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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4110308/2021

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Open Preliminary Hearing held in Glasgow on 29 November 2021

Employment Judge: R Sorrell

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Ms A Khan

**Claimant
In Person**

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Brook Street (UK) Ltd

**Respondent
Represented by:
Ms S Fallone
Counsel**

25

OPEN PRELIMINARY HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that:-

- (i) The respondent's application for strike out of the claim is dismissed.
- (ii) The respondent's application for a deposit order is dismissed.
- (iii) It is just and equitable to extend the time limit in which to lodge the claim and therefore the Tribunal has jurisdiction to hear the claim.

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REASONS

E.T. Z4 (WR)

Introduction

1 The claimant lodged a claim for race discrimination on 1 July 2021.

2 A case management preliminary hearing was held on 16 September 2021 by
way of telephone conference call. At the hearing, Employment Judge Strain
5 ordered that the case be set down for an Open Preliminary Hearing to
determine the preliminary issue of time bar and just and equitable extension
of time in relation to the claim.

3 Following an application made by the respondent for strike out of the claim
and a deposit order on 9 November 2021, the Tribunal directed that this
10 application also be heard at this hearing.

4 As the claimant was a party litigant, I explained the purpose and procedure
for the hearing and that I was required to adhere to the Overriding Objective
of dealing with cases justly and fairly and to ensure that parties were on an
equal footing.

15 5 I further explained to parties that as it was likely I would be reserving my
decision, I would firstly hear the applications for a strike out of the claim and
a deposit order. This would be by way of submissions and evidence taken
from the claimant as to her ability to pay any deposit order. I would then hear
evidence from the claimant in respect to the time bar issue and the reasons
20 she lodged her claim at the time she did.

6 Ms Fallone, for the respondent advised that Mr Shailesh Luximon of the
respondent company was in attendance at the Tribunal in the event he was
called to give evidence.

7 Parties lodged a joint bundle of productions and the claimant lodged a further
25 document at the outset of the hearing. The importance of referring to the
relevant documents was explained to the claimant.

1) Respondent's Application for Strike Out of the claim and a Deposit Order

11. Ms Fallone submitted on behalf of the respondent that the claim should be struck out on the grounds that it has no reasonable prospects of success in accordance with Rule 37 (1) (a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. Whilst this is a high bar, it is submitted
5 that this is met as the claim does not make out sufficient facts to support a contention of discrimination on the grounds of ethnicity. The alleged bare facts of difference between the claimant and the person she wishes to use as a comparator only indicates the possibility of discrimination. Without more than simply stating a difference in treatment, there would not be sufficient material
10 for a tribunal to conclude on a balance of probabilities that the respondent has committed an unlawful discriminatory act.
12. The claim lacks specification and the respondent contends that it has not had fair notice in order to submit a properly formed defence. The claimant has not set out the evidence upon which she founds her contention that someone else
15 not of her ethnicity has received different treatment. The claimant has stated that the comparator is the brother of her job coach, but she has not set out her own ethnicity or the ethnicity of the assumed comparator. Without there being a hint of something more, a claim on the basis of discrimination can be struck out; ***Madarassy v Nomura International plc [2007] EWCA Civ 33.***
- 20 13. The facts of this case are mostly agreed. The respondent does not dispute that the copy of the birth certificate the claimant supplied to the respondent was erroneously rejected. The primary fact in dispute is that the respondent's rejection of the claimant's birth certificate was in any way a result of discrimination. The claimant has not provided any evidence to support a
25 contention of any discrimination. Proof is required of any link between the birth certificate and alleged discrimination on the grounds of ethnicity. It cannot be assumed on the basis of the claimant's sense of injustice. There must be some fact(s) the claimant can hang her hat on which would give rise to a reasonable inference that there is a link between the act complained of and
30 her ethnicity. Without reference to concrete evidence it would not be possible for liability to be established and the tribunal would be justified in striking out the claim; ***Ahir v British Airways plc 2017 EWCA Civ 1392, CA.*** Some of

the criticism of the claim may be fixed by further and better particulars, but as it stands it has no reasonable prospects of success and the respondent should not have to meet the costs of defending a claim with no such prospects.

