EMPLOYMENT TRIBUNALS

Claimant: **Miss R Devito**

Respondent: **Oxleas NHS Foundation Trust**

Heard at: London South **On: 08/08/23**

Before: EJ England

Representation
Claimant: Miss M Devito, Mother
Respondent: Mr A Ross, Counsel

JUDGMENT having been sent to the parties on 08 August 2023 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. At the outset of the preliminary hearing (PH) we discussed the claims and the Claimant confirmed them in summary as:
    a. Constructive unfair dismissal;
    b. 'Disability discrimination', which after discussion I understood to be a claim of direct discrimination and/or discrimination arising from disability;
    c. Victimisation; and
    d. Various wages claims that all related to the same loss caused by underpayment of salary and was treated as a claim for unauthorised deduction of wages.

2. The PH was listed primarily to determine the application of the Respondent dated 07/03/23, which was an application to strike out the claim or alternatively for a deposit order, essentially on the basis that claims were said to be out of time, the unfair dismissal claim was said to lack jurisdiction because the Claimant did not have sufficient length of service (time in employment) and generally due to the merits of the claims.

3. The papers that I received were predominantly contained in a bundle of 182 pages electronically. There was also a separate response from the Claimant to the Grounds of Resistance (GoR) and an effectively joint agenda. I heard from the parties predominantly by way of submissions although, conscience of the blurred boundaries that can arise with litigants in person and lay representatives even when there is an official period of 'evidence' in contrast to 'submissions', I informed the Claimant and her mother that they would need to tell the truth in what they informed me and they assured me that would be the case. In those circumstances, I did not feel the need to formally swear them in to provide evidence, nor after discussion with Mr Ross did he require such a procedure. Where applicable, I therefore assessed what the Claimant and her mother stated as formal evidence, such as when they explained why the wages claim had not been presented earlier.

The Rules

4. The Respondent's application was relying on the following elements of the tests for strike out and deposit order applications from Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Rules'):

> 37.— Striking out
> (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;
> (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.
>
> 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.

5. In considering a strike out application, there are many cases that emphasise the need to so cautiously and only in the correct circumstances. For example, in *SCA Packaging Limited v. Boyle* [2009] IRLR 746 at para. 9 Lord Hope observed:

> "It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly. This is in keeping with the overriding aim of the tribunal system. It was set up to take issues away from the ordinary courts so that they could be dealt with by a specialist tribunal as quickly and simply as possible. As Lord Scarman said in Tilling v Whiteman [1980] AC 1, 25, preliminary points of law are too often treacherous short cuts. Even more so where the points to be

> decided are a mixture of fact and law. That the power to hold a prehearing exists is not in doubt: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SR 2005/150), Schedule 1, rule 18. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School [1995] ICR 317, 323. The essential criterion for deciding whether or not to hold a prehearing is whether, as it was put by Lindsay J in C J O'Shea Construction Ltd v Bassi [1998] ICR 1130, 1140, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute."

6. Similarly, In considering a strike out application, Lady Smith in *Balls v Downham Market High School and College* [2011] IRLR 217 summarised the relevant consideration as, "in short, a high test", stating at paras. 4-6:

> "...strike out is often referred to as a draconian power. It is. There are, of course, cases where fairness as between parties and the proper regulation of access to employment tribunals justify the use of this important weapon in an employment judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached... the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

7. A case should not be struck out when there is a dispute in relation to material facts, per *North Glamorgan NHS Trust v Ezsias* [2007] IRLR 603.

