2206741/2018
2203669/2019
2205768/2020

EMPLOYMENT TRIBUNALS

Claimant: **Ms R Kumbharati**

Respondent: **Network Rail Infrastructure Limited**

Heard: **CVP** **On:** **12 March 2021**

Before: **Employment Judge N Walker**

Representation
Claimant: in person
Respondent: Mr Braier of Counsel

JUDGMENT

Corrected under Rule 69 of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013

1 All allegations (save for the allegation that the Respondent failed to pay her equal pay which claim is based on like work) in the Claimant's claim in case number 2206741/2018 are struck out, on the basis that the Claimant has failed to pay the deposit provided for in the Deposit Order dated 28 November 2019.

2 The following parts of the Claimant's claim in case number 2203669/2019 are struck out as having no reasonable prospect of success:

The PIDA Schedule claims at
(a) Detriment 2 in Section 1,
(b) Section 2,
(c) Detriment 4 in Section 3,
(d) Section 4,
(e) the first part of Section 5,
(f) Detriments 1 and 2 in the second part of Section 5
(g) Section 6,
(h) Section 7,
(i) Section 8.

REASONS

1 The Claimant has brought three claims. The first claim number (2206741/2018) was subject to a series of deposit orders made as a result of the Respondent's application heard on 27 November 2019. The Claimant appealed the deposit orders and sought a reconsideration. Both the appeal and reconsideration

failed. The Claimant has not paid the deposit. There was a brief hiatus when the allegations which were subject to the deposit order were struck out and then reinstated when it became clear that the application for reconsideration had not been addressed. Thereafter it was referred to EJ Davidson who refused it. Accordingly, the first claim allegations that were subject to the deposit order are struck out. The only residual allegation in the first claim is an equal pay claim based on like work.

2 The Claimant brought the second claim (2203669/2019) on 24 September 2019, and she admits this second claim includes some matters which were in the first claim. The Claimant explained that this was in part because she had failed to tick a box which asked the Tribunal to refer the claim to the regulator. The Claimant said that at a hearing before Judge Davidson, she had asked what happened about the reference to the regulator and had been told that was a matter for the tribunal staff. She also said that there had been discussion about how she could introduce new matters and while she was aware there was an option to apply to amend, she was worried about the timing and the question of whether she would be out of time. In consequence, she thought it was preferable to issue a new claim which meant she could tick the box asking the document to be referred to the regulator. She accepts that some of the matters in the second claim duplicate matters in the first claim.

3 The second claim is presented in two parts. The first part is the ET1 form. The second part is a Schedule, which was sent as an attachment to the ET1. The Schedule sets out all the allegations and is again in two parts, the first being headed Equality Act Schedule which then has two separate allegations and the second part being headed Public Interest Disclosure Schedule ("PIDA Schedule")which has eight sections. Number 5 in the Public Interest Disclosure Schedule is repeated, so section 5 is referred to in this judgment as the first section 5 and the second section 5.

4 In both the Equality Act Schedule and the PIDA Schedule, there are a number of columns. In the PIDA Schedule, the Claimant has included columns detailing the date of the disclosures relied upon, the details of the disclosure, the sub sections of section 43B of the Employment Rights Act 1998 which she relies on and the basis of that reliance. She also has columns detailing why she says the disclosure was in the public interest. A part of the Schedule addresses detriments and there are columns which identify the detriment number, its date, the description of it, the alleged perpetrators, witnesses and what the Claimant says was the link between the detriment and the disclosure.

5 The third claim (2205768/2020) was issued on 28 August 2020 after the Claimant was dismissed and it is not a matter which was the subject of any application today in relation to strike out.

The Application

6 The Respondent seeks a strike out in relation to the second claim. I had submissions from the Respondent and the Claimant, and the Claimant gave witness evidence.

7 First the Respondent says some claims are out of time. Secondly the Respondent says some claims are an abuse of the process. Thirdly the Respondent says that there has been issue estoppel in relation to some matters. I have taken those grounds in turn.

Jurisdiction - Time

8 Under section 48(1)(a) Employment Rights Act 1996, claims must be brought within three months of the event complained of. This time limit is usually adjusted to allow for the ACAS conciliation process but in this case the certificate (to the extent it is applicable and there is an argument that it is not) was issued the same day and therefore, this did not have the effect of extending time. At most, the Respondent says that if the ACAS process had extended time, it would have moved it by 4 days. The second claim was issued on 24 September 2019. For the purposes of this application, I have taken the date most advantageous to the Claimant which is the date three months beforehand, moved by 4 days, and that is 20 June 2019. Prima facie any events occurring before 20 June 2019 are out of time.

