



## EMPLOYMENT TRIBUNALS

**Claimant**

Mrs S Badshah

**Respondent**

Castle Villas Ltd

## PRELIMINARY HEARING IN PUBLIC

Heard at: Leeds by CVP

On: 8 June 2023

Before: Employment Judge Davies

**Appearances**

For the Claimant:

In person

For the Respondent:

Mr McPhail (counsel)

## RESERVED JUDGMENT

1. The complaints of victimisation, harassment and unfavourable treatment because of something arising in consequence of disability are struck out because the Claimant has no reasonable prospect of succeeding in showing that they were presented within the time limit in the Equality Act 2010 or that it is just and equitable to extend time for bringing them.
2. The complaint of being subjected to detriment for making a protected disclosure is struck out because the Claimant has no reasonable prospect of succeeding in showing that it was presented within the time limit in the Employment Rights Act 1996, or that it was not reasonably practicable to do so and that the claim was presented within a reasonable period.

## REASONS

### Introduction

1. This was a preliminary hearing in public to decide whether the Claimant's most recent claim, case number 1801823/2023, should be struck out because she has no reasonable prospect of showing that it was not presented within the relevant time limits, nor that the time limits should be extended.
2. The preliminary hearing had also been listed to consider whether the claim should be struck out because it had no reasonable prospect of success on the merits. There was not enough time to consider that. However, the merits of the claim are one relevant factor in assessing whether there are reasonable prospects of showing that it is just and equitable to extend the time limit. To that extent, I invited the parties to address the merits of the claim.

3. The Claimant represented herself. Mr McPhail of counsel represented the Respondent. The Claimant has poor mental health and we discussed reasonable adjustments for the Claimant at the start of the hearing. The Claimant wanted the hearing to go ahead, even though it could not be recorded. We agreed that she should ask for a break if she needed one and she did so.
4. The hearing was listed for three hours, but around an hour was spent trying to make sure that everybody had copies of all the relevant documents. The parties therefore agreed that each would make oral submissions, and would then send in written submissions. I made case management orders about that. I have considered the documentary evidence uploaded to the Tribunal's Document Upload Centre, the oral submissions, and the written submissions and evidence provided by the parties. This judgment does not address every point raised, because that would not be proportionate. I have considered all of the points raised.

### **Relevant procedural and factual background**

5. This case has a complicated procedural background. It is not necessary to set that out in detail in this judgment. I summarise the relevant aspects.
6. The Claimant worked for the Respondent between October 2019 and June 2020. She presented a Tribunal claim against the Respondent on 29 June 2020 (case number 1803630/2020), complaining of unfair dismissal, disability discrimination, breach of contract with respect to notice pay and failure to make other payments. She said that her employment terminated on 23 June 2020.
7. The documents from the time make clear, and there is no dispute, that on 23 June 2020 the Respondent wrote to the Claimant, confirming that she was being dismissed with one week's notice and was being asked to take annual leave during that final week. In text message exchanges immediately afterwards, the Claimant alleged that she was being treated unfairly for bringing up health and safety concerns. On 3 July 2020 a wage slip was sent to her, and the Respondent expressed the view that it covered everything she was owed. No notice pay was paid.
8. At a preliminary hearing on 7 September 2020 EJ Wade identified the Claimant's discernible complaints, including breach of contract in respect of notice pay, unfair dismissal for making protected disclosures and that the dismissal was an act of victimisation for doing a protected act. EJ Wade noted that the issue in relation to notice pay was whether the Respondent could lawfully require the Claimant to take her holiday during her notice period. The Claimant provided further, written particulars in October 2020 and subsequently provided a table setting out what she said were her protected disclosure and disability discrimination complaints. She also said that the Respondent had failed to provide her statutory terms and conditions of contract. She made other complaints.

