



EMPLOYMENT TRIBUNALS

Claimant: Mr D Coletta

Respondent: Bolton College

HELD AT: Manchester (in person) **ON:** 26th April 2023

BEFORE: Employment Judge Anderson

REPRESENTATION:

Claimant: In Person

Respondent: Ms Guilding (Solicitor)

JUDGMENT having been given orally and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Respondent makes an application for deposit orders in respect of each allegation made by the Claimant in his table of allegations.
2. The Respondents position is that allegations 1-17 are out of time and therefore have little reasonable prospect of success and that allegations 18-20 require a deposit order on the merits and are said to have little reasonable prospect of success on that basis.
3. At the outset of the hearing, both parties agreed that this matter would be dealt with by way of submissions and that no live evidence would be heard.

4. Enquires were made in respect of adjustments needed by the Claimant. The Claimant asked that matters were explained in straightforward terms and I took care to avoid idioms and metaphor when talking to the parties. The Claimant was also able to ask for a break at any point and there was a break of 15 minutes following the Respondents submissions to enable the Claimant to think about his response.

The Law

5. The relevant provision is contained within Rule 39 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

39.— Deposit orders

(1) Where at a preliminary hearing (under [rule 53](#)) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in [rule 21](#).

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of [rule 76](#), unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the

party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

6. Within this test, I am permitted to take into account disputes of fact to an extent that is not permissible in respect of strike out. It requires me to form some view of the case and I have a greater leeway to make an order that I would not have with strike out.
7. I also had regard to the leading authorities in respect of time limits including Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, Robertson v Bexley Community Centre [2003] IRLR 434 and Adedeji v University Hospitals NHS Trust [2021] EWCA Civ 21.

Relevant Dates

8. I note the following dates for completeness:
 - a. Act 17 is the 2nd November 2021
 - b. Date A – 25th May 2022
 - c. Date B – 6th June 2022
 - d. The ET 1 is dated 21st June 2022.
9. In terms of allegation 19 – the Claimant relied on this occurring in the period 12th November 2021 to 9th June 2022.

Allegations 1-17

10. The Respondent pursued allegations 1-17 in respect of time limits.
11. In respect of allegations 1-17, I am unable to accept the Respondents proposition that this has little reasonable prospects of success. Whether it is an act extending over a period is fact sensitive. These matters are clearly capable of so doing and cannot be said to be so weak so as to have little reasonable prospect of success.
12. These matters potentially link to the matters ‘post-relationship’ (this phrase isn’t settled and is possibly in dispute between the parties) regarding the Claimant’s disability.
13. The Respondent has placed significant weight on the ending of the ‘relationship’ as being a demarcation which results in the claim having little reasonable prospects of success due to time limits. However, beyond the mere fact of the ending of the relationship, there was little else before me to identify why this would prevent the act extending over a period to the extent that I could find that the claim had little reasonable prospects of success.
14. Furthermore, on top of that, there is the possibility of a just and equitable extension again, this is fact sensitive and it also relates to a period of time in which the Respondent has an ongoing internal investigation. I consider this point in further detail below in respect of the sexual orientation point.

15. The Respondent's position is stronger in respect of sexual orientation discrimination. Claimant has accepted before me that 18-20 relate to the protected characteristic of disability only. These are not absolute matters, but are nonetheless important. The fact that different protected characteristics are involved are a particular factor against the continuing act. It follows that it is unlikely that the Claimant will establish sexual orientation discrimination as an ongoing act to the last act relied upon. This sexual orientation claim is at real risk of being out of time.
16. However, that is not the end of the matter. There is still the possibility of a just and equitable extension covering a time period of the Respondents internal investigation. Internal investigations potentially help preserve the evidence or the quality of the evidence by crystallising it through statements or making parties recall events earlier than they otherwise would. This does not in any way create an automatic right of extension of time, but it is a relevant factor for any Tribunal considering the point. No specific prejudice was evidenced at this preliminary stage. Furthermore, if the reason for the claim being late is the Claimant's misunderstanding of the relevance of an internal procedure to time limits, this is potentially relevant in a way that it would not be under the reasonable practicability test. The Claimant's prospects in respect of a 'just and equitable' extension of time in respect of sexual orientation discrimination are not 'little reasonable prospects'

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Allegations 18-20

17. The application in respect of allegations 18-20 were pursued on the merits.
18. Turning to 18-20, the Claimant has withdrawn the allegation that these were acts of sexual orientation discrimination. This was sensible as these points in isolation ran the real risk of deposit orders due to the lack of a link to the protected characteristic.
19. However, the Claimant has articulated how 18-20 link to his protected characteristic of disability. I was taken to specific entries on specific documents. More than one conclusion can be drawn from those entries. There are legitimate matters to address on an application of the burden of proof provisions or 'the reason why' approach. I wont elaborate further in these reasons as it is ultimately a matter for the final hearing to look at afresh. On the merits, this is a trial issue. There are competing versions of events and interpretations of events that can only be properly explored through live witness evidence. It is not 'little reasonable prospects of success'.
20. I therefore refuse the application for a deposit order or deposit orders in respect of allegations 18-20.

Postscript

21. I would emphasise that the test is 'little reasonable prospects of success'. It would be wrong for the Claimant to understand from today that I have

endorsed his claim. His is not a straightforward case. I have not described it as 'good' and nothing in this Judgment should be seen as anything other than a refusal to make a deposit order or orders, based on the specific application that was put before me.

Employment Judge Anderson
Date 26th April 2023

REASONS SENT TO THE PARTIES ON
2 May 2023

FOR THE TRIBUNAL OFFICE