EMPLOYMENT TRIBUNALS

Claimant: **Mr. F. Mohammed Jimale**
Respondent: **British Broadcasting Corporation**

London Central **On: 15 October 2020**
Before: **Employment Judge Goodman**

Representation
Claimant: **Mr J. Neckles, trade union representative**
Respondent: **Mr T. Brown, counsel**

PRELIMINARY HEARING

RESERVED JUDGMENT

1. Claim no. 2204131/20 is dismissed on withdrawal.
2. Claim no. 2203989/20 is dismissed because it was brought out of time and the tribunal has no jurisdiction, in the alternative, because it discloses no reasonable prospect of success.
3. Claim no. 2204807/20 is dismissed because it was brought out of time.

REASONS

1. This preliminary hearing was listed to decide applications by the respondent to strike out three of the claimant's four claims on grounds either that they were out of time, or that they were an abuse of the process because the later claim ought to have included the earlier claim (the rule in **Henderson**), or that they had no reasonable prospect of success. Failing those applications, the tribunal was asked to make a deposit order in these three claims.

2. The facts on which these claims are based start with a grievance by another employee about the claimant's conduct, which was made in October 2018. After investigation of the grievance the claimant was charged with disciplinary offences in respect of two of the allegations made and on 14 October 2019 invited to a disciplinary meeting. On 9 November 2019 the claimant launched his own grievance about the investigation and arrangements for disciplinary proceedings. On 2 March 2020, the respondent found one of the allegations proved, and issued a written warning under the disciplinary procedure. He is still in the respondent's employment.

3. The claimant's representative, Mr John Neckles of PTSC union, has advised and assisted him in these employment disputes from at least 5 August 2019, when the respondent was notified that he represented the claimant.

Procedural History

Claim 1 - 1226

4. While the disciplinary process was ongoing, the claimant took steps to start employment tribunal proceedings. He approached ACAS for early conciliation on 8 January 2020. His early conciliation certificate is dated 23 January. He presented claim number 2201226/20 on 21 February. The case was listed for final hearing on 15-20 October 2020 - this would have been the first hearing day. The employer responded on ET3 on 30 March 2020, disputing liability.

5. On 17 June there was a preliminary hearing for case management on 1226 before E. J. Norris. A list of issues identified the following as less favourable treatment, alternatively harassment:

> (i) being the subject of a disciplinary investigation and disciplinary proceedings up to the date of lodging the claim (21 February 2020). The Claimant denies the allegations against him;
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> (ii) directly or indirectly denying the Claimant the right to be accompanied by the Claimant's Trade Union (the PTSC);
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> (iii) failure/refusal to challenge or (alternatively) afford to the Claimant the opportunity to defend himself and his reputation following insinuations of him having terrorist links.

6. The list also records that the respondent denied the claims on the following grounds:

> (i)disciplinary investigation: grounds to believe that the Claimant may have committed misconduct
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> (ii) disciplinary proceedings: a genuine belief that the Claimant had committed misconduct
>
> (iii) trade union representation: application of the Respondent's policy on representation in internal proceedings (which prohibits legal representation but does permit union representation which the Claimant was afforded);
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> (iv) insinuation of terrorist links: the Respondent did not conclude that the Claimant had any link to terrorism and did not conclude that the Claimant's reputation was damaged in this regard. The Claimant had the opportunity to take any other steps he wished in respect of the comment that had been made; the Respondent genuinely considered that no further action was necessary or appropriate.

Claim 2- 3989

7. Unknown to the respondent and the Employment Judge at the hearing, the previous day the claimant had been issued with another early conciliation certificate, after approaching ACAS on 27 May to start the process. He went on to present his second claim, 2203989/20, which gives this early conciliation certificate number, on 3 July 2020.

8. This second claim is for victimisation and harassment. The grounds of claim state the protected act is that he had started claim 1226 on 21 February 2020. The detriment for the protected act is (1) failing to provide "the usual HR support" when subject to grievance in 2019, and (2) failing to investigate his grievance of 9 November 2019. The same acts are also pleaded as race harassment.

Claim 3 -4131

9. On 8 July the claimant went to ACAS again. A third early conciliation certificate was issued the same day, and, still on the same day, he presented his third claim, 2204131/20. This alleges that a document connected with some July 2020 settlement discussions was an act of victimisation.

