



EMPLOYMENT TRIBUNALS

Claimant: Mr. I Khan
Respondent: Citizens Advice Nottingham & District Bureau
Heard at: Nottingham
On: 17 March 2020
Before: Employment Judge Broughton (Sitting Alone)

Representatives

Claimant: In Person
Respondent: Mr. McDevitt - Counsel

RESERVED JUDGMENT (ON A PRELIMINARY POINT)

1. The following complaints of direct discrimination relying on the protected characteristic of race and/or religion as set in the Claim Form presented on 10th December 2019, were presented outside the time limit provided for by Section 123 Equality Act 2010 however it is just and equitable pursuant to section 123 (1) (b) to allow the complaints to be brought;

1.1 Failure to provide support and engagement during the Claimant's probationary period

1.2 The termination of the Claimant's employment.

The complaints are of less favourable treatment under section 13 of the Equality Act 2010.

2. The application to strike out the complaints under rule 37(1) Employment Tribunal Rules is not well funded and is dismissed.

3. The Claimant will be required to pay a deposit of £50 by not later than **21 days** from the date of this Order, under rule 39 (1) of the Employment Tribunal Rules to proceed with the allegation referred at 1.2 above namely that the termination of his employment was an act of less favourable treatment under section 13 Equality Act 2010.

4. A Preliminary Hearing will be listed by telephone for the purposes of case management after the date for payment of the Deposit has passed, to make appropriate Orders for the claim to proceed and to list it for a hearing. Notice of the Preliminary Hearing will follow.

REASONS

Background

5. The Claimant issued a claim in the Employment Tribunal on 10 December 2019 which included claims of discrimination and unfair dismissal.
6. The Claimant had been employed by the Respondent from 20th February 2019 to 23rd August 2019, a period of employment of just over six months. The Claimant did not therefore have the requisite two years qualifying service required by section 108 (1) of the Employment Rights Act 1996 (ERA) to bring a claim of 'ordinary' unfair dismissal under section 94 ERA and this claim was dismissed by Employment Judge Adkinson on 7 February 2020, on the grounds that it had not reasonable prospect of success.. The remaining complaints were claims of discrimination on the grounds of sexual orientation, race and religion, however the claims had been brought outside of the primary 3 month time limit.

Jurisdiction - Time Limits

7. The last possible act of alleged discrimination on the face of the pleadings, was the decision the termination of the Claimant's employment on 23 August 2019. The Claimant started the Acas early conciliation process on 9 December 2019. The Acas certificate was issued on the 10 December 2019. The Claimant accepts that his claim issued on 10 December 2019 (even if the alleged discrimination was part of a continuing course of conduct under section 123 (1) Equality Act 2010) culminating in the last act being the termination of his employment, was presented out of time. The 3 month time limit would have expired on 22 November 2019. The claim was potentially therefore brought 18 days outside the primary time limit.
8. A response to the claim was filed on 3 February 2020. The Respondent requested that the Preliminary Hearing listed for 17 March 2020 be converted into a public hearing. The Respondent raised jurisdictional issues on the time limit points and made an application to strike out the claims of discrimination on the grounds that they have no reasonable prospects of success or in the alternative an Order that the Claimant must pay a deposit in respect of each allegation/claims on the grounds that the complaints have little prospect of success.
9. Employment Judge Adkinson by the same letter of 7 February 2020, directed the Claimant to provide to the Tribunal by 14 February 2020, a written statement setting out the following;

9.1 Why he says the claims were presented in time, if he does not agree that they are out of time

- 9.2 *If they are out of time, why the Tribunal should extend the time within which they should be brought*
- 9.3 *Why any claims should not be struck out because of no reasonable prospect of success or why he should not pay a deposit because they have little prospect of success*
- 9.4 *If the Tribunal ordered [him] to pay a deposit as a condition of continuing his claim, details of his means (i.e. income, expenses, assets and liabilities) if [he] would like to be taken into account.*
10. The Claimant sent into the Tribunal, on 11 February 2020 a document setting out the information as Ordered. Unfortunately, it transpired at the hearing today that the Claimant had not sent a copy of this document to the Respondent. I had a spare copy which I was able to provide to Counsel for the Respondent during the course of the hearing. Counsel was provided with an opportunity during a short adjournment of the hearing to consider its contents. No application for an adjournment of the hearing was made.

