



EMPLOYMENT TRIBUNALS

Claimant: Miss M Bapodara

Respondent: Travelodge Hotels Limited

Heard at: London South Employment Tribunal (by video)
On: 31 May 2023

Before: Employment Judge Abbott

Representation

Claimant: in person

Respondent: Mr Sam Way, barrister, instructed by JMW Solicitors LLP

JUDGMENT FOLLOWING OPEN PRELIMINARY HEARING

1. The following allegations of things said to amount to less favourable treatment under the complaints of direct sex discrimination and direct race discrimination are struck out:
2. The complaint of direct age discrimination is struck out in full.
3. The complaint of unlawful deductions from wages is struck out in full.

REASONS

Introduction

1. This is my judgment on the respondent's application to strike-out certain aspects of the claimant's claim, made at a preliminary hearing held by video on 31 May 2023. Specifically, the respondent sought to strike out the following allegations on the basis that the allegations are *prima facie* out of time:
 - (1) *"Fail to give the claimant a pay rise from 2013-2017 and even after 2017, up to when she left, paid the claimant less than other colleagues*

in the same role but who had responsibility for less complex sites or sites with few rooms” (issues 5.1.1, 5.6.1 and 5.10.1 in the List of Issues found at paragraph 51 of the Order of EJ Corrigan sent to the parties on 24 March 2023).

- (2) *“Fail to appoint the claimant to a number of positions” (issues 5.1.2, 5.6.2 and 5.10.2). The claimant has specified that these all relate to dates before 2019.*
 - (3) Making an unauthorised deduction of £370 from the claimant’s wages in May 2020 (issue 8.1).
2. The allegations at (1) and (2) form part of the complaints of direct sex discrimination and direct race discrimination (the other allegations are not the subject of this strike-out application), but are the only allegations made under direct age discrimination. The allegation at (3) is the only one made in the claim of unauthorised deductions from wages.
 3. I delivered my decision orally at the hearing, and these reasons are provided following a request made by the claimant during the hearing.

Relevant law

4. Rule 37(1) of the Employment Tribunals Rules of Procedure provides that the Tribunal may strike out all or part of a claim 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] 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].
5. The power to strike-out may only be exercised if the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested by the claimant, at a hearing (Rule 37(2)). Here, the claimant has been on notice since a preliminary hearing before EJ Corrigan on 8 February 2023 that strike-out on the basis of time limits was on the agenda for today’s hearing (see paragraph 3 of the Order following that hearing) and had the opportunity to make submissions at this hearing. I am satisfied that she has had a reasonable opportunity to make representations as required under Rule 37(2).
6. The respondent advanced its application under Rule 37(1)(a), arguing that

the abovementioned allegations have no reasonable prospect of success, because there is no reasonable prospect of them being found to be in time or that an extension of time would be granted. It is therefore necessary to consider also the rules on time limits. These differ for the Equality Act (discrimination) complaints and for the unlawful deductions complaint.

Equality Act complaints

7. Section 123(1) of the Equality Act provides, insofar as relevant, that a complaint under the Act 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.
8. Under section 123(3), conduct extending over a period is treated as done at the end of the period, and a failure to do something is to be treated as occurring when the person in question decided on it.
9. In considering whether to allow an extension of time under the 'just and equitable' test, the Tribunal has a wide discretion but there is no presumption that the discretion should be exercised. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule (*Bexley Community Centre v Robertson* [2003] EWCA Civ 576). In other words, the burden of persuasion is on a claimant.
10. The Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, explained that the best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of, and the reasons for, the delay. The judgment also quoted from an earlier Court of Appeal judgment, *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, which emphasised at paragraph 19 that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

Unlawful deductions complaint

11. Section 23(2) of the Employment Rights Act 1996 provides, insofar as relevant, that an employment tribunal shall not consider a complaint of unlawful deductions from wages unless it is presented before the end of the period of three months beginning with, in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made.
12. Section 23(4) of the Employment Rights Act 1996 provides that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is

presented within such further period as the tribunal considers reasonable.

13. Court of Appeal case law has established three general rules which apply when considering the application of the “escape clause” provided in section 23(4) (and its equivalents in other applicable legislation).
 - (1) The section should be given a “liberal construction in favour of the employee” — *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53, CA.
 - (2) What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide — see, e.g., *Wall’s Meat Co Ltd v Khan* [1979] ICR 52, CA.
 - (3) The onus of proving that presentation in time was not reasonably practicable rests on the claimant. “That imposes a duty upon him to show precisely why it was that he did not present his complaint” — *Porter v Bاندridge Ltd* [1978] ICR 943, CA.

