Case Number: V 2303971/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Sitting alone

BETWEEN:

Mrs A Mahadevan **Claimant**

AND

ISS Facility Services Ltd **Respondent**

ON: **15 February 2021**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr P Tomison, Counsel**

JUDGMENT

1. The Claimant's claims of unfair dismissal under s 98 Employment Rights Act 1996 ("ERA") and unlawful deductions from wages have no reasonable prospect of success and are struck out.
2. The Claimant's claims of age and race discrimination were not brought within the statutory three month time limit s 123(1)(a) Equality Act 2010 (Equality Act) and it is not just and equitable to extend time under s 123(1)(b). The Tribunal therefore has no jurisdiction to hear those claims and they are dismissed.

Reasons

Introduction

1. The hearing was a remote hearing conducted by CVP with the consent of the parties as it was not at the time practicable to hold the hearing in person by reason of the Covid-19 pandemic.

2. By a claim form presented on 13 September 2019 the Claimant brought claims of unfair dismissal, age and race discrimination and a claim for unpaid wages. She had first contacted ACAS on 24 July 2019 and received the ACAS certificate on 19 August 2019. The claim form itself contained limited particulars of the unfair dismissal claim and no particulars at all of the claims of race and age discrimination.

3. There was a delay in the Respondent responding to the claims, but having been granted an extension of time by Employment Judge Hyams-Parish, the Respondent put in a response resisting all the claims on or around 10 March 2020.

4. There was a remote case management hearing before Employment Judge Phillips on 2 December 2020, matters having been further delayed by the Covid-19 pandemic. Although conducted by telephone, the hearing provided the Claimant with an opportunity to explain her claims in further detail. The Claimant outlined her concerns about the fairness of her dismissal and confirmed that her age and race discrimination complaints were based on remarks made to her at a meeting with her manager, Amy Stoner on 8 October 2018.

5. Following that confirmation, the Respondent made the applications that were considered by me at this hearing, namely:

    a. An application that the Tribunal decline to hear the claims of age and race discrimination because they were made out of time;
    b. If the Tribunal agreed to extend time, an application for a deposit order in respect of the discrimination claims on the basis that they had little reasonable prospect of success;
    c. An application that the unfair dismissal claim be struck out as having no reasonable prospect of success, or, in the alternative, that the Claimant be ordered to pay a deposit as a condition of continuing with the claim because it had little reasonable prospect of success.

    Mr Tomison confirmed that it was not pursuing an application to strike out the discrimination claims. He also submitted that the fact that the discrimination claims had been explained so late in the proceedings meant that the Claimant also needed to make a formal application to amend her claim to include those

details. I did not think it was necessary to decide this point separately as, for reasons I will go on to explain, it was clear to me that time ought not be extended on the facts of the case.

6. At the hearing I was provided with a bundle of documents (any page numbers in this decision is a reference to page numbers in that bundle) and I heard evidence from the Claimant and from Ms Siddall-Collier, a member of the Respondent's legal team. Both witnesses had prepared written statements, which I read before the hearing.

7. At the end of the hearing I informed the parties orally that I did not consider that it would be just and equitable to extend time for the hearing of the Claimant's discrimination claims and that those claims would therefore be struck out because the Tribunal did not have jurisdiction to hear them. I said that I would provide my reasons in writing when I made my decision on whether the unfair dismissal claim should be struck out. I reserved that decision to enable me to consider the documents in more detail and to consider Mr Tomison's submissions.

8. I also made case management orders on a provisional basis, including identifying a date for a full hearing of the unfair dismissal claim. As I have decided that the claim has no reasonable prospect of success and should be struck out, that hearing date will no longer be needed.

The relevant law

9. Mr Tomison had made detailed and helpful written submissions in support of the Respondent's application and I have considered the law and authorities set out in those submissions. I have referred to particular aspects of the submissions in the remainder of these reasons.

Jurisdiction – the discrimination claims

10. The Claimant's statement for the hearing contained very little information about why she had delayed in putting in her claim of discrimination to the Tribunal. She said simply this: "*Whilst the respondent is dependent on timelines, I would state that due to the stress and depression I experienced due to my treatment from Ms Stoner and Ms Baldon, the impact on my mental health impeded both my thinking and memory for several months*".