10. On 13 August the claimant wrote to the respondent saying he intended to withdraw this claim, but he did not do so until earlier this week, (and at the start of the hearing the message had not yet reached me). In view of that, this claim is

dismissed on withdrawal under rule.

Claim 4 – 4807

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11. On 7 August the claimant presented a fourth claim, 2204807/20. This claim is for victimisation. The protected act is a grievance dated 14 August 2019 (though the grounds of claim say 14 August 2020) for which it is alleged he was removed from his role as lead presenter on 16 August 2019. This action is also alleged as harassment.

Respondent's applications in claims 2,3 and 4.

12. On 27 August, responding to representations by the respondent that the three new claims meant they could not all be ready for final hearing in October, and would need a new list of issues, and because they wished to make submissions as to jurisdiction in the new claims, E. J. Emma Burns converted the final hearing due for 15 October to an open preliminary hearing, and sent directions to the parties to file an agreed bundle by 8 October.

13. On 22 September the respondent filed responses to the new claims and made the applications listed for hearing today.

14. The entire morning was taken up with preliminary argument, because after the respondent had sent a bundle to the tribunal as ordered by 8 October, the claimant had sent his own substantial bundle to the tribunal late on 13 October, together with a witness statement. The respondent disputed the admission of the new material as they had had little opportunity to take instructions. Eventually, to save time – the claimant was asked to identify any disputes about what was pleaded which required reference to documents but was not able to do so until much later in the day- the respondent agreed it should be admitted provided that if a matter arose on which they must seek instructions because unanticipated, it would be adjourned part-heard, and they could apply for costs. The other time-consuming matter arose because the claimant had sent the new bundles to a journalist. One document contained material in which the sexual orientation and trade union membership of the person lodging the 2018 grievance could be seen, and the respondent sought to restrain publicity of this personal information. After argument in a private case management hearing, to which the journalist was invited to contribute, an order was made under rule 50, then typed in the adjournment (with the oral reasons summarised in the written order) barring publication of this information until final hearing.

15. For want of time decisions on the strike out applications were reserved.

3989 and 4807 - is either claim in time?

16. The time limit for claims under the Equality Act (as these are) is three months from the act complained of, unless the tribunal considers it just and equitable to allow the claim to proceed out of time. Whether it is just and equitable must be decided having regard to the factors set out in **British Coal Corporation v Keeble:** the amount of delay, the reason for it, the effect of delay on the cogency of the evidence, and then assessing the balance of prejudice. It is for the claimant to show it is just and equitable to extend time. Where there is "conduct extending over a period" time does not run until the end of the period. There is much case law on what is an underlying discriminatory state of affairs which is a course of conduct, as opposed to a one-off act which has continuing consequences.

17. The requirement to seek early conciliation before presenting a claim has resulted in the concession in the regulations that if time is still running when the claimant goes to ACAS, the clock then stops until the issue of a certificate, whereupon a

claimant has another month to present his claim. However, the discussion of cases on multiple early conciliation certificate in **HMRC v Sera Garau (2017) ICR 1121** shows that it is not necessary to repeat the process for amendments of existing claims, nor to do so for added claims if despite getting a certificate time is still running, and importantly, that if the claimant does so, he only gets one extension of time, and cannot extend his time by going back for more conciliation.

18. I explored with the claimant's representative the claim for failing to deal with the grievance on 9 November 2019, and whether he expected the respondent to deal with it later, or as part of the disciplinary process. On omissions, section 123(4) of the Equality Act states that:

> "in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a)when P does an act inconsistent with doing it, or
>
> (b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

The claimant suggested he was still waiting for the respondent to act on his grievance when he went to ACAS on 22 May, 5 months after making it, and presented his claim on 3 July. The claimant argues that he was patiently waiting for an outcome, and took action when eventually he realised none was coming.

19. The emails on the claimant's bundle show that the respondent replied to the 9 November grievance on 12 November 2019, saying (after other explanations of matters raised in the disciplinary process):

> As the matters you raise in your letter titled GRIEVANCE COMPLAINT 9.11.2019 relate to the Disciplinary Process and your misunderstanding of Step 1 of the Disciplinary Process, your entitlements under the European Convention on Human Rights/ the Human Rights Act and your right to be accompanied by a Trade Union Official and not a legal representative, I am of the opinion that they are not grounds for you to raise a grievance.
>
> I would strongly urge you to attend the disciplinary hearing tomorrow to enable you to have opportunity to respond to the allegations in full.

