EMPLOYMENT TRIBUNALS

Claimant: Mr J Wilkinson

Respondent: (1) Commissioner of Police of the Metropolis
(2) Shared Services Connected Limited
(3) Julie Froud
(4) Claire Wallis

Heard at: London Central (by video) **On:** 14 November 2022

Before: Employment Judge Stout

Appearances
For the Claimant: In person
For the First Respondent: Mr Adjei (counsel)
For the Second to Fourth Respondents: Mr Perry (counsel)

WRITTEN REASONS FOR JUDGMENT ON OPEN PRELIMINARY HEARING

Background

1. These are the written reasons for my judgment given orally at the hearing on 14 November 2022 and sent to the parties on 15 November 2022. At that hearing I decided:

    1.1 The claim in case number 2204734/2022 against the First Respondent (being a victimisation claim under s 27 of the Equality Act 2010 (EA 2010) in respect of the failure to change the Claimant's line manager between 24 March 2021 and May 2021) is not struck out under Rule 37(1)(a), but will proceed to be dealt with as part of the final hearing in case number 2201414/2021 (subject to the Tribunal finding a that hearing that it has jurisdiction under s 123 of the EA 2010).

1.2 The claims in case number 2204734/2022 against the Second to Fourth Respondents are struck out as standing no reasonable prospect of success under Rule 37(1)(a).

1.3 Case numbers 2201414/2021 and 2204734/2022 are consolidated and will be heard together in the final hearing commencing on 23 January 2023 (albeit only the Claimant and First Respondent will be involved as the claims against the Second to Fourth Respondents have been struck out).

2. The Claimant has brought two claims. The First Claim (Case No. 2201414/2021) was filed on 24 March 2021. The First Respondent (the Commissioner) is currently the sole respondent to that claim, claims brought against individuals (the Claimant's line managers Mr Matthews and Mr Rawlinson) having been dismissed previously. The First Claim has been subject to case management and is listed for a six-day hearing commencing on 23 January 2023, having already been postponed once from its original listing of 18 May 2022 as a result of lack of judicial resource. What was described by Employment Judge James as a Final List of Issues was appended to his Case Management Order of 20 January 2022, EJ James having at that hearing largely refused an application by the Claimant to further amend his claim. The parties have since that date corresponded about the List of Issues for the First Claim, as a result of which some amendments have been agreed, but a number of issues remain in dispute and/or may require an application to amend, which will be the subject of consideration at a further Closed Preliminary Hearing on 30 November 2022. In particular, it was identified that the following matters are in dispute in relation to the List of Issues that the Claimant has prepared for the First Claim:

2.1 Para 3 – there were three allegations of direct discrimination, previously six, R says paras (3)(c), (e), (f) and (g) are new matters;
2.2 Para 5 – C has added commentary in relation to the PCPs;
2.3 Para 8 – (b)-(e) in dispute and R submits they cannot flow from the alleged PCPs;
2.4 Para 12(d), (f), (g) and (h) the R says are new, while 12(i) should have been 'failure to redeploy the Claimant to another role'.

3. The Second Claim (Case No. 2204732/2022) was filed on 20 July 2022 following a period of ACAS Early Conciliation that commenced on 18 May 2022 and finished on 29 June 2022 for the First Respondent and 22 June 2022 for the other three Respondents. The Second Respondent (SSCL) is a joint venture between the UK Cabinet Office and Sopra Steria Limited and is engaged to provide HR support services to the First Respondent. The Third and Fourth Respondents are employees of the Second Respondent and together I refer to them as the "SSCL Respondents". All the Respondents have submitted ET3s and Grounds of Resistance in response to the Second Claim, but this hearing was the first Preliminary Hearing in that claim. It is the Respondents' position that the relationship between the First and Second Respondent is one of service provision. The First Respondent does not accept that the SSCL Respondents act as its agents and the Second Respondent maintains that as it was not the Claimant's employer the Claimant cannot bring claims against the SSCL Respondents under s 39 of the Equality Act 2010 (EA 2010).

4. We spent some time at this hearing identifying what the List of Issues is in the Second Claim, using a draft prepared by the SSCL Respondents as a starting point. We identified the issues to be as follows:

