EMPLOYMENT TRIBUNALS

Claimant: Mr C Anderson

Respondent: The Commissioner of Police of the Metropolis

Heard at: Bury St Edmunds Employment Tribunal (remote via CVP)

On: 15 August 2022

Before: Employment Judge K Welch (sitting alone)

Representation
Claimant: No attendance
Respondent: Ms K Loraine, Counsel

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The claimant's claims of discrimination relating to the removal from his role as Safer Schools Officer in March 2017 were submitted out of time, it is not just and equitable to extend time and they are dismissed.

2. The claim for unlawful deductions from pay is struck out on the basis that it has no reasonable prospects of success.

3. The claimant's remaining claims of direct race, sex and/or disability discrimination continue.

REASONS

Background

1. This open preliminary hearing came before me on 15 August 2022. The hearing was listed to determine the following issues:

a. whether the Tribunal should Strike Out, or alternatively make a Deposit Order in respect of, the Claimant's complaints regarding his removal from his role as Safer Schools Officer in Enfield Borough (now North Area Command) in March 2017; and

b. whether the Tribunal should Strike Out, or alternatively make a Deposit Order in respect of, the Claimant's complaints that the Respondent made unlawful deductions from his wages.

2. The case had been case managed by EJ Tynan on 31 March 2022 who listed the case for an open preliminary hearing to be held on 26 May 2022.

3. The Case Management Order went on to provide that statements should be provided by the claimant and the respondent in respect of the open preliminary hearing and that he should provide information concerning his means.

4. The claimant provided a statement on 9 May 2022 [pages 89 – 92 of the bundle referred to below] explaining why his claim was not presented within time and why, in his view, it was just and equitable to extend time in this case. He also, on the same date, provided information concerning his means.

5. The night before the original open preliminary hearing, the claimant's wife wrote to the tribunal copying in the respondent's solicitors to advise that the claimant was too unwell to attend. The hearing on 26 May 2022 was therefore postponed until today.

6. On 16 July 2022, the claimant's wife again emailed the tribunal, copying in the respondent's solicitor, to advise, "*Please see attached letter in support from [the claimant's] GP. He is unable to attend the hearing and would like for the matter to proceed in his absence*.". The email attached a GP letter which confirmed, "…*A new date has been set for 15th August 2022. His condition remains the same, he has severe Phobias now and will not be able to attend the tribunal in any form*…".

7. In light of the claimant's request that this hearing be held in his absence, and there being no objection from the respondent, I continued with the hearing. I considered it was in accordance with the overriding objective to do so, particularly as this hearing had already been postponed previously due to the claimant's inability to attend and there was no indication from the claimant's GP as to when he would be in a position to attend such a hearing. I also noted that the claimant had provided a written statement relating to some of the matters to be considered at the preliminary hearing and therefore felt it appropriate to continue with the hearing in these circumstances.
8. The hearing was a remote hearing held via cloud video platform ("CVP"). This was in accordance with the overriding objective and there were no issues with the hearing continuing this way.
9. I was provided with an updated bundle of documents which had originally been prepared for the first open preliminary hearing, but which had one additional document added to it, namely the case management order from that postponed hearing. References to page numbers within this Judgement refer to page numbers within that bundle.
10. The respondent had provided a skeleton argument and one authority in respect of the unlawful deductions from wages claim.
11. I heard no oral evidence although took into account, so far as appropriate, the claimant's statement which he sent on 9 May 2022.

FINDINGS OF FACT FOR THE PURPOSES OF THE PRELIMINARY HEARING

12. The claimant was at all material times a police officer.
13. In March 2017, the claimant was removed from his role as Safer Schools Officer, which he considered to be unfair.

14. The claimant raised a grievance on or around 7 March 2017. The claimant had access to the Police Federation, although states that he did not receive "adequate assistance" from the Police Federation or any other "legal body" at this time.
15. The claimant notified ACAS of a potential claim on 27 April 2017 (as stated in the claimant's witness statement), which resulted in an ACAS early conciliation certificate being issued dated 28 April 2017.
16. The claimant contended in his statement that he was depressed at that time, although there was no medical evidence supporting this.
17. The claimant's sickness absence record appeared at page 97 of the bundle. This showed that the claimant was off work due to sickness absence for the following periods/ reasons:
    a. from 20 February 2017 to 5 March 2017 for an unspecified reason;
    b. from 21 November 2017 to 28 August 2018 for an unspecified reason;
    c. from 1 to 2 March 2019 due to headache/migraine;
    d. from 25 to 27 November 2019 due to digestive disorder;
    e. from 8 to 11 January 2020 due to headache/migraine
    f. from 24 March 2022 to 11 August 2020 due to self isolating (working from home);
    g. from 12 August 2020 to date due to psychological disorders – stress/debility.
18. The claimant commenced a further period of early conciliation with ACAS on 6 May 2021, which continued until 17 June 2021. The claimant's claim was presented on 17 June 2021 [pages 2 – 37].
19. The claimant remains a police officer although, as set out above, has been off sick since 12 August 2020.

20. The claimant's pay was reduced to half pay on or around 4 February 2021, and further reduced to no pay in or around August 2021.

RELEVANT LAW

21. The Tribunal may strike out a claim or allegation where it considers that it has 'no reasonable prospect of success under Rule 37(1)(a) which says:

    Striking out

    (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.

22. This is a high hurdle and, particularly in discrimination cases, and where there are disputes of fact, it will rarely be appropriate; Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391.