The Hearing - Arrangements

11. The Claimant informed the tribunal staff that he would have difficulty at the hearing today, given the presence of two of the Respondent's employees who accompanied counsel. The Claimant was concerned that he may suffer panic attacks if he was required to see the Respondent's employees. An adjustment was made which involved the Claimant sitting throughout the duration of the hearing at the witness table and being screened from the public seating area. Counsel for the Respondent was however at all times able to see the Claimant including when he was giving his evidence and being cross examined. Those in attendance in the public seating were able to hear the Claimant at all times. There was no objection raised by the Respondent or indeed those sat in the public area to these arrangements and I am pleased to say that the hearing proceeded without any difficulty.

The Claims

12. The claim as originally presented included a complaint of discrimination on the grounds of; race, religious belief and sexual orientation.
13. At the outset of today's hearing the Claimant explained that he was not pursuing a claim of discrimination on the grounds of sexual orientation. The complaints all relate to alleged treatment from his supervisor (BD). The Claimant informed the tribunal that he had included a complaint of discrimination on the grounds of sexual orientation because he "*felt something was wrong*" in the way he had been treated by BD, he did not know what it was and therefore included sexual orientation but this was no longer a claim he wanted to pursue. A separate Order will be made dismissing the claim on withdrawal by the Claimant.

Race and Religious Discrimination

14. The Claimant confirmed that in terms of the claim of race discrimination, his ethnicity is British Pakistani.
15. In terms of the claim of religious discrimination, the Claimant's religion is Islam.
16. There was scant information within the claim form regarding the treatment of which he complains, the Claimant had however submitted an additional document to the tribunal and Respondent on 1 March 2020 headed "*Dear Judge*", this document sets out some further particulars of his complaint. A copy of this had been provided to the Respondent. The Claimant had explained that he had produced this document because he suffers migraine and headaches when recalling events and had prepared this document to set out his main points. Although this set out some alleged occasions when the Claimant asserts that BD failed to support him or show any engagement or interest in the clients he was dealing with, he does not identify when these incidents took place and states that he is unable to provide further details of other allegations of such less favourable treatment, without the casebook setting out the cases he dealt with.

The Claims

Less Favourable Treatment – section 13 Equality Act 2010

17. Before addressing the evidence on the time point or hearing submissions on the application to strike out or for a deposit order, I sought to establish further the nature of the claims with the Claimant.
18. The Claimant explained that he was not alleging acts of discrimination but omissions throughout the period of his employment from 20th February 2019 to 23 August 2019. He described his complaint thus; "*if I did anything it was not good enough for [BD], if I took work back to her there was no comment on it ...there was no help or assistance, in particularly those of ethnic minorities, these clients were disregarded*". In essence what the Claimant confirmed he is complaining about is an ongoing a lack of feedback, of support and general lack of engagement by BD as his supervisor. The Claimant referred to BD being "*very angry*" with him but accepted that he could not identify anything in particular she had done or said to him.
19. The Claimant compares his treatment he told me, to three White British employees; Jay Hayes, Alex and Louise. The Claimant could not recall the last names of Alex and Louise. Mr McDevitt for the Respondent was not in a position to assist with their full names.
20. The complaints as described by the Claimant today appear to be claims of direct discrimination under section 13 of the Equality Act 2010 namely that the Respondent treated the Claimant less favourably than it treated the three named White British comparators because of the Claimant's protected characteristics of race and/or religion. The Claimant had not identified prior to this hearing what section of the Equality Act 2010 he was asserting had been breached.