11. I understood from this that the Claimant's main reason for not bringing her discrimination claims to the Tribunal earlier than she did was her mental state following the meeting with Ms Stoner in October 2018. In her oral evidence to the Tribunal she repeated this, saying that at the time she completed the claim to the Tribunal she was suffering from mental health issues and needed her brother's help to complete the form. She provided no evidence in support of this however, despite the issue of medical evidence arising in a telephone conversation between the Claimant and Ms Siddall-Collier in the week before the hearing. Ms Siddall-Collier confirmed in her evidence that she had explained to the Claimant that it would be preferable for any medical evidence

on which she wanted to rely to be included in the bundle for the hearing. I was also shown a copy of an email Ms Siddall-Collier sent to the Claimant on 9 February 2021 which stated as follows: *"You mentioned on our call yesterday that you might be providing a statement from your GP and we discussed whether medical evidence would be better including in the document bundle. Do you have anything you wish to send over to me to be included in the email that I send to the ET as we really need to include everything in one e mail as the tribunals are experiencing some administrative challenges at the moment?".* On the basis of this email I did not accept the Claimant's assertion that Ms Siddall-Collier had told her that it was too late to include medical evidence.

12. I have no doubt that the situation the in which the Claimant found herself caused her a great deal of upset and affected her frame of mind negatively. I cannot make any specific findings about how badly she was affected because she did not provide that evidence to the Tribunal. But for the following reasons I was not persuaded by the Claimant's argument that because she was upset, she was prevented from presenting her claim of discrimination in time:

    a. She took advice before submitting her grievance on 2 November 2018. Although she did not mention this in her written statement, in cross examination she confirmed that she had taken advice from the Citizen's Advice Bureau ("CAB") who had helped her put the grievance letter at page 67 together. I agree with Mr Tomison who suggested that the grievance is clear and comprehensive. The Claimant confirmed in her evidence that she had mentioned the remarks that she relies on as acts of discrimination to the CAB at the time she took advice on her grievance. She also said that she thought the CAB had advised her about her potential claim and the legal rights that would arise from the comments, but that she had not been in the right frame of mind to act on this advice. I find that difficult to accept as a reason for neither mentioning the alleged discrimination to the Respondent in the grievance (the comments are not referred to at page 67) or putting in a claim in respect of them within the three-month time limit, because the Claimant was clearly able at the time to put in a clearly explained grievance about the other aspects of the situation that concerned her.
    b. I was also not persuaded that she was not advised of the relevant time limits or would not have understood at the very least that there are time limits in Tribunal proceedings. The Claimant's evidence in cross examination was that in or around October or November the CAB told her that she could bring a discrimination claim and that she would need to speak to ACAS. Although I accept that the Claimant is not legally represented in a formal way, she clearly had a number of conversations with the CAB and ACAS and I find it improbable that time limits were never mentioned in the way the Claimant suggests. The Claimant said that she could not remember whether the CAB had mentioned time limits and had been taking medication at the time. But she also referred to medication as the reason that she *had* been able to engage in the grievance process, so it cannot also have been the reason that she was *unable* to deal with the issue of a time limit. She

agreed that she had participated in the grievance hearing of which the minutes were at page 68, albeit with the help of a colleague.

