



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE HARRINGTON
(sitting alone)

ON: 3 March 2021

BETWEEN:

Miss A McQuilkin Claimant

and

National Probation Service Respondent

Appearances:

For the Claimant: In person

For the Respondent: Miss G Hirsch, Counsel

RESERVED JUDGMENT

It is the Judgment of the Tribunal that:-

- (1) The Claimant's claim was brought outside the primary limitation period and it is not just and equitable to extend time.
- (2) The Claimant's claim has no reasonable prospects of success pursuant to Rule 37 of the ETs (Constitution & Rules of Procedure) Regulations 2013, Schedule 1.
- (3) These proceedings as a whole are therefore dismissed.

REASONS

Introduction

- 1 I held a Preliminary Hearing in this case today, on 3 March 2021. The Hearing was a remote hearing with the parties joining by CVP. The Claimant, Miss McQuilkin, represented herself and the Respondent was represented by Miss Hirsch of Counsel.
- 2 The purpose of the Preliminary Hearing was to hear the Respondent's application to strike out the Claimant's claim. Following a short hearing on 18 February 2021, I produced a Case Management Order dated 21 February 2021 and relisted the case for today. Within that Case Management Order I recorded that the Tribunal has been provided with the following:
 - 2.1 A Preliminary Hearing bundle (paginated 1 - 69). This bundle included written submissions from the Respondent regarding the application to strike out the claim (pages 49-59);
 - 2.2 An authorities bundle (paginated 1 - 46); and
 - 2.3 A further Preliminary Hearing bundle produced by the Respondent (paginated 1 - 144). Page references within square brackets of this Judgment, refer to this bundle.
- 3 I also made the following Case Management Orders:

Hearing bundles

- 2 The Respondent shall, as soon as possible, provide the Claimant with paper copies of the three bundles, namely the two Preliminary Hearing bundles and the authorities bundle.

Claimant's submissions

- 3 No later than 4 p.m. on **25 February 2021**, the Claimant shall provide to the Tribunal and to the Respondent any written submissions in respect of the Respondent's application to strike out the claim. These submissions should be focused on any matters relevant to the Respondent's skeleton argument, which appears at pages 49 – 59 in the Preliminary Hearing bundle (paginated 1 – 69).
- 4 At the Hearing today, it was confirmed that the Respondent had sent hard copies of the bundles to the Claimant, which she had safely received, and in an email at 21.29 hours on 24 February 2021, the Claimant had sent a 37 page document, which I have referred to in this Judgment as the Claimant's Statement. Miss Hirsch had not received the Statement and I therefore forwarded this to her during the hearing by email. There was an adjournment during the course of the hearing today to enable both Miss Hirsch to consider the Statement and for the

Claimant to consider her response to the Respondent's application to strike out her claim.

- 5 There had also been some further correspondence between the parties, and copied to the Tribunal, concerning: documents the Claimant had sought from the Employment Appeals Tribunal, a further authority relied upon by the Respondent (Adedeji v University Hospitals Birmingham NHS Foundation, 2021 WL 00135734 (2021)) and difficulties the Claimant has had and is currently experiencing.
- 6 At all times the Claimant confirmed to me that she wished to proceed with the hearing. At one stage during the hearing, the Claimant confirmed that she had not opened the packages containing the hard copies of the relevant bundles for the hearing today. She explained to me that it was a deliberate decision by her not to do so and that she wished to continue with the hearing.
- 7 I have heard from both the Claimant and Miss Hirsch today and prior to the conclusion of the hearing, both parties confirmed that they had had a full opportunity to make any submissions and representations they wished.

Relevant Background

- 8 On 17 August 2014 the Tribunal received the Claimant's ET1, in which she sought to bring claims arising from her employment with the London Probation Trust from 13 October 2003 to 20 December 2013 ('the London South claim'). The fees regime was in place at that time and the claim did not proceed because the Claimant failed to pay the fee or to apply for a fee waiver.
- 9 On 27 August 2017 the Claimant presented a further ET1 to the London East Employment Tribunal ('the London East claim').
- 10 On 24 November 2017, HMCTS wrote to the Claimant following the Supreme Court Judgment in the case of R (on the application of Unison) v Lord Chancellor [2017] regarding Tribunal fees, to ask the Claimant if she wished to have the London South claim considered for reinstatement [31]. In response, the Claimant appears to have provided some further details on 1 January 2018 [41-42] and on 8 January 2018 a second letter was sent to her from HMCTS [39 - 40]. That letter confirmed that an initial response had been received from the Claimant to the November letter. It stated,

'We previously wrote to you about your Employment Tribunal claim which was rejected and returned because you didn't pay an issue fee. Thank you for confirming that you would like to apply for that case to be reinstated.'
- 11 The existence of the London South claim was known by Employment Judge Pritchard, when a Preliminary Hearing was held in the London

East claim on 5 January 2018. That hearing considered the London East claim but reference was made in paragraphs 9 and 10 of the Tribunal Order, dated 5 February 2018 [33-34] to the London South claim. It was noted that a Preliminary Hearing in that claim would be needed.