- 5 14. If the Tribunal does not accept that the claim should be struck out, a deposit order is sought under Rule 39 1 (a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 on the grounds that the claim has little reasonable prospects of success. The Tribunal has greater leeway when considering a deposit order than with a strike out application; ***Jansen Van***
10 ***Rensberg v Royal Borough of Kingston-Upon-Thames and ors EAT***
0096/07. A deposit order of £1000.00 is sought as the respondent has already spent considerable time dealing with this claim and will have to put more time into it if it proceeds. The respondent has no information regarding the claimant's ability to pay a deposit order so cannot comment on that.

15 **Claimant's submissions in reply**

15. The claimant submitted that the Tribunal is reluctant to strike out a claim when there is a dispute on the facts which there is here. The respondent states that this is down to a mistake made by a junior employee, whereas she is contending that it is down to poor working practices which has led to
20 discriminatory treatment and that the respondent is not as careful as it should be. The respondent states the particulars are not well defined which is confusing as the case has been accepted by the Tribunal. The respondent contends that she has not explained her ethnicity or the comparators, but those are issues to be covered by the Tribunal. She does not know about the
25 cases the respondent has quoted, but this is about a real difference in treatment as compared to a white person and she believes her case does have reasonable prospects of success. Her struggles to find work are reflected in broader society and this is well documented.

16. In respect of the application for a deposit order, this would prevent her from
30 seeking justice and should not be imposed. She believes the respondent is

taking advantage of her being unrepresented and trying to frighten her out of this case.

Findings in Fact

The following facts are found to be proven or admitted;

- 5 17. The claimant's date of birth is 9 December 1969.
18. The claimant works 22.5 hours per week between the hours of 10pm-6am as an Operations Assistant for Marks and Spencer. She is paid £11.50 per hour. This employment is temporary and ends on 17 December 2021.
19. The claimant is also in receipt of universal credit which varies according to
10 her income. The most she receives is £1,069.00 per month if she is not working at all.
20. She has four children, three of whom still live at home. She receives child benefit but does not receive any child maintenance from their father.
21. She is making efforts to secure employment once her temporary employment
15 ends. She had an interview last week and has another one on 10 December 2021.
22. She has savings of £230.00.

Relevant Law

23. Rule 37 (1) (a) of the Employment Tribunal (Constitution & Rules of
20 Procedure) Regulations 2013 provides that a Tribunal may strike out all or part of a claim or response if it is scandalous, or vexatious or has no reasonable prospect of success.
24. In ***Balls v Downham Market High School & College UKEAT/0343/10/DM***
Lady Smith considered that no reasonable prospect of success is a high test.
25 The tribunal must first consider whether on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success.

25. In ***Anyanwu and anor v South Bank Student Union and anor*** 2001 ICR 391, HL, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination in order to make a proper determination.
26. ***Kwele-Siakam v Co-Operative Group Ltd*** EAT 0039/17 provides further support for the proposition that tribunals should avoid striking out discrimination claims where the facts of the case, including the reasons for the acts complained of, are in dispute, which would require a tribunal to make findings in fact after a full hearing.
27. In ***Silape v Cambridge University Hospitals NHS Foundation Trust*** EAT 0285/16 the EAT emphasised that before determining whether a discrimination claim has no reasonable prospect of success, it is necessary to take the claim at its highest. This means examining the pleaded facts and for the purposes of the strike out consideration, assuming that the claimant's version of any key disputed facts is correct, unless there is a compelling reason not to. Following this approach, it was held there were sufficient facts in the claimant's pleaded case for the protected characteristic and appropriate comparator to be established.
28. The authority of ***Cox v Adecco and ors*** 2021 ICR 1307, EAT provided guidance in relation to strike out applications against litigants in person and held that if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.
29. In determining whether to strike out a claim (or part of) on any grounds, a tribunal must also give consideration to whether a fair trial is still possible.
30. Rule 39 (1) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states that where at a preliminary hearing 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

to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Rule 39 (2) provides that 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.

5 31. The authority of ***Jansen Van Rensberg v Royal Borough of Kingston-Upon-Thames and ors EAT 0096/07*** held that the test for little reasonable prospect of success for a deposit order is plainly not as rigorous as the test that the claim has no reasonable prospect of success and while a tribunal has greater leeway when considering whether to make a deposit order, it must
10 have a proper basis for doubting the likelihood of the claimant being able to establish the facts essential to the claim.