c. The Claimant was also being helped by her brother. It is a straightforward matter to obtain information about time limits from various sources on the internet, where the information is displayed prominently. I note that the Claimant was able to submit the unfair dismissal claim within the statutory time limit.
d. The Claimant did not mention the discrimination in the list of detailed questions she sent to the Respondent on 14 February 2019 (page 83), although she made specific reference in that email to the fact that she was contemplating a claim to the employment tribunal. Again, she had the assistance of her brother in formulating those questions, which were clear and to the point. She accepted that he had researched her rights before preparing the questions. I find it more likely than not that if her brother had been researching her rights for the purposes of those questions, he would have encountered the issue of time limits in employment tribunal proceedings.
e. The Claimant attended a meeting with the Respondent on 21 February 2019 (page 87) but did not mention discrimination at that meeting, although she did refer to having consulted ACAS and taken advice in relation to the request by the client for her to be removed from the contract. When it was put to her again that ACAS would have mentioned time limits she said she could not recall events clearly because they had occurred a long time ago and had been struggling with her mental health at the time. It seems to me however that the Claimant was managing to deal with certain aspects of her complaints about her treatment successfully at the time, regardless of her mental health difficulties. I do not therefore accept that that was the reason that she did not start proceedings about her discrimination claims earlier than she did.
f. The Claimant had further meetings with the Respondent on 7 March (page 93), 19 March (page 95) and 18 April (page 109). The meeting 18 April was the first part of the meeting leading to the termination of the Claimant's contract. This meeting was the first time that the Claimant mentioned her concern about discrimination to the Respondent.
g. She went on to raise a formal grievance about discrimination on 8 May (page 118) in which she made reference to the Equality Act. Her evidence was that her brother had researched this for her. Again I observe that if her brother had been researching her legal rights it is more likely than not that he would have encountered the issue of time limits. It was nevertheless a further two months before she began the ACAS early conciliation process, which she commenced on 24 July. She presented her claim to the Tribunal on 13 September.

13. These delays also caused real prejudice to the Respondent in dealing with the discrimination allegations. By the time the Claimant first raised the issues, Amy Stoner had left the Respondent's employment, thus undermining the Respondent's ability to investigate the issue. That difficulty would plainly continue if the claim were to proceed to a full hearing. Ms Siddall-Collier's

witness statement addressed the practical difficulties the Respondent would face in having to defend the allegations, which would have been much less of a problem if it had been able to take a statement from Amy Stoner before she had left its employment. That would have been possible if the Claimant had raised the issue with the Respondent promptly commenced and commenced her Tribunal claim within the statutory time limit.

14. For all of the above reasons I am not satisfied that the Claimant was prevented from bringing her discrimination claims to the Tribunal within the statutory time limit for any reason that would make it just and equitable to extend time. In my judgment she could have and should have raised the issue earlier. Time limits in Tribunal claims are generally strictly applied although in a discrimination case a Tribunal has a discretion to extend time if in all the circumstances it is just and equitable to do so. But it is for the Claimant to show why time should be extended – there must be a sound reason. I am not persuaded by the reasons the Claimant has put forward in this case. Furthermore, on the facts of this case to extend time would present real practical difficulties to the Respondent. I therefore decline to extend time and the Tribunal therefore does not have jurisdiction to hear the claim.

The unfair dismissal claim

Issues and law

15. The issues I have needed to consider are whether, on the basis of the documentary evidence in the bundle and the Claimant's witness evidence, the Claimant has any reasonable prospect of showing that:

    a. The Respondent did not have a potentially fair reason to dismiss her under s 98 ERA;
    b. The procedure it adopted in reaching the decision to dismiss was unfair, either because it did not follow its own written procedures or because it did not meet the standards required by s98(4) of the ERA.

    Those standards require the employer to act reasonably in the procedure it adopts and in the treating the situation as a reason to dismiss, rather than imposing some lesser sanction. In a case of this kind, where the employer is relying on third party pressure, what needs to be considered carefully is whether the employer handled the request from the third party correctly and fairly and in accordance with its own written procedures and whether it made enough effort to find an alternative to dismissal by looking for alternative employment for the Claimant.

16. The Respondent applied for the unfair dismissal claim to be struck out under Rule 37 of the Tribunal Rules or in the alternative that the Claimant be ordered to pay a deposit under Rule 39 of the Tribunal Rules as a condition of continuing with it. If I reached the view that the Claimant had no reasonable prospect of showing that either that the Respondent had no fair reason to dismiss her or that the procedure adopted by the Respondent had been unfair, then the appropriate course of action would be to strike out the claim under

Rule 37. If on the other hand I reached the view that the Claimant had little reasonable prospect of showing either that the Respondent had no potentially fair reason to dismiss her or the procedure adopted had been unfair, then the appropriate course would be to make an order for the Claimant to pay a deposit under Rule 39.

