



EMPLOYMENT TRIBUNALS

Claimant: Ms A Yates
First Respondent (R1): Caritas Recruitment Limited
Second Respondent (R2): Lambeth Borough Council

RECORD OF A PRELIMINARY HEARING

Heard at: London South via CVP and telephone **On:** 5 November 2021
Before: Employment Judge Beckett

Appearances:

For the claimant: in person
For the first respondent: Mr J Keeble, solicitor
For the second respondent: Mr B Jones, counsel

JUDGMENT AND REASONS

1. For the reasons set out below, the tribunal does not extend the time limit to enable the Claimant to amend her Claim to add a claim of victimisation.
2. The part of the discrimination claim relating to the Facebook is struck out on the basis that there is no reasonable prospect of it succeeding.

The hearing

3. The hearing was conducted remotely, which was agreed upon by all parties. The format was a hybrid hearing, with the Claimant over the telephone via CVP and the other parties over a video link via CVP. The Claimant was not able to join via video, although the case was put back for her to receive further instructions on how to join the video hearing.
4. The parties offered to turn cameras off, in case the Claimant considered that they would not be on an equal footing. However, the Claimant confirmed that she did not object to the other parties keeping the video format.

5. As the Claimant was content for the hearing to proceed in this way, and having given consideration to the overriding objective of ensuring that the case was dealt with fairly and justly, in particular seeking flexibility in the proceedings and avoiding delay, the tribunal used this hybrid hearing.
6. There had been a case management hearing on 27 May 2021 in front of Employment Judge Kelly. The order following that hearing set out the purposes of this further case management hearing, namely for the Claimant to amend her claim to add a claim for victimisation, for the Respondents to make an application to strike out/ for a deposit order relating to the discrimination claim against R1 and the discrimination claim in relation to the postings on Facebook, and to make further case management orders.
7. At the hearing on 27 May 2021 the Claimant was ordered to provide the Respondents with a list of any further named comparators she wished to rely on in relation to the claim relating to the Facebook posts, and full details of the unpaid expenses claimed. She was also ordered to provide a Schedule of Loss to the Respondents (at paragraphs 5 and 6 of the Case Management Order made by EJ Kelly).
8. The Claimant told the Tribunal that she had obtained some advice to prepare for the hearing, and she might instruct someone "later on". She added that as a woman of faith and God she believed that she did not need legal representation.
9. The Claimant made an application to amend her claim to add a claim of victimisation.
10. The Second Respondent made an application to strike out part of the Claimant's direct discrimination claim.

Application to amend Claim to add Victimisation

11. The Claimant confirmed that she wished to add an application to amend her claim by way of victimisation by a failure to pay her travel expenses. This application had been made at the hearing on 27 May 2021. However, R2 was not able to deal with the application at that time.
12. EJ Kelly advised parties that the decision as to whether or not to allow the Claimant to amend her claim would be based on the principles set out in the case of *Selkent Bus Company v Moore*, and she advised parties that an explanation of the case is widely available on the internet (paragraph 3 of the CMO).
13. In respect of the expenses, the Claimant confirmed that she was seeking £55.80, which were the bus fares for her daily commute to and from work. She stated that it was part of her contract that expenses were covered.