9 Time can also be adjusted where there is a continuing act, so that in effect, if the Claimant is subjected to a series of acts over a period which have a relevant connection, she can claim in relation to the earlier acts if the last or later acts were in time.

10 It is important to note that some events which the Claimant complains about are matters where she says the Respondent failed to act. Section 48 provides that complaints about detriments which are done on the ground that an employee has made a protected disclosure can be presented to an employment tribunal. Section 48 (3) and (4) set out the time limits for such complaints. Section 48(4) addresses continuing acts and failures. Failures are treated in a different manner to continuing acts. Section 48(4)(b) states:

> *a deliberate failure to act shall be treated as done when it was decided on; and the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.*

11 The Respondent argued that in a number of the sections in the PIDA Schedule, there was no detriment which was within time. In relation to those sections where there was a detriment within time, the Respondent argued that there was not a prime facie case that they formed a series with those pleaded in the same part which were on their face out of time. For this reason, the Respondent argued that the "in time acts" could therefore not rescue those which fell outside the time limit. This argument was based on the case of Lyfar v Brighton and Sussex University Hospital Trust [2006] EWCA Civ 1548 at para 10. The Respondent admits this is a discrimination case but is considered by various

authoritative texts also to apply to time limits under section 48 of the Employment Rights Act.

12 The Claimant argued that the events were part of a continuing act and her witness statement sets out her belief that the detriment she relies upon was ongoing. She also explained why she thought it necessary to issue a new claim.

13 I am bound by the statutory provision in relation to any acts which are failures to act. The test applicable to claims for a PIDA detriment, under section 48 (3) of the Employment Rights Act 1996 is that it must be brought within the time period, except where the Tribunal is satisfied that it was not reasonably practicable for the claim to be brought in time, and then it must be brought within such further time period as the tribunal considers reasonable. The Claimant did not make a request for an extension of time or suggest that it was not reasonably practicable for her to have brought her claims within the time period.

14 I recognise that the Claimant considers there was an ongoing detriment but where there is a failure to act, the law is clear about how the time of the failure is to be assessed.

15 The Claimant has clearly identified the disclosures she relies upon and the detriments which she argues she was subjected to in consequence of those disclosures and in relation to the following allegations, there is no detriment which is within time.

15.1 Section 2 has two detriments. The Claimant says the first took place on 30 July 2018. The second one took place on 6 August 2018 and the Claimant says it is still ongoing. In so far as a complaint is about a failure to act, it cannot be treated as ongoing. The first detriment in this section is a complaint about a failure to reply by Neil Soden to the Claimant's request for feedback and monitoring of her close call. This is not stated to be ongoing, but assuming the Claimant meant that it should be, based on the statutory provision, the latest date when this could have been effective for the purpose of calculating time is the point at which it could reasonably have been expected that Mr Soden would have replied. I assess that would have been within one month at the longest. The second detriment is a request to Neil Soden and Rob Walton to be part of safety leadership made on the 6th of August 2018. The Claimant complains she has been given no information on how to be part of this. This is also a complaint about a failure to act. I have nothing to suggest that there has been an inconsistent act and therefore I have to decide when the period expired within which the Respondent might be expected to have done the failed act. In other words I have to decide by when the Respondent might have been expected to provide information about how to be part of the safety leadership. I would have expected that any information would have been provided within one month. Accordingly, applying the test in section 48(4) of the Employment Rights Act 1996, the last date of the two detriments in Section 2 is 6 September 2018. This is significantly out of time and the claims in this

section are therefore struck out on the basis that the tribunal has no jurisdiction to consider them.

15.2 Section 4 of the PIDA Schedule sets out three detriments which took place between 11 January 2018 and 6 August 2018. All three detriments are failures to act on the part of the Respondent. The last one which took place on 6 August 2018 is the Claimant's request to Neil Soden and Rob Walton to be part of the safety leadership and is identical to the detriment I have described above. For the same reasons, I regard the maximum time during which the Respondent might have been expected to act as one month after the date of the Claimant's request. Therefore, time runs from 6 September 2018. As noted, the earlier detriments are also failures to act. The Claimant complains that in June 2018 Frank Liu and Rob Walton didn't consider her for opportunities in his team and hired contractor staff and that the first one is that Rob Walton and Frank Liu didn't invite her to any integration meetings. From the dates of the incidents described, all these events took place in 2018 and are thus significantly out of time and therefore the claims in section 4 are struck out.