8. In terms of procedure and the case to be reviewed, in *Ukegheson v London Borough of Haringey* [2017] EWCA Civ 1140 it was stated by the Court of Appeal at para. 27, "We are primarily concerned with the pleadings, though the power to strike out as having no reasonable prospect of success can be exercised where there is a dispute of fact where the Claimant cannot realistically succeed.". In the EAT, Langstaff J, sitting then as the President of the EAT in *Day v Lewisham and Greenwich NHS Trust and another* [2016] IRLR 415 (later appealed but not on this point), summarised the position at para. 10:

> "when considering whether to strike out a claim a Tribunal must accept the facts asserted by the Claimant in his originating application, taken at their reasonable highest in his favour"

9. More recently from the EAT, Ellenbogen J provided a comprehensive review of the applicable authorities and principles, distilling 13 principles at para. 50 of her judgment in *E v X & Anor* ([2020] UKEAT 20_0079_20_1012 (Unreported, 10 December 2020) and at para. 47 outlined various points in relation to evidence, including disagreeing with the view expressed previously by HHJ Auerbach and highlighting her view that it is not the case that evidence should never be considered for a strike out application.

10. On the relationship between a strike out application and one for a deposit order, Simler J, sitting then as the president of the EAT in *Hemdan v Ishmail* [2017] IRLR 228 stated at paras. 12 and 13:

> "The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.
>
> The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested."

11. In considering a deposit order, the Tribunal is entitled to have regard to the likelihood of a party being able to establish the facts essential to their case and consider the credibility of assertions being put forward, see *Van Rensburg v Royal Borough of Kingston-upon-Thames* (UKEAT/0095/07, Unreported).

<u>Constructive Unfair Dismissal</u>

12. The dates of employment were agreed to be 08/01/21 to 21/09/22, it was agreed that this did not provide for two years of employment (service) and it was agreed that the legal position under s.108 Employment Rights Act 1996 was that two years' service was needed to bring a claim of constructive unfair

dismissal. The Claimant was not relying on any automatically unfair reason for dismissal.

13. The Claimant's belief was that because she was discriminated against that the two years' service rule would not be in force. Her response to the Grounds of Response says, "Claimant also falls under the protected disability discrimination protection due to her being a registered carer to her disabled mum, therefore the Claimant believes the continuous service of 2 years is discounted due to her protected characteristic".

14. There is no legislation or case law that I know of to that effect, nor could the Claimant point me to anything that justifies that position. I have no option or discretion, the two year rule is simply the time limit set by the current government and therefore this claim must be struck out for lack of jurisdiction.

Disability Discrimination

15. I considered the Respondent's application cautiously and remind myself of the case law stated above and the general guidance from the many cases that emphasise the need not to strike out claims when there is a significant factual dispute, for example, particularly those involving discrimination claims as is often the case with such claims having lots of facts in dispute.

16. The Respondent however submits that this is not the case here, referring me to the case of *Kaul v Ministry of Justice & Ors.* [2023] EAT 41 at paras. 18-22, arguing that the Claimant's case is a case consistent with *Ahir v British Airways* [2017] EWCA Civ 1392, quoted within *Kaul* and observing:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary for liability being established, and also provided they are keenly aware of the danger of reaching such conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context…"

17. The Respondent argues that this is not a case in which there is a significant factual dispute that has to be determined before considering the dismissal of the claims, it is simply that the case is inherently implausible and there is no factual basis in which I can infer a reasonable case of discrimination that has reasonable prospects of success.

18. There is no claim of disability discrimination that can be adequately understood from the ET1 or other documents such as the response to the GoR. I asked many questions of the Claimant's representative about the claims to understand what was being claimed and despite lengthy discussion the claims still did not make sense as a legal claim. It does not appear here to be one in which there is a significant factual disputes in terms of the strike out application but that actually even at its highest as articulated by and on behalf of the Claimant that the claim could not succeed.

19. I asked who was the disabled person relied upon for the claim and the answer was difficult to understand but I understood it to be both the Claimant and her

mother because the Claimant was her mother's carer. No distinction was made in terms of the acts of alleged discrimination relied upon though and the Claimant was unable to explain what the basis of claiming discrimination was for each of them or how the different motivations related to the different disabled person overlapped or were distinguished. In general, the Claimant's view was similar to her belief regarding the unfair dismissal claim – that the existence of a disability automatically equated to the possibility of discrimination and that automatically equated to a legal claim, without having thought through the factual and legal details about whether there was such discrimination and if so why did the Claimant think this.