    4.1 Whether the Claimant meets the definition of disability in EA 2010, s 6 (this is conceded by the First Respondent in the First Claim, but not conceded by the SSCL Respondents who have not yet seen any disclosure relevant to it);
    4.2 Discrimination arising from disability (EA 2010, s 15), specifically: R3 (for whom R2 is responsible under s 110) advising R1 to consider Unsatisfactory Police Performance (UPP) action if the Claimant remained off sick (as reflected in an email sent on 10 February 2021 by R3 to R4 – p 108, i.e. the email quoted in the claim form as being dated 16 February 2021)?
    4.3 Victimisation (EA 2010, s 27): R1 failing to change the Claimant's line manager between 24 March 2021 (when he filed his First Claim) and May 2021 (when his line manager changed)?
    4.4 Causing/aiding (EA 2010, s 111/112): R2/R3/R4 knowingly helped and/or caused R1 to:
        4.4.1 Harass the Claimant by requiring him to be line managed by Inspector Matthews (an issue in the First Claim);
        4.4.2 Fail to make reasonable adjustments for the Claimant to the PCP requiring officers to have a line manager based in the same location as them where possible (an issue in the First Claim);
        4.4.3 Victimise the Claimant not changing his line manager between 24 March and May 2021;

        By:

        4.4.4 R3 sending the email of 10 February 2021; and,
        4.4.5 R3/R4 failing to challenge R1 as to her position of not changing the Claimant's line manager between 5 February 2021 and May 2021.

5. The issues for me to consider included:
    5.1 Whether the Second Claim should be struck out against all Respondents on ground that it stands no reasonable prospect of success as it was brought out of time and/or is unmeritorious in substance;
    5.2 Whether the First and Second Claim should be consolidated;
    5.3 Whether they should be heard together at the currently listed Final Merits Hearing commencing on 23 January;
    5.4 Whether they should be heard by the same Tribunal but on different dates.

Submissions

6. I heard submissions from all parties on the issues. I did not receive oral evidence from anyone, including the Claimant, but he in the course of making his submissions he explained why he put the Second Claim in when he did and as this is a strike-out application I took his evidence in this respect 'at its highest' (i.e. as being wholly true and accurate) in deciding whether the Second Claim stood no reasonable prospect of success as against the First Respondent or the SSCL Respondents.

7. In short, he explained that he had first seen the email of 10 February 2021 when it was disclosed by the Respondent on 22 February 2022, but he waited until receipt of the First Respondent's witness statements on 11 May 2022 because he expected to see that Mr Rawlinson and Mr Matthews' witness statements would deal with the conversation that they had with the Third Respondent as reflected in her email of 10 February 2021, but they did not. The Claimant was during this period particularly unwell and under the care of a psychiatrist. His capacity for cognitive functioning was much reduced. On 12 May 2022 (p 113), he wrote to the Tribunal asking whether he could amend his First Claim to include a victimisation claim in the light of the 10 February 2021 email. In that email he set out his understanding that he was 'in time' to raise a claim in relation to that email because he was *"within the protected time limit of 3 months less a day to raise this matter"*. The Claimant explained that it was then (and remained now) his understanding that he had three months from the date on which he received that email in disclosure on 22 February 2022 to raise a claim about it. The Claimant did not receive a response from the Tribunal to his email of 12 May, so contacted ACAS on 18 May 2022. He then filed his Second Claim on 20 July 2022, within one month of the end of the Early Conciliation period and believed that he had put the claim in in time. The Claimant argued that even if the claim was not brought within the primary three month time limit, it should not be struck out because the Second Claim is all about what was going on at the Respondent in terms of decision-making in relation to his request for a new line manager, which is one of the main issues in his First Claim.

8. As to the claim about the advice about considering UPP procedures, the Claimant confirmed to me that he was unaware at the time about the advice given by the Third Respondent, although he was always aware that the First Respondent might commence UPP procedures against him because of his absence, and that was a source of stress. The First Respondent did not ever commence UPP procedures.

9. Mr Adjei for the First Respondent submitted that the claims ought to be consolidated because of the overlap between the issues, but noted that as the Third Respondent is on pre-booked annual leave and unable to attend the January hearing and the Fourth Respondent is not available for some of the hearing he recognised that (if the Second Claim proceeds) consolidation of the claims would lead to the loss of the January hearing dates and as the First Respondent wants the January hearing to go ahead to avoid further delay he resists consolidation for that reason. As to time limits, he submitted that all the matters in the Second Claim were a long way out of time because they related at the latest to things that happened in May 2021 but ACAS was not contacted until a year later. He further submitted that what the Claimant did once he had received disclosure from the First Respondent was not reasonable. Rather than raising the potential claims immediately as amendments to the First Claim, he waited to see what the Respondent's witness statements would say, but there was no reason to expect the Respondent's witness statements to deal with an email between two people who were not its employees. The Claimant ought to have known about time limits as they were referred to in EJ James' reasons for refusing his previous application to amend. He submitted the length of and reason for the delay between 22 February 2022 and the claim being submitted on 20 July 2022 were not reasonable. The hearing of the First Claim was originally due to have commenced

on 18 May 2022 and the Claimant plainly ought to have raised this matter in time for it to be dealt with at that hearing. Further, if time is extended now and the Second Claim permitted to proceed, there will need to be evidence from the additional respondents which may result in the loss of the January hearing dates. In contrast, the Claimant will not lose anything significant from not being permitted to bring the Second Claim as it adds very little to his claims in the First Claim. The Claimant case is essentially that the First Respondent's position regarding a change of line management (already the subject of the claim in the First Claim) was hardened in response to proceedings being commenced. The Second Claim relates to a two-month period between then and May 2021 when the Claimant's line management was changed in May 2021 in response to receipt of an OH report recommending that.