15.3 The first part of Section 5 includes two detriments both of which of the Claimant identifies as taking place in April 2018. She complained that Neil Soden did not give her any feedback on IP IMS task despite her requesting this at a review meeting in March 2018. Secondly, she complained that John Nixon ignored her request to have an IP IMS session in the next team meeting. Tasks were assigned but no encouragement or feedback given. It is clear that both of those alleged detriments are failures to act and that both took place in or around April 2018. Allowing for a reasonable period of time within which the Respondent should have acted, it seems that both failures to act must have crystallised one month later (i.e. by May 2018) and they are both significantly out of time and are struck out.

15.4 Section 6 lists 8 detriments which the Claimant identifies as taking place on 10 April 2017, 23 March 2018 and 18 March 2019. The incidents are all failures to act. I carefully considered all of them and particularly the last one. Some are about specific performance review forms and three are about a failure to arrange a performance review meeting in March 2019. The last detriment on the list is not dated but must fall within the dates above which are the dates given for all the detriments. The Claimant complains that Mr Soden moved a budget allocated to her project to another project without informing her or a designated commercial manager or sponsor. I am satisfied that the detriment is the failure to communicate with the Claimant and this too is a failure to act. Allowing a reasonable period for Mr Soden to communicate with the Claimant about it, as it happened, according to the Claimant, in March 2019 she would have expected Mr Soden to communicate with her within one month, i.e. by April 2019, so these matters are significantly out of time and are struck out.

15.5 Section 7 lists three detriments which the Claimant says occurred between 12 November 2018 and 14 March 2019. The event in March 2019 is the removal of the Claimant's "substantial post" which was a specific act. On

the face of it these matters occurred between 7 and 3 months before 20 June 2019, and are clearly significantly out of time. They are struck out.

15.6 Section 8 lists one detriment which occurred on 2 May 2019 when the Claimant complains of a failure to act by Human Resources who ignored a request she made for a Handbook. Again, as this is a failure to act. I would normally expect a simple request for a document to have ben acted on within a week or two, but even allowing for a time period of one month for the Respondent to have acted, I would assess the date when it occurred as 2 June 2019, so that it is out of time by almost three weeks.

16 I have considered whether I should also strike out sections 1, 3 and the second Section 5 on the basis of the Respondent's submission that there is not a primary facie case that these detriments form a series with those pleaded which are outside the time limit. While I understand the Respondent's arguments on that point, I am not satisfied that I can reach a firm conclusion without further evidence. The question of whether they could form a part of a series should be left to the full merits hearing to determine. I will not strike them out for this reason.

Issue Estoppel

17 The Respondent argues that certain of the allegations mirror those in the first claim which have been struck out because the Claimant failed to pay a deposit. Where there is an allegation which was part of the first claim and subject to a deposit order, which the Claimant chose not to pay so that the claim is now struck out, there is an issue estoppel which means that allegation cannot be raised again in new proceedings.

18 The Respondent relies upon the Judgment in the case of Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46 at para 17 per Lord Sumption which explains that res judicata is a portmanteau terms used to describe a number of different legal principles with different juridical origins. He then proceeds to explain each of them. Lord Sumption's explanation of the fourth principle (issue estoppel) reads as follows:

"Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355, [1775–1802] All ER Rep 623. 'Issue estoppel' was the expression devised to describe this principle by Higgins J"

19 Employment Judge Davidson made a deposit order on the basis that detriment claims which relied on the Claimant having made qualifying disclosures on close calls in which the Claimant reported that her colleagues had failed to sign in and out of attendance registers in accordance with company protocols had little reasonable prospect of success. Had I not already struck it out as above, I would have struck the repeats of that allegation out for this reason and thus both detriments raised at section two of the PIDA schedule in the second claim would be struck out for this reason.

20 Section 1 of the PIDA schedule lists as detriment 2, a matter which the Respondent says is essentially the same as paragraph 102 of the chronology to the first claim at page 107 of the joint bundle and also the summary at page 188 paragraph 36, being the complaint about the Claimant's rating on the 2018 annual capability record. I have reviewed the Schedule and the prior documents, and I am satisfied that it is the same matter. This is also a matter which has been struck out as a result of the non-payment by the Claimant of the deposit following EJ Davidson's order and it is therefore subject to issue estoppel and must be struck out.

