Case Number: 2203140/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
BETWEEN:

Ms Z Simmonds-Plummer

Claimant

AND

London Borough of Hammersmith & Fulham

Respondent

ON: **22 August 2023**
Appearances:
For the Claimant: **Mr W Brown, solicitor**
For the Respondent: **Mr S Bishop, counsel**

JUDGMENT ON PRELIMINARY HEARING (heard remotely by CVP)

The Judgment of the Tribunal is that:

1. The claims for harassment related to sex and race are dismissed upon withdrawal by the claimant.
2. The claim for victimisation is struck out as having no reasonable prospect of success.

REASONS

1. This decision was given orally on 23 August 2023. The claimant requested written reasons.

2. The claim form in this case was presented four years ago on 23 August 2019. It has been the subject of an appeal to the Employment Appeal Tribunal following a strike out of the claims by a Judgment sent to the parties on 9 May 2020.

3. On appeal the claims for post-employment sex and race harassment and post-employment victimisation continued. At paragraph 59 of the

Judgment of the EAT, Mrs Justice H Williams said that her decision was not intended to preclude the respondent from renewing its strike out application on remission of this case, and/or from seeking a deposit order.

4. The claimant Ms Zanney Simmonds-Plummer worked for the respondent local authority as a Traffic Order/Project Engineer from 25 September 2007 to 4 March 2019. The original claim was for unfair dismissal, race discrimination and for notice pay.

The issues for this hearing

5. This preliminary hearing was listed by Employment Judge Davidson on 27 March 2023 to consider whether the claims had little or no reasonable prospect of success, such that they should be struck out, or that the claimant should pay a deposit as a condition of being allowed to continue with any allegation or argument.

6. This hearing was originally listed to take place on 23 May 2023 and was postponed by Employment Judge Joffe on the claimant's application.

7. Judge Davidson set out a Case Summary in her Order of 27 March 2023 as follows: "*The claimant was employed by the respondent, a local authority, as a traffic order/project engineer. She submitted her resignation on 4 March 2019 by email. On 5 March 2019 she was dismissed for gross misconduct following a disciplinary hearing which she did not attend. The claim is about the continuation of the disciplinary process after her resignation. The respondent's defence is that the decision makers were not aware that she had resigned when they reached their decision*".

8. The claims are for post-employment harassment on grounds of race, post-employment harassment on grounds of sex and post-employment victimisation. Aside from remedy, the issues were identified by Judge Davidson as follows:

<u>Harassment related to sex and race</u>

(1) Did the respondent proceed to take disciplinary action resulting in dismissal for gross misconduct after the claimant had terminated the contract by her resignation?
(2) If so was that unwanted conduct?
(3) Did it relate to sex or race?

<u>Victimisation</u>

(4) Did the claimant do a protected act by assisting a colleague, Annliese Johns, with her complaint of discrimination?
(5) Did the respondent do the following things:
    a. Continue with the disciplinary procedure?
    ~~b. Reach a decision of gross misconduct without the~~

~~claimant having an opportunity to make representations? [~~This point was removed following the discussion set out below].

(6) By doing so, did it subject the claimant to detriment?
(7) If so, was it because the claimant did a protected act?
(8) Was it because the respondent believed that the claimant had done, or might do a protected act?

9. At the outset of this hearing the claimant withdrew the claims of harassment both as to post-employment harassment related to race and post-employment harassment related to sex.

The respondent's application to amend the list of issues

10. In relation to the victimisation claim the respondent said that the issue of "*Reaching a decision of gross misconduct without the claimant having an opportunity to make representations*" was never part of the original claim at any stage, either in the ET or the EAT.

11. The claimant said that Mr Bishop attended the preliminary hearing on 27 March 2023 when these issues were identified by Employment Judge Davidson. If the tribunal got it wrong, then that should be a separate issue.

12. Mr Bishop said that the two victimisation issues were mutually exclusive. The claimant says that she did not attend the hearing because she resigned, so how could she say at the same time, she was not given an opportunity to make representations?

13. Mr Brown said that the claimant relied on the first point, that of carrying on with the process notwithstanding the resignation so the second point fell away.

