



EMPLOYMENT TRIBUNALS

Claimant: Ms Hayley Murphy

Respondent: Hellerman Tyton Limited

HELD AT: Manchester (by CVP) **ON:** 31 May 2023

BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: In person

Respondent: Mr Philip Warnes, solicitor

RESERVED JUDGMENT

1. The claimant's claim of harassment relating to sex is struck out under Rule 37 of the Employment Tribunal Rules because it was not presented in time and it is not just and equitable to extend time.
2. The respondent's application for a Deposit Order regarding the claimant's claim for Constructive Dismissal is dismissed. No Deposit Order is made.

REASONS

PREAMBLE

1. In a claim treated as received on 21 October 2022 following ACAS Early Conciliation, the claimant has brought complaints of Constructive Dismissal and Harassment on grounds of sex. The final hearing of this claim is listed for 29, 30, and 31 October 2024 at Manchester Employment Tribunals, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA.
2. This was a public preliminary hearing listed to consider:
 - a. Whether the claimant's claim of harassment relating to sex should be struck out under Rule 37 of the Employment Tribunal Rules because it has no reasonable prospect of success on the basis of jurisdiction as to whether it was presented in time and/or whether it would be just and equitable to extend time;
 - b. Alternatively, whether the claimant should be ordered to pay a deposit order under Rule 39 of the Employment Tribunal Rules in relation to her claim of harassment related to sex on the basis that the claim has little reasonable prospect of success on the basis of jurisdiction as to whether it was presented in time and whether it would be just and equitable to extend time;
 - c. Whether the claimant should be ordered to pay a deposit order under Rule 39 of the Employment Tribunal Rules in relation to her claim for constructive unfair dismissal on the basis it has little reasonable prospect of success.
 - d. To make any further case management orders thereafter, if required.

EVIDENCE

3. I heard submissions from both parties. There is a helpful 52-page bundle.

CASE SUMMARY

4. This case summary is in large part taken from Employment Judge Martin's Case Management Order sent to the parties on 24 March 2023.

5. The claimant was employed by the respondent as a quality manager. She worked for the respondent from 2006 until she resigned in July 2022. She complains that the managing director (MD) abused his power. She raised a grievance. She says she was told to go on sick leave, which she did. The grievance against the MD was heard in 2021 and was upheld. The MD was dismissed. The respondent says it is not liable for the MD's actions, who it says was acting outside his authority.

6. The respondent claims that it sought to assist the claimant to return to work. The claimant says that the respondent failed to support her after her return and that her health was suffering. She submitted her resignation in March 2022, but rescinded this, she says, on the respondent's request and agreement to provide support. Despite this she says support was not forthcoming.

7. The claimant is unrepresented. She pursues claims of Constructive Dismissal and Harassment related to sex.

LAW

Strike out/Deposit order

8. Rule 37 of the Employment Tribunal Rules of Procedure 2013 deals with application to strike out. It provides as follows:

37.—(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. ...

9. Strike out is a draconian step that should be taken only in exceptional cases.
10. In considering whether a claim has no reasonable prospect of success, the Tribunal must consider whether there is a “more than fanciful” prospect of the claim succeeding (*A v B and another* [2011] ICR D9).
11. The Claimant’s case must be taken at its highest. The tribunal must be particularly careful not simply to ask a litigant in person to explain their case while under the stresses of a hearing, but must take reasonable care to read the pleadings and any other key documents (*Cox v Adecco and ors* [2021] ICR 1307).
12. In the context of an unfair dismissal claim, guidance was given by the Court of Session in the case of *Tayside Public Transport Co Ltd v Reilly* [2012] IRLR 755. Almost all unfair dismissal claims are fact-sensitive. Where the central facts are in dispute, the claim should be struck out in only the most exceptional circumstances. Where there is a serious dispute between the parties, it is not for the Tribunal to conduct an impromptu trial of the facts. That said, the Court of Session recognised that there may be cases where it is instantly demonstrable that the central facts in the claim are untrue, such as where they are conclusively disproved by disclosed documentation.
13. The EAT held, in *HM Prison Service v. Dolby* [2003] IRLR 694 EAT, at para 15, that the striking out process requires a two-stage test. The first stage involves a finding that one of the specified grounds for striking out has been established;

and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. *Dolby* was decided under a previous version of the Employment Tribunal Rules, but the important part of the wording of the relevant rule was the same.