9. The Claimant made an application to amend her claim on 2 October 2020, to add a complaint under the Equality Act 2010 in relation to notice pay and a complaint in relation to the failure to provide her with a written contract. As I understand it, that amendment application has been refused. In an email dated 11 November 2021 to the Respondent's legal representative, the Claimant referred to the Respondent's failure to disclose the contract she alleged had been issued to the Claimant and to a "string of falsification".
10. In its amended response provided on 26 October 2020 the Respondent (which was now legally represented) pleaded that on 9 April 2020 the Claimant became an employee and was given a statement of terms and conditions of her employment.
11. There was a further preliminary hearing on 28 January 2021 before EJ Brain, following which the Claimant provided an amended version of her schedule of complaints. The Claimant made amendment applications. There were subsequently other hearings and orders, appeals, applications for reconsideration and for relief from sanction and a range of other matters. Various preliminary hearings have been listed and postponed.
12. In November 2021 the Claimant raised a concern with the Tribunal that the Respondent had failed to disclose a copy of her alleged contract. The Respondent has never disclosed a copy and it says that it cannot find it. It has disclosed a copy of another contract, which it says is its standard contract. The Claimant disputes that. She has provided documentary evidence that she says supports her contention that the Respondent is being dishonest about this.
13. On 20 March 2023, EJ Maidment conducted a preliminary hearing for case management. It was originally listed to determine the Claimant's outstanding amendment applications and her application for specific disclosure, but in the end it addressed reasonable adjustments and a clarification of the Claimant's existing claims and proposed amendments. EJ Maidment confirmed in his Case Management Order that the Claimant's existing complaints were of wrongful dismissal (notice pay); automatically unfair dismissal for whistleblowing; victimisation dismissal; unauthorised deduction from wages and failure to pay for accrued but untaken holiday. The Claimant also had outstanding amendment applications, made in July and December 2021.
14. The claim form in these proceedings (case number 1801823/2023) was presented on 29 March 2023. It was evidently prompted by the fact that the Respondent decided to pay the Claimant her notice pay and did so in February 2023. The Claimant had gone through early conciliation between 22 and 24 March 2023. The claim form complains of conduct of the Respondent "between 3 July 2020 and 10 February 2023." The particulars attached identify the conduct complained of. It is that:
  - 14.1 The Respondent failed to pay the Claimant her notice pay and dishonestly said that she was given a written contract that entitled the Respondent to require her to take holiday during her notice period;
  - 14.2 On 9 February 2023 the Respondent emailed the Claimant to pay her notice pay plus interest;

- 14.3 Withholding her notice pay and dishonestly maintaining that she was given a written contract that entitled the Respondent to require her to take her holiday during her notice period was therefore a continuous act of detriment (amounting to whistleblowing detriment, victimisation, unfavourable treatment because of something arising in consequence of disability and harassment).
15. The Respondent's position, set out in its ET3, is that the payment of notice pay was a gesture of goodwill with a view to easing what had become difficult and disproportionate litigation. In its email sent to the Claimant in relation to the payment, it wrote:
- "I am writing to advise you that I have made a payment to your account of £548.75. I wrote to you on 23/6/20 giving you one week's notice to terminate your employment with [the Respondent.]  
At the time we asked you to take your one week's holidays accrued in your notice period. You have stated that you feel that is unfair therefore we are paying you for your one week's notice which is £451.75. This is your one week's wage.  
I also acknowledge that this payment is late and should have been paid on your last wages on 3/7/20.  
I have therefore calculated interest at the rate of 8% p/a for the period between 3/7/20 and 10/2/23.  
The interest payment amounts to £97.00."
16. On 5 June 2023 the Claimant emailed the Tribunal in advance of this preliminary hearing. In her email she confirmed the chronology surrounding her dismissal and associated payments (as set out above). Then she said that at the hearing before EJ Wade on 7 September 2020 she had raised the fact that she had not been given a written contract and that the Respondent had said that she had personally given her one. The Claimant was plainly aware by September 2020 that the Respondent was saying it had given her a written contract when she said that it had not.
17. The Claimant has provided evidence and submissions that she says show dishonesty on the part of the Respondent, particularly in respect of the assertion that its standard contract of employment permits it to require employees to take holiday during their notice period, but also in respect of other matters. I am not in a position to make findings about that. I assume for the purposes of this application that the Claimant will be able to prove at the final hearing that there was such dishonesty.
18. I have taken careful note of the medical evidence. There is no doubt that the Claimant experiences poor mental health and is at times incapacitated by it. However, I have also carefully considered the procedural background. The Claimant's presentation before me and the content of her written submissions lend force to the view expressed by EJ Maidment, that the Claimant has a very clear understanding of the legal principles relevant to her claim and an ability to articulate them. She is intelligent and can and does communicate clearly. She can articulate her claims in writing fully and coherently. I note that she has done so throughout her Tribunal proceedings so far. There may be times when she is too unwell to participate, but throughout the history of her Tribunal proceedings she has played a regular, insistent and coherent part.

## Legal principles

### Time limits

19. The time limits for bringing claims of discrimination, harassment and victimisation are governed by s 123 Equality Act 2010, which provides, so far as material, as follows:

#### 123 Time limits

(1) Subject to section 140A, 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.

...

(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.

...

