



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms M Gan

**Respondent:** County Durham and Darlington NHS Foundation Trust

**HELD at Teesside Justice Hearing Centre ON: Monday 5 September 2022**

**BEFORE:** Employment Judge Johnson

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Miss C Ibbotson of Counsel

# JUDGMENT

1. The title to these proceedings is amended to show the correct name of the respondent as County Durham and Darlington NHS Foundation Trust.
2. All claims by the claimant against Ms Sue Jacques are dismissed upon withdrawal by the claimant.
3. The claimant's complaint of unlawful deduction from wages are struck out and dismissed on the grounds that it has no reasonable prospect of success.
4. The claimant's complaint of unfair constructive dismissal is struck out and dismissed on the grounds that it has no reasonable prospect of success.
5. The claimant's complaint of automatic unfair dismissal for making protected disclosures is struck out and dismissed on the grounds that it has no reasonable prospect of success.
6. The claimant's complaint of unlawful race discrimination is struck out on the grounds that it has no reasonable prospect of success.
7. The claimant's complaints of being subjected to detriment because she had made protected disclosures are struck out and dismissed on the grounds that they have no reasonable prospect of success.

# REASONS

1. This matter came before me this morning by way of a private preliminary hearing, pursuant to earlier Orders made by Employment Judge Jeram at a preliminary hearing which took place on 9 June 2022. As set out in Judge Jeram's record of that hearing, the purpose of today's hearing was to:-
  - 1.1. Confirm the name of the respondent.
  - 1.2. Identify the allegations being advanced by the claimant.
  - 1.3. Consider and determine any application to amend the claim form.
  - 1.4. Identify what issues arise from the allegations, including any further preliminary issues.
  - 1.5. Make further case management orders as appropriate.
2. Judge Jeram ordered the claimant to provide further information about her unfair constructive dismissal claim, her race discrimination claim and her complaint of being subjected to detriment on the grounds that she had made protected disclosures. The claimant was also ordered to set out in writing any application to amend her claim, by not later than Friday 12 August 2022.
3. At paragraph 16 of the case management summary prepared by Judge Jeram, it was recorded that the claimant at that stage brought the following complaints:-
  - 3.1. Unfair constructive dismissal.
  - 3.2. Race discrimination.
  - 3.3. Detriment on the ground that she had made protected disclosures.
4. Judge Jeram discussed with the claimant what appeared to be a contradictory element in her original claim. The claimant made it clear to Judge Jeram that she believed she remains an employee of the respondent because she had a "permanent contract" with the respondent which had not been terminated. It was pointed out to the claimant that if she continued to insist that she remained an employee of the respondent, then she could not possibly pursue a complaint of unfair dismissal, or unfair constructive dismissal or automatic unfair dismissal because she had made protected disclosures. The claimant was told that she must clarify her position in that regard by the time of today's hearing. The claimant was informed by Judge Jeram that her original claim form did not contain any allegations of being subjected to detriment because she had made protected disclosures, nor did it contain any allegation that she had been automatically unfairly constructively dismissed because she had made protected disclosures. If those claims were to be pursued, then the claimant would have to make a written application to amend her claim.
5. The claimant is of Chinese origin and maintains that her treatment at the hands of the respondent amounted to unlawful direct race discrimination, contrary to section 13 of the Equality Act 2010. For the purposes of today's hearing, the claimant had requested the attendance of a Mandarin/English interpreter and the Tribunal had the benefit of the assistance of Ms Jing Griffin to act as interpreter. The claimant required the assistance of Ms Griffin on very few occasions during the course of today's hearing and I was satisfied that the claimant could and did

in fact understood everything which was said to her by myself and everything which was said by Ms Ibbotson.

