earlier preliminary case management hearing, on 20 April 2019, the Respondent made an application for strike out of the Claimant's discrimination claims, either because the Tribunal lacked jurisdiction to hear them, due to them being out of time, or, alternatively that they had little reasonable prospects of success. In the further alternative, the Respondent sought deposit orders in respect of such claims as may be found to have little reasonable prospect of success. There is no dispute that the Claimant's claim of constructive unfair dismissal is within time.

2. I heard no evidence in respect of the merits or otherwise of the Claimant's claims. While the Order following the previous hearing had specified exchange of witness statements, it specifically excluded reference to evidence in those statements as to the merits, or otherwise, of the claims '*as such matters are to be determined at the final hearing, in due course, if appropriate.*' No witness evidence was, in any event, provided.
3. I heard submissions from both parties.

### The Law

4. In respect of the discrimination claims, s.123(1)(b) and (3)(a) of the Equality Act 2010 ('EqA'), state that:

*Claims 'may not be brought after the end of ... such other period as the employment tribunal thinks just and equitable' and*

*'For the purposes of this section, conduct extending over a period is to be treated as done at the end of the period'.*

5. **British Coal Corporation v Keeble [1997] IRLR 336 UKEAT** provided guidance on the application of the 'just and equitable' principle, which I shall consider below.

6. In respect of strike out of claims, **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**, indicated that cases should not, as a general principle, be struck out on the grounds of having no reasonable prospect of success, when the central facts are in dispute. In the EAT, in **Mechkarov v Citibank NA [2016] UKEAT/0041/16**, by reference to previous authorities, Mitting J summarised the approach that should be taken in a strike out application in a discrimination case, as follows (at para 14):

*"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."*

7. In respect of deposit orders, the case of **Hemdan v Ishmail [2017] UKEAT IRLR 228** states that it should be borne in mind that the assessment of whether there is little reasonable prospect of success is a summary assessment intended to avoid cost and delay, and should not involve a mini-trial of the facts, as this would defeat the object of the exercise. But, as in **Sharma v New College Nottingham [2011] UKEAT 0287/11**, where there are underlying factual disputes, centred on the outcome of oral evidence that evidence needed to be heard.

**Submissions**

8. The Respondent, both in a written application of 11 November 2019 and in oral submissions today, stated, in summary, the following:
- a. Subject to Rule 37(1)(a) of the Employment Tribunal's Rules of Procedure 2013, the allegation that the Claimant's suspension on 24 April 2019 was for discriminatory reasons had no reasonable prospects of success, as the decision was carried out in accordance with the Respondent's internal procedures, as a result of alleged misconduct by her.
  - b. Subject to Rule 39(1), deposit orders should be made in respect of the claims.
  - c. Subject to s.123, the claims are out of time and the Tribunal should not exercise its discretion to extend time. Further, there has been no '*conduct extending over a period*', linking alleged acts of discrimination over the Claimant's period of employment. In this respect, the following specific submissions were made:
    - i. The discrimination claim having been presented on 20 August 2019 and the last act of discrimination alleged having been the Claimant's suspension on 24 April 2019 and she not having attended work in the intervening period, there can have been no subsequent act of discrimination.
    - ii. The Claimant's allegations predating the act of suspension are individual allegations of discrimination and do not constitute a continuing act of discrimination/a campaign of discrimination and are therefore out of time. Even on a generous reading of the claim, that is the case.
    - iii. Even if those acts are found to be 'continuing acts', they are distinct from the decision to suspend the Claimant and therefore the suspension cannot be the 'last act', enabling the earlier allegations to be within time.
    - iv. It would not be just and equitable to extend time. The Claimant has been supported by her trade union throughout and therefore cannot have been unaware of the deadline for presenting her claim. The balance of prejudice is in the Respondent's favour, as the Claimant will be able, nonetheless, if her discrimination claims are struck out, to bring her claim of constructive unfair dismissal.
9. The Claimant, in both written and oral submissions, stated, in summary, the following:
- a. Her claims do have reasonable prospects of success. She has evidence to support them and should be given the opportunity to put the Respondent's '*deeply flawed*' grounds of resistance to the test.

- b. It was not her decision to not return to work, following her suspension and in fact her trade union representative repeatedly pointed out that both the act of suspension and the length of it was unfair.
- c. The disciplinary proceedings and suspension were themselves part of the continuing discrimination, which continued until she resigned. The allegations against her were false or grossly exaggerated and much worse behaviour was commonplace from her then-colleagues, without even any rebuke, much less disciplinary proceedings.
- d. The acts complained of are not 'clear and distinct acts', as asserted by the Respondent, but a global continuing act, throughout her employment.
- e. Although not considered necessary in respect of her claims, it would be just and equitable to extend time, if necessary.
- f. She does not dispute that she has had professional advice.