21. As the Claimant was not legally represented I also read out to him the definition of harassment under section 26 of the Equality Act 2010. The Claimant however stated that he did not consider that the definition of harassment applied to his complaints, that was he was alleging was only direct discrimination under section 13. The Claimant had made a passing reference to indirect discrimination however on explaining indirect discrimination to the Claimant, he confirmed that he had misunderstood and that this was not the type of discrimination he was alleging.

Dismissal

22. With regards to the termination of his employment, the Claimant alleges that this was a further act of direct discrimination, he refers in his claim form to BD using "*the opportunity to get rid of me*" by assessing his performance 4 weeks after his return from sick leave. He referred initially during this hearing, to having received a report after he had been dismissed and that what was contained in this report were things which BD had never sat down and explained to him, they were essentially issues with his performance. The Claimant had not brought a copy of this report with him to the hearing today. The Claimant alleged that when he read this report it made him realise that BD had been "*lying to him all the time*". I sought to clarify with the Claimant whether he was saying that there were no issues with his performance and that the issues raised in the report were inaccurate/false or whether he was saying that there were issues with his performance but these were as a result of the lack of support and engagement. The Claimant's evidence was that I; "*there may have been issues my performance but she didn't want me there. When I read the report had more than insight into that person.*"

23. I then sought to clarify with the Claimant whether what was said in the report about him formed part of his claim. The Claimant however then said that; "*it was nothing to do with the report, it didn't matter*".

24. The Claimant then repeated number of times that the report was not relevant and he wanted the tribunal to disregard the report. It was therefore difficult to understand clearly what the Claimant's complaint in connection with his dismissal is. What I was able to establish today with the Claimant was that his claim includes two main complaints of direct discrimination under section 13 and those are the following;

a) *A failure by his supervisor (BD) to provide the Claimant with feedback, support and engagement during his employment; and*

b) *Complaint about the termination of his employment*

Evidence at the Preliminary

25. To address the time limit point I considered the two documents prepared by the Claimant and in particular the one prepared in response to the Order of Employment Judge Adkinson. The Claimant also gave further oral evidence and was cross examined. The Respondent made oral submissions.

Claimant's Evidence

26. On the issue of why the claims had not been brought in time, the Claimant's document dated 11 February 2020 set out his response in one paragraph, which I set out below;

"I believe the tribunal should give me a chance because the discrimination was occurring since February 2019 – August 2020. I have never experienced this before and did not realise it was something bad that was happening to me as a result of another person. On the date I was terminated from employment my health was effected in such a way I could not even read the gov.uk website in order to know what to do next. I could not even physically speak about what had happened to me because I just felt dirty and inferior. After my appeal had been rejected by Trish Eaton, I immediately went to see the Councillor for the Meadows Area (Michael Edwards) and he made me realise I am in dire need of counselling because I still think about the client cases constantly. He even started to ring agencies for me because he was in complete shock and I could not understand why. After speaking to the psychiatrist in A and E having collapsed unexpectedly on one of many occasions she told me that I had been discriminated against after telling her all the facts. I have been put through continuous and what I can only describe as severe pain due to continuous discrimination against me. My GP could confirm that my health has been so bad since May 2019 and I would have found it difficult to go through a tribunal process. I was tricked and deceived by BC and CAB"

27. The Claimant was given the opportunity to give further oral evidence and did so. In summary the additional evidence he gave was as follows;
28. He had been too unwell to bring a claim sooner. He had not produced any medical evidence, he had asked for the medical notes from his GP a few weeks ago just in case he needed them for today but the doctor had been off work.
29. Repeatedly the Claimant referred to not having realised that he had been discriminated against during his employment and that it was not until sometime afterwards that he realised he must have been. He referred to talking to his counsellor and to his doctor who are both Pakistani and that they had both made him "realise" he had been discriminated against.
30. The Claimant then went on to the CAB website and the government website and read through tribunal cases. He telephoned lawyers but alleged that he found the websites more helpful.
31. The Claimant believed he contacted ACAS before 9th December but could not recall when.
32. The Claimant knew that there are time limits to bring legal claims but he had not realised he had a claim because he had not realised that he had been discriminated against.
33. The Claimant gave details of his financial situation while under oath and advised that he is left with £100 per month after his financial outgoings and commitments.