17. Striking out an unfair dismissal claim as having no reasonable prospect of success is not a course of action that should be undertaken lightly (**Tayside Public Transport C Ltd (t/a Travel Dundee) v Reilly [2012] SLT 1191**). However this is a case in which in my judgment this is the correct course of action. As Mr Tomison submitted, the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978; [2019] ICR 1,** confirmed that where there are no relevant issues of primary fact, and evidence relevant to the issue in dispute consists only of the documentary record, the tribunal may be entitled to strike out.

Factual background

18. The factual background was summarised by Mr Tomison in his submissions and is supported by the documents in the bundle. The Claimant did not challenge any of these essential facts in her evidence at the hearing.

19. The Claimant was employed to work as a Contract Coordinator for the cleaning services provided at St James's Place Wealth Management (the "client") on 18 October 2016 and transferred to the employment of the Respondent on 1 October 2018 along with 15 other employees. From 3 October onwards the client began to express concerns about the Claimant and the standard of the work for which she was responsible. On 9 October 2018, the Claimant commenced sick leave following a meeting with the Respondent's operation manager Amy Stoner. She did not return to her duties after that date. On 25 October 2018, the client requested that the Claimant be removed from the contract with immediate effect (page 51).

20. On 6 November 2018, the Claimant raised grievances against Amy Stoner and Jeff Creedy, also an operation manager of the Respondent (page 67). The grievance meeting took place on 21 November 2018 (pages 68-71) and the grievance outcome was provided on 11 January 2019 (page 74). Although the Claimant was aware of her right to appeal, she did not do so at the time and the Respondent later refused to allow her to appeal out of time. That refusal does not form part of her complaint to the Tribunal.

21. The Claimant started to attend formal meetings regarding the client's request for her removal and its consequences for her employment from 21 February 2019 (page 87). Following unsuccessful attempts to provide the Claimant with alternative employment, the Claimant's employment was terminated on 3 May 2019 (page 119).

Prospects of the Claimant's claim of unfair dismissal

22. The reason the Respondent relied on for dismissing the Claimant was the

request of its client, St James Place Wealth Management, to remove her from the contract on which she was deployed as a cleaner. A client's request to remove an individual from a role – 'third party pressure' is capable of amounting to some other substantial reason for dismissal as envisaged by s98(2) ERA. The client's request is set out at page 52 and is expressed in clear terms. The correspondence leading to that request and the photographic evidence it relied on in support of it is set out at pages 52-66. The Claimant has challenged the fairness of the client's assessment of her, but not the facts set out in these documents. The documents show clearly as a matter of fact that the client issued a request for the Claimant to be removed from her role. In my judgment the Claimant has no prospect of showing that the Respondent did not receive the request from the client and therefore that it did not have a potentially fair reason to dismiss her.

23. I therefore need to consider whether the Claimant has any prospect of showing that the procedure adopted by the Respondent in response to the client's request was not a reasonable procedure as required by section 98(4) ERA.

24. The receipt of requests from third parties to remove certain individuals from contracts is a process with which the Respondent has to deal periodically, and it therefore has a Third Party Pressure Policy (page 44-45). That policy sets out the steps the Respondent will take if it receives a request from a client, such as it received in this case, to remove an individual employee from a contract. These steps include verifying the request with the third party, asking the client to reconsider the request if it does not arise out of disciplinary concerns and, if the client is not willing to reconsider, making reasonable attempts to find an alternative to dismissal.

25. Considering each in turn, the Respondent clearly did take the first of these steps in this case. An email from the client requesting the Claimant's removal from the contract was sent on 25 October 2018 (page 52), making the client's concerns explicit to the Respondent. The Claimant accordingly has no reasonable prospect of showing that the Respondent did not take that step.

26. The Respondent also took the second step by asking the client to reconsider. There is a detailed and careful email dated 21 February 2019 from Nick Britten of the Respondent to Colin Monk at St James' Place at page 51. The delay in sending that communication was explained by the Claimant's absence from work on sick leave. The Respondent offered to train the Claimant, provide performance management and monitor her performance in an attempt to persuade the client to allow her to stay in her role. On 13 March 2019 however (page 50), the Client refused to reconsider its request for the Claimant's removal, despite the offer of enhanced training and supervision. In my judgment the Claimant has no reasonable prospect or showing that the Respondent did not take the step required by its policy, namely to try to persuade the client to reconsider its request. Further, in my judgement, the Respondent went above and beyond what the policy required by offering to provide the claimant within enhanced training and supervision in order to address the client's concerns about her performance in the role.