20. Under s 123(3)(a), conduct extending over a period is treated as being done at the end of the period. A distinction is drawn between a continuing act and an act that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, such a practice will amount to an act extending over a period. Where there is no such regime, rule, practice or principle, an act that affects an employee will not be treated as continuing, even though it has consequences that extend over a period of time: see *Barclays Bank plc v Kapur* [1991] ICR 208, HL. The concepts of policy, rule, practice, scheme and so on are examples of when an act extends over a period. However, they should not be treated as a complete and constricting statement of when there can be conduct extending over a period. The focus of the inquiry is not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against, including the claimant, was treated less favourably: see *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530, CA.
21. As regards extending time, the Tribunal has a wide discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time: see *Robertson v Bexley Community Centre* [2003] IRLR 434, CA. It is a question of fact and judgment, to be answered case by case by the Tribunal: see *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327, CA. The Tribunal must consider all the relevant factors in deciding whether it is just and equitable to extend time. Those factors will always include (a) the length of and reasons for the delay; and (b) any prejudice arising from the delay, but the Tribunal must take into account all relevant matters: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050 (CA); *Adedeji v University Hospital*

*Birmingham NHS Foundation Trust* [2021] ICR D5 (CA). That may include the merits of the claims.

22. The time limit for bringing a complaint of being subjected to detriment for making a protected disclosure is governed by s 48 Employment Rights Act 1996. By virtue of s 48(3) the complaint must be presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates. Where the act or failure is part of a series of similar acts or failures, it must be within three months of the last of them. Under s 48(4), where an act extends over a period, the date of the act is the last day of the period. Further, a deliberate failure to act is done when it was decided on.
23. If the claim was not brought in time, it is for the Claimant to satisfy the Tribunal that it was not reasonably practicable to bring her complaint within the time limit and that it was brought within a reasonable period: s 48(3)(b). Reasonably practicable means something between “reasonable” and “physically possible”: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, CA. It is a question of fact for the Tribunal whether it was reasonably practicable for the complaint to be brought in time. The factors to be considered may include the manner of, and reason for, the dismissal; whether the employer’s conciliation machinery has been used; the substantial cause of the Claimant’s failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether and if so when, the Claimant knew of her rights; whether the employer misrepresented any relevant matter to the employee; whether the Claimant has been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the Claimant or her adviser which led to the failure to present the complaint in time: see *Palmer and Saunders*.
24. If the Tribunal finds that it was not reasonably practicable for the claim to be brought in time, it must then consider whether it was brought within a reasonable period thereafter. This requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for the proceedings to be instituted, having regard to the strong public interest in claims being brought promptly, and against a background where the primary time limit is three months: see *Cullinane v Balfour Beatty Engineering Services Ltd* UKEAT/0537/10 (5 April 2011, unreported).

### **Strike out under Rule 37**

25. Under Tribunal Rule 37, the Tribunal may strike out a claim on the ground that it has no reasonable prospect of success. Guidance on the proper approach to be taken in respect of striking out on time limit grounds in discrimination cases was given in *Caterham School Ltd v Rose* [2019] UKEAT/0149/19 and in *E v X, L and Z* [2020] UKEAT 20\_79\_20\_1012. Where the issue is whether or not the alleged discrimination formed part of a course of conduct extending over a period, the test is whether or not that is reasonably arguable. If it is not reasonably arguable, the allegations may in principle be struck out. If it is reasonably arguable, it should be deferred to the final hearing.

26. The general approach in respect of striking out discrimination complaints is that this should only be done in the most obvious and plainest of cases: *Anyanwu v South Bank Student Union* [2001] 1 WLR 638, HL; *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126, CA.

### **Application of the law to the facts**

27. The first issue is whether the Claimant has reasonable prospects of showing that these claims were brought within the time limit, i.e. that there was conduct over a period that ended on or after 23 December 2022. The test is whether that contention is reasonably arguable. I have concluded that it is not.
28. The Claimant's complaints are about not paying her notice pay and about dishonestly asserting that she was given a written contract of employment. I find that it is not reasonably arguable that the failure to pay the Claimant notice pay amounted to conduct over a period. On the undisputed facts, set out in the documents from the time and confirmed by the parties, the Respondent, rightly or wrongly, decided not to pay the Claimant for her notice period. Her final wage slip in July 2020 therefore did not include any notice pay. This seems to me to be a clear and obvious example of a one-off decision or act. The suggestion that it amounted to conduct over a period is wholly unarguable. The fact that the Respondent decided to pay the Claimant her notice pay in February 2023 does not change that and does not bring to an end a course of conduct over a period. I do not need to decide whether the payment was a goodwill payment to try and bring these proceedings to an end, or was made in recognition that the Respondent had acted in breach of contract. Either way, it is wholly unarguable that there was a policy, rule, practice or ongoing situation in which the Claimant or others were treated less favourably, discriminated against or victimised in this respect. There was, clearly and simply, a single decision not to pay the Claimant for her notice period. Likewise, it is unarguable that the failure to pay the Claimant her notice pay was part of a series of similar acts or failures, the last of which fell within the time limit. The failure to pay the Claimant in respect of her notice period happened in July 2020.
29. I also find that it is not reasonably arguable that asserting that the Claimant was provided with a written contract of employment amounted to conduct over a period. Again, it is not arguable that there was a policy, rule, practice or ongoing situation in which the Claimant was discriminated against or victimised in this respect. The Respondent pleaded in October 2020 that the Claimant was given a statement of terms and conditions of employment. That had apparently been stated at the first preliminary hearing in September 2020. It has been the Respondent's position since. That does not reasonably arguably make this discriminatory conduct extending over a period, even if it is untrue. It is simply the Respondent's pleaded case in defending the Claimant's original Tribunal claim. Likewise, it is unarguable that the Respondent's assertion that the Claimant was provided with a written contract of employment was part of a series of similar acts. Again, it is simply its pleaded case in defending the Claimant's Tribunal claim.
30. I turn therefore to the question whether the Claimant has reasonable prospects of persuading the Tribunal that the time limits should be extended. I approach