20. When I asked about the basis of the claim it was again difficult to understand but I understood that the Claimant had asked for her role to become a full time role, that was not granted and someone else who did not have caring responsibilities did have a full time job already and the Claimant was essentially questioning why was she treated differently. I asked what the link was to discrimination or disability and nothing was stated to explain that claim, the Claimant was simply asking why was she not allowed that position but without being able to identify anything that may be linked to either her or her mother's disability or something arising, even theoretically.

21. There appeared to be no basis for a claim of constructive discriminatory dismissal that would have any reasonable prospects of success, nor did the Claimant suggest any.

22. I also considered that the prospects of this claim would struggle due to time limits. I asked when did the above events happen and I was told 'just once in September 2021'. The claim was issued in December 2022 and therefore this act of alleged discrimination was clearly very far out time and there did not appear to be any potential argument about a series of events. I asked why would a Tribunal extend time to allow the claim on a just and equitable basis and the Claimant's mother explained that they did know about the 3 month deadline from the ACAS Early Conciliation period, the first of which was in October 2021 (there being two ACAS EC certificates in this claim). The Claimant and her mother explained difficulties in attaining further advice because 'everyone wanted to charge' but also explained that in March 2022 a lawyer did give advice in a telephone consultation. The Claimant's mother also confirmed that they did have internet access and the ability to research the time limits. I consider that given the Claimant knew of the time limit, certainly had the opportunity to find out, and no positive reason was put forward as to why an extension would be made, it would be extremely unlikely that a Tribunal would consider it just and equitable to extend time to allow this claim to proceed, particularly when so far out of time.

23. My conclusion therefore is that this claim should be struck out. I do so cautiously and conscious of the warnings emphasised in case law but consider here the Claimant has two fatal problems. One is the issue of time limits and the claim appears to be well out of time with no reasonable prospects of success of the Claimant succeeding in showing that the claim should be considered in time. Secondly, even taking the Claimant's case at its highest and giving her free reign to explain the basis of her discrimination claim, she was unable to identify anything material that linked her treatment to disability discrimination other than the fact that she and her mother were disabled. I

consider that this claim is a rare one in which it can be said that there are no reasonable prospects of success and accordingly it is struck out.

Victimisation

24. In summary, there are essentially two parts to what the law calls 'victimisation'. Firstly, the 'protected act', which is the action that the Claimant did to complain about discrimination and then secondly the treatment suffered because of that complaint.

25. I asked what was the protected act and the Claimant's mother said that 'she brought something up which affected her and others' and after numerous questions about what was brought up it was clear that the Claimant's concerns were really about her pay, which is the heart of the Claimant's claim as outlined in the ET1 that she understood her salary to be higher than what she was actually paid. There was nothing from the answers that had anything to do with discrimination, whether suggesting a protected act or caused by a protected act. When I asked about the absence of any link to discrimination, the Claimant's mother made a reference to there being 'something' in other documents that were not sent to the Tribunal. Again this was very vague and non-specific and my understanding after asking further questions was that concerns were raised about pay but this had nothing to do with discrimination.

26. I approached this application on the basis that it was not to be a mini trial and if detailed consideration of evidence was needed then it would suggest that strike out was not appropriate. I emphasised to the parties at the outset that I had not read the evidential documents if there were any evidential documents in the bundle that they wanted me to consider that they needed to draw my attention to them. From a brief consideration of the documents that are in the bundle there did not appear to be any reference to discrimination. Again in trying to ensure that the Claimant had every opportunity, I flagged this omission and the Claimant did not identify any document that did raise discrimination. The Claimant's mother referred to not having supplied all documentation and the Respondent's representative explained and read out an email sent to the Claimant supplying a draft bundle and expressly asking if the Claimant wanted to add any documents, which the Claimant accepted was received by her. The Claimant did not then provide any documents although in my judgment she was nevertheless afforded the opportunity.

