EMPLOYMENT TRIBUNALS

Claimant:	**Mr O Akinosho**	
Respondent:	**London Borough of Camden**	
Heard at:	London Central	On: 3 March 2021
Before:	Employment Judge Emery	
Representation:	Claimant: Ms L Vonwyler (solicitor) Respondent: Mr B Uduje (counsel)	

PRELIMINARY HEARING
JUDGMENT

The claim is struck out on the following grounds:

a. Many factual issues have been substantively determined in case 2207264/2017
b. The claim amounts to an abuse of process
c. The claim is out of time and it is not just and equitable to extend time

REASONS

The Issues

1. The parties were provided with this judgment and the oral reasons for this decision at the end of the hearing.

2. This case was listed for a preliminary hearing to determine the following issue: whether the claim should be struck out on any or all of the following grounds-
   (i) The issues have been substantively determined in case 2207264/2017;
   (ii) New claims, if any, are of the same factual matrix as the 2017 claim
   (iii) They are out of time

Or whether a deposit order should be made.

The law:

3. Equality Act 2020

s.123 - Time limits

(1) Subject to [early conciliation time limits] 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.

4. ET Rules of Procedure 2013

Rule 37(1): An EJ or Tribunal has the power … on the application of a party, to strike out all or part of a claim or response on the grounds -

(a) that it is scandalous or vexatious or has no reasonable prospect of success

….

(e) that the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response.

5. Case Law

(i) *Cox v Adecco* UKEAT/0339/19 - guidance as to the approach to be adopted in relation to a strike out or similar order:

i. No-one gains by truly hopeless cases being pursued to a hearing;
ii. Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
iii. If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
iv. The Claimant's case must ordinarily be taken at its highest;
v. It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
vi. This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

vii. In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

viii. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

ix. If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

(ii) Before making a striking out order in any of these situations, the tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing -Rule 37(2).

(iii) *HM Prison Service v Dolby* [2003] IRLR 694*, EAT*: there is a two stage test: The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid.

(iv) Just and equitable extension – Equality Act 2010 *Hutchison v Westward Television Ltd* [1977] IRLR 69 – there is 'a wide discretion to do what the tribunal thinks is just and equitable in the circumstances … they entitle the tribunal to take into account anything which it judges to be relevant'.

(v) *Adedeji v University Hospitals Birmingham NHS Foundation* [2021] EWCA Civ 23, [2021] ICR D5 – there is no checklist of factors - 'The best approach for a tribunal in considering the exercise of the discretion under s 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”'.

(vi) *The length of and reason for the delay: Adedeji* - in determining whether it is just and equitable to extend time 'it is always necessary for a Tribunal to make some finding about the reason for the delay in starting a claim'.

(vii) Prejudice: *Miller v Ministry of Justice* UKEAT/0003/15 – there are two types of prejudice which a respondent may suffer if the limitation period is extended. The first is the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the second is the 'forensic prejudice' which may be suffered if the limitation period is extended

by many months or years, caused by such things as fading memories, loss of documents and losing touch with witnesses. If there is forensic prejudice, this will be 'crucially relevant' in the exercise of the discretion, telling against an extension of time, and it may well be decisive. However, the converse does not follow. If there is no forensic prejudice to the respondent, that is: (a) not decisive in favour of an extension; and (b) depending on the tribunal's assessment of the facts, may well not be relevant at all; it will depend on the way the tribunal sees the facts

(viii) *The potential merits: Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278*, EAT* – the tribunal should consider the potential merits of the claim. However, an enquiry into the merits will necessarily be conducted at a high level and should not involve a trial within a trial.

(ix) *Henderson v Henderson*: "established the principle that prevents parties from opening the same subject of litigation that they could have advanced in earlier proceedings but was omitted due to negligence, inadvertence or accident. Defendants are therefore protected from the burden of successive suits when a single claim could have disposed of the matter"(*Henderson* and *Barrow v Bankside*).

(x) *Johnson v Gore Wood*: the purpose of the rule is to ensure parties put their whole case before courts which: maintains the public policy of finality in litigation; avoids wasted time and costs; prevents duplication of effort and dispersal of evidence; reduces the risk of inconsistent findings which are involved if different courts at different times are obliged to examine the same facts giving rise to the subject of litigation.