20. There was nothing in the later documents about the grievance. Nothing shows that the claimant had misunderstood and wanted to know why nothing was happening.

21. In my finding it was clear to the claimant from 12 November that the respondent was not going to deal with his grievance, that is, in the language of section 123(4)(a) he did an act inconsistent with it ("it" being investigating the grievance); alternatively, that this *was* the outcome to his grievance. He was after all accompanied to hearings by his trade union representative (part of his grievance), and was in this email given explanations of the process, which did address what he had raised.. Time to complain about the refusal (or the outcome) ran from that date. It was not a continuing state of affairs when the claimant might be waiting to see when a reasonable employer would take action.

22. The claimant has advanced no argument on why it would be just and equitable to extend time. There is no explanation for the delay. It is not suggested that a later document revealed anything to him on this.

23. It might be argued that as the respondent has to defend claims that cover this period, there is no additional matter to cover in evidence, the addition should be allowed in late, but there is prejudice to the respondent in having to return to witnesses nearly a year later to obtain evidence on their decision making at the time, as their recollection will be less precise, and it increases costs. Viewed alternatively in the

frame of an amendment of claim, rather than a new claim, the claimant is bringing a new claim, not relabelling one already brought. It should be noted that although not represented by a practising solicitor or barrister, Mr Neckles holds himself out as having a law degree and legal skills, and says he has been representing in tribunals for 17 years. He is a regular advocate at this and other employment tribunals. The claimant cannot be viewed as a litigant in person innocent of the law or the rules. In the absence of any reason for this late claim, other than oversight by his representative, the balance of what is just and equitable is against the claimant.

24. Turning to 4807, the treatment complained of occurred nearly a year before he presented his claim. The claimant argued today that time continued to run after 16 August 2019 because he lodged a grievance about this on 11 September 2019, and when that was turned down on 31 October, he had appealed the outcome on 9 January 2020. He does not consider time started to run until the appeal failed on 11 May 2020. He them waited nearly three months before presenting the claim.

25. The difficulty is with this is that there is no mention in his grounds of claim of a grievance or an appeal being the subject of his claim. It is right that parties should try to resolve grievances internally rather than go to an employment tribunal, but this can continue in parallel with tribunal proceedings, and the claimant by his representative was well aware of time limits, and that the act he complained of was removal from his post, a one-off act. It was not a continuing act, even if it had continuing consequences. Even if he were complaining of the grievance outcome (and he does not) or says he did not know how the respondent justified what they had done until he had the grievance outcome (which he does not), his time would run from 31 October, and he would still be well out of time.

26. As before, no argument is advanced that it is just and equitable to allow it to proceed out of time. The claimant was well aware of the decision, and well engaged with process, with Mr Neckles on the record with the BBC from 5 August 2019, and involved throughout from then on. If allowed to proceed now the respondent would have to investigate well over a year from when it happened. Though it is likely some has already been undertaken to deal with the grievance, the witnesses still have to remember the detail where it is not written down. The respondent is prejudiced and the balance of prejudice is against the claimant, who has not explained why he did not start proceedings earlier.

Abusive Conduct. The rule in Henderson

27. The respondent argues that by bringing 2 additional claims which could have been included in the 1st claim the claimant abuses the procedure and they should be struck out under order 37 (1) (B) in that “the manner in which the proceedings have been conducted by or on behalf of the claimant… Has been scandalous, unreasonable or vexatious”.

28. In Henderson the Henderson, in 1843, where a matter which have been adjudicated in Newfoundland was also being brought in England, it was felt that a litigant should “bring forward his whole case” and not bring some arguments at one point, and other arguments later, because justice should be final, and the other party should not be vexed with repeat litigation around the same subject matter. Exceptions were allowed in **Virgin Atlantic v Zodiac (2013) 3 WLR 299**, where other law was clearly relevant, and **Arnold v National Westminster Bank (1981) 2 WLR 1177**, where there had been a relevant change in the law. The doctrine was re-examined in **Johnson v Gore Wood (2002) 2 AC1**. It was held that “there was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter; but that whether an action was an abuse of process as offending against that public interest should be judged broadly on the merits taking account of all the public and private interests involved in all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of