6. The first point I raised with the claimant was the requirement to properly identify the respondent against whom her claims were brought. On the basis that those claims could only be brought against her employer or former employer (unless the claimant wished to pursue personal allegations of unlawful race discrimination) then the correct respondent would be County Durham and Darlington NHS Foundation Trust and not Miss Sue Jacques, who at the relevant time was the chief executive officer of the Trust. I am satisfied that the claimant understood the difference. The claimant accepted that the title to the proceedings should be amended to show the sole respondent as County Durham and Darlington NHS Foundation Trust. The claimant confirmed that she agreed to any claims against Sue Jacques being dismissed upon withdrawal by her. I so order.
7. The next point I raised with the claimant was whether she maintains that she continues as at today's date to be an employee of the Trust. The claimant informed me in clear and unequivocal terms that she believes she continues to be an employee of the Trust. That would of course mean that she had not been dismissed by the Trust, nor had she resigned from her employment with the Trust. I explained to Ms Gan that if that remained her position, then I would invite her to agree to the claims of unfair dismissal and automatic unfair dismissal for making protected disclosures being dismissed upon withdrawal by her. I explained to Ms Gan that she could not maintain that she remained an employee if she wished to pursue any kind of complaint of unfair dismissal or automatic unfair dismissal. The claimant then changed her mind and stated that her position was that she had resigned from her employment in November 2009 in circumstances which entitled her to pursue a complaint of unfair constructive dismissal and/or automatic unfair constructive dismissal for making protected disclosures. I then explained to the claimant that if she accepted there had been a termination of her contract of employment in November 2009, then she could not pursue a complaint relating to unlawful deduction from wages for any period after that date. The claimant accepted that position. I recorded that the claimant's position is that her employment with the respondent came to an end when she resigned in November 2009.
8. I then explained to the claimant that, as at the date of that resignation, she did not have two years' continuous service as an employee of the respondent and thus the Employment Tribunal does not have jurisdiction to entertain any complaint of unfair dismissal or unfair constructive dismissal, unless that dismissal is because she had made qualifying and protected disclosures (otherwise known as "whistle-blowing"). The claimant then informed me that she wished to pursue a complaint of automatic unfair constructive dismissal because she had made protected disclosures. I explained to the claimant that she would have to satisfy the Tribunal of the following matters:-
  - 8.1. That she had made qualifying and protected disclosures.
  - 8.2. That she had been subjected to detriment because she had made qualifying and protected disclosures.
  - 8.3. That she had resigned because of those detriments.

The claimant confirmed that she understood those matters and I was satisfied that the claimant does indeed understand those matters.

9. I enquired of the claimant as to how many qualifying and protected disclosures she alleges were made by her. The claimant informed me that she had made 7 such disclosures in total. I reminded the claimant that the case she now wished to pursue must mean that such qualifying and protected disclosures took place before she resigned and that the imposition of any detriments because of those disclosures, also took place before she resigned.
10. I then agreed to give the claimant some time to consider the points we had discussed by this stage of the hearing. I again drew to the claimant's attention the Appendix Attached to Judge Jeram's orders, in which is set out section 43B of the Employment Rights Act 1996, which defines what is meant by a qualifying disclosure. I was satisfied that the claimant fully understood what was expected of her.
11. Upon her return, the claimant informed me that she alleges that she made 5 qualifying and protected disclosures as follows:-
  - 11.1. In May 2009 to Julie Buschell when the claimant said, "can you sort out my permanent contract with Derek Murphy".
  - 11.2. On 5 June 2009 to Claire Dundass, when the claimant complained about being told that "silly is not an issue".
  - 11.3. On 15 July 2009 to Claire Dundass about her department having approached many people for references about the claimant, which people should not have been approached because they had not been included on the claimant's list of referees and that by doing so the respondent had damaged the claimant's reputation.
  - 11.4. In August 2009 in an email to the respondent's HR department saying, "NHS issued a statement on me saying "silly is not an issue" and that the outcome of the respondent's sickness review was not true and that this had caused the claimant to become stressed and unable to attend the next meeting.
  - 11.5. In July 2009 in an email to Sue Williams and Lisa Wilson of the respondent's HR department saying, "I'm going to make an ICO complaint if you do not supply me with the information about the reference checks and correspondence."
  - 11.6. In her resignation letter of 16 October 2009.In respect of the latter complaint, I enquired of the claimant as to how she could allege that she had, after making disclosures, been subjected to detriments which led her to resign, if the resignation letter itself was a document relied upon as a qualifying and protected disclosure. The claimant was unable to answer that question.
12. I informed the claimant of the requirement for a qualifying disclosure to contain factually specific information which satisfies one of the criteria in section 43D of the Employment Rights Act 1996. The claimant at first informed me that she believed the respondent's behaviour to amount to "criminal conduct." That is clearly not the case. The claimant then maintained that her disclosures related to a "breach of a legal obligation" and/or that "her personal health was being endangered by the respondent's behaviour".
13. I then enquired of the claimant as to the factual allegations which she intended to pursue as complaints of unlawful direct race discrimination, contrary to section