(xi) *Johnson v Gore Wood:* a subsequent action does not automatically amount to an abuse of process where an issue could have been raised before but was not. Instead the court should make a broad, merits-based judgment that takes account of all the facts of the case and focuses attention on whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue that could have been raised before.

(xii) *Dexter v Vlieland-Boddy*: the following principles should be considered:

a. where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process;
b. a later action against B is much more likely to be held to be an abuse of process than a later action against C;
c. it is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive
d. the question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process

Witness

6. I heard evidence from Mr Akinosho who provided a witness statement and was asked questions by Mr Uduje and by myself. I also read a statement supplied on behalf of the claimant by Mr Gary Boyce. Mr Akinosho swore an oath and confirmed the contents of his statement.

7. The Hearing was conducted by the CVP video platform. I assessed the hearing throughout to ensure that all parties were participating and could see and hear all the proceedings. Regular breaks were taken every hour to because of the additional strain of watching, listening and speaking over a video link. No concerns were raised by the parties about the format of the Hearing.

8. This judgment does not recite all of the evidence I heard, instead it confines its findings to the evidence relevant to the issues in this case.

9. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

10. The claimant submitted a claim form on 9 August 2020 (the 2020 claim) alleging age and disability discrimination against his former employer, LB Camden. He was employed a senior social worker and his employment ended on 12 May 2017 (claim form page 4). He alleges that he was referred to as "old wood" and that there were no reasonable adjustments made to take account of his medical condition. He alleges he was referred to the HCPC by the respondent in September 2019, this is as an act of discrimination and victimisation.

11. For the purposes of this hearing, I accepted that the allegations were credible and could be evidenced. I heard no evidence on the allegations the claimant makes, and I assumed that his claims could well succeed.

12. The parties agree that the claimant has previously issued proceedings against the respondent for unfair and wrongful dismissal. These proceedings were successful (case number 2207264/2017 - the 2017 claim, and the 2019 judgment). The parties settled the compensation payable after the liability judgment without a remedy hearing taking place.

13. The 2019 judgment's narrative of events record that the claimant was subjected to a gross misconduct procedure. The 2019 judgment records the claimant alleged that Mr Rigby wanted to get him dismissed, that this is "undisputed" evidence; also that the claimant had an outstanding grievance against Mr Rigby at the date of his dismissal. It states that the claimant alleged the reason for his dismissal was because he had asserted to his employer that he had been underpaid wages.

14. The 2019 judgment concludes that the respondent's belief in gross misconduct was a genuine belief but an unreasonable belief. It does not uphold the

claimant's allegation that there was a different reason for his dismissal relating to his allegation about underpayments.

15. In brief summary, the 2020 claim makes allegations against Mr Rigby, saying that he had an outstanding claim against him at the date of dismissal, and says his dismissal amounted to discrimination and victimisation on grounds of his protected act (the grievance). It also alleges that in September 2019 the respondent *"tried to have me struck off as a social worker … as they stated I was not fit to practice",* by a referral to the HCPC.

16. In his evidence the claimant accepted that prior to his dismissal he had submitted a grievance contained allegations about disability, about age discrimination, harassment and victimisation. He said that he did not receive the outcome of this investigation until September 2017, after his dismissal. He accepted that when he issued his 2017 claim he was fully aware that discrimination was *"an issue"* in his mind.

17. The claimant's case is that he sought legal advice, that his adviser *"did not provide me the appropriate advice"* and so he did not tick the 'discrimination' box on the ET1 claim form. He accepted that the Judge at an earlier hearing had suggested he make a separate claim for discrimination. One of the reasons he did not do so was because the respondent had referred him to the HCPC and he was undergoing a fitness to practice procedure, *"…I needed to focus on likelihood and income; without a job or being able to practice my livelihood."*

18. The claimant's evidence in response to questions was that he was told about the possibility of another claim in October 2019 (in his witness statement this is said to be October 2018). He started ACAS early conciliation in December 2019 which ended 10 January 2020 with the issue of the ACAS Certificate. The further delay in issuing the claim to 9 August 2020 was because his wife became sick with Covid at the end of February 2020, this turned into long-covid with continuing health issues, and that from then on there were "*family issues of life and death"* which he had to prioritise.