### **Conclusions**

10. 'No Reasonable Prospects'. I deal with this issue briefly. Applying **Mechkarov**, this is not a clear case where the allegation in relation to the suspension should be struck out. There are core disputed facts as to the events leading up to the suspension and the nature or validity of the allegations made against the Claimant, in respect of which I am in no position to make findings, as I've heard no evidence, or seen '*undisputed contemporaneous documents*' which "*conclusively disprove*" or are "*totally and inexplicably inconsistent*" with the allegation that the Claimant was accused of misconduct and suspended for discriminatory reasons. Indeed, it seems from the previous order and the lack of any evidence provided today that it was never intended that I would have the opportunity to consider such evidence. I therefore refuse this element of the application.
11. 'Little Reasonable Prospects'. Based, as the Claimant's claims are, largely on oral evidence, which I have not heard, I am not in a position to consider that they have little reasonable prospects of success. While it is possible that witnesses called by the Respondent will seek to contradict her allegations, it is impossible for me to predict the outcome of cross-examination of those witnesses and the consistency, or otherwise, of their evidence, both in respect of their own evidence and when compared to others. Nor can I come to a view as to how a Tribunal would consider the credibility, or otherwise, of the Claimant's evidence and those of the Respondent's witnesses, when weighed against each other. I therefore also refuse this element of the application.
12. Jurisdiction. I find that the Tribunal does have jurisdiction to hear the Claimant's claims, for the following reasons:

- a. It is not the case, as asserted by the Respondent that the last act of discrimination pleaded by the Claimant is in respect of her suspension. Her grounds of claim plead the rejection of her grievance, on 28 June 2019, which she states was '*about the discrimination*' (paragraph 43) and which is included under the section heading of '*unfair treatment due to discrimination*'. The grievance outcome itself goes into some considerable detail about the alleged acts of discrimination complained of and there is therefore clearly a link between the grievance and the past alleged acts of discrimination.
- b. The history, nature and similarity of the allegations made by the Claimant clearly indicate at least the possibility of a course of conduct by the Respondent, thus engaging s.123(3)(a). In **Commissioner of Police of the Metropolis v Hendricks [2003] ICR530 EWCA**, the Court made it clear that tribunals should not take too literal an approach to the question of what amounts to 'continuing acts', focusing on the substance of the complaints in question, which, as I've said in this case, bear much similarity with each other.
- c. I do not consider that because the Respondent's decision to suspend the Claimant was apparently conducted subject to its policies and in response to serious allegations against the Claimant that it cannot have been, therefore, discriminatory, thus 'breaking' any course of continuous conduct. The Claimant asserts that she was suspended on trumped-up charges, following a campaign of discrimination against her and without hearing evidence in respect of those charges, I am in no position to come to a view that the suspension was not discriminatory and therefore, at least potentially, it is.
- d. In any event, even were I not minded to consider that there has been, potentially, a course of conduct by the Respondent, culminating with the grievance outcome, I would nonetheless find that it would be just and equitable to extend time, subject to s.123(1)(b), to permit jurisdiction, for the following reasons:
  - i. While not a foregone conclusion, a Tribunal's discretion to allow an extension of time is a wide one.
  - ii. Applying **British Coal Corporation v Keeble**, I consider the following factors:
    1. The length of delay (even on the Respondent's argument that the suspension is the last act complained of, but cannot be an act of discrimination) is not excessive, as the Claimant alleges other acts of discrimination in April 2019.
    2. Any delay can be explained by the Claimant awaiting the outcome of the grievance procedure, a legitimate decision on her part and one which, if she had not

taken, she would no doubt have been criticised for by the Respondent.

3. Any delay will have little or no effect on the cogency of the evidence, with the Respondent having considered many of the allegations at the time of the Claimant's grievance.
4. The Claimant took such advice as she could from her union (but without the possibility of representation) and I don't consider that advice to have been incorrect.
5. When balancing the prejudice suffered by the parties, due to this decision, I consider that it falls in the Claimant's favour, as if she were not permitted to bring her discrimination claims, she would lose all possibility of recourse in respect of them. While I note the submission that she would nonetheless be able to continue with her constructive unfair dismissal claim, I don't consider such a claim, alone, sufficient potential recompense for being debarred from her discrimination claims, due both to her loss of the ability to access justice in respect of the latter, based as they are on serious allegations in respect of three protected characteristics and also, even if the dismissal claim were successful, the relatively modest financial remedy (approximately £3000, based on her schedule of loss) that she could hope to recover in respect of it.

**Judgment**

13. Accordingly, therefore, the Respondent's application for strike out and/or deposit orders is refused.

---

Employment Judge O'Rourke

Date 18 March 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON 20 March 2020

.....  
FOR THE TRIBUNAL OFFICE