the court". Where it was held "the bringing of a claim… in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim… should have been raised in the earlier proceedings if it was to be raised at all. I will not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on previous decision some dishonesty weathers elements are present later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of the party". On the particular facts of the case, it was there was no abuse because sufficient. Distinction between company claims and personal injury claims to allow separate proceedings which the parties appeared to have contemplated. It was made clear that nearly bringing later actions was not of itself abuse of process. Justice and fairness required because all the circumstances in round. The 3 voices of mitigating or relitigating issues that had already been mitigated or should have been were firstly, the substantial waste of court time and unfairness to other litigants, a public policy consideration, secondly that it was unfair that defendants had to face more than one set of proceedings, as it increased costs, and thirdly, they might be a collateral attack on the outcome of previous proceedings, when justice should be final.

29. The respondent argues that there is no excuse for not including the matters complained of in 3989 and 4807 in the February 2020 claimant in 1226. All the matters of which he now complaints have already occurred, (with the exception of 1226 itself as a protected act for which the earlier acts are said to be victimisation). Respondent asserts that the way the claimant has proceeded is disrupted proper case management, for example by not telling the tribunal respondent at the case management hearing on 17 June but there was another claim coming, when proficient might have been made in directions those matters in the list of issues. As a result, they say, the final hearing in October has been lost, and is unlikely to be relisted before September 2021.

30. The claimant did not really address this point, and does not explain why these matters were brought so much later. The claimant argued that the rule only applies where there has been an adjudication, and the later proceedings are trying to get round it.

31. The timing of these new claims has disrupted the timetable severely, and for nearly a year's delay in bringing to a final hearing process which began in 2018. This would not be necessary if the claimant had told the respondent tribunal on 17th June at the had already gone to a house with a view to bringing the 2nd claim. It would have been possible to adjust the timetable to ensure that all matters would be heard at the hearing in October 2020. It was also impossible for the claimant at that hearing to the mentioned that he proposed to bring a claim based on the removal from the lead presenter role in August 2019, because it was then over a month since he had known that the grievance appeal had been turned down, and there was no reason why he could not bring it to the tribunal then, or if he thought he needed an early conciliation certificate, take us to cut short the conciliation period, as happened with claim 3, or even apply to amend. It is not clear whether the claimant acted as he did through oversight, having forgotten the other matters until having to focus on them at the time of the preliminary hearing. This frame of mind might explain why he first issued claim 3, then said he was going to withdraw it, and then failed to withdraw it until the last minute, which required the respondent and the tribunal to focus on whether the matter on which it was based was privileged, and certainly required the respondent to prepare a separate bundle and index of privileged material. It is equally possible that he thought that prolonging matters this would increase the respondent's appetite for settlement. Both are speculative. Certainly the latter would be an abuse of procedure.

32. It used to be the case, with uncertainty about the effect of early conciliation, the requirement to pay fees, and uncertainty about how to apply time-limit difficulties when amending claims, the practice grew up among claimants to issue successive proceedings. It has become clear in recent years that this is no longer necessary. So bringing multiple claims has been tolerated in the employment tribunal, that they make additional work in case management. What is new in this case is not keeping the tribunal and the respondent informed of what is coming so that allowance can be made in the timetable. However, while there is some abuse, I would not hold that by itself it would be in the interests of justice to strike out these claims under order 37 when it is still possible to have a hearing, not least because they have been struck out on time grounds.

No reasonable prospects of success

33. In the light of the absence of explanation for delay, and for the avoidance of doubt, I would not hold that there is any reasonable prospect of success in establishing that it would be just and equitable to allow the out of time matters to proceed..
34. In case 3989, it is plainly illogical to bring a victimisation claim based on a protected act in February 2020 and argue that this was the course of the treatment in 2019. Conceivably a claimant might argue that the respondent was aware of his intention, and that he proposed to bring proceedings, but he does not argue that here. Were it not struck out on time grounds, the victimisation claim in 3989 is struck out on the basis that it has no reasonable prospect of success at all.