- 12 The letter from HMCTS of 8 January 2018 required the Claimant to complete a blank ET1 form and to return the letter, completed and signed. The Claimant completed and signed the letter on 11 June 2018 [40], shortly before the next hearing in the London East claim.
- 13 Following that hearing, on 14 and 15 June 2018, and in a Judgment dated 23 July 2018, the Claimant's London East claim was dismissed as a whole [64 - 76]. The Claimant appealed against that Judgment to the Employment Appeal Tribunal but her appeal was unsuccessful.
- 14 On 13 April 2019 a Rule 21 judgment was sent to the parties in the London South claim [85]. No response had been received to the claim and, accordingly, Judgment was given in the Claimant's favour with the remedy to be determined at a hearing. It was noted in the later Judgment of Employment Judge Hyams-Parish that this Rule 21 Judgment came as a surprise to the Respondent, given they had already successfully defended the London East claim (see further, paragraph 17 below).
- 15 Upon receipt of the Judgment, the Respondent contacted the Tribunal and was sent a copy of the claim form. They then sent a detailed application to set aside the Judgment, together with a draft response, on 28 May 2019.
- 16 On 14 May 2020, Employment Judge Martin listed a Preliminary Hearing to consider whether the Rule 21 Judgment should be set aside and, if it was set aside, whether to strike out the London South claim on the grounds that the claim had already been determined by Employment Judge Pritchard at London East Employment Tribunal [116].
- 17 On 6 November 2020, Employment Judge Hyams-Parish conducted a Preliminary Hearing [130]. He determined the first of these matters and decided that the Judgment made pursuant to Rule 21 should be set aside. At that hearing, he specifically decided not to proceed to consider the strike out application but to provide the Claimant with a further opportunity to provide the necessary information requested (see paragraph 26 of Employment Judge Hyams-Parish Judgment).
- 18 It is the Respondent's application to strike out the claim that I have determined today.

Legal Summary

- 19 The following is a summary of the relevant legal principles: Section 123 of the Equality Act 2010,

(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.^[SEP]...

(3) For the purposes of this section—^[SEP]

(a) conduct extending over a period is to be treated as done at the end of the period;^[SEP]

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) 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^[SEP]

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

20 A Tribunal can extend time for bringing a discrimination claim by such period as it thinks just and equitable (section 123(1)(b)). ^[SEP]Tribunals should not extend time unless the Claimant convinces them that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule (Robertson v Bexley Community Centre [2003] EWCA Civ 536). ^[SEP]The EAT, in both British Coal Corporation v Keeble [1997] IRLR 336 and DPP v Marshall [1998] IRLR 494, held that the Tribunal's discretion in these circumstances is as wide as that of the civil courts under section 33 of the Limitation Act 1980. This requires courts to consider factors relevant to the prejudice that each party would suffer if an extension were refused. These include:

a) The length of and reasons for the delay;

b) The extent to which the cogency of the evidence is likely to be affected by the ^[SEP]delay. ^[SEP]

c) The promptness with which the Claimant acted once they knew of the ^[SEP]possibility of taking action. ^[SEP]

d) The steps taken by the Claimant to obtain appropriate professional advice once ^[SEP]they knew of the possibility of taking action. ^[SEP]

21 There is no legal obligation on the Tribunal to go through the above list, providing that no significant factor is left out (London Borough of

Southwark v Afolabi [2003] IRLR 220 (CA)). The emphasis should be on whether the delay has affected the ability of the Tribunal to conduct a fair hearing (DPP v Marshall).

22 I have also been referred to the case of Adedeji v University Hospitals Birmingham NHS Foundation 2021, WL 00135734 (2021). The best approach for a tribunal in considering the exercise of the discretion under Section 123 (1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of and the reasons for the delay.