14. Applications for a deposit order are governed by Rule 39 Employment Tribunal Rules of Procedure 2013 which provides as follows:

39.—(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.
15. The purpose of a deposit order is to weed out claims which are unlikely to succeed but do not meet the strike out criteria, and to give a clear warning that costs may be payable if a claim succeeds (*Hemdan v Ishmail and anor* 2017 ICR 486). The Tribunal retains a discretion even where the test in rule 39 is met.
16. In considering whether to strike out or make order a deposit, the Tribunal must bear in mind the overriding objective, in rule 2 of the ET Rules:
The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
- (a) ensuring that the parties are on an equal footing;
 - (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
 - (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

Time limits/"just and equitable"

17. I consider the guidance in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, in which Lord Justice Underhill stated:

37. ... The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) 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 (as Holland J notes) "the length of, and the reasons for, the delay". ...

18. The judgment in *Adedeji* goes on to refer to guidance from *Miller v Ministry of Justice* [2016] UKEAT 0004/15:

19. That said, 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).

Harassment

19. The Equality Act 2010 materially states:

26Harassment

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b)the conduct has the purpose or effect of—
 - (i)violating B's dignity, or
 - (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b)the conduct has the purpose or effect referred to in subsection (1)(b).
- (3)A also harasses B if—
 - (a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b)the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a)the perception of B;
 - (b)the other circumstances of the case;
 - (c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.

...

[Part 5]

40Employees and applicants: harassment

(1)An employer (A) must not, in relation to employment by A, harass a person

(B)—

- (a)who is an employee of A's;

...

120Jurisdiction

(1)An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

- (a) a contravention of Part 5 (work);
- (b) a contravention of section 108, 111 or 112 that relates to Part 5.

...

123Time 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.

(2)Proceedings may not be brought in reliance on section 121(1) after the end of—

- (a)the period of 6 months starting with the date of the act to which the proceedings relate, 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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Unfair dismissal

20. Section 94 of the Employment Rights Act 1996 gives an employee a right not to be unfairly dismissed by his employer. In an unfair dismissal complaint, the respondent bears the burden of proving on the balance of probabilities that the dismissal was for a potentially fair reason within section 98 of the Employment Rights Act 1996. In *Abernethy Mott, Hay v Anderson* [1974] IRLR 213 CA, it was held that the reason for a dismissal is a set of facts known to the employer or beliefs held by him that cause him to dismiss the employee. See also Underhill LJ's comments in *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748; 23 May 2017. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see *W Devis and Sons Ltd v Atkins* [1977] ICR 662.

21. Section 95(1) of the Employment Rights Act 1996 provides that:

for the purposes of this part of this Act, an employee is dismissed by his employer only if:

(a) the contract under which he is employed is terminated by the employer

(b) ...

(c) *The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct ...*

22. The Court of Appeal, Lord Denning MR presiding, in *Western Excavating (ECC) v Sharp* [1978] ICR 221 said the following about the predecessor to s. 95, which was the same:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct and he is constructively dismissed"

23. In *Omilaju v Waltham Forest LBC (No.2)* [2005] I.R.L.R. 35 the Court of Appeal explained that the final act (the so called "last straw") in a series of actions which cumulatively entitled an employee to repudiate her contract and claim constructive dismissal need not itself be a breach of contract and need not be unreasonable or blameworthy. The act complained of had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach.

24. Further guidance is set out in the Court of Appeal decision of *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978 at para 55 which advises the posing of the following questions:

"(1) What was the most recent act or omission on the part of the employer which the employee says caused or triggered her resignation?"

(2) Has she affirmed the contract since that act?"

- (3) *if not was that act or omission by itself a repudiatory breach of contract?*
- (4) *if not was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a remain repudiatory breach of the implied term of trust and confidence?*
- (5) *Did the employee resign in response to that breach?*

25. The claimant must resign in response to the breach of contract, and not any other reason. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and lost the right to claim constructive dismissal.

26. In *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443, Mr Justice BrowneWilkinson (as he then was) stated:

13. ... Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: Allen v Robles [1969] 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation ..."

FINDINGS

27. The first issue is whether the claimant's claim of harassment relating to sex should be struck out under Rule 37 of the Employment Tribunal Rules because it has no reasonable prospect of success on the basis of jurisdiction as to whether it was presented in time and/or whether it would be just and equitable to extend time.

28. The respondent's application is based on time limits. Mr Warnes argues that any acts by the Managing Director (MD) could not have persisted after June 2021, because the claimant was on leave from that point and did not return to work until after the MD had been dismissed in October 2021. Her claim was lodged in October 2022.

29. Mr Warnes also submitted that the dismissed MD was unlikely to cooperate with either party as a witness. After so long, and without the key witness, it was not just and equitable to extend time because the cogency of the evidence would be poor. The respondent had admitted some of the MD's behaviour that was known to it during the adjudication of the claimant's grievance, but it would not be able to mount any defence to any new accusations.

