EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Farnan	v	Infor (United Kingdom) Limited

Heard at: London Central **On**: 8 October 2021

Before: Employment Judge A James

Representation

For the Claimant: In person

For the Respondent: Mr C McDevitt, counsel

JUDGMENT

(1) The claims for direct sex discrimination are struck out because they were not submitted to the tribunal in time.
(2) The S.15 Equality Act 2010 claim is struck out because it was not submitted to the tribunal in time.
(3) The S.27 Equality Act 2010 claim that on 9 January 2019 the respondent escalated the disciplinary allegation against the Claimant to one of gross misconduct, including a threat of dismissal for the first time, is struck out because it predates the protected act relied on in the pleaded case.

REASONS

The Issues

1 This preliminary hearing was listed to determine whether:

(a) Any of the claims should be struck out because the Tribunal does not have jurisdiction to consider them;

(b) Any of the claims should be struck out because they have no reasonable prospects of success; or

(c) Any of the claims, or parts thereof, should be made the subject of deposit orders on the grounds that they have little reasonable prospects of success.

The law

Strike out

2 Rule 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:

> *(1) An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds:*
>
> > *(a) that it is scandalous or vexatious or has no reasonable prospect of success (r37(1)(a)); ……*

3 Before making a strike 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 (r.37(2)). An application by a party for such an order should be made in accordance with the provisions of r.30.

4 The striking-out process requires a two-stage test (see *HM Prison Service v Dolby [2003] IRLR 694, EAT*, at para 15; approved and applied in *Hasan v Tesco Stores Ltd UKEAT/0098/16 (22 June 2016, unreported*). 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.

5 The principles applicable to strike out applications are set out in numerous authorities, and recently in for example in, *Malik v Birmingham City Council, UKEAT/0027/19/BA*, 21 May 2019, Choudhury P, paras 29-33; *Cox v Adecco, UKEAT/Appeal No. UKEAT/0339/19/AT*, 9 April 2021, at para 28.

6 The general principle is that a Tribunal will not strike out discrimination claims except in the most obvious and plain case (*Anyanwu v South Bank Student Union [2001] 1 WLR 391*). The same approach applies in whistleblowing cases: see *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126*, at para 29, in which the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases.

7 However, as *Anyanwu* and *Ezsias* themselves make clear, such cases must exist. As Lord Hope set out in *Anyanwu*, at para 24:

> *The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail.*

8 See further for example, the Court of Appeal's judgment in *Ahir v British Airways plc [2017] EWCA Civ 1392* at paras 15-16:

> *Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established…*

9 And, at para 24 of Ahir, per Underhill LJ:

> *… where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so.*

10 See also *Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1,* CA at para 77:

> *… there is no absolute rule against striking out a claim where there are factual issues - see, eg Ahir v British Airways plc [2017] EWCA Civ 1392. Whether it is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed.*

Time limits

11 Section 123 EA 2010 provides that:

> *(1) Subject to [section] … 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.*
>
> *…*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(6) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

12 Section 207B(3) ERA provides:

> *(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

13 These provisions have been considered in a number of cases. These demonstrate that time limits are to be applied strictly in Employment Tribunal proceedings, and the onus is on a claimant to show to the tribunal that hers is a case in which the time limit should, exceptionally, be disapplied (see *Robertson v Bexley Community Centre [2003] IRLR 434*, at para 25:

> *It also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no*

presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.

14 As explained in *Caston v Lincolnshire Police [2010] IRLR 327*, para 26:

Plainly, the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour). Plainly, Schedule 3 of DDA does not give rise to a presumption in favour of extending time. In my judgment, Auld LJ's use of the word 'convince' in paragraph 25 of his judgment adds little.

15 Finally, as set out by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*, 15 January 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 (as Holland J notes) "the length of, and the reasons for, the delay".

Conclusions

Time limits

16 Acas Early Conciliation was commenced on 18 March 2019 and lasted until 2 April 2019 (15 days). It is accepted that the original claim form was submitted on 26 June 2019.

17 The Respondent contends that the sex discrimination allegations set out in paragraphs 7 - 13, 15 – 17, 30 and 34 of the Claim Form do not amount to conduct extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010; and in any event the last act occurred nearly five months before Acas Early Conciliation was commenced on 18 March 2019. Further, the claim form itself was not submitted until 4 September 2020, over five months after Acas Early Conciliation ended.