27. At the Claimant's request the Respondent also asked her previous employer whether they had been aware of any performance concerns on the client's part. The previous employer refused to provide the information, citing data protection legislation. Overall the documents show that the Respondent was scrupulous in its dealings with the Claimant in the period between receiving the client's request and her eventual dismissal. As noted, the Claimant raised her grievance in this period, which was dealt with by the Respondent in tandem with the third party pressure process. The documents show that the Respondent was careful to consider the Claimant's concerns and give reasoned responses to all of the points that she raised, adjourning meetings where appropriate in order to give a proper response. Notably it did this on 18 April 2019, when what would have been the final meeting before the Claimant's dismissal was adjourned so that the manager with conduct of it, Mr Hartley-Powell, could consider the allegations of discrimination that the Claimant had raised for the first time at that meeting. The Respondent's overall approach to the Claimant was, in my judgment, reasonable and respectful.

28. My focus for the purposes of this application however is on whether the documents show that Respondent's search for suitable alternative employment for the Claimant, met the test of reasonableness in s98(4). I note at this point that it did not appear to be the Claimant's case at the hearing that the search had been inadequate or unreasonable. The focus of her evidence was really on what the client had done and whether that was reasonable. She was plainly aggrieved by the client's request, but the actions of the client are not what an unfair dismissal claim against the Respondent would be concerned with. The focus of an unfair dismissal claim is on the actions of the employer and whether they meet the standards required by s98 ERA. The search for alternative employment is a crucial part of this in a claim involving third party pressure.

29. As regards alternative employment, the contact between the Claimant and the Respondent in the period between receipt of the request from Colin Monk to remove her from the contract and her dismissal on 3 May 2019, was summarised by Mr Tomison in his submissions. The documents show that there were five meetings under the Third Party Pressure procedure, on 21 February, 7 March, 19 March, 18 April and 3 May, each of which is documented (pages 87, 93-94, 95-96, 109-112 and 112-116 respectively). Alternative roles were put forward at the first three meetings and on 21 March the Claimant was sent the job descriptions. On 28 March the Respondent followed up, reminding the Claimant that her job was at risk if alternative employment was not found and she replied the same day, declining the roles and saying "*After careful consideration I am unable to go forward with the 2 positions below due to the fact I believe this would be detrimental to my health being night shifts and would also increase my anxiety and stress, as I would be paranoid the client would be trying to get me as SJP did*" (page 99-100). The Respondent did not take this at face value however, but responded the next day to say it has company procedures to manage the concerns the Claimant had expressed, and adding that although a referral to occupational

health had been placed on hold, this could be picked back up to explore supportive measures (page 99). This was clear documentary evidence that showed that the Respondent was making a serious effort to avoid the termination of the Claimant's employment.

30. The Claimant did not explain in her witness statement for the hearing or in her oral evidence why the Respondent's actions were unfair as distinct from those of the client. She was critical of the client's decision to seek her removal from the contract and questioned the motives behind her removal, but again, in an unfair dismissal claim it is the employer's response to the client's request that is under scrutiny, not the reasonableness of the client's actions. In his submissions Mr Tomison referred me to **Scott Packing & Warehousing Co Ltd v Paterson [1978] IRLR** 166, as referred to in **Henderson v Connect (South Tyneside) Ltd UKEAT/0209/09/SM** and to the passages in **Henderson** that establish that a dismissal in response to third party pressure can be fair, even if the client who seeks the employee's dismissal itself acts unfairly or without justification. Provided that the employer does what it can to mitigate the effects of the third party's actions, and "pulls out the stops", the ultimate decision to dismiss may be fair, despite its harsh impact on the individual employee. In my judgment the documents show that the Respondent did what it could in this case, that it did "pull out the stops" by seeking to change the client's mind and by then undertaking an extensive search for alternative employment for the Claimant, offering her support to overcome her misgivings by some of the alternative roles on offer.