14. R1 set out the contractual chain, with Lambeth BC instructing Matrix to manage the supply of temporary staff. Matrix used a panel which included R1. There was no contract between the Claimant and R1.
15. The Claimant stated that she did not have the agreement, but had had a conversation about expenses and had worked for the agency for years and had always had her travel expenses paid.
16. The Claimant explained that the non payment amounted to victimisation as she had complained about the issue to R2, and no one would support her or assist her. She said that no one tried to address who owed the money.
17. The Claimant stated that she had not added the victimisation claim in her ET/1 claim form as she thought that the issues would all be dealt with and linked together.
18. R1 told the Tribunal that the understanding had been that the claim was made against R2 not R1, as seen in part at page 35 of the bundle. Insofar as that position changed during today's hearing, R1 objected to the application to amend the claim as it could have been ventilated in the claim form, but that the claim was now significantly out of time.
19. R2 submitted that the Claimant was clear in her points that the R2 could not have made any detriment against her as the previous dealings were with R1, the conversation with Charlie and the emails also related to R1.
20. The initial claim, the ET/1, was received on 27 February 2020. The Claimant indicated that she was claiming that she was discriminated against on the grounds of religion or belief and race, and that she was owed arrears of pay.
21. Within the details of claim, the Claimant stated that she had been discriminated against as a black woman and as a Christian. She gave some examples, including her refusal to wear her identity card "with the rainbow colours", and cited the Facebook post.
22. She also stated, "Lambeth is yet to pay my millage for travelling, I contacted Caritas who email me and said Lambeth has refused. Caritas has colluded with Lambeth as they promise to take actions as I have provided photographic evidence".

The relevant law

Application to amend Claim

23. The Claimant seeks to amend her Claim to add a claim of victimisation. The ET/1 was received by the Tribunal on 27 February 2020.
24. The application was discussed at the hearing in May 2021, and has been orally made today.
25. The principles to be considered when dealing with an application to amend were set out in the case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836. Whilst

this is not a prescriptive list, and there are other factors that might be relevant, there are certain circumstances which should be taken into account to ensure a balance between the injustice and hardship of allowing the amendment against the injustice and hardship of reusing it.

26. First of all, the nature of the amendment is an important issue to consider. Some amendments might simply amount to a correction of a clerical or typing errors, whilst others might be an application to add factual details to an existing allegations. The making of entirely new factual allegations which change the basis of the exiting claim is the most serious amendment.
27. The applicability of time limits must be considered. The Tribunal must consider whether a new complaint or cause of action is out of time, and if so, whether the time limit should be extended under the applicable statutory provisions.
28. Finally, the timing and manner of the application is important. The Tribunal should consider why the application was not made earlier and why it is now being made.

Findings of fact

The nature of the amendment

29. In essence the proposed amendment raises a brand new cause of action, namely victimisation.
30. The facts arise out of the same facts as the original claim in part. However, the Claimant now states that her expenses were not paid to her as part of the discriminating behaviour of her previous employers.

Time limits

31. This complaint is out of time. The issue to be decided is whether the time limit should be extended.
32. The claim may be considered out of time provided that it has been presented within 'such other period as the employment tribunal thinks just and equitable' (section 123(1)(b) Equality Act).
33. The conduct complained of, namely the non payment of expenses, took place during her employment which was between 29 July 2019 and 8 November 2019.
34. The onus is on the Claimant to convince the tribunal that it is just and equitable to extend the time limit.
35. The Court of Appeal in *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, CA, made it clear that when employment tribunals consider exercising the discretion under s123(1)(b), "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 the discretion is the exception rather than the rule”.

The timing and manner of the application

36. The delay in this case has been some 15 months. The reason for the delay was not clear. The Claimant was asked directly to deal with this aspect and was unable to state why she had not stated that her expenses were not paid due to victimisation. She originally just stated that the monies were owed to her as they had always previously been paid.

37. I have to consider the balance of hardship and injustice. The time limit provisions are in place for good reason. They protect respondents from being faced with stale claims.

38. I bear in mind that the Claimant is a litigant in person.

Conclusions

39. It is clear from her initial claim, that the Claimant was separating the claims of discrimination and those relating to expenses. She added the final paragraph in respect of expenses, essentially stating that they were due to be paid to her, but each Respondent disputed they owed any travel expenses. She did not set out any causal link between the non-payment of expenses and the issues relied upon in her discrimination claims.