32. In ***Sharma v New College Nottingham EAT 0287/11*** the EAT quashed the deposit order due to there being underlying factual disputes and that the claimant was asserting behind the documentation there had been behaviour
15 towards him that constituted acts, which in the absence of an acceptable explanation, the tribunal could conclude were on the ground of his race. In reaching this view, the EAT referred to ***Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*** where it was held that discrimination issues should as a general rule be decided only after hearing
20 the evidence and that it would be illogical to require an employment judge to take different approaches depending on whether he or she was considering striking out or making an order for a deposit as either order was a serious and potentially fatal course of action.

Issues to be Determined

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33. Does the claim have no reasonable prospects of success?
34. If not, should the claim be struck out under Rule 37 (1) (a) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013?
35. Does the claim claim have little reasonable prospects of success?

36. If so, should a deposit order be issued under Rule 39 (1) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013?
37. If so, what should be the amount of the deposit order?

Conclusion

- 5 38. Having considered parties' submissions, the productions lodged and the relevant material held on the tribunal file, I have taken the view that the respondent's application to strike out the claim on the grounds there is no reasonable prospect of success should be dismissed.
- 10 39. This is because I found that whilst most of the facts in this case are not in dispute, the central fact as to the reasons for the act complained of; namely the respondent's rejection of the claimant's birth certificate she supplied to them, is in dispute, which I considered would require a tribunal to make findings in fact after a full hearing.
- 15 40. In reaching this view, I have taken account of the claimant being a litigant in person, as considered in **Cox v Adecco and ors 2021 ICR 1307, EAT** and the fact-sensitive nature of a race discrimination claim, as discussed in the leading authority of **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL** and **Kwele-Siakam v Co-Operative Group Ltd EAT 0039/17**.
- 20 41. I have also noted the respondent accepted that some of the concerns raised about the lack of specification in the pleadings may be resolved by way of further case management.
- 25 42. Accordingly, I did not consider that the high test identified by Lady Smith in **Balls v Downham Market High School & College UKEAT/0343/10/DM** has been met and am satisfied that in these circumstances, a fair trial is still possible.
43. For these reasons the respondent's application for strike out of the claim is dismissed.

44. For the same reasons, I have taken the view that the respondent's application for a deposit order on the ground there is little reasonable prospect of success should be dismissed. In doing so, I have had particular regard to the EAT's decision in the case of *Sharma v New College Nottingham EAT 0287/11* to
5 quash a deposit order due to there being underlying factual disputes, as well as the leading authority of *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*, which held that the same approach should be taken in respect to the consideration of a deposit order application as a strike out application as either order was a serious and potentially fatal course of
10 action.

45. As I have dismissed the deposit order application, I have not considered the claimant's ability to pay such an order.

46. For these reasons the respondent's application for a deposit order is dismissed.

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2) Is it Just and Equitable to extend time in which to lodge the claim?

Findings in Fact

The following facts are found to be proven or admitted;

47. It was not in dispute that the claimant lodged her claim out-with the 3 month's
20 statutory time limit.

48. Following information given to the claimant by her work coach at DWP, the claimant applied for a temporary Customer Service Assistant role with HMRC through the respondent agency on 2 November 2020.

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49. On 5 November 2020, Ms Lucie Ospalkova of the respondent agency asked the claimant to scan and email documents to her for compliance purposes in order to move her onto the next stage of the recruitment process. This included the claimant's birth certificate.

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50. On 11 November 2020 the claimant had a WhatsApp call with Ms Ospalkova at which she asked to see the same documents.

5 51. On 16 November 2020 Ms Ospalkova emailed the claimant to advise that her birth certificate could not be accepted as it needed to be the original one which would have been issued after her birth. (D64) As a result, the claimant was not considered further for this role.

10 52. The claimant was disappointed and thought it could be due to HMRC having stricter compliance requirements.

15 53. On 26 May 2021 the claimant was told by her new work coach, Susan, that both she and her brother had secured employment through the respondent company and that her brother had submitted the same certified birth certificate as the claimant for compliance purposes which had been accepted by the respondent.

20 54. The claimant was very surprised by this and wanted to have a better understanding of what had happened in relation to the rejection of her birth certificate and why.

25 55. On 27 May 2021 she spoke to the Equality and Advisory Support Service who said they could support her to resolve the matter informally with the respondent and directed her to their templates.