13 of the Equality Act 2010. The claimant provided me with 7 examples, as follows:-

- 13.1. Taking 9 months to undertake a reference check.
  - 13.2. Approaching persons for references who had not been named as referees by the claimant.
  - 13.3. Approaching her children's nursery asking for personal information, such as whether her child had yet registered for nursery.
  - 13.4. Approaching a Chinese restaurant (where the claimant had formerly been employed) asking whether the claimant was ambitious and how much she had been paid as a waitress.
  - 13.5. Approaching a Chinese restaurant in Glasgow, asking for a reference.
  - 13.6. Approaching a language college in Glasgow, asking for a reference.
  - 13.7. Asking a previous employer for a reference "to see if I had lied on my CV."
14. The claimant alleged that each of these amounted to direct race discrimination, because it had been undertaken because of her Chinese origin and would not have been undertaken in respect of candidate or employee with a different racial origin.
15. I specifically asked the claimant if she could identify a comparator in respect of any of those allegations. The claimant named three people, as follows:-
- 15.1. Paula – who applied for the same job and who is not Chinese.
  - 15.2. Hayley – who had an interview on 6 October without any reference check.
  - 15.3. Ricky – no reference check was carried out in respect of this candidate/employee, who is not Chinese.

The claimant alleged that it did not take 9 months to undertake reference checks in respect of any of those candidates. None were required to provide additional information to what was included in their CV and none had been labelled by being referred to as, "silly is not an issue."

16. I asked the claimant to clarify that each of the allegations of unlawful race discrimination related to the language used to her and the procedures adopted by the respondent in undertaking reference checks about her. The claimant confirmed that this was her case. I asked the claimant when was the last act relating to the references and the claimant confirmed that it was 25 March 2009, when the respondent undertook a reference check with Phillips Collection Services, a former employer of the claimant.
17. The claimant then informed me that on 24 December 2021, the respondent's data protection officer had emailed to the claimant the outcome of the investigation into her complaints. The claimant informed me that respondent's HR department had lied about undertaking these reference checks and that they had lied because she is of Chinese origin.
18. I asked the claimant if there had been any other acts of discrimination between 25 March 2009 and 24 December 2021. The claimant was unable to provide me with any specific instances, other than to say that she had been subjected to a continuous course of race discrimination since her resignation. The claimant alleged that since 2009, the respondent has refused to engage with her about her complaints. The claimant alleged that when she had attended at Darlington

Memorial Office to pursue her complaints, she had been forcibly removed by the respondent's security guards and that this had been done because she is Chinese. The claimant alleged that in February 2021 she had emailed Sue Williams of the respondent's HR department, who had refused to re-open her case. The claimant insists that the respondent "faked a grievance outcome document" and used it to close the claimant's case in October 2009.