14. The issue that remained for this hearing the consideration of the prospects of success of the following claim: that the continuation of the disciplinary process in the light of the resignation, was because the claimant had done the protected act of assisting her colleague with a discrimination claim. Both parties were in agreement that this was the issue for consideration at this hearing.

Documents for this hearing

15. There was a bundle of documents from the respondent of 87 pages.

16. Included in that bundle was a witness statement from Satpaul Mall of the respondent, an Infrastructure & Systems Engineer, specialising in Office 365 for the IT services. The date of the statement was 13 April 2023.

17. The tribunal had a Skeleton Argument from the respondent to which counsel spoke. Both parties made oral submissions.

18. There were no papers from the claimant's side. The claimant's solicitors were recently instructed.

19. The tribunal and the claimant's solicitor did not have access to a hearing bundle prepared for a preliminary hearing in February 2020. Mr Bishop for the respondent had a copy of this bundle and had referred in his Skeleton Argument to certain pages within it. It was agreed that if it became necessary to see any of those documents, either Mr Brown or the Judge could request those pages and Mr Bishop would send them across. No requests were made for any of the pages from that bundle.

The submissions

<u>The respondent's submissions</u>

20. The respondent submitted that the decision to proceed with the disciplinary hearing on 4 March 2019 was not discriminatory conduct. It was submitted that the claimant had not shown any reason why that hearing should not have continued in her absence, save for her resignation and she made a decision not to participate so as to avoid a finding of gross misconduct in her disciplinary proceedings.

21. The respondent said that the computer evidence showed that the dismissing officer Mr Siddiqui was not aware and could not have known on 4 March 2019 of the claimant's resignation. The decision to conduct the hearing and impose the sanction was made on that same day.

22. The chronology was that the claimant's disciplinary hearing was originally due to take place on 27 December 2018 and was postponed at her request. The claimant was invited to a hearing on 25 February 2019 and was told that it could proceed in her absence. This was consistent with the terms of the disciplinary procedure.

23. The claimant did not respond to the invitation to the hearing which was arranged for 4 March 2019. Neither she nor her union representative attended the hearing. Mr Siddiqui made his decision that day. The outcome letter was sent on 3 April 2019 and the claimant was given a right of appeal.

24. The respondent submitted that the claimant did not identify any facts from which the tribunal could conclude, in the absence of any other explanation, that the decision to proceed with the disciplinary was related to her sex or race or related to the protected act. The respondent submitted that in the 4 years since these proceedings were commenced, the claimant had made no such link and that she would be no better placed to do so at trial.

25. In terms of time limits, this was dealt with at paragraph 4 of the Amended Grounds of Resistance. Anything prior to 2 April 2019 is on the face of

it, out of time. The claimant contacted ACAS on 2 July 2019 and time had already expired in relation to the decision to dismiss on 4 March 2019. The primary time limit ran to 3 June 2019. This was the reason for the strike out of the unfair dismissal claim.

26. The Amended Grounds of Resistance were filed on 17 July 2022 and it was now August 2023, there was a preliminary hearing 27 March 2023 and this strike out application was originally listed for 23 May 2023. The claimant had not adduced any evidence on whether it would be just and equitable to extend time and the reason why she did not present the claim in time.

27. The respondent said that the tribunal would have to consider whether there were reasonable prospects of time being extended. The respondent relied on the decision of the EAT in ***Chandhok v Tirkey 2015 ICR 527*** (Langstaff P) who said:

> *"There may still be occasions when a claim can properly be struck out—where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time;"*

28. On the substantive claim, the respondent referred to section 108 EQA which deals with post termination discrimination. Section 108(1)(b) says "*(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act".* Thus had there been no resignation, what took place would have to have been discriminatory. There is no claim that the commencement of disciplinary proceedings was an act of discrimination. Section 108 says that you have to look at it as if the contract is continuing. The respondent submitted that resignation was therefore irrelevant. The respondent said that it was hard to understand that if there was no complaint about the disciplinary process itself, how the continuation of it was said to be victimisation.