this question bearing in mind the high threshold for striking out discrimination complaints and the exceptional nature of doing so. I also assume that the Claimant's complaints will prove to be well-founded. Even approaching matters on that basis I have concluded that in this case the Claimant has no reasonable prospect of persuading the Tribunal that it is just and equitable to extend the time limit for bringing her Equality Act complaints and that she has no reasonable prospect of persuading the Tribunal that it was not reasonably practicable to present her whistleblowing claim within the time limit.

31. Her complaints are about the failure to pay her notice pay in July 2020 and about the assertion that she did have a written contract of employment. She now says that this was discrimination, harassment and victimisation contrary to the Equality Act 2010. The notice pay complaints are two and a half years out of time. The written contract complaint more than two years out of time. I have no doubt that she has no reasonable prospect of persuading the Tribunal that it is just and equitable to extend the time limit to that extent. I have referred above to her mental health. I have considered the evidence about that. However, as a cursory examination of the Tribunal file reveals, she has throughout that period engaged coherently, competently and insistently in pursuing her Tribunal claims. It is not arguable that her mental health prevented her in any meaningful way from bringing these claims sooner. The Claimant knew all the elements that now form the basis of the complaint about failing to pay her notice pay when she lodged her original claim form. That claim form included complaints about the failure to pay her notice pay. She knew the elements of the complaint about wrongly asserting that she had a written contract at the preliminary hearing before EJ Wade (and in the amended ET3 response). These complaints could plainly have been brought at that time. The Claimant has not identified the reason why it took so long to present these claims. The fact that the Respondent chose to pay her notice pay in February 2023 does not even arguably amount to a persuasive reason. The prejudice to the Respondent in allowing the claims to proceed now would be real, not least because is likely further to delay these already protracted proceedings. The Respondent would also have to defend additional complaints. The prejudice to the Claimant would be much less, given that she has existing complaints about the failure to pay her notice pay and that these complaints are unlikely to add to any compensation she is awarded in respect of her existing complaints, even if successful. The fact that the Claimant made an amendment application (apparently refused) identifying some of these complaints does not assist her in asserting that the time limit should be extend. On the contrary, it shows that she could have presented the claim at that time (October 2020). It also potentially raises questions of estoppel. Looking at all the potentially relevant factors and assuming that these are meritorious complaints, I have no doubt that the Claimant has absolutely no reasonable prospect of succeeding in persuading the Tribunal that it is just and equitable to extend the time limit for bringing these Equality Act complaints by more than two years, in the context of her ongoing proceedings throughout that time. That is not reasonably arguable.
32. The threshold for extending the time limit for presenting the whistleblowing complaint is higher. It is unarguable that it was not reasonably practicable to present those complaints within the time limit and it is unarguable that they were presented within a reasonable period. As already indicated, the Claimant knew



all the elements of her complaints in July and October 2020 respectively, and neither her health nor any other factor arguably made it not reasonably practicable to present the claim in time. Even if it had not been reasonably practicable, there is no basis whatsoever for arguing that the two year delay in presenting them was a reasonable period.

33. Having concluded that the Claimant has no reasonable prospects of success in relation to these time limit points, I have considered separately whether it is consistent with the overriding objective to strike them out. I have given careful thought to the fact that these are discrimination complaints and to the exceptional nature of striking out such complaints. My judgment is that it is consistent with the overriding objective to strike them out. The Claimant has existing complaints, including complaints relating to her notice pay, and complaints that her dismissal was automatically unfair for whistleblowing and was an act of victimisation. It is now more than three years since those complaints were presented, and it is in the interests of justice to ensure that they are determined without undue delay. The interests of justice would not be served by adding further complaints relating to events that took place two and a half to three years ago that have no reasonable prospects of success in relation to time limits.

**Employment Judge Davies**  
**18 August 2023**

Sent to the parties on:

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For the Tribunal:

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