23. The time limits for discrimination complaints are found in section 123 Equality Act 2010 (EqA). These provide:

"*123 Time limits*

(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."

24. Whilst early conciliation extends time in some cases, this does not apply when ACAS has not been contacted within the primary time limit.

25. I have a wide discretion to extend the time limit for a discrimination claim to be presented by such further period as is considered just and equitable (section 123(1)(b), EqA 2010). In deciding whether it is just and equitable to extend time to permit an out-of-time discrimination claim to proceed, the tribunal is entitled to take into account anything that it deems to be relevant.

26. However, I note that time limits should be strictly applied, and the exercise of the discretion is the exception rather than the rule. There is no presumption that the Tribunal should exercise its discretion.

27. The Tribunal is not legally required to, but may, consider the check list set out in section 33 of the Limitation Act 1980 in considering whether to exercise its discretion:

a) the length and reason for the delay;

b) the extent to which the cogency of the evidence is likely to be affected by the delay;

c) the extent to which the party sued had cooperated with any requests for information;

d) the promptness which the claimant acted once he knew the facts giving rise to the cause of action; and

e) the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

28. The most relevant factors are the length of, and reasons for, the delay and whether the delay has prejudiced the respondent. The Tribunal will consider whether a fair trial is still possible. The Tribunal may consider the merits of the claimant's race discrimination claims when deciding whether to extend time on the basis it is just and equitable to do so.

29. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal advised against following the Limitation Act factors as a checklist, but rather advised that a tribunal should take into account all relevant factors including the length of and reasons for the delay.

30. For the unlawful deduction from wages claim, I had regard to section 230(3) Employment Rights Act 1996 ("ERA") which provides:

"*In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by

virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.”

31. The case of Commissioner of Police of the Metropolis v Lowry-Nesbitt (EAT) [1999] ICR 401 is authority for the fact that a police officer is not a worker for the purposes of the right not to suffer unauthorised deductions from wages under section 13 ERA 1996.

CONCLUSION

32. I do not consider that the claims relating to the claimant’s removal from his post as Safer Schools Officer in March 2017 relate in any way to the later allegations of discrimination (namely his reduction in pay nor the allegation that he was not permitted to take ill health retirement). In my view, this does not amount to conduct extending over a period under section 123(3)(a) EqA. There are different alleged perpetrators of the alleged discriminatory acts, which are not connected and therefore whilst the latter claims of discrimination were presented within time, this does not assist in bringing the earlier claims, relating to the claimant’s removal from his post, within time.
33. Therefore, the claimant failed to present his claim within the necessary time limits and so, in order to proceed with his claim, I have to go on to consider on the evidence before me whether the claimant has shown that it is just and equitable to extend time in this case.
34. ACAS were initially contacted around the time of the claimant’s removal from his role as Safer Schools Officer. This shows that the claimant was aware of his need to do so, in April 2017, which was within the time limit to bring a claim. He clearly considered that his treatment at this time gave rise to a potential claim,

due to him involving ACAS and contacting his police federation. However, the claimant failed to present a claim until 17 June 2021.

35. The claimant says in his statement that he was not at a "*satisfactory mental health point to handle such matter*" at the time, however, the claimant was able to present a grievance and contacted ACAS. Also, from the claimant's attendance record (P97), it appeared that he was at work from 5 March 2017 until 21 November 2017, despite saying in his statement that he was absent for 6 months until late 2017.

36. The claimant contacted ACAS again prior to presenting his claim. However, for the discrimination claims relating to his removal from post in March 2017, this later early conciliation period will not extend time, since ACAS were not contacted on this second occasion prior to the expiry of the primary time limit. Therefore, the sections providing for extension of time for ACAS Early Conciliation were not triggered in respect of the second early conciliation.

37. I weighed carefully the factors on both sides, but consider that the very long delay in presenting the claim will cause severe prejudice to the respondent. Witnesses may not be able to recall the alleged incidents so many years after they took place, documents have been deleted under the respondent's document retention policy and it is not clear whether these will be able to be retrieved and some of the main witnesses no longer work for them. Whilst this latter fact does not of itself prevent a fair trial taking place, since employees often leave employers before a hearing comes to trial, I consider that when considered with the other factors together, the prejudice weighs in favour of the respondent.

38. I note the prejudice to the claimant in not having his claim heard, and accept that this is a severe prejudice to him, however, I still do not consider that this outweighs that caused to the respondent. Therefore, I do not consider it just and

equitable to extend time on this occasion. I am not satisfied that there is anywhere near sufficient grounds to extend time on a just and equitable basis relying upon the matters set out in the claimant's statement. I do not consider that it remains possible to have a fair trial of this discrimination complaint due to the matters referred to above. Therefore, the discrimination claims relating to the claimant's removal from the post of Safer Schools Officer are dismissed.

39. Turning to the claim for unlawful deductions from wages, I consider that this claim should be struck out on the basis that it has no reasonable prospects of success. The claimant is a police officer, and under the authority of Commissioner of Police of the Metropolis v Lowrey-Nesbitt referred to above, police officers within the Metropolitan police force are not workers, and therefore cannot claim for unlawful deductions from pay.

40. Therefore, the claim of unlawful deductions from wages is struck out on the basis that it has no reasonable prospects of success.

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Employment Judge Welch

Date 26 August 2022

JUDGMENT SENT TO THE PARTIES ON
8 September 2022
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FOR THE TRIBUNAL OFFICE

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