30 56. On 4 June 2021 the claimant wrote a formal letter of complaint to the respondent alleging direct discrimination because of her ethnicity, in that she had been treated less favourably than the brother of her work coach, who is white, as her birth certificate and therefore job application had been rejected. The claimant requested that her complaint be investigated with a view to explaining and resolving the issue. (D83-4)

35 57. On 11 June 2021 Mr Shailesh Luximon, HR Business Partner of the respondent company responded to the complaint. (D85-6)

58. The claimant was dissatisfied and upset with Mr Luximon's response. There was further exchange of correspondence between them. (D85-94)

59. The claimant did not know who else she could complain to as she was not an employee of the respondent and felt like she was in a grey area.

60. On 15 June 2021 the claimant contacted ACAS to seek advice. Mr James Boffey, an ACAS conciliator emailed her on 17 June 2021 and said she should wait for a phone call from him to discuss her concerns.

61. Mr Boffey called the claimant on 1 July 2021. He advised her of her options including bringing an employment tribunal claim for race discrimination and of the time limits in which to do so.

62. After this conversation and on the same date, the claimant obtained the ACAS early conciliation certificate and lodged an employment tribunal claim.

Respondent's Submissions

63. The respondent submitted that the burden of proof of it being just and equitable to extend time lies with the claimant and the tribunal has a broad discretion in deciding that. There is not a prescribed list of factors, but case law suggests relevant factors are the prejudice that each party would suffer as a consequence of that decision. The delay in raising the discrimination claim has inhibited the respondent's ability to fully investigate the situation. Ms Ospalkova has left the respondent employment and so it is not practicable to make any inquiries about that.

64. The respondent has been prejudiced regarding the amount of time spent in defending and preparing against a hopeless claim. The length and reason for the delay in lodging a claim is a factor that can be taken into account. The action the claimant is aggrieved about occurred on 16 November 2020, but she didn't raise the claim until 1 July 2021 so it is substantially out of time. The respondent does not accept that the claimant has a good reason for the delay. Her only explanation is that she did not know the respondent had

accepted similar documents to the one she submitted until 26 May 2021. This is not credible and she has not supplied any evidence of that. The claimant accepts that she thought it unreasonable to request an original birth certificate at the time but she chose not to query that. The claimant's explanation seems inherently implausible and the respondent contends it should be rejected. There is also the issue of promptness with which the claimant acted once the cause of action became known. The claimant's position is that this became known on 26 May 2021, but she then does not seek to raise a claim until 11 June 2021 which is nearly two weeks later. The claimant is an educated woman who could reasonably be expected to seek legal advice. The claimant should therefore have been more proactive once she became aware of the information that highlighted the difference in treatment.

Claimant's submissions

65. The claimant submitted that throughout this situation, Mr Luximon's letters have blamed Ms Ospalkova for the mistakes made. However, her information was sent to other agents who she also spoke to and neither they or her work coaches flagged up that her birth certificate should have been accepted. Mr Luximon's letters really upset her and pushed her into taking this action because he did not investigate anything. He was far removed from the application process and even though she sent letters and emails to him, he did not refer to them. It was his response that pushed her to seek a declaration of her rights.

66. Section 123 (1) of the Equality Act 2010 law allows for the extension of time when it is just and equitable. ***Hutchinson v Westward Television Ltd [1977] IRLR 69*** held that the tribunal has a wide discretion as to what it can do in such circumstances and the tribunal is entitled to take into account anything it thinks is relevant. The case of ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640*** held that the two questions to consider are why has the primary time limit not been met and the reason for the delay after the expiry of the time limit. ***British Coal***

Corporation v Keeble and ors 1997 IRLR 336 set out factors a tribunal may consider in these circumstances.

5 67. The knowledge she gained from her work coach, Susan, was fundamental in her thinking that she had a complaint to make. She did not contact ACAS on 11 June 2021 as stated by the respondent. She spoke to ACAS on 15 June 2021 but was not able to speak to Mr Boffey until 1 July 2021. She would have submitted her claim earlier if she had been able to discuss it sooner with ACAS.