35. The other claim in 3989 is that the claimant was subject to harassment related to race by not being provided with “the usual HR support” in the context of the grievance against him which was being processed during 2019. I explored with the claimant and his representative what was “the usual HR support”. I asked whether it was covered in the respondent’s grievance policy, but it appears there is nothing there. HR support is usually provided to the managers investigating the grievance, or having to decide whether it is justified. I’m not aware that HR support is provided to the people named in the grievance, or even to the people bringing the grievance. Very late in the proceedings it was suggested that there was a meeting at which a Miss O’Sullivan expressed a strong view about the claimant’s culpability, where a case manager was assisted by a human resources officer. I could not see how this related to an allegation that the claimant was not supplied and provided with HR support. The minute of this meeting tends to show that the HR officer was there to assist the case manager, not Miss O’Sullivan, who in this context was a witness being interviewed. In the absence of any coherent explanation of what support the payment expected, or what usually have been provided, and against the employment judges panel understanding of how employers’ grievance policies work, I find that this argument has little reasonable prospect of success.
36. It is just possible that what the claimant really intended to say was that Miss O’Sullivan’s expression of opinion was harassment of him, but it was not made to his face, and he was wholly unaware of it until it obtained disclosure of documents. It was not even in his 3 volume bundle, but emailed separately late in the afternoon. There remains the claimant’s harassment in the handling of his grievance of 9 November 2019. Having read the email of 12 November 2019 in full, it is couched in courteous though firm terms, and provides very full explanations for respondent’s decisions to act as they did. I doubt that any tribunal would find that this response was conduct tending to intimidate or humiliate, or that it was hostile or offensive, other than that it was not what the claimant wanted to hear.

37. Of course fact sensitive claims like those brought under the Equality Act should not be struck out without hearing the evidence except in very clear circumstances where the claim makes no sense on the pleadings or taking the claimant’s case at its highest (and I have a sworn statement, unchallenged so far), or where there are clear contrary documents. The victimisation claim lacks logic, and evidence would make no difference to that. The provision of HR support claim is threadbare, and the

claimant was unable to elaborate or explain when invited to do so. Even on the pleaded case with this further information, evidence will not assist or make a difference. Finally, on the handling of his grievance of 9 November, it is quite clear in the document of 12 November 2019 what the BBC did and said that might be construed as harassment. The claimant has not mentioned anything else in relation to that grievance other than that it was not investigated. I conclude that these are claims which can be struck out without hearing the evidence.

38. I would not so hold in relation to the claims in 4807.The claimant's main difficulty here is the time point, for which it is struck out, and the fact that it should have been included in 1226. On the merits, there would have to be an examination of the evidence.

Deposit Orders

39. For completeness, if I am wrong about the decision to strike out the claims in 3989 and 4807 because they are out of time, or because 3989 discloses no reasonable prospect of success, I would have concluded that they have little reasonable prospect of success (either on the same grounds as the finding that 3989 had no reasonable grounds of success, or that neither claim would succeed in showing that it was just and equitable that they should proceed out of time). I would have made deposit orders in respect of both these claims : £200 for the victimisation claim in 3989, £200 for the argument that failing to provide the usual HR support in 2019 was an act of harassment, and £200 for the argument that the handling of the grievance of 9 November 2019 was harassment, and in 4807 £200 for arguing that removal from the team leader role on 16 August was because he had made a grievance on 14 August alleging breach of the Equality Act, and £200 for the claim that removing him from lead presenter on 16 August 29 was an act of harassment.

40. In making these contingent deposit orders I have taken into account the information the claimant provided of his means. He is still employed and paid well over average earnings. There was a schedule of outgoings which left him with a surplus of around £350 per month, the outgoings including regular repayments on debts of around £11,000, and £200 sent to children from his mother he is separated, and all money sent to family abroad. Neither income no expenditure was in any way documented, and information was not the subject of the witness statement, and I treat the information with caution. If the claimant were to choose to pay all these deposits, he would not be barred from access to justice by the amounts involved, and in any case he might choose to proceed with some claims and abandon others. As Mr Neckles would be able to explain, is not a paying a deposit at this stage that is the deterrent, but that if he loses any claim on substantially the same grounds, there is a high risk that he may have to pay the respondent's costs of defending that claim.

41. In conclusion, only 1226 survives. Case management directions will be given separately to bring it to a final hearing on the merits.

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Employment Judge - Goodman

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Date : 16th Oct 2020

JUDGMENT SENT TO THE PARTIES ON

17/10/2020.

FOR THE TRIBUNAL OFFICE