10. Mr Perry for the SSCL Respondents submitted that it would not be fair to have a hearing involving the SSCL Respondents in January because of the availability difficulties for the Third and Fourth Respondents. He submitted that it was not necessary however for the two claims to be consolidated.

11. As to time limits, Mr Perry submitted that the SSCL Respondents were being drawn into a potentially very lengthy hearing in which they would play only a very small part. He submitted that the the Claimant already has a remedy for the alleged wrongs pleaded in the Second Claim by dint of the matters in the First Claim. He adopted Mr Adjei's submissions as to the lack of good reason for the delay since February 2022. He further submitted that the Third Respondent's email itself shows that the SSCL Respondents did challenge the First Respondent on its approach (and thus undermines part of the Claimant's claim in the Second Claim). He asserted that no claim could be brought against the SSCL Respondents under s 39 EA 2010 because there was no employment relationship between them and the Claimant. He relied on *Gilbank v Miles* [2006] EWCA Civ 543 and *Shepherd v North Yorkshire County Council* [2006] IRLR 190 in support of his argument that legally a failure to challenge was unlikely to amount to 'causing' or 'knowingly helping' for the purposes of ss 110-111 EA 2010. He submitted those cases show that an absence of discouragement is not enough.

The legal principles

12. Rule 37 permits the tribunal to strike out all or part of a claim, at any stage of the proceedings, on its own initiative or on the application of a party, on grounds (among others) that the claim has no reasonable prospect of success.

13. This is a power to be exercised judicially, taking into account all the relevant circumstances, and in accordance with the over-riding objective. Although a strike-out may not be appropriate in cases where there are substantial disputes of fact, especially in discrimination claims which are highly fact sensitive as the House of Lords emphasized in *Anyanwu* [2001] UKHL 14, [2001] ICR 391, if those can fairly be resolved at the strike-out hearing, or the claim stands no reasonable prospect of success whatever the outcome of the dispute, then a strike-out will be appropriate: see *Ahir v British Airways Plc* [2017] EWCA Civ 1392.

14. The principles relevant to consideration of strike-out applications were recently summarized by Linden J in *Twist DX Ltd v Armes* (UKEAT/0030/20/JOJ) at para 43 as follows (I summarise):-
    14.1 A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances;
    14.2 The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail or where the prospects of success are only *"fanciful"*;
    14.3 The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view;
    14.4 Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law;
    14.5 The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it "may" do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed;
    14.6 Particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English.

15. The general rule under s 123(1)(a) EA 2010 is that a claim concerning work-related discrimination under Part 5 of the EA 2010 (other than an equal pay claim) must be presented to the employment tribunal within the period of three months beginning with the date of the act complained. This is subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 140B of the EA 2010, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period. If a claim is not brought within the primary time limit, the Tribunal has a discretion under s 123(1)(b) to extend time if it considers it is just and equitable to do so.

16. The burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time: *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 374 at [24]. The discretion whether or not to extend time is a broad one to be exercised taking account of all relevant circumstances, in particular the

length of and reasons for the delay, and balancing the hardship, justice or injustice to each of the parties: see *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23. In an appropriate case the substantive merits may also be relevant, provided that the Tribunal is properly in a position to make an assessment of them: *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132 at [63].

My decision

17. I consider first whether the Second Claim against the First Respondent stands no reasonable prospect of success, that is the claim in the Second Claim that the failure to change his line manager between 24 March 2021 and May 2021 (already the subject of discrimination/harassment claims in the First Claim) was an act of victimisation for having brought the First Claim. This Second Claim has been brought approximately one year outside the primary three-month time limit and at a point *after* the First Claim was due to have been heard (and would have been heard had there not been a shortage of judicial resource). However, in my judgment the Claimant has a reasonably arguable case that a just and equitable extension should be granted in respect of the claim. This is because:

    17.1 The email of 10 February 2021 on which the Claimant relies provides *prima facie* evidence in support of a victimisation claim in that the Third Respondent recounts that at her meeting with Mr Rawlinson and Mr Matthews that day *"They … stated that they felt there shouldn't be a change of manager whilst ET going on against them, as would send wrong message"*. This provides a *prima facie* argument that, whatever the previous reasons for refusing the Claimant's request, after the First Claim commenced that formed a material part of the reasons why the Claimant's line manage was not changed between then and May 2021;