19. I drew the claimant's attention to paragraph 26 of Judge Jeram's case management summary, which specifically refers to a requirement for complaints under the Employment Rights Act 1996 and Equality Act 2010 to be brought within 3 months of the date of the act about which complaint is made. I am satisfied that the claimant was aware of the time point and that it was for her to satisfy the Tribunal that it had not been reasonably practicable to present the Employment Rights Act claims within 3 months or that it would be just and equitable to extend time beyond 3 months in respect of the Equality Act claim. The claimant's response to this was that she became stressed, anxious and depressed as a result of the respondent's treatment, and was twice admitted to a mental hospital and on two occasions the NHS Crisis Team had to attend at her house. The claimant has failed to produce to the respondent or the Tribunal any medical evidence whatsoever to support her contention that her mental health was such that she was unable to present her complaints to the Tribunal within the 3 month time limit. Of particular significance in this regard is the claimant's own evidence and submissions to the effect that she had continued to engage with the respondent throughout that period in an attempt to resolve matters with them without recourse to litigation. The claimant accepted that in October 2009 she had instructed solicitors, who had written to the respondent indicating an intention to bring a civil claim for alleged harassment and defamation. The allegations in that regard contain some of those upon which the claimant now relies in these Employment Tribunal proceedings. The claimant also informed me that during this period she had made applications to the Data Protection Act and to the Information Commissioner's Office (ICO) to obtain documents relating to the respondent's attempts to obtain references about her and relating to the respondent's investigation into those matters about which the claimant complained in her resignation letter. I put to the claimant that if during the 13 year period in question she had been able to engage with the ICO, the respondent's data protection officer and to correspond with the respondent, then how could she explain her inability to complete and present to the Tribunal a relatively simple claim form ET1. The claimant was unable to answer that question.
20. Having heard the submissions from the claimant for approximately 3 hours, I was satisfied that the main thrust of the claimant's claim was a comment made to her or about her, saying "Chinese is silly" and that when the claimant complained about that she was told, "Silly is not an issue". The claimant also complains about the process followed by the respondent in seeking references about her when she applied for employment. The claimant insists that she was given a permanent contract and not a fixed term contract, as is alleged by the respondent.
21. The respondent denies all the allegations brought by the claimant. The respondent denies that the claimant made any qualifying or protected disclosures and in particular refers to the lack of any specific factual information in what the claimant now alleges she said or wrote. The respondent denies that, on her best

case, the claimant's allegations about the process followed to obtain a reference could amount to "less favourable" treatment, because of her Chinese nationality. The respondent particularly relies upon the passage of some 13 years since the claimant's resignation and the lack of any meaningful explanation as to why it has taken so long for the claimant to present her complaint to the Tribunal. By a letter dated 29 April 2022 the respondent's solicitors invited the Tribunal to strike out all of the claims on the grounds that they have no reasonable prospect of success, in accordance with Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013.

22. In her submissions to the respondent on behalf of the respondent, Miss Ibbotson stated that four of the people to whom the claimant refers are no longer employed by the respondent. Documents to which the claimant makes reference cannot be found after a reasonable search and after this length of time are likely to have been destroyed. Any persons who remain employees of the respondent and who may have been involved with the claimant during her relatively short period of employment, are unlikely to be able to remember much or anything about the claimant's allegations. The effect of that submission by Miss Ibbotson was that Rule 37(1)(e) was also engaged, namely that it is no longer possible to have a fair hearing in respect of the claim.

### **The law**

23. Rule 37 of the 2013 Rules states as follows:-

*(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;*

*(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.*

24. Following Miss Ibbotson's submissions, I explained to the claimant the meaning of Rule 37. In particular, I explained to the claimant that, if she so required, I would be willing to postpone today's private preliminary hearing and list a Public Preliminary Hearing, at which the Tribunal would consider the respondent's application to strike out all of the claims. That is in fact what Judge Jeram had indicated at the previous hearing, namely that consideration would be given today to listing of a Public Hearing to consider the strike out application. I am satisfied that the claimant fully understood what was being said to her and in fact on this occasion Ms Griffin interpreted that for the claimant. The claimant's response in clear and unequivocal terms was that she wished the strike out application to be dealt with today and that she did not require any further time to

consider her response to that application. The claimant informed me that she had provided all the information which she wished to present and requested that I continue to hear with and dispose of the application. I am satisfied that it is in accordance with the Overriding Objective to do so.