40. I find that the Respondent would be prejudiced by the granting of the application. The initial claim in respect of expenses was being defended by each Respondent (as it was initially unclear against whom the claim was made) on the basis that there was no contractual term that allowed for such claims, and therefore the Claimant simply was not entitled to expenses. The only evidence that each Respondent would need to retain and provide would be any contracts or other written terms of agreement.

41. The claim of victimisation goes much further than this and would require significantly more evidence to be sought. Further, potential witnesses would now be asked to recall events from some 2 years ago.

42. I find that the Claimant could have added the claim for victimisation, even if it was not pleaded in precise terms, in respect of the expenses at the time of making her claim. She did not link the claim for unpaid expenses to any facts relating to discrimination; it was an entirely separate claim.

43. Having regard to all the circumstances above, I do not allow the Claimant to amend her claim.

44. The claim should and could have been made in time, and it is not just or equitable to extend the time limit.

Direct discrimination claim: R2's application for strike out or deposit order

45. R2 stated that the single alleged detriment relates to the alleged post on Facebook, said to have been made by a manager employed by R2.
46. R2 submitted that there were two discrete bases to respond to the allegation, and submitted that each was fatal by itself.
47. The first argument made on behalf of R2 was that there was no reasonable prospect of the claim being successful, as there was no vicarious liability. The second argument was that the claim did not make any sense as direct discrimination.
48. In support of R2's first argument, Mr Jones reminded the Tribunal that the only basis upon which the Tribunal could consider section 109 Equality Act is that the act relied upon was done in the course of the individual's employment. The submission made was that if Mr Jennings had not made the post on Facebook in the course of his employment then R2 was not liable.
49. R2 submitted that Mr Jennings' Facebook account was personal. There was no suggestion made by the Claimant that his job involved social media, or that his employer was identified in any way on his account. The post was made in his private capacity, and not in the course of his employment. Therefore, the post could not form part of an arguable claim against R2.
50. R2 set out the second limb of his argument, namely that the claim did not make sense as a claim of direct discrimination under section 13 Equality Act. The post was made on Facebook and was not directed at the Claimant. The audience for the post was not purely Christian, it was open to all people of Christian and non Christian faith.
51. The Claimant responded by saying that she said that offensive that it was essentially being submitted that a person could be racist in the background but not at work. She stated that the Race Equality Act and code of ethics should prevent someone in the position of Mr Jennings, who worked as the head of service in adult social services and as such worked with vulnerable people, from making posts on social media that could affect his work.
52. She said that his Facebook account is open and she searched for his account after someone said there was evidence there. She said the post that she saw amounts to evidence that he is discriminating against her and others.
53. The Claimant described the post she saw as a picture depicting Jesus being nailed to the Cross with an offensive comment relating to a manicure. She said that she took her faith very personally. She also added that the Borough had a policy for all staff to use all forms of communication responsibly and appropriately, including social media.

The relevant law

54. The Claim of direct discrimination because of religion or belief is made against both Respondents. The only aspect of the Claim which is subject to the strike out application is the claim relating to the Facebook post.
55. Section 13 of the Equality Act provides as follows:
- S13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
56. The relevant protected characteristic in this case is religion or belief, namely the Claimant's Christian religion.
57. The rules on the burden of proof in discrimination cases say that it is for the claimant to establish facts from which the Tribunal could conclude that discrimination has occurred. If the claimant does so, then the burden will pass to the Respondent to provide an adequate non-discriminatory explanation for what happened.
58. The case law makes it clear that the Claimant has to do more than show that he or she was treated unfavourably and that he or she is from a particular race or religion. Instead, the claimant must provide some evidence to establish facts pointing to less favourable treatment because of that race or religion.
59. The claim is made against Lambeth Borough Council, who employed Mr Jennings at the relevant time.
60. For the second Respondent to be liable for its employee's actions, the employee must have been acting in the course of his or her employment (s109 Equality Act 2010). If the action had been taken in the course of Mr Jennings' employment then the employer, R2, could be vicariously liable for his action.

Application to strike out

61. An employment tribunal can exercise its power to strike out a claim or response, in whole or in part, at any stage of the proceedings. This can be done of its own initiative or on the application of a party (rule 37(1) of the Tribunal Rules).
62. Rule 37(2) provides that a claim or response cannot be struck out unless the party in question has been given a reasonable opportunity to make representations. The application to strike out was discussed at the previous case management hearing.
63. The Claimant made her representations during the hearing as set out above. She also responded to the submissions made by R2 during the course of the argument.

64. The power to strike out part of a claim, as relates to this case, must be exercised in accordance with reason, relevance, principle and justice (*Williams v Real Care Agency Ltd* 2021 ICR D27, EAT).
65. The application is made under rule 37(1)(a), on the basis that it has no reasonable prospect of success.
66. It is acknowledged that strike-out orders are rare at preliminary hearings, and are usually more appropriately considered once the statements and supporting evidence have been provided and considered. It is further acknowledged that striking out part of a claim or response is a draconian measure. If part of a claim is struck out, the Claimant can no longer pursue it.

Findings of fact

67. It is not suggested by either Respondent that any aspect of the claim is scandalous or vexatious, which would also allow a tribunal to consider striking out a claim under rule 37(1)(a). Indeed, it was clear from the hearing that the Claimant believes her claims to be well-founded and based on evidence.
68. The tribunal has also considered authorities relating to the striking out of claims brought by a litigant in person, as this Claimant is. However, this is not an issue of how the case is pleaded, or how the Claimant has explained her case. This issue relates wholly to the application of the relevant law.
69. Section 109(1) and (3) of the Equality Act provide that anything done by an employee 'in the course of employment' is to be treated as being done by the employer, irrespective of whether that thing was done with the employer's knowledge and approval. The term 'in the course of employment' is to be given a broad interpretation.
70. It is accepted by the Claimant that Mr Jennings did not cite his employment or employer in his Facebook profile or in the post itself. The post complained of was posted on his personal Facebook account. The Claimant was told about the post and therefore searched to find it.
71. Those key facts were established at the hearing.

Conclusions

72. It cannot be said that Mr Jennings was in any way acting in the course of his employment when he posted the relevant image onto his personal Facebook page. Whilst the Claimant might well have been offended by the post, for a claim to succeed within the Employment Tribunal, the employer would have to be vicariously liable, which they are not in this case.
73. The Respondent cannot be said to be in any way vicariously liable for Mr Jennings' post.
74. In light of these findings, I do not need to consider the second argument put forward on behalf of R2.

75. In the particular circumstances of this case, it is proper to consider the application now.
76. The service of witness statements and evidence would have no impact on this aspect of the claim, as it is acknowledged by the Claimant that the post in question did not refer to the employer, and I have found above that the post was not made in the course of Mr Jennings' employment. A full hearing would not change the position.
77. The relevant facts in support of this part of the claim are agreed by both parties. I have considered, and distinguished, the case of *Cox v Adecco and others* 2021 ICR 1307, EAT. The facts on this narrow issue have been identified and agreed.
78. The key facts having been agreed, the sole issue for consideration by the tribunal are whether the post was made in the course of Mr Jennings' employment. As I have found above that the post was in no way connected to his employment, the claim could not succeed in the employment tribunal.
79. I am entirely satisfied that there is no reasonable prospect of success in respect of this discrete part of the claim.
80. The part of the claim relating to Facebook, which involves R2, is therefore struck out.

Further information

81. All judgments and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.
82. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here:
<https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>
83. The Employment Tribunals Rules of Procedure are here:
<https://www.gov.uk/government/publications/employment-tribunal-procedure-rules>
84. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here:
<https://www.gov.uk/appeal-employment-appeal-tribunal>

.....
Employment Judge Beckett
London South
Dated: 7 January 2022

Date sent to the parties
21 February 2022

For the Tribunal Office