19. The claimant accepted that throughout the period October 2019 to date he had solicitors acting.

Closing Submissions.

20. I considered Mr Uduje's written skeleton. In his verbal submissions he argued that this claim was an abuse of process, the clamant is seeking to bring a claim on the same issues as in 2017. Both are about his treatment by Mr Rigby and dismissal, the first is because he raised unlawful deduction issues, in the 2nd because he complained about acts of discrimination*. "The factual matrix is the same. It's issue estoppel".*

21. Mr Uduje relied on *Henderson* abuse of process as an alternative submission. This is not the same cause of action, but had the claimant applied himself with due diligence, these additional claims should have been brought *"For whatever reason he failed to do so in his first claim".*

22. The claim is also out of time – there was no good reason why the claimant could not have brought his 2nd claim in the 2017 proceedings or shortly thereafter.

23. To extend time, it's a just and equitable discretion *"and it must be exercised judiciously*". It is not just and equitable to extend time in this case. Also, a fair trial is not possible – this goes back to allegations about treatment in 2016, with a hearing unlikely until 2022.

24. The claimant has not put forward cogent reasons for the delay. He may have competing priorities, but the claimant is therefore *"picking and choosing when he brings this claim - and this is not just and equitable".* The respondent is entitled to have an end to the litigation

25. Alternatively, Mr Uduje argued that a deposit order should be made. There are no reasonable prospects of this claim succeeding – there is a judgment that says that the genuine reason the claimant was dismissed was misconduct "the claimant now wants to run a disability and age claim"; this cannot have reasonable prospects of success.

26. Ms Vonwyler for the claimant argued that this claim was *"a new factual matrix - age and disability, harassment, and victimisation."* The facts are different, bar dismissal which the claimant is saying is discriminatory. It is not the claimant's fault that the 2017 claim did not include discrimination – *"his counsel did try to get the claim amended but it was too late…"*

27. One part of the claim is post-employment – the reference to the referral to the HCPC, that the respondent trued to have the claimant struck off as a social worker *"this is a post-employment victimisation claim".*

28. The decision from HCPC is 7 December 2019, the delay after the ACAS Certificate is because the claimant needed to focus on his wife's health problems which ended up as long-covid. He then approached solicitors after this. *"He was preoccupied with life and death issues and should not be penalised for this."*

29. Ms Vonwyler argued that there was no prejudice to the respondent. The claimant did not get the decision on the grievance *"for ages",* the appeal was not then dealt with. So the delay is not the claimant's fault.

30. The claim has good prospects of success, it would be *"an injustice"* if it was not allowed to proceed.

31. There is not an abuse of process - these are separate claims of age and disability discrimination. There are reasonable explanations why the claims were not made on time. It's just and equitable to extend time, and a fair trial is still possible.

32. Mr Uduje in response argued that the referral to the HCPC is not a continuing act. It was a referral on 3 July 2017. It is not a continuing act as the respondent informed the HCPC of the fact of dismissal - this is a discrete act and it ought to be part of the first claim. The HCPC made a decision to adjourn the case until the outcome of the ET. The claimant informed HCPC of the decision and the subsequent settlement. The HCPC then reinstated the issue in September 2019

before making its final decision in December 2019. The only referral made was at page 107 and the claimant was informed of this referral at the time.

Conclusion on the law and the evidence

Abuse of Process

33. The 2020 claim contains factual allegations relating to issues up to and including the claimant's dismissal. These are factual issues which have already been determined within the 2017 claim. I concluded that the claimant is attempting to make a new claim on factual issues which have already been decided within the 2017 claim.

34. In fact, the claimant is attempting to make a different argument in the 2020 claim – that his treatment including his dismissal amounts to Equality Act 2010 victimisation; in the 2017 claim he argued that it was a detriment for having asserted as statutory right. This was, I concluded, an attempt to relitigate issues on the same facts as 2017, with allegations which should have been raised in 2017 – they were issues contained in the claimants grievance – but which were not.