Cross Examination of the Claimant

34. The Claimant was then cross examined by Mr Mc Devitt.

Findings of Fact

35. The Claimant referred in his evidence to becoming so ill due to BDs treatment of him that he was absent on sick leave for 4 weeks; he confirmed during cross examination that this was a reference to an admission into the Accident and Emergency department on 23 May 2019. He also accepted that he had then returned to work in June 2019 and remained at work until he was dismissed on 16 August 2019. During this period, he did not consider that this treatment was on the grounds of his race or religion.
36. During cross examination the Claimant accepted that the decision to terminate his employment was communicated to him on the 16 August 2019 and that he was then given 1 weeks' notice but not required to work it, he alleges that he was told this was because he was an "embarrassment". He accepts that the last act of discrimination that took place was therefore not the 23 August but when the decision to terminate his employment was made on 16 August 2019.
37. After his employment was terminated the Claimant's evidence is that he was affected in such a way that he could not even read the government UK website to prepare an appeal. He then met with the Councillor, Mr Edwards of the Meadows area of Nottingham about a month before Christmas, who told him to take legal advice and the Claimant's evidence is that he his advice was; "*something to do with ET tribunal.*"
38. The Claimant submitted an appeal on 22 August. He accepted the dates in paragraph 29 and 30 of the response seemed correct to him. Paragraph 29 of the response provides that the appeal was sent in on 22 August and that he was told on the 1 October 2019 that the Respondent's policy does not provide for a right of appeal for employees who had not passed their probation.
39. The Claimant also confirmed that the dates in paragraph 30 of the response looked correct; those are dates on the 3rd and 13th December 2019 and 13th January 2020 when the Claimant wrote to the Respondent stating that he felt he had been discriminated against in relation to his dismissal. Unfortunately copies of the correspondence were not provided to the tribunal. The Claimant had he accepted, therefore communicated his belief that he had been discriminated against by 3 December 2019, almost a week before he contacted ACAS and filed his claim. The Claimant however stated that during the dates when he contacted the Respondent in December and January, he had been "*unwell during this period of time*".
40. The Claimant confirmed that he was aware of Acas and from his answer, it was clear that he had known about them for some time. During cross examination he referred to it as; "*an organisation everyone knows about*".

41. The Claimant's repeated explanation for not having filed a claim sooner was because he did not realise during his employment and for some time after it ended, that his treatment was discrimination.
42. The Claimant states, and we accept this evidence that he had been "*convinced*" that the reason for the discrimination was because he is Pakistani, by another Pakistani colleague *who worked at the CAB*. That he felt he had been treated "*wrongly*" during his employment but did not know why at the time. He also refers to things which had been said to his counsellor and his GP who are both Pakistani who "*were both saying do something as mental health not good*".
43. The Claimant was well enough to submit an appeal on 22 August, after he had been told his employment was being terminated. I find on a balance of probabilities that he was therefore also well enough to contact Acas and that he did not do so because he did not consider, according to his own evidence, that his treatment was due to his race and/religion.
44. The Claimant further maintains that the reason he did not put issue the claim is earlier is also due to his health. Although his evidence is that he had asked his doctor for his notes for the hearing, thus acknowledging that he understood they may be helpful, he had not brought any evidence with him. He referred to his doctor having been off for several weeks, however the Claimant had not asked for an adjournment. I therefore only have the Claimant's oral evidence and this was of limited assistance in understanding the impact his health had on his ability to issue a claim earlier. The Claimant did not explain how his health had been over the whole period of time since the termination date up to the 10 December when he issued the claim, if there had been any improvement and if so when and to what extent. Although he described how ill the decision to terminate his employment had made him, he had been able to submit an appeal in August and on 3 December 2019 had been well enough to communicate with the Respondent and raise allegations of discrimination.
45. The Claimant does not contend that his health was materially different as at 10 December 2020 then it was on 15 November 2019.
46. I find on a balance of probabilities that the Claimant does suffer with his mental health. The Respondent in its response refers to the Claimant having a period of stress related sickness in May 2019 (certified with a GP note) and returning on a phased return on 8 July 2019. The Claimant informed the Respondent that he was having counselling and taking medication for stress. The Respondent states it carried out stress risk assessments. What I am unable to make any finding on is the extent to which the Claimant's ill health was material to the decision not to issue a claim until 10 December or whether the principal reason was actually his belief that he had not been discriminated against.
47. The Claimant is clearly a bright individual, he confirmed that he had carried out his own research and searched the government website and even read through transcripts of employment tribunal cases. He repeatedly stated that he had not appreciated at the time until others convinced him, that the treatment was discrimination. The Claimant also referred to contacting the law centre for advice about his treatment by the