18 The acts themselves are set out in summary form in paragraph 4 of the draft list of issues. The alleged conduct took place between 13 July and 23 October 2018.

19 The section 15 Equality Act 2010 claim relates to an incident on 13 July 2018 (the same incident as set out at paragraph 4a of the draft list of issues, as an alleged act of sex discrimination).

20 In deciding whether or not to accept jurisdiction, despite the claims not being submitted within the primary time limit of three months, I take note of the fact that the claimant has not provided a witness statement explaining why her claim was not submitted before 26 June 2019. This is despite there being an order in relation to the preparation of witness statements for the preliminary hearing, made by Employment Judge Grewal at the preliminary hearing on 13 August 2021. This was to set "*out why she did not present any of her claims before 26 June 2019 and any other documents on which she wishes to rely at the first preliminary hearing*".

21 As the above authorities made clear, it is incumbent on a claimant to show why an Employment Tribunal should exercise its discretion to extend time. There is however no witness evidence for the tribunal to take into account when considering that.

22 The tribunal accepts respondent's counsel's submission that in considering whether there was a continuing state of affairs, the tribunal should determine whether there was a continuing state of affairs in relation to the same statutory provision. As noted above, the alleged acts of direct sex discrimination are not said to have continued beyond 23 October 2018; and the only disability discrimination claim relates to a single incident on 13 July 2018. There is therefore no continuing state of affairs, in relation to those claims, beyond those dates.

23 The tribunal notes that the claimant accepts that she was taking advice from solicitors from summer 2018, and they were formally on the record as acting for her, in January 2019. Further, the claimant told the tribunal that negotiations were taking place between the claimant, via her solicitors, prior to her dismissal. However, such negotiations respondent do not stop the clock running. The solicitors acting for the claimant would (or certainly should) have known that.

24 Bearing in mind the legal authorities referred to above, the tribunal has not been persuaded that it would be just and equitable to extend the time limit in relation to these legal claims. No compelling reason, backed by evidence, has been put forward by the claimant as to why the tribunal should do so.

25 The tribunal notes that the claimant was on sick leave in November and December 2018 but no evidence has been presented as to how that impacted on her ability to take legal advice at that time, or afterwards, if at all. Any such evidence should have been in a witness statement, with reference to any medical records relied on. Again, no such records have been presented either.

26 The claimant asked the tribunal for more time to present such evidence, but balancing the interests of both parties, and bearing in mind the overriding objective requires that cases be dealt with without undue delay, the tribunal does not consider that to be an appropriate course of action. The claimant has been given sufficient time to comply with directions already. Breaches of those directions have been raised with her by the respondent's solicitors in correspondence; the claimant has been urged to seek/take advice. The requirement for a witness statement was specifically raised in that correspondence.

27 In relation to the section 15 claim, the tribunal was struggling to understand what the 'something arising' is, which is relied on the by the claimant. The claimant was not able to say what it was either. The prospects of that claim succeeding when the claimant cannot articulate how the claim is put claim is a further factor relied on as to why it is not just and equitable to extend the time limit. It is difficult to foresee how that claim could possibly succeed, when the claimant is not able to properly set out all of the legal and factual basis for all of the necessary elements of the claim in the first place.

28 Finally, the tribunal takes note of the fact that the claimant's claims in relation to her dismissal are still able to proceed, despite the above-mentioned claims not being allowed to continue.

Strike out/deposit orders – prospects of success

Sex victimisation claim – draft list of issues - 6.b.i.

29 The protected act relied on by the claimant is a grievance submitted by her on 10 January 2019 alleging sex discrimination. The first detriment relied on however - escalating the disciplinary proceedings on 9 January 2019 to include the threat of dismissal – predates that. The claimant told the tribunal that she had raised issues before with HR on an informal basis. However, her claim, which was prepared by solicitors, has not been put in that way. There is no application to amend the claim. Since the first alleged detriment predates the protected act relied on in the pleadings, that allegation has no reasonable prospect of success and is struck out on that basis.

Whistle-blowing claim – first protected disclosure

30 The first protected disclosures relied on by the claimant is the grievance submitted by her on 10 January 2019 alleging sex discrimination and what was said at the grievance hearing. The respondent requested that the tribunal strike out that part of the claim because of what is said in the minutes of the meeting. These record that when the claimant was asked whether she was alleging that she was been taken to a disciplinary because she is a woman, she is recorded as saying in reply: "*no not really, but my lawyer has said that*". It is argued that this demonstrates that the claimant did not reasonably believe that sex discrimination had occurred.