23 Rule 37 of the ETs (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 provides,

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

24 Where it appears to a tribunal that a case has no reasonable prospects of success, the facts that there are disputed facts should not, of itself deter the tribunal from striking out the claim (Ashok Ahir v British Airways EWCA 18 July 2017).

25 Rule 39 refers to Deposit Orders,

(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. [L] [SEP]

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order. [L] [SEP]

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21. [L] [SEP]

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order— [L] [SEP]

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), [L] [SEP] otherwise the deposit shall be refunded. [L] [SEP]

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Respondent's Application

26 The Respondent makes an application to strike out this claim on the basis that it has been brought out of time, there are no reasonable prospects of success and / or the manner in which the proceedings have been conducted by the Claimant is unreasonable. Miss Hirsch confirmed today that the Respondent no longer relies upon arguments of issue estoppel / res judicata.

Claim brought out of time

27 The Claimant's ET1 was received by the Tribunal on 17 August 2014, almost 8 months after the effective date of termination on 20 December 2013. Pursuant to Section 123 of the Equality Act 2010, the Claimant's claim was brought out of time, even allowing for early conciliation.

28 A Tribunal can extend time for bringing a discrimination claim by such period as it thinks just and equitable (section 123(1)(b) EqA 2010). The Respondent refers to the case of Robertson v Bexley Community Centre [2003] EWCA Civ 536 in submitting that it is for the Claimant to satisfy the Tribunal that it is just and equitable to do so – this exercise of discretion being the exception and not the rule.

- 29 The Respondent submitted that the Claimant had failed to provide a sufficient explanation for why her claim had been brought so late and out of time. Nor did the Claimant present any argument in support of the Tribunal exercising its discretion to extend time.

No reasonable prospects of success

- 30 Miss Hirsch further submitted that the Claimant's claims have no reasonable prospects of success. Neither party has a copy of the Claimant's resignation letter and there is nothing in the response to the resignation letter to suggest that the Claimant referred to alleged harassment when resigning. It was also argued that the information provided with the ET1 [18] lacks specifics such as relevant dates, times and witnesses. The Respondent submits that the drafting of the complaint suggests that *'even the Claimant herself is not sure exactly what was said or done, by whom, and when, sufficient to found a case which is capable of discharging the burden of proof of a prima facie case'*.
- 31 With reference to the Claimant's Statement submitted for this hearing, Miss Hirsch noted that there seemed to be an upsurge of allegations around 2007 when the Claimant says she suffered a psychotic episode. Miss Hirsch submitted that this was likely to make it more difficult for the Claimant to prove that her allegations around this time were true. Further, she identified that many of the allegations were extremely vague and that, if there had been further evidence which supported the points made, that evidence should have been produced or identified by the Claimant.

Unreasonable Conduct

- 32 The Respondent submits that the Claimant should have alerted the London East Tribunal to the rejuvenation of the London South claim. In particular, reference is made to the fact that the Claimant signed and returned the letter of 8 January 2018 three days before the second hearing in the London East claim. It is said that by delaying her response to the letter of 8 January 2018 and failing to inform the London East Tribunal of the rejuvenation of the London South claim, the Claimant was acting unreasonably such that this claim should be struck out. The Respondent contends that the Claimant was unreasonably trying to keep her options open with both claims.

Claimant's submissions

- 33 The Claimant confirmed that this claim relates to matters from 2007 until her resignation in November 2013.
- 34 The Claimant told me that she was admitted to hospital and sectioned in February 2014. She recollects that she was discharged from section in April 2014. Following this and in May 2014, the Claimant began volunteering two days a week at an employment club. This voluntary

work included assisting those with mental health issues / drafting applications for courses and job searches. In addition at this time, and as a condition of receiving Employment and Support Allowance, the Claimant was actively looking for work herself, including registering with job agencies. This culminated in the Claimant being offered work as a temporary probation officer in Watford. The Claimant says that she started this work for Watford Probation Service in August 2014.

- 35 With regards to the prospects of her claim succeeding, the Claimant said that her recording of matters during the years of 2007 – 2013 was not very specific as she had mental health problems. She had not kept an exact, detailed account. She told me that she knows that she has *'bits and pieces all over the place'* but she doesn't have a diary. The Claimant referred to having *'boxes and boxes of papers, things just chucked in and left'* but that she would make every effort to try to pull it together. The Claimant referred to having a psychotic episode in 2007 and that she had been sectioned in 2000, 2002, 2004, 2010 and 2013-2014.
- 36 In respect of the argument of unreasonable conduct, the Claimant stated that she had told EJ Pritchard about the London South claim in January 2018 and he had said that she should go ahead and reinstate it. The Claimant says that she was unaware that she had to inform the London South Tribunal about the London East claim. The Claimant said that she may not have told EJ Pritchard about sending the letter on 11 June 2018 but that he had known she was going to seek to reinstate the claim. The Claimant considered it to be a separate matter.