31. The Respondent emailed the claimant on 11 April to try to arrange a call to talk to her about alternative roles (page 103) and wrote again on 15 April to confirm that its search for alternative rules was continuing (page 106). It sent the Claimant details of a different role on the 17 April (page 106). A further meeting took place on 18 April and alternative roles were discussed (page 109-112). That meeting was adjourned as a result of the Claimant raising her allegation of discrimination and at the reconvened meeting on 3 May the Claimant confirmed that she was unable to apply for the alternative role identified on 18 April as the hours did not suit her (page 112-116). As the Claimant had not herself identified any alternative roles that she could do or wanted to do, she was dismissed at that point.

32. Claimant did not submit in her evidence to the Tribunal or her submissions at the hearing, that the search for alternative employment had been inadequate. However I note that the matter did emerge during the hearing of her appeal against her dismissal, which was conducted by Mr Horrell, the Respondent's Service Director for Road and Rail, although it had not formed part of the grounds of her appeal. In the outcome letter at page 141 Mr Horrell gave a detailed summary of the Claimant's position on alternative roles and the Respondent's search as follows:

> **"You raised with me the unsuitability of the roles that you were offered as alternative employment.**
> **In your initial meeting as reflected in the letter of 15th February you advised that you were open to a range of opportunities – Operative/part time however I**

understand that you later changed your position on this. You were added to the ISS retention list and were contacted about the Hitachi rolls through this. I have listed below the positions that were discussed:

- **Cleaning positions with the defence business**
- **Manager positions with Hitachi at Stoke Gifford . Even with the night work you expressed an initial interest and Sarah Walker emailed you about these roles.**
- **Mobile cleaning operative role covering Bristol/Swindon areas. We discussed this role during our call and you confirmed that as you were unavailable to work Saturdays you did not want to further discuss this role following your call with the hiring manager Jean.**

In terms of recruitment search, Sarah Walker sent 3 emails to the wider ISS P&C team which is how which is how we identified the opportunities with the Retail High Street and defence teams. The roles presented had a mix of hours/salary bandings and were presented as they were located near your home and may have been of interest to you. We will always make every effort to find alternative employment, however unfortunately following a 10 week search we were unable to find a suitable role for you. I am satisfied that a thorough search was undertaken."

33. The summary set out by Mr Horrell does, in my view, describe a thorough search for alternative employment. It is also supported by the contemporaneous documents. It was the Claimant's decision to decline some of the roles offered, having concluded that she did not find them suitable, but that does not mean that the Respondent's search was unreasonable – a variety of roles was offered, and those that were not self-evidently unsuitable, it was just that they did not work for the Claimant.

34. I have considered this point carefully as in my judgment the issue of alternative employment is the aspect of the evidence that is most likely in this case to be made clearer by the hearing of oral evidence. But starting from the premise that the obligation on the Respondent was to take reasonable steps to avoid the dismissal, the question is whether the Claimant has any prospect of showing that the search for alternative employment did not meet the required standard, making the dismissal procedurally unfair. Having considered the point carefully I have concluded that the Claimant does not have any reasonable prospect of showing this for two reasons. The first is that looked at objectively, the Respondent's search was reasonable and it is difficult to see what evidence the Claimant would be able to produce that would change that. Secondly, the Claimant did not in fact complain about this part of the process in the case that she presented at the hearing on 15 February. She has not explained how and why the search for alternative roles was unreasonable, even though she does appear to have said something about it at the appeal hearing. The hearing on 15 February was the Claimant's opportunity to explain why it was necessary to have an oral hearing in this case and why an oral hearing might change the outcome that the documents suggest, namely that the Respondent did everything it could to find an alternative role and that having done so without success its decision to dismiss was fair. The Claimant did not put forward that case.

35. On these grounds I have come to the conclusion that the unfair dismissal case has no reasonable prospect of succeeding and should be struck out.

Deductions

36. I accept the Respondent's submission that there were no unlawful deductions in this case. The Claimant was merely paid late on one occasion. That claim has no reasonable prospect of success for that reason.

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Employment Judge Morton
Date: 31 March 2021