10 **Relevant Law**

68. Section 123(1) of the Equality Act 2010 provides that proceedings on a complaint within section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

15 69. In exercising their discretion to allow out of time claims to proceed, tribunals may have regard to the checklist contained in section 33 of the Limitation Act 1980, as modified by the EAT in *British Coal Corporation v Keeble and ors 1997 IRLR 336*. This includes the consideration of the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case. In particular, the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with requests for information, the promptness with which the claimant acted once
20 he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
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Issue to be Determined by the Tribunal

70. The Tribunal identified the following issue required to be determined:-

- (i) Is it just and equitable in all the circumstances to extend the time in which to lodge the claim?

Conclusion

5 71. Having carefully considered all the evidence in the round, I am satisfied that it is just and equitable in all the circumstances to extend the time in which to lodge the claim. In reaching this view I have taken account of a range of factors.

10 72. I found the claimant's account of events in respect to the length of and reason for the delay in lodging her claim to be credible and reliable. In doing so, I noted the level of detail given in her oral evidence and its consistency with the documentary evidence lodged.

15 73. Although the claimant was disappointed when her birth certificate was rejected and her application could not be taken further, she was not aware there could have been a difference in the treatment of her birth certificate as compared to other applicants until the conversation with her work coach, Susan on 26 May 2021. Given that the alleged discriminatory act occurred on 16 November 2020, the statutory time limit in which to lodge a claim expired on 15 February 2021, which was more than 3 months before this information came to light. I did not therefore consider the delay between receiving this information on 26 May 2021 and the claimant lodging her claim on 1 July 2021 to be significant.

20 74. After speaking to her work coach on 26 May 2021, I found that the claimant acted promptly in her desire to obtain a clearer understanding of the reasons for the rejection of her birth certificate and that she had a genuine desire to resolve the issue informally, which is corroborated by her letter of 4 June 2021 to the respondent. (D83-4)

25 75. Following a conversation with the Equality and Advisory Support Service on 27 May 2021, the claimant wrote to the respondent on 4 June 2021. As a

result of her dissatisfaction with the response she subsequently received from Mr Luximon, together with her uncertainty about her position as a non-employee of the respondent, she contacted ACAS on 15 June 2021 who advised that an ACAS conciliator would be in touch. However, Mr Boffey, the
5 ACAS conciliator did not contact her until 1 July 2021, at which point she was advised of her options that included bringing an employment tribunal claim for race discrimination.

76. Having been advised of her options, the claimant acted immediately by obtaining an ACAS early conciliation certificate and lodging her tribunal claim
10 on the same date.

77. I considered that the extent to which the cogency of the evidence is likely to be affected by the delay in bringing the claim was minimal. This is because the claimant's letter to the respondent on 4 June 2021 had in effect put the respondent on notice of her complaint and provided them with an opportunity
15 to investigate it and gather evidence at that stage.

78. Whilst I have noted that Ms Ospalkova had already left her employment with the respondent by then and could not be asked about the claimant's application, according to Mr Luximon's response to the claimant on 11 June
20 2021, she had left her employment in January 2021. (D85) This meant the delay in the claimant bringing a claim could not have affected this evidence anyway and that the cogency of the evidence may well have been the same if the claimant had lodged a claim before the expiry of the time limit.

25 79. In view of the responses from Mr Luximon to the claimant's correspondence, I considered that the respondent has cooperated with the claimant's requests for information. (D85-94)

30 80. In terms of the prejudice that either party would suffer as a result of the decision reached, I found that the claimant would not suffer any prejudice if her claim was allowed to proceed, but would suffer considerable prejudice if it were not allowed to proceed as she would be prevented from seeking legal

redress. In respect of the respondent, I found they would not suffer any prejudice if the claim were not allowed to proceed and would suffer little prejudice if the claim were allowed to proceed. This is because of my findings that as the respondent had been put on notice of the claimant's complaint on 4 June 2021, there was minimal effect on the cogency of the evidence as a result of the delay in the claim being lodged.

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81. Having applied ***British Coal Corporation v Keeble and ors 1997 IRLR 336*** and weighed all the relevant factors in the round, I am satisfied that it is just and equitable to extend the time in which to lodge the claim in all the circumstances of the case.

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82. For these reasons the Tribunal has jurisdiction to hear the claim.

83. **A case management preliminary hearing shall proceed to be fixed in order to discuss further procedure.**

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Employment Judge: Rosie Sorrell
Date of Judgment: 12 January 2022
Entered in register: 13 January 2022
and copied to parties

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