21 Section 3 of the PIDA schedule lists as detriment 4 a matter which the Respondent says is pleaded at paragraph 80 of the chronology to the first claim at page 103 of the joint bundle, and appears in the summary at page 186 paragraph 26, being a complaint that fit notes forwarded in July 2018 to Neil Soden were not acknowledged. I have reviewed the Schedule and the prior documents, and I am satisfied that it is the same matter. This is also a matter which has been struck out as a result of the non-payment by the Claimant of the deposit following EJ Davidson's order and it is therefore subject to issue estoppel and must be struck out.

22 Part 2 of Section 5 of the PIDA schedule lists as detriment 1, a matter which the Respondent says is pleaded at paragraph 107 of the chronology to the first claim at page 108 of the bundle and appears in the summary at page 189 paragraph 42, being a complaint by the Claimant that she gave a presentation to various colleagues and that neither Mr Soden, nor Mr O Toole, who were present said anything to her about it. Essentially this is a claim that they did not give the Claimant any feedback. I have reviewed the Schedule and the prior documents, and I am satisfied that it is the same matter. This is also a matter which has been struck out as a result of the non-payment by the Claimant of the deposit following EJ Davidson's order and it is therefore subject to issue estoppel and must be struck out.

23 Part 2 of Section 5 of the PIDA schedule lists as detriment 2, a matter which is pleaded at paragraph 108 of the chronology to the first claim at page 109 of the bundle and also the summary at page 189 paragraph 44, being an allegation that the Claimant was not involved in presentations while other managers were. I have reviewed the Schedule and the prior documents, and I am satisfied that it is the same matter as appears in the summary at item 44. This is also a matter which has been struck out as a result of the non-payment by the Claimant of the deposit following EJ Davidson's order and it is therefore subject to issue estoppel and must be struck out.

Abuse of process

24 The Respondent has also argued that bringing the second claim falls foul of the rule in Henderson v Henderson, which put briefly is an expectation that a party to litigation will bring forward their whole case rather than bringing later proceedings in respect of matters which could have been brought forward with the first claim but were not. The Respondent has referred the Tribunal to an

EAT decision in Lynch v East Dunbartonshire Council [2010] ICR 1094 which held that the doctrine of lis pendens does not apply in the ET but it is open to the ET to strike out a second claim as vexatious under Rule 37(1)(a) if the circumstances are such that by bringing the second claim in that context the Claimant is acting improperly or oppressively.

25 The Claimant has explained that she brought the second claim after the Judge informed her that for new matters, she would need to bring a new claim. She was also told about the process for amendment. The Claimant did not obtain legal advice. Having understood from Judge Davidson what a public interest disclosure claim was, she appears to have decided that many of the matters she had raised should be public interest disclosures. Bearing in mind the time limit she says for the fresh issues and the preliminary hearing date for the first claim on 27 November 2019, she submitted a new claim on 24 September 2019. She says she was concerned that if any of my amendments were not considered at the November hearing then she would be out of time. She also says "*in the ET1 for the second claim, I ticked the box for section 10 which I did not do in my first claim*".

26 It is clear that this aspect of the Respondent's application depends on me concluding that the Claimant has acted oppressively so as to fall within the provisions of the employment tribunal rules allowing for a strike out where the Claimant's conduct has been vexatious. At this stage, while I can see that the Claimant's conduct has had an oppressive impact on the Respondent because of the large number of individual items that the Claimant has raised and the length of time over which they are spread, it is not clear to me that the Claimant has acted vexatiously. Rather it seems that as a litigant in person she has been somewhat concerned to ensure that she did not miss an opportunity to raise her claim in format she considered appropriate due to what she would see as a technicality of procedure. For this reason, I am not prepared to strike out any further allegations on this ground at this stage, but this decision does not determine the matter for all time. If the Claimant continues to introduce new claims which she could have brought already, it would be open to some future tribunal to conclude that her conduct overall, including conduct I have considered, has reached that threshold.

27 This Judgment has been corrected this 15th day of April 2021, under Rule 69 of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013.

28

Employment Judge **Walker**

Date: 15 April 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

16th April 2021.

FOR THE TRIBUNAL OFFICE