27. In any event, it did not appear that a consideration of unidentified 'missing documents' would have added anything material. The Claimant nor her mother identified any specific evidence or document that they say would have been added or does identify a protected act and I was simply told that 'all of it' would have been included. That gives me less rather than more confidence that there was something specific within the documents that would have demonstrated a protected act because it was not the Claimant's case that such a document existed, simply a generic point was being made that 'all documents' should have been added.

28. The second part of the test concerns the detriment suffered. I asked what was the detriment and it was said to be 'being passed from pillar to post between different people' and when I asked why that was said to be because of any element of discrimination or a concern raised about discrimination again there

was no understandable link or connection to discrimination or a concern raised. It was very difficult to see why there would be such a link, particularly in the absence of an identified protected act. The Claimant's mother said that the act of 'being passed from pillar to post between different people' occurred because the Claimant had picked up on things that no one wanted to look into but that again was explained in the context of pay and the lack of clarity of contractual terms rather than anything to do with discrimination.

29. I agree with the point made by the Respondent that when the Claimant's mother was asked when the events happened and her answer was "from the very start [of employment]" that this undermines the basis for a victimisation claim because effectively therefore it was being said to have happened before the complaint was actually made, or at least suggests no consideration has been given to the specific chronology of the protected acts and then the detriment(s).

30. It is very difficult therefore to see any merit in the victimisation claim on the element of whether events occurred because of a protected act.

31. Again, I am very conscious of the caution needed when considering a strike out claim but in this claim I have given the Claimant free reign to state her claim and she has been unable to identify a discernible basis for a victimisation claim. The issue is not that there is a factual dispute between the parties and I think the Respondent's account is more likely to succeed but that taking the Claimant's case as its highest no reasonable Tribunal could uphold this claim. The victimisation claim has no reasonable prospects of success and is also struck out.

<u>Unauthorised Deduction of Wages</u>

32. The final set of claims all relate to wages and their alleged underpayment. Various boxes were ticked on the ET1 form and it was confirmed that they all relate to deduction of the same wages, including references to breach of contract and other payments. After discussion, we agreed that the claims would be treated as unauthorised deductions of wages for time limit purposes because that gives the Claimant the most amount of time in which she could have brought a claim because the time runs from the last deduction rather than the end of employment as for a breach of contract claim.

33. The Respondent's application highlighted that the burden was on the Claimant to prove that it was not reasonably practicable to have issued the claim in time and that she has not discharged that burden. The Respondent confirmed that they were not contesting the second part of the 'reasonably practicable test' (whether issued within a reasonable time after), this claim having been issued one day out of time.

34. The classic explanation of what 'reasonably practicable' remains that of May LJ in *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, who equated the test with "was it reasonably feasible". See in particular paragraphs 34 and 35.

35. In *Asda Stores Ltd v Kauser* UKEAT/0165/07, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> "[…] 'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

36. I also reminded myself of other cases regarding the correct legal principles, including *Wall's Meat Co Ltd v Khan* [1978] IRLR 499, *Marks & Spencer v Williams-Ryan* [2005] IRLR 562 and *Lowri Beck Services Ltd v Brophy* [2019] UKEAT 277_18_2503 (Unreported).

37. The relevant dates are that the Claimant received her final pay on 23 September 2022 and she issued her claim on 23 December 2022. The claim was therefore issued one day out of time. The Claimant had previously contacted ACAS as part of the Early Conciliation process but the first time was in October to November 2021 and the second time was 20 March 2022 to 5 April 2022. I do not consider that either period therefore had the effect of extending the time limit because the time to issue after those ACAS certificates were provided had long since expired by the time the claim was issued, so the claim remains therefore one day out of time. The Claimant and her mother accepted today that the claim was out of time.