Respondent after his employment had ended, that he had contacted them “*many times to get advice*” however he was vague about when he had made those enquiries. The Claimant admitted that he became aware of the 3-month time limit but could not recall when. He confirmed during cross examination that he had access to information to find out his rights while working at the CAB however he did not do so was because he did not know he was being discriminated against at the time. The Claimant also during cross examination, explained that he had studied for a business management degree which included law as module but not employment law, and conceded that he understood there were time limits which applied to court proceedings.

48. I have little difficulty in finding that by 3 December 2019 the Claimant had not only formed the view (from what others had said to him) that the treatment which he was unhappy about was due to him being British-Pakistani but was able to present a claim to the tribunal. He was by this stage making allegations of discrimination to the Respondent. He does not assert that he required assistance in preparing those communications or indeed in preparing his appeal.

49. In terms of the merits of the claim; the Claimant does not dispute that there may have been issues with his performance but complains that these had not been raised with him. He is not aware whether there were any performance issues with his three named comparators.

50. Even when he filed the claim he also alleged that it may be due to his sexual orientation but now does not consider that to be the case and withdraws that claim. During this hearing he stated that he believed it may also be due to his background, coming from an area in Nottingham which he described as “*under developed*”. During cross examination he stated that he now believes that he was treated the way he was “*because I am Muslim and Pakistani and because I come from the Meadows area*”. The Claimant further comments that in terms of coming from the Meadows area; “*maybe that was the reason, some reason. Maybe that was reason they didn’t like me.*”

51. I find that on the Claimant’s own evidence he remains uncertain about why he was, as he describes it, he was not supported by BD who showed a lack of interest in the work he was doing and why as he alleges, she wanted to terminate his employment. He pleaded it may have been religious discrimination and today, maintained it may have been because of where he lived.

The Legal Principles

52. Before turning to my findings of fact, it is necessary for me to set out a brief statement of the law which I shall in turn apply to those facts as I have found them to be.

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

53. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

54. Rule 37 provides as follows:

“At any stage of the proceedings, either on its own initiative or on the application of a party, the 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 it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)”*

55. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success. A claim can have no reasonable prospect of success if there is no jurisdiction for a Tribunal to entertain it.

56. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is “no reasonable prospect” of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to be appropriate, the claim or the part of it that is struck out must be bound to fail. 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...”*

57. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested.

58. Particular care is required where consideration is being given to the striking out of discrimination claims and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence. However, if a claim can properly be described as enjoying no reasonable prospect of succeeding at trial, it will nevertheless be permissible to strike out such a claim.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

59. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

“(1) Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

“(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.”

60. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.

Direct Discrimination

61. It is also necessary to consider the law in respect of the discrimination claim that the Claimant advances.

62. Section 13 Equality Act 2010 provides that:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.

63. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**).

64. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

65. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator

may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

66. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomuna International Plc [2007] IRLR 246**:

“‘Could conclude’ must mean that ‘a reasonable Tribunal could properly conclude’ from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the Respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the Tribunal then moves to the second stage. The burden is on the Respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim.”

67. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**.)

Time limits in discrimination cases

68. Section 123 Equality Act 2010 deals with the time limits in which Claimants must present discrimination complaints to the Employment Tribunal and provides as follows:

(1) Subject to sections 140A and 140B 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.

Therefore, Section 123 provides that proceedings must be brought “*within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable*”.

69. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, a Tribunal will be required to go on to consider whether it is “just and equitable” to allow time to be extended and the complaint to proceed out of time.

70. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and should have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**).
71. In considering whether to exercise their discretion, a Tribunal must consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:
- The length of and reasons for the delay.
 - The extent to which the cogency of the evidence is likely to be affected by the delay.
 - The extent to which the party sued had co-operated with any requests for information.
 - The promptness with which the Claimant acted once they knew of the possibility of taking action.
 - The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.
72. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. However, the burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 Equality Act 2010.

Submissions

73. I heard submissions from Mr Mc Devitt who had provided extracts from the IDS brief. In summary he argues that the onus is on the Claimant to convince the tribunal to extend time. That the correct date when the claim should have been issued is the 16 August when the Claimant was notified of the decision to terminate his employment. Mr McDevitt argues further that the strength of the claim is a relevant factor, that he accepts the Claimant feels badly treated and may not feel his performance came up short, but that he is "*searching for a peg to hang a claim on*". He referred to various comments from the Claimant whereby he referred to not knowing why he had been treated by BD as he had and that a difference in treatment and a difference as to the protected character does not shift the burden of proof without '*something more*'.
74. Mr McDevitt argues that taking his case at its highest the Claimant is not able to say even now why BD treated him the way he alleges she did, other than BD did not like him, he does not allege that she ever said anything with racist overtones.
75. In terms of the delay; the Claimant had contacted Acas, the CAB, Nottingham Law centre and researched the internet, he had the resources and skills to research how to bring a claim and eventually did so.

76. Mr McDevitt accepted that with respect to prejudice to the Respondent, he was “*struggling*” to identify prejudice but referred to a risk around the availability of some witnesses if fixed terms contracts are not renewed however, he did not identify which witnesses and he accepted this was “mild prejudice”
77. On the issue of strike out or deposit, Mr McDevitt relies on the points he had made about merit in the claims, and refers to the complaint about lack of support being a mere “assertion”. with respect to the claim of dismissal he contends it is weak given the Claimant’s lack of clarify as to whether even now he is not clear whether he believes the decision to terminate was directly due to race/religion or issues with his performance which in turn he believes may have been the result of a lack of support. Mr McDevitt did not deal with each of the 8 individual allegations of a lack of support/ engagement set out in the Claimant’s document headed “*Dear Judge*” dated 1 March 2020, although I invited him to do so.
78. We had a short adjournment to allow the Claimant to consider the submissions made by Mr McDevitt before making his own. I had been through the *Keeble* factors I would be considering at the commencement of the hearing and at my suggestion the Claimant had noted them down. The Claimant’s submissions were essentially a repeat of some of his evidence, he referred to delay being due to his health, and referred me to two cases. He did not explain the relevance of the cases to his case and did need take me to any particular part of the decision but asked me to look them. The cases are; **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** .A court of Appeal case which in summary held that the date on which an employer first breaches its duty to make reasonable adjustments for disabled employee is not the same as the date on which time starts to run for the purposes of the limitation period under section 123 (4) Equality Act 2010 and **Betsi Hawaladar University Local Health Board case 1600551/2018** a first instance decision where the tribunal had held it was not just and equitable to extend in a discrimination claim. The Claimant had not identified what in the cases he wanted to draw my attention to however I do not consider that those cases are of any particular assistance in this case. The Claimant is not contending that there was any subsequent information or disclosure from the Respondent which made him aware there had been discrimination after the time limit had expired, his case is that he formed this view after others had “convinced” him, but not with reference to the disclosure of any new information that he was not already aware of (at least nothing which he raised during this hearing).