31 The claimant however disputes what is in the minutes, which have not been agreed. Whilst the minutes have not been formally disputed, that is more of a cross examination point, in the tribunal's judgment. It is not clear evidence that they were agreed. Since there is a clear evidential dispute on the point, the tribunal did not consider it was appropriate to strike out the claim. Further, the tribunal does not consider it possible to say that claim has little reasonable prospects of success. The tribunal considers that in relation to this factual dispute, live evidence needs to be heard before a determination can properly and fairly be made on that issue.

The second protected disclosure

32 The second protected disclosure relied on by the claimant is the alleged breach by the claimant's colleague JT of his contract of employment, as set out at the particulars of claim, paragraphs 6 and 40. These allege a breach of JT's contractual duties to his previous employer. Those paragraphs do not allege a breach of data protection; nor do they allege that it was a criminal act. The claim is not pleaded in that way and again, there is no application to amend. Whilst the tribunal does not want to take an overly technical approach to the way the case has been pleaded, the claimant was represented by solicitors and they did after all draft the particulars of claim.

33 Those particulars would (or should) have been discussed and agreed with the claimant. The respondent argues that the claimant has no reasonable prospect of establishing that she had a reasonable belief that the disclosure was made in the public interest, because any alleged breach by JT of his

contract does not have a sufficient public interest element in it. Whilst I can see the force of that argument, I do not consider that this is a case where the tribunal can be satisfied that there is no reasonable prospect of success. However, the tribunal is satisfied that that the claimant has little reasonable prospect of establishing that this was a protected disclosure.

34 The tribunal asked the claimant about her income and outgoings. The claimant has a new job, earning approximately £6000 per calendar month, but her income exceeds her outgoings. She is in debt and has a number of loans. The claimant's means were taking into account in deciding that a deposit order of £50 was appropriate in this case. That would not prevent the claimant in and of itself from continuing with that element of her claim, if she chooses to do so. But as the separate deposit order will make clear, if the claimant continues with that element of her claim and fails, then the respondent would usually be awarded the additional costs associated with defending that element of the claim (subject again to means, if the tribunal decides to take those into account).

The wages claim

35 Finally, the tribunal was asked to strike out the wages claim/make a deposit order in relation to it. The basis of the wages claim is that the claimant alleges she should have been paid company sick pay when she was on sick leave, but was only paid statutory sick pay.

36 Clause 8.5 of the claimant's contract of employment states:

> *8..5 You shall not be entitled to any Company sick pay where the period of absence commences after you have been notified that you are required to attend a disciplinary investigatory Interview or a disciplinary hearing, after you have been suspended pending a disciplinary Investigation or whilst you are otherwise subject to disciplinary proceedings.*

37 It is the respondent's case that the claimant was notified that disciplinary proceedings were to be taken against her, prior to her commencing a period of sick leave. As a result, the respondent argues that the claimant was not entitled to company sick pay. During the hearing, the claimant informed the tribunal that she had received an earlier email, to those at page 62 of bundle; but that she had not opened them.

38 The tribunal did not feel able to make a decision, without a search being made for those earlier emails, and both the respondent and the claimant being given the opportunity to comment on the content of them; as well as commenting on which emails were read, and when. Case management orders have been made in that regard, and a decision will be made on the papers, following compliance with those orders.

Further preliminary hearing – 5 November 2021

39 A further preliminary hearing had already been listed for 5 November 2020 one, to decide the disability issue. As the claimant's sole disability discrimination claim has now been struck out, it is not necessary for that issue to be decided. Instead, that preliminary hearing will proceed, to consider any further applications for unless orders or strike out due to any continuing failure by the claimant to comply with directions; to set a date for the final hearing; to identify the issues; and to make further appropriate directions. The tribunal

stressed to the claimant that whilst some latitude may be shown to litigants in person, they were nevertheless expected to comply with Employment Tribunal orders. The order relating to the preparation of a schedule of loss should be complied with by the date of the next hearing, failing which the respondent is likely to proceed with its application for unless orders/strike out.

40 Written reasons were requested by the claimant at the conclusion of the hearing, hence this judgment with written reasons.

Employment Judge A James
London Central Region

Dated 1 November 2021

Sent to the parties on:

01/11/2021.

For the Tribunals Office