    17.2 The Claimant has an explanation for the delay in bringing the claim in that he did not have the email on which he bases the claim until 22 February 2022 and thereafter he was (taking his case at its highest) under a genuine misapprehension as to the way time limits work in these circumstances. Such a genuine mistake by a litigant in person can often provide the basis for an extension on just and equitable grounds (subject to other relevant factors);

    17.3 The victimisation claim in the Second Claim is very closely linked to the discrimination/harassment claims already going to trial in the First Claim. The First Respondent will need no more witnesses to be able to respond to the victimisation claim (since there is no need for the Third Respondent to be a witness – her email speaks for itself) and it will not involve any more evidence than will already be considered by the Tribunal as part of the First Claim. There is no reason why it could not be joined to, and dealt with, together with the First Claim at the January hearing;

    17.4 Although there is considerable overlap between the First and Second Claims as concerns the First Respondent, the victimisation claim could succeed even if the Claimant's existing claims about the change of line manager fail. Denying him the right to bring that claim would therefore be prejudicial to him;

17.5 That also means there is a converse prejudice to the First Respondent of permitting the claim to proceed, but given the *prima facie* merits of the claim, there is a good argument that justice and equity requires an extension of time so that it can be heard.

18. The First Respondent's application to strike out the Claimant's Second Claim is therefore refused.

19. The position of the SSCL Respondents is different. As regards the claims against them in the Second Claim, I consider that they stand no reasonable prospect of success. They have been brought over a year out of time. Although the Claimant has an explanation for the delay which as noted above might in some cases be a factor in favour of granting a just and equitable extension of time, in this case the other relevant factors point the other way and there is in my judgment no reasonable prospect of the Claimant being granted a just and equitable extension of time for the following reasons:-

19.1 The SSCL Respondents have not previously been involved in the First Claim and the individual Respondents (who are also the witnesses for the corporate Respondent) are not available to attend the (whole of the) January hearing in the First Claim. It is more prejudicial for them suddenly to be facing claims about matters that happened over a year previously than it is for the First Respondent and its witnesses who have been preparing to respond to claims about those matters for some considerable time;

19.2 There is so much overlap between the First Claim and the Second Claim that they need to be heard by the same Tribunal or there is a risk of conflicting decisions on the same facts. The First Claim has already been postponed once and neither the Claimant nor the First Respondent want it postponed again. Further postponement is not in my judgment in accordance with the overriding objective of avoiding delay;

19.3 The merits of the claims against the SSCL Respondents appear to me to be weak for reasons that are readily apparent even at this stage. In particular, so far as the claim about advice about UPP is concerned, not only is there the issue that the SSCL Respondents are not the Claimant's employer and in providing advice to the First Respondent as a service provider would not ordinarily be regarded as agents of the First Respondent for the purposes of EA 2010, s 109 (although I note that the Third and Fourth Respondents use First Respondent email addresses so the relationship may be more akin to that of an internal HR advisor than has been accepted before me), but – much more importantly – the Claimant accepts that he did not know about the advice at the time and no one acted on it. As such, it seems to me that he stands no reasonable prospect of establishing that the advice amounted to unfavourable treatment of him (or, if he succeeds on liability, that he suffered any injury to feelings related to it given that he says he was worried about UPP procedures being pursued in any event). Further, so far as the claims of causing/knowingly helping the First Respondent to commit contraventions are concerned, I agree with Mr Perry that those claims stand little prospect of success in the light of the authorities to which he has referred me, and also in the light of the email of 10 February 2021 itself

which, if it reflects reality, shows that the SSCL Respondents were in general providing challenge to the First Respondent;

19.4 Finally, I cannot see that the Claimant suffers any real prejudice by not being permitted to proceed with his claims against the SSCL Respondents. The causing/aiding claims are essentially 'parasitic' on the claims against the First Respondent and are highly unlikely to succeed unless the claims against the First Respondent succeed and, in any event, the Claimant will get no greater remedy from succeeding against the SSCL Respondents as well as the First Respondent. So far as the UPP advice issue is concerned, it is rather like the Claimant trying to sue the Respondent's solicitors as well as the Respondent – it adds nothing of substance to the claim he is already bringing against the First Respondent. In contrast, the prejudice to the SSCL Respondents of being brought into these proceedings at such a late stage is significant for the reasons I have already outlined.

20. For all these reasons, I consider both that the Claimant stands no reasonable prospect of success in his claims against the SSCL Respondents and that it is appropriate to strike those claims out under Rule 37(1)(a).

21. The Second Claim against the First Respondent will be joined with the First and heard together in January 2023 within the existing listing.

Employment Judge Stout

22 November 2022

Sent to the parties on:

23/11/2022

For the Tribunal Office:

OLU