38. I therefore had to consider why the claim was out of time. The document that was provided by the Claimant in response to the GoR goes through in detail over its seven pages responding to individual paragraphs and argues that the claim was in time. The Claimant's mother confirmed that the document was produced about a week ago and it appears that at that stage it was believed that the claim was in time because it was thought that the final pay was received on 24 September 2022. What I understood happened yesterday is the Respondent's solicitor asked for screenshots of the Claimant's bank account in September and from there it was revealed that in fact the payment was received on 23 September.

39. The Claimant's position in the hearing as to why it was out of time really pointed to two elements. The first was illness of the Claimant's mother, who was assisting the Claimant with the claim. Her mother explained that she was bedridden due to an abdominal issue and the Respondent described the evidence given in that regard as vague. I agree with that description and despite questioning from myself, no specific dates were given nor importantly an explanation given about why the claim could not have been issued just one day earlier than it was, or earlier. I do not find, nor do I think the Respondent was suggesting that there was any sense of 'lying' from the Claimant or her mother in that regard but to suggest that the illness was at the level to say 'not reasonably practicable' to have issued just one day earlier or indeed any time over the preceding three months is not a compelling case here at all on the evidence I heard. In addition, the document responding to the GoR, which includes responding to this very point about time limits, makes no reference to illness being a factor in when the claim was issued. I accept the illness would have made the period more difficult but not to the stage of being not reasonably practicable to have issued in time.

40. The other reason why the claim was not issued earlier and the one that I find was the only operative reason why the claim was not issued in time, undermining the suggestion that illness made a material difference, was the misunderstanding of when the Claimant had been paid. The Claimant and her mother agreed that in September 2022 they understood the legal position that the claim had to be issued within three months less one day. That was something they had found out from the various sources outlined above, including legal advice, ACAS and online research.

41. The position here is not therefore one in which the Claimant was ignorant of the law but ignorant of fact, i.e. the fact of when the Claimant was paid and therefore to do the correct calculation and issue in time. That fact in my view could have been ascertained earlier relatively easily either from the payslip which at page 180 says the pay date off 23 September or more definitively from the Claimant's bank account itself.

42. The Claimant highlights that the 24th of each month was the default day for the payment to be paid and that is correct but it's certainly not universal that this would be the case. The Claimant's mother highlighted that three times over the prior nine months the Claimant had not been paid on the 24th if that date fell on a bank holiday or weekend (as was the case in September 2022). I accept that figure and I do not think that 1/3rd of the time (i.e. 3 out of 9) is insignificant to just be taken for granted and not checked here in the context of issuing the claim, again noting that it was at the very end of the three months that the claim was issued.

43. The contract gives the position that payment will be on the 24th [page 128] unless falling on a weekend or bank holiday and again the Claimant's mother's answer was that it was "common knowledge" that there would be a change in date if the employer's default date of the 24th was a weekend or bank holiday. Again, in light of the 24th September being a weekend I see no practical difficulty within those 3 months of working out the correct time limit.

44. Moreover, the fact that the claim was issued one day out of time at the very end of the three months in one way makes it more difficult for the Claimant to argue that it was not reasonably practicable because it's harder to see why the claim couldn't have been issued just one day earlier. My finding is that the Claimant and her mother chose to issue at the end of the time limit but they miscalculated when that was.

45. The answer simply seems to be a miscalculation of the time limit and the cause was not a misunderstanding of law but fact and it is not a fact I consider was not reasonably practicable to have ascertained within that three months by the Claimant's mother or indeed the Claimant herself. There was no suggestion that the Claimant's mother's illness prevented her from taking the relatively simple steps needed to check the payment date or suggest that the Claimant checked it, irrespective of the separate ability of the Claimant to check herself. Applying the cases of *Kauser* and *Brophy*, I do not consider that the ignorance of fact here was reasonable, I do not consider that it was not reasonably practicable for the Claimant to have issued in time and therefore the claim is struck out.

46. The breach of contract claim must also be struck out for the same reasons, noting that such a claim would be even more out of time.

Signed

_____

Employment Judge England

_____

Date 15 August 2023