35. I concluded that the claimant is seeking to raise before the tribunal an issue that could and should have been raised before. I concluded that the 2020 claim amounts to an abuse of process.

36. I noted that just because a new claim may amount to an abuse of process, this is not the end of the analysis. I considered the *Johnson v Gore Wood* principles, that a broad, fact-based approach is needed. One of the potentially relevant factors is the reason for the delay. The claimant asserts he received negligent advice, however no evidence has been provided to this effect.

37. Also, no evidence has been provided as to why he did not seek to amend his 2017 claim prior to that hearing, or issue new claim after his lawyer had tried and failed to get an amendment to his 2017 claim. He has provided no good reason why he did not allege in his 2017 claim that he had been referred to the HCPC.

38. I noted also that the consequence of allowing the 2020 case to proceed means that the claimant is contesting the factual conclusion of the 2019 Judgment – he would be asking a new tribunal to conclude that the 2019 Judgment was incorrect in asserting that the respondent had a reasonable belief in the claimant's misconduct. This, I concluded, was an impermissible attempt to reopen a judicial decision which has not been otherwise challenged.

39. I noted also the significant delay when, on his case, he did become aware he may have a claim (October 2019) and issuing the claim in August 2020. I accepted that the claimant's wife was ill, and that this was a difficult and stressful time for him and his family. However, she only became ill at the end of February 2020, and we received no evidence that she was ill for the whole of the period to August 2020. I did not accept that his wife's ill health accounted for the whole of the delay in issuing the claim. I took into account that this delay occurred when he knew already his claim was significantly out of time.

Time

40. There is one new issue within the 2020 claim – the allegation relating to the referral to the HCPC. This referral was shortly after the claimant's dismissal, I concluded that there was no fresh referral by the respondent to HCPC in September 2019 as alleged. I concluded that the claimant was aware that the respondent had not made a fresh referral at this time. The letter from HCPC to the claimant dated 30 August 2019 states that *"this matter has met our Threshold for Fitness to Practice investigations…"* (126), it does not mention that the respondent was involved.

41. I did not accept that the failure of the respondent to seek to withdraw the allegations to HCPC amounted to a continuing act by the respondent. Once they were made, it was for the HCPC to determine how to deal with the allegation. In September 2019 it was the HCPC lifting its own stay, which had followed the claimant sending it the settlement documents. These were not the acts of the respondent.

42. Accordingly, this claim is out of time as it should have been brought as part of the 2017 claim. If there was negligent advice in 2017, there is no explanation why this allegation was not the subject of an application to amend or why an earlier claim could not have been made.

43. I considered whether it was just and equitable to extend time. At the very latest, the claimant was aware there may be a further act of discrimination by the respondent by 1 September 2019, when he received the HCPC documentation. The claim was not issued until August 2020.

44. I took into account that the claim may well have merits on the facts. But I also considered that there was significant delay after 30 September 2019. If a claim is out of time, it must be brought as soon as possible after. But there was no explanation why ACAS was not approached in (say) October 2020, or a claim issued immediately after the ACAS certificate in January 2020 – there was no explanation for the delay between this date and his wife's ill-health.

45. I also took into account the fact that the delay was significant, and that the claim would not be heard until approximately 6 years after the events complained of and witnesses memories would inevitably be . I accordingly concluded that it would not be just and equitable to extend time

Conclusion

46. This claim is struck out because:
    - (i) it amounts to an abuse of process, many of the facts already having been adjudicated in the 2017 claim
    - (ii) the claimant is now raising different legal allegations to explain the same events set out in the 2017 claim, including his dismissal
    - (iii) The claimant has not provided evidence why the 2020 claim allegations were not brought in 2017
    - (iv) The evidence is that the claimant received legal advice in September/October 2019 but still delayed making a claim to tribunal
    - (v) The claimant has not provided evidence or good reason for all of the delays since 2018

(vi) The claimant has not provided an explanation for the delay between October 2019 and the ACAS process; and from the ACAS Certificate to end-February 2020

(vii) The significant delay causes prejudice to the respondent's witnesses and their recollection of events

(viii) It is not just and equitable to extend time,

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Employment Judge Emery
Dated: 4 March 2021

ORDER SENT TO THE PARTIES ON

29/10/2021……

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS