



EMPLOYMENT TRIBUNALS

Claimant: Hla Kalaya

Respondents (in all claims):

- (1) Ekk Vision Ltd t/a Boots Opticians
- (2) Boots Opticians Professional Services Ltd

Heard at: London South **On:** 9 May 2022

Before: Employment Judge Rahman

Appearances

For the claimant: Ms Kalaya, attending with a friend Krysia Carr

For the respondents:

- (1) Mr Clement, counsel for Ekk Vision Limited
- (2) Mr Graham, solicitor, for Boots Opticians Professional Services

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The complaints of unfair dismissal and discrimination on the grounds of race, disability, sex and religion or belief against Boots Opticians Professionals Services Ltd are struck out
2. The following complaints against Ekk Vision Limited are struck out:
 1. Constructive Unfair Dismissal
 2. Wrongful Dismissal/Notice Pay
 3. Direct Discrimination: Disability
 4. Discrimination arising from a disability
 5. Harassment: Disability
 6. Victimisation: Disability
 7. Failure to make Reasonable Adjustments
 8. Discrimination: Race (unspecified)
 9. Discrimination: Religion or Belief (unspecified)
 10. Discrimination: Sexual Orientation (unspecified)
 11. Discrimination: Age (unspecified)
 12. Protected Disclosures: Detriment
 13. Failure to allow a right to be accompanied (ERA 1999 s.10-12)

14. Other Payments
15. Unlawful deduction of Wages
16. Holiday Pay

RECORD OF AN OPEN PRELIMINARY HEARING

Applications and Issues

1. This hearing was listed to consider the following applications and issues:
 - a. Whether the claims for unfair dismissal and discrimination on the grounds of race, disability, sex and religion or belief against the Second Respondent were out of time / should be dismissed and/or whether deposit orders should be made;
 - b. Whether the claims against the First Respondent (listed below) should be struck out owing to the Claimant's continuous breach to provide further and better particulars of her claim as ordered by the Tribunal;
 - c. (In the alternative) the First Respondent's application for a deposit order
 - d. If the case proceeded consideration of the Claimant's disability status pursuant to section 6 of the Equality Act 2020
 - e. If the case proceeded, case management.
2. There were originally three different claims made by the Claimant against a number of respondents. At the last hearing on 11 February 2022 the identity of the respondents was confirmed as against the First and Second Respondents only and the claims against all other respondents was dismissed by agreement of the Claimant.
3. The Claimant made the following complaints against the First Respondent
 1. Constructive Unfair Dismissal
 2. Wrongful Dismissal/Notice Pay
 3. Direct Discrimination: Disability
 4. Discrimination arising from a disability
 5. Harassment: Disability
 6. Victimisation: Disability
 7. Failure to make Reasonable Adjustments
 8. Discrimination: Race (unspecified)
 9. Discrimination: Religion or Belief (unspecified)
 10. Discrimination: Sexual Orientation (unspecified)
 11. Discrimination: Age (unspecified)
 12. Protected Disclosures: Detriment
 13. Failure to allow a right to be accompanied (ERA 1999 s.10-12)
 14. Other Payments
 15. Unlawful deduction of Wages
 16. Holiday Pay

4. The claims against the Second Respondent are for unfair dismissal and discrimination on the grounds of race, disability, sex and religion or belief.

Evidence

5. The Tribunal had the benefit of two separate bundles prepared for this hearing. Additional documents were also served by the Claimant and considered by the Tribunal and parties.
6. The Tribunal heard submissions on the part of each of the three parties in respect of the applications relating to jurisdiction, striking out and deposit orders.
7. It should be noted that the Tribunal took extra care to ensure the Claimant was well enough to attend (she having previously indicated she was unwell), checking with her at regular intervals and offering regular breaks including when the Claimant became emotional. The Claimant was provided significant extra time to navigate documents electronically and a paper bundle was also provided by the Tribunal. No other adjustments were requested by her.

Submissions

Second Respondent's applications

8. In respect of the Second Respondent's applications it was argued the claim for unfair dismissal should be struck out as the Claimant was not their employee. The Claimant accepted this and agreed the claim for unfair dismissal against the Second Respondent should be struck out.
9. The Second Respondent argued the other discrimination claims were out of time and argued against an extension of time.
10. The issues to be determined in this context were therefore as follows:
 - a. Were all of the claimant's claims against the Second Respondent brought in time?
 - b. Does the conduct complained of amount to conduct extending over a period within the meaning of section 123(3)(1) of the Equality Act 2010 (EqA) or part of a series of similar acts or failures under section 48(3) of the Employment Rights Act 1996 (ERA)?
 - c. If not, would it be just and equitable to extend time for any claims brought under the EqA?
 - d. Was it reasonably practicable for the claimant to bring her claims under the ERA in time?
 - e. If not, were the claims nevertheless brought within such further period as the Tribunal considers reasonable?
11. The Claimant's particulars of claim annexed to her ET1 describe incidents between 10 August 2019 and 12 September 2019. She would have had a

period of three months after the last date to contact ACAS – namely by 12th December 2019 pursuant to section 123(1) Equality Act 2010. The Claimant started the ACAS early conciliation procedure on 6 January 2020 and ACAS issued the certificate on 20 February 2020. The Claimant then presented the Claim Form on 3 March 2020.

12. The Claimant accepted it was out of time. She argued she was sick and had a medical certificate for the period between 11-19 October 2019. She was also unaware the deadline was close to expiring.
13. The Tribunal had no medical evidence of the Claimant's ill health in the material time namely in the period after 12 September and before the Claim Form was issued. A psychiatric report was adduced today which refers, within the chronology, to a medical certificate that was issued stating the Claimant had 'TMJ problems, jaw swelling and work-related stress'. However the medical certificate itself was not produced before the Tribunal – and even if it had it would only cover, it appears, some 8 days of the relevant period.

First Respondent's Applications

14. The First Respondent argued that the Claimant's claims should be struck out owing to a repeated failure to comply with Tribunal orders for disclosure and provision of an impact statement which it is said puts the First Respondent at significant disadvantage.
15. The Claimant indicated she had provided the information. After significant time was spent locating the material sent to the First Respondent, it was clear although a number of documents were sent, there was no actual response from the Claimant to the request as directed. The original requests for materials were made by the First Respondent on 16 October 2020 and repeated on 14 June 2021. Orders were then made by the Tribunal directing the documents requested – on 14 July 2021 and on 11 February 2022. The information and documents remained outstanding.
16. Moreover the Tribunal ordered the Claimant to provide an impact statement with a breakdown of the information sought at the hearing on 11 February 2022.
17. The Claimant provided a one paragraph summary which she asserted was an impact statement.
18. The Claimant argued she was not able to provide the disclosure as directed as there were very difficult personal circumstances including a war in her home country, relatives sick with Covid, losing her job in April 2021, having periods of self-neglect, post-traumatic stress disorder and other health issues.

Law

19. The relevant time limits are set out below.

20. Section 123 of EqA provides as follows:

*(1)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.

21. It is evident from the wording of s.123 that the Employment Tribunal has a wide discretion in deciding whether or not to extend time as being just and equitable.

22. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980 (*British Coal Corporation v Keeble* (1997) IRLR 336). Tribunals are therefore required to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including: the length of, and the reasons for, the delay and the extent to which the cogency of the evidence is likely to be affected.

23. There is no presumption in favour of extending time. In fact, Tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so.

24. Section 48 ERA provides as follows:

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented— (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

25. The test under section 48 imparts a two-part test: was it reasonably practicable to file the claim within the deadline; and if not, did the claimant file within such further period as was reasonable.

26. It is important to separate the two stages and the burden of proof is on the claimant.

27. The Tribunal has had regard to the overriding objective. This is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which states as follows:

Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules.

28. The rule in relation to striking out is as follows.

Rule 37 provides:

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;*
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;*
- (d) that it has not been actively pursued;*
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

29. The EAT held that the striking out process requires a two-stage test in *HM Prison Service v Dolby* [2003] IRLR 694, and in *Hassan v Tesco Stores* 4110423/2021 Page 5 Ltd UKEAT/0098/16. 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.

Fact Finding and Conclusions

Second Respondent's applications

30. It is clear the claim form was issued out of time against the Second Respondent. The Claimant herself conceded this.
31. The Tribunal considered whether it was just and equitable to extend the time limit.
32. The Tribunal is mindful that the Claimant is a litigant in person, for whom English is not a first language. It is not clear she has a full understanding of the legal tests that apply. However balanced against that she has experience of the Tribunal process and has been a litigator in the past. She also describes a period of ill health that is substantiated only in part, for at most a week. This does not account for the weeks before or after that week in October.
33. The Tribunal considers it is not just and equitable to extend the time. There is no presumption that applies in favour of an extension and there is no explanation as to why the claim was not progressed in the time limit at a time when the Claimant would have not been affected by the medical issues.
34. It follows that the Tribunal considers it was reasonably practicable to file the claim within the deadline. The Tribunal also has had regard to the overriding objective and the need to avoid delay.
35. On this basis the discrimination claims against the Second Respondent are struck out.

First Respondent's applications

36. The Claimant accepted she had not complied with the orders of the Tribunal on two occasions, namely orders made on 14 July 2021 and 11 February 2022. These reinforced requests that had been made by the First Respondent on 16 October 2020 and 14 June 2021.
37. The Tribunal is mindful, as indicated above, the Claimant is a litigant in person and English is not her first language. However she has experience of litigation in this Tribunal. More significantly the requests of her have now spanned 19 months. Two orders have been made – both have not been complied with in respect of the disclosure. The purported impact statement she provided contains scant detail and none of the information directed by the Tribunal.
38. The upshot is that the First Respondent is put at a significant disadvantage. The Tribunal accepts that the non-compliance with these orders by the Claimant means that, coming up to 2 years after the event, the First Respondent does not know what case it has to meet. The non-compliance therefore substantially prejudices the position of the First Respondent. The Tribunal notes the explanations provided by the Claimant for the non-compliance but it does not provide an adequate explanation for failing to comply with the Tribunal's directions for several months. Orders are meant to be complied with. No extension was sought. The Tribunal also has regard to the overriding objective and the need to avoid delay. There has been ample

opportunity in this case to comply with orders for disclosure and provision of an impact statement.

39. It is therefore clear to the Tribunal that there is an established ground for striking out – namely r.37(1)(c). Having considered the extent of the Claimant's delay in these proceedings and the nature of the default (the effect of which significantly prejudices the case of the First Respondent as set out above) the Tribunal considers it is entirely appropriate given the matters set out above that it will exercise its discretion to strike out the claims against the First Respondent.

40. Therefore all claims against the First Respondent are struck out.

Documents

About these orders

41. These orders were made and explained to the parties at this preliminary hearing.

Useful information

42. 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.

43. The Employment Tribunals Rules of Procedure are here: <https://www.gov.uk/government/publications/employment-tribunal-procedure-rules>

44. 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 Rahman

9 May 2022