Submissions

14. Mr Way, for the respondent, argues in summary that each of these allegations has no reasonable prospect of success. They are all substantially out of time and cannot arguably form part of any continuing course of conduct with acts that were in time. Accordingly, an extension of time would be required and the burden of persuasion in that respect is on the claimant. No explanation for why there had been a delay was advanced in the ET1 claim form or in correspondence prior to the hearing today, nor did anything that the claimant said in submissions change the position.
15. The claimant explained her reasons for not bringing the claims earlier in submissions. In essence, this was because she was in continuing employment with the respondent and, although she raised issues internally regarding her treatment at or around the times that events occurred, until her departure she did not think to take those to ACAS or onwards to the Tribunal.

Conclusions

16. I will deal with the Equality Act allegations first, then the unlawful deductions allegation.

Equality Act allegations

17. I accept the respondent’s submission that there is no reasonable prospect of the claimant establishing that the relevant allegations form part of any continuing course of conduct with acts that were in time. They plainly do not. They are concerned with very separate issues to those raised elsewhere in the claim, which relate to events from September 2021 onwards, and involve different individuals. Accordingly, the relevant question for me is whether the claimant has any reasonable prospect of persuading the Tribunal at the final hearing that it is ‘just and equitable’ to allow these allegations to be pursued.

18. I am conscious that no reasonable prospect of success is a high bar. However, having heard the claimant's submissions and taking them at their highest, I can see no reasonable prospect of the panel at the final hearing granting an extension of time on any of these allegations.
19. As already mentioned, in considering whether it is just and equitable to extend time, the Tribunal has a wide discretion but must take account of all relevant factors, including considering the length and reason for the delay and whether the delay has prejudiced the respondent in respect of matters such as investigation and obtaining evidence. The burden of persuasion is on the claimant.
20. In respect of these allegations, there are very lengthy delays (the allegations date from 2013-2019; the claim was presented in January 2022) and the explanation given for the delay is very thin indeed (amounting to no more than that the claimant did not want to 'rock the boat' during the time of her employment, during which she was evidently a successful employee). It is unarguable that the respondent will be substantially prejudiced by having to investigate issues going back as far as 2013, but even the most recent allegations relate to 2019 which is still between 4 and 5 years before the final hearing in this claim. As I have already said, the allegations are concerned with very separate issues to those raised elsewhere in the claim, which relate to events from September 2021 onwards, and involve different individuals. All of these factors weigh very heavily against an extension being allowed. No other factors have been identified by the claimant as favouring an extension, nor are any evident to me based on the materials available.
21. Accordingly, I can see no reasonable prospect that a Tribunal, even with its wide discretion, could be persuaded by the claimant that it is just and equitable to allow an extension of time for the pursuit of these allegations. As this means the allegations are out of time, they shall be struck out. That has the consequence of narrowing the issues under direct sex discrimination and direct race discrimination, and striking out the direct age discrimination claim in full.

Unlawful deductions allegation

22. The unauthorised deduction complained of is plainly outside of the primary three-month time limit, having been made in May 2020 and the claim presented in January 2022. Accordingly, the relevant question for me is whether the claimant has any reasonable prospect of persuading the Tribunal at the final hearing that the "escape clause" provided in section 23(4) of the Employment Rights Act 1996 should apply here.
23. Again, I am conscious that no reasonable prospect of success is a high bar. However, having heard the claimant's submissions and taking them at their highest, I can see no reasonable prospect of the panel at the final hearing granting an extension of time on any of this allegation.
24. As noted above, the time limits for an unlawful deduction complaint, are more stringent than for an Equality Act complaint. The first thing the claimant

must do is to satisfy the Tribunal that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of three months. Here, the claimant has put forward nothing to suggest it was not reasonably practicable to bring that claim earlier. Her explanations were to the effect that it was her choice not to pursue such a claim during the course of her ongoing employment.

25. On that basis, I can see no reasonable prospect that a Tribunal could be persuaded by the claimant that the “escape clause” provided in section 23(4) of the Employment Rights Act 1996 should apply here. As this means the allegation is out of time, it shall be struck out. This has the consequence of striking out the unlawful deductions complaint in full.

Employment Judge Abbott

Date: 31 May 2023