Conclusion

Jurisdiction – time limit

79. In deciding whether it is just and equitable to extend time, the following factors applying *Keeble*, I consider to be particularly relevant are as follows;

- 79.1 The length of the delay is 25 days; Mr. McDevitt referred to this as a delay that is in addition to what he described as an already 'generous' 3 month-time limit however while not trivial, it is not a particularly lengthy delay.
- 79.2 The cogency of the evidence is unlikely to be affected by this delay and nor did Mr. McDevitt seek to argue otherwise.
- 79.3 The Claimant did not raise any issue about the failure by the Respondent to co-operate with any requests for information. This is not argued by the Claimant as being a reason for his failure to submit the claim in time.
- 79.4 With regard to the promptness with which the Claimant acted once he knew of the possibility of taking action; the Claimant refers to not being well however, I find the principal reason why he did not act earlier was because he did not consider that he had been discriminated against until at some point after his employment had been terminated when others convinced him that he had been.
- 79.5 The steps taken to obtain appropriate advice once he knew of the possibility of taking action; the Claimant by 3 December 2019 was alleging discrimination. We find that the Claimant is a bright and resourceful individual who was clearly capable of carrying out research and admitted to being aware of Acas and of contacting the Law Centre on a number of occasions. Given the Claimant's vague recollection of dates, it is not possible for the tribunal to make any definitive finding on what he did when, however we find on a balance of probabilities that as he had submitted an appeal promptly and written on 3 December alleging discrimination, that he was able to act more promptly to obtain whatever further advice he required in order to submit a claim.
80. I have also taken into account the merits of the claim and accept the strength of the claim may be a relevant factor; **Lupetti v Wrens Old House LTD 1984 ICR 348 EAT**. I comment further on the merits below.
81. I now to consider the prejudice to the parties. It is incumbent on the Tribunal not only to consider whether the Claimant ought to have submitted his claim in time but the tribunal must weigh up the relative prejudice that extending time would cause. Other than having to defend the complaint, which they would have had to do if the claim had been issued in time, I cannot discern any particular prejudice to the Respondent. Mr McDevitt has referred to the possibility of some witnesses perhaps no longer being employed by the Respondent by the date of the hearing but sensibly Mr McDevitt accepted that this was a 'mild prejudice'. Conversely, there is prejudice to the Claimant as he will not be able to have his discrimination claim ventilated on the merits and determined by the Tribunal. I would observe, however, that this is tempered by the fact that, as I shall come to, I do consider the Claimant's discrimination claim relating to the termination of his employment has little reasonable prospect of success and the discrimination during employment is not without its difficulties, and so he is not in the same

position as a Claimant whose out of time complaint has obvious merit. Nevertheless, I accept that there will be some prejudice to him in this regard and more so than to the Respondent.

82. With all that in mind and balancing all of those factors against each other, I am satisfied that it is just and equitable to extend time to allow the discrimination complaints to proceed, however, the issue of whether the acts of discrimination prior to the 16 August 2019 amount to conduct extending over a period of time for the purposes of section 123 (3)(b) Equality Act 2010 are thus brought within time, is a matter reserved to the final hearing.

Strike out

83. I turn now to consider the application to strike out the claim of discrimination.

84. Special considerations arise if a tribunal is asked to strike out a claim of discrimination on the grounds that it has no reasonable prospect of success. In ***Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL***, the House of Lords highlighted the importance of not striking out discrimination claims except ***in the most obvious cases*** as they are generally fact-sensitive and require full examination to make a proper determination.

85. The Court of Appeal in ***Community Law Clinic Solicitors v Methuen 2012 EWCA Civ 571, CA***, held that an employee's claim for age discrimination should not be struck out because the case required further examination of the facts so as to properly consider whether age discrimination could be inferred.

86. Put at its highest, the complaint is that the Claimant was subject to less favourable treatment and a difference in treatment compared with three White British comparators were offered more support and BD showed more interest and engagement toward. Where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out the claim.