25. The power for the Tribunal to strike out a claim on the ground that it has no reasonable prospect of success requires the Tribunal to form a view on the merits of the case and only where it is satisfied that the claim has no reasonable prospect of succeeding can it exercise that power to strike out. Special considerations arise if the Tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. 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. The test is not whether the claim is likely to fail, nor is it the question of asking whether it is possible that the claim will fail. It is now generally accepted 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. It is generally accepted that it is unfair to strike out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered. When determining whether a discrimination or whistle blowing claim has no reasonable prospect of success, it is necessary to take the claimant's case "at its highest." This means examining the pleaded facts and for the purposes of the strike out consideration, assuming (unless there was a compelling reason not to) that the claimant's version of any key disputed facts is correct. (**Balls v Downham Market High School and College** – 2011 IRLR 217), (**Kwele-Siakam v Co-operative Group Limited** EAT 0039/17).
26. However, in **Ahir v British Airways Plc** [2018 EWCA – Civ – 1392] the Court of Appeal asserted that Tribunals should not be deterred from striking out even discrimination claims that involved disputed facts, if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored.
27. In considering whether a claim should be struck out, the Tribunal must consider whether a fair trial is still possible. That is particularly relevant when the allegation is made relating to incidents which took place in the long distant past. The Tribunal must be aware that evidence may no longer be available; the memories of those who are available and may well have faded and documents which may be of assistance to the Tribunal may no longer exist. The Overriding Objective requires Employment Tribunals to deal with cases justly. The test to be applied must therefore be whether there can still be a fair trial of the issues between the parties, which will produce a just outcome.
28. It is abundantly clear in this case that the allegations brought by the claimant which form the subject matter of her claims, are considerably out of time. They are out of time not just by days or months, but by many years. The claimant has failed to produce any evidence to support her contention that she was unable to present her claims in time because of her mental health. In my judgment, the claimant's submissions in this regard are contradicted by her assertions that one of the reasons why she did not present the claim form in time was because she continued to engage with the respondent's HR department, their data protection officer and the IOC. I am satisfied that the claimant could not persuade a Tribunal that it was not reasonably practicable for her claims to be presented in time in



respect of the Employment Rights Act claim. I am not satisfied that the claimant would be able to persuade a Tribunal that it would be just and equitable for time to be extended in respect of the Equality Act claim.

29. I am not satisfied on the claimant's evidence in any event that she made any qualifying, protected disclosures. On the claimant's best case, she has said or written to the respondent does not contain any factually specific information which could possibly amount to a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996.
30. The claimant complains about the steps taken by the respondent to obtain a reference for her. Those complaints in the main relate to respondent pursuing references from persons who had not been provided as referees by the claimant. I cannot see how the claimant could possibly link the respondent's request for references, to her Chinese nationality.
31. The claimant complains that she was told "Chinese is silly" and that when she complained about it was told "Silly is not an issue". I must consider the balance of prejudice to the claimant in not being permitted to pursue that complaint and the balance of prejudice to the respondent in having to defend it. The value of such comment in terms of injury to feelings would be minimal in my judgement. I cannot see how it would be proportionate to allow that claim to proceed after this length of time. Prejudice in terms of time, cost and fairness to the respondent far outweighs any financial benefit lost to the claimant.
32. Having carefully considered everything that has been said to me by the claimant and having carefully considered everything that was put before me in terms of documents, I am entirely satisfied that none of the complaints presented by the claimant have any reasonable prospect of success. In my judgment, this is one of those exceptional cases where despite the allegations of discrimination, the claims should be struck out. I so order.

G Johnson

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Employment Judge Johnson

Date: 15 September 2022

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