30. The claimant does not argue that the harassment persisted after the MD left the respondent company. She says that the delay was because she was on sick leave until after the MD was dismissed and that she should have maintained her resignation in November 2021. She was not going to put her claim in while still employed there. She feels that she received no support after returning and her position was untenable. She got legal advice just before she put in the claim to the ET. She accepted that it would be difficult to get evidence about the MD's acts that were not listed in her grievance.

31. I understand the claimant to be saying that in her mind, there is no substantive delay because the events led from one to another; the effects of the MD's harassment persisted because the respondent did not recognise how serious her mental health problems and stress had become and did not provide support to help her recover.

32. I find that it is not just and equitable to extend time. The main reasons are because the delay is significant and the reasons for it are understandable but do not justify it, and there is clearly prejudice to the respondent.

33. The claimant's claim regarding harassment is effectively almost a year out of time. She had no more contact with the MD after June 2021. He was dismissed in October 2021 after the respondent upheld the claimant's grievance against him and the claimant returned to work soon after. The claimant was candid that she now feels she should have maintained her resignation in November 2021. Had she done so, she may well have made her claim soon after. It seems to me that while it is unfortunate that the claimant would now do things differently, she allowed the opportunity to make the claim about harassment pass by.

34. The claimant says that she did not obtain legal advice about a claim in November 2021. She did obtain advice before making the claim in October 2022, though she is not represented at this hearing. Had she obtained legal advice in November 2021 she might have acted differently. There is no medical evidence before me about her mental or physical health at the time. I cannot make a finding that her health was an operative reason that she did not make the claim in time.

35. There is clearly prejudice to the respondent. The claimant did not suggest that it is likely that the MD would give evidence, and I accept Mr Warnes' submission that in those circumstances the respondent would not be able to respond to the claimant's claims. The respondent has accepted some of the claimant's claims about the MD's acts (though not whether they amount to Harassment) because they were made in her grievance. Determining whether any other claims are true would be very difficult without the MD's evidence. In any event the claims relate to events before June 2021, and any witness' memory will have deteriorated, including the claimant's.

36. There is no real dispute of fact regarding the time limits. The respondent accepted that the MD harassed the claimant at least to the extent of what she included in her grievance. It seems to me that any dispute of fact only arises regarding the

support the claimant received after the MD was dismissed in October 2021 until she submitted her notice in March 2022.

37. In the circumstances I find that the test for whether it is just and equitable to extend time is not met. The claim is out of time and is struck out under Rule 37 of the Employment Tribunal Rules.

38. The next issue is whether the claimant should be ordered to pay a deposit order under Rule 39 of the Employment Tribunal Rules in relation to her claim for constructive unfair dismissal on the basis it has little reasonable prospect of success.

39. I find that the claimant should not be ordered to pay a Deposit Order. The circumstances of the claim for Constructive Dismissal are quite different than those of the struck-out Harassment claim.

40. Mr Warnes submitted that the claimant's claim has little reasonable prospects of success because none of the respondents acts or omissions could amount to breach of contract based on a breakdown of trust and confidence. In any case, he said, she affirmed the contract through delay.

41. The claimant's submissions described why she felt that she was not supported after returning to work. She felt that she was being talked about and she lost the professional relationships she had had with the senior team. She believed she had been promised one-to-one meetings with human resources and assistance to reintegrate into work, and felt that nothing was provided.

42. It seems to me that whether there was a breakdown of trust and confidence is a matter for evidence in the final hearing. I bear in mind the guidance in *Omilaju v Waltham Forest LBC (No.2)* and consider that the "last straw" need not itself be a breach of contract. The claimant argues that her time at the respondent company between November 2021 and March 2022 was not an affirmation of the contract but was a period in which she came to believe that she had no choice but to resign due to the company's omissions.

43. I refuse the respondent's application for a Deposit Order regarding the claimant's claim for Constructive Dismissal. The claim is already listed to be heard on October 29, 30, and 31 October 2024 and Employment Judge Martin's Case Management Order was sent to the parties on 24 March 2023.

CONCLUSION

44. The claimants claim for Harassment on the grounds of sex is struck out under Rule 37 of the Employment Tribunal Rules because it was not presented in time and it is not just and equitable to extend time.

45. I make no order regarding the claimant's claim for Constructive Dismissal.

Employment Judge Ficklin

25 July 2023

JUDGEMENT & REASONS SENT TO THE PARTIES ON

1 August 2023

FOR THE TRIBUNAL OFFICE