87. This is not a case where the factual disputes have been conclusively disproved at this Preliminary Hearing. There are core issues of fact namely an absence of support and interest in his work, that would need to be determined to an extent by oral evidence.

88. I have, as I am required to do taken the Claimant's case 'at its highest', and in doing so assumed in the absence of compelling reason not to, that his version of events is correct, namely that he was treated less favourably in that BD showed no interest in his work and provided him with no support or less support than was given to White British colleagues.

89. In the circumstances while there are concerns with the merits, not least given the Claimant's own admission that during employment he did not consider his treatment was due to his race or religion, I am not prepared to strike out the claims at this stage. The case taken at its highest will require oral evidence to determine the factual disputes. The claim will

require further case management however, and will require further particulars to be provided.

Deposit Order

90. I turn then to consider the Respondent's application for a Deposit Order.
91. The Claimant originally pleaded that the less favourable treatment was on the grounds of sexual orientation and during the hearing then gave evidence that it may have been due to the area of Nottingham where he lived and prejudice related to his background in that context.
92. The Claimant failed his probationary period, he explained in his evidence that he had received a report after his employment ended, setting out issues with his performance and he did not necessarily deny there were issues with his performance. While he initially said he took issue with what was said in the report about his performance and hence why he had not passed his probationary period, he then said that the content of the report was not relevant. The Claimant identified three potential comparators however he accepted that he was not sure whether there had been similar alleged issues with their performance and therefore was not able to compare the reason he was given for failing his performance with the way they were treated. Indeed, when the Claimant was asked whether he was alleging that the decision that he had not passed his probationary period was discrimination, he was equivocal and as Mr McDevitt put forward in his submissions, it remained unclear what his claim was in connection with the termination, at the close of the hearing ie whether it was that he failed because of a lack of support which affected his performance or whether BD decision that he had not passed his probationary period was based on an unfair perception/ assessment of his performance.
93. The Claimant is however far more vociferous in terms of his treatment during his employment and the lack of support he received and what support he says he saw others receive. However, deposit orders are to attach to specific allegations or arguments in a claim and should not be used as a substitute for more appropriate case management orders aimed at clarifying the facts and issues. The Respondent seeks an order in relation to the claim that the Claimant was not supported in his work rather than specific allegations of instances where he was not supported. The Claimant had set out 8 specific allegations which require further particularisation and he states, there were others but he required disclosure before he could provide further details.
94. The Claimant needs an opportunity to fully particularise his claim in relation to a lack of support, setting out each and every allegation of an omission on the part of the Respondent. I do not therefore consider it appropriate to make a deposit order as applied for, which applies to the entirety of the claim of a lack of support and engagement relating to incidents which took place over a period of 6 months. The claim requires further case management.
95. However, in connection with the termination of his employment, this is a specific allegation. The Claimant himself when asked directly, was uncertain whether termination was because of his race/religion or

where he lived, and accepted that there may have been issues with his performance. He accepts that with respect to the three comparators that he relies on in connection with the lack of support claim, there may have been no issues with their performance. The Claimant referred to a report where BD had set out as I understand it, the reasons why he had failed his probationary period and although he referred to having then become aware that BD had been “lying”, stated that the report was not relevant. The claim that the termination of his employment was an act of discrimination on the grounds of his race/religion has little reasonable prospect of success and the Claimant is required to pay a deposit in order to proceed with it.

96. The Claimant gave evidence as to his means. His evidence was that after his various commitments and outgoings which he details, he has a monthly disposable income of £100 per month. The Claimant will be required to pay a deposit of £50 to continue with the allegation that the termination of his employment was an act of direct discrimination on the grounds of his race/religion, if he intends to pursue this claim.

Employment Judge Rachel Broughton

Date: 28th April 2020

JUDGMENT SENT TO THE PARTIES ON

Date: 18th May 2020

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FOR THE TRIBUNAL OFFICE

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