Conclusions

- 37 I have considered the entirety of the documentary materials provided to the Tribunal and the submissions made by both parties.
- 38 It is my Judgment that the claim has been brought outside of the primary limitation period and it is not just and equitable to extend time. Further, the claim has no reasonable prospects of success pursuant to Rule 37 of the ETs (Constitution & Rules of Procedure) Regulations 2013, Schedule 1. Accordingly the entirety of the claim is dismissed.
- 39 I accept the Respondent's submission that the Claimant's claim was presented outside the primary limitation period. This is clear, even taking account of early conciliation. In those circumstances, I must then consider whether to exercise my discretion to extend time by such period as I think is just and equitable.
- 40 The Claimant has had a full opportunity to provide her response to the Respondent's application for her claim to be struck out. This included my specific direction in the Case Management Order dated 21 February 2021 for her to provide written submissions focusing on the arguments set out in Miss Hirsch's skeleton argument. Despite this,

the Claimant has not sought to address why her claim was presented late to the Tribunal. Nor has she provided any evidence to support her response to the Respondent's application – for example, medical evidence.

- 41 The Claimant told me that she had a period of illness following her dismissal but that by May 2014 she was volunteering at an employment club. This volunteering comprised her actively helping the club's members in administrative tasks and correspondence for applying for courses and jobs. She was able to undertake this work at this time. Further, the Claimant was able to carry out her own job search at this time including registering with employment agencies. The Claimant did not provide any explanation as to why she was able to carry out these tasks but was not able to present her claim for, approximately, a further three months.
- 42 I also accept that the delay in presenting the claim did negatively affect the Respondent's ability to investigate the claim while matters were reasonably fresh. This is particularly significant as the claim appears to indicate the involvement of a wide number of personnel over a lengthy period of time.
- 43 Accordingly, I am not satisfied that it is just and equitable to extend time for bringing the claim.
- 44 I also accept the Respondent's submission that the Claimant's claim has no reasonable prospects of success. In reaching this conclusion, I have read the entirety of the Statement produced for today's hearing and the documents to which I have been referred to in the bundle. I have concluded that the claim, as this stage, is not capable of meaningful understanding. The Claimant has provided pages of narrative in her Statement but it remains difficult to place, with any certainty, the allegations she makes both in terms of time and identity of those said to be involved. During the hearing today, this issue was explored with the Claimant. She tells me about her ongoing mental ill health and says that she will try to piece together the large volume of evidence that she says she has in 'boxes and boxes' of papers and other bits and pieces.
- 45 In short, the position at this stage is that the claim is not sufficiently particularised with the necessary clarity so as to be capable of meaningful understanding. It is for that reason that the claim has no reasonable prospects of success. For the avoidance of doubt, I am not satisfied that, even if the Tribunal was persuaded to give the Claimant more time to seek to provide the necessary clarity, that the Claimant would be able to do this. Most recently, I required her to provide any written submissions she had in respect of Miss Hirsch's written argument for this application and the very lengthy Statement produced by the Claimant did not do this.

- 46 Accordingly, I am satisfied that the claim should be struck out, as it has no reasonable prospects of success.
- 47 The Respondent makes a further argument that the manner in which the Claimant has conducted the proceedings has been unreasonable. The Claimant did delay for a significant period of time in responding to the letter from HMCTS dated 8 January 2018. In the event, she responded just prior to the second hearing in the London East claim. However I have taken into account the fact that the Claimant did refer EJ Pritchard to the London South claim at the first hearing in London East. There was therefore some knowledge of there being two claims and the prospect of the Claimant reinstating the London South claim. I am not satisfied that the Claimant, representing herself, was aware of any ongoing obligation to update the London East tribunal with regards to her London South claim, following her initial mention of the claim. I accept the Claimant's explanation that she thought it was a separate matter and in those circumstances, I am not satisfied that her conduct was unreasonable as submitted by the Respondent.
- 48 As the Respondent's first two arguments are well founded, the Respondent's application succeeds and the Claimant's claim shall proceed no further.

**Employment Judge Harrington
11 March 2021**