29. The respondent submitted that they did not know about the resignation. The claimant did not concede the accuracy of the information given by the respondent as to delivery of the emails and this had been a live issue since 2019, from the original pleadings. The claimant had since 2019 to adduce evidence on this, including on the first strike out application. The claimant's point was always that the respondent's officers knew that she had resigned. This was the second listing of a strike out application since the decision of the EAT. In July 2022 the claimant was sent the respondent's evidence on the receipt of emails and had been in possession of this for over a year.

30. The respondent said that this claim was now stale and it was late for the claimant to wish to raise a challenge to the respondent's IT evidence. The claimant did not say why it was not believable. The respondent said that she simply does not accept it and wants to test it and that in the

respondent's submission was a classic case of no real prospects of success. The respondent said that factually, the respondent's officers could not have known about her resignation when the decision was made because the emails had not been released to them.

31. The respondent said that if they did have knowledge of the resignation they had an employee who had deliberately absented herself from a hearing of which she had plenty of notice. The claim was that they should have stopped the process and there was no evidence and no causal link that it was related to a protected act.

The claimant's submissions

32. The claimant went over the dates on the time point to be clear on this. The primary time limit expired on 3 June 2019 and the claim was not issued until 23 August 2019. The claimant did not go for Early Conciliation until after the expiry of the primary time limit. The claimant accepted that there was no evidence on the just and equitable issue. The claimant said that in terms of fair process, the overriding objective and Article 6 considerations, to reach a fair decision, the tribunal should find out from the claimant why the claim was late.

33. The claimant's solicitor said that there may or may not be an explanation, the claimant was present at the hearing and she could give an answer.

34. On the issue of the outcome letter of 3 April 2019 and the decision of 4 March 2019 and section 108(1) EQA, the claimant said the respondent only decided to carry on with the disciplinary because of the protected act. The claimant did not take issue with the disciplinary process itself, but the decision to carry on after she resigned. Mr Brown asked, can Parliament have intended there to have been no complaint after she had resigned? It was submitted that this was "*somewhat bizarre*". The claimant did not accept that the result of section 108 was such that she could not argue that the continuation of the disciplinary was because of the protected act.

35. On the merits of the case, the claimant took issue with the IT evidence. The claimant said that this was evidence presented by the employer and she was entitled to challenge that evidence. She has not yet obtained a report and it may be as a result of that she may not have a good challenge, but she wishes to challenge whether the respondent knew or did not know and she "*should be given the opportunity to have a crack at that*".

36. The claimant said that if there was a choice to be made it was deposit order rather than strike out territory.

37. The case was fact sensitive and the tribunal should be slow to strike it out.

38. The claimant's solicitor wanted time to take instructions from the claimant on the issue of whether it would be just and equitable to extend time in relation to prospects on the time issue. The claimant was present so on her application, she should be allowed to put this forward.

The respondent's reply

39. The respondent said that the claimant had known about time limitation since the original pleadings and knew that it was the reason her unfair dismissal claim was struck out. The respondent found it hard to understand why the claimant was wishing to raise this four years down the line.

40. In response to the claimant's solicitor saying that they thought time point had "*gone away",* the respondent said it was raised at paragraph 4 in in the Amended Grounds of Resistance of 17 July 2022 (page A35 in the bundle for this hearing) so the claimant did not have reason to believe the point had gone away. She had filed nothing in response.

Decision on the claimant's application to be called to give evidence on the just and equitable point

41. I considered the claimant's application to be called to give evidence as to why the victimisation claim was brought out of time and the prospects of her being able to show that she had reasonable prospects of convincing the tribunal that it would be just and equitable to extend time.

42. I refused leave for this for the following reasons:

    a. The claimant has known about the time limitation issues since the original pleadings in 2019.
    b. Time limitation was the reason for the strike out of her unfair dismissal claim.
    c. The Amended Grounds of Resistance of 17 July 2022 raised this at paragraph 4, specifically on the just and equitable issue.
    d. This is the second listing of this hearing, it has been postponed for 3 months from 23 May 2023 to 22 August 2023. There has been enough time for the claimant to set out her reasons.
    e. The claimant's representative told the tribunal that he had taken instructions prior to this hearing, which led to the withdrawal of certain parts of the claim and this could have been covered.
    f. The time issue was flagged in the respondent's Skeleton Argument prepared for the original listing in May 2023, a copy of which was available to the claimant's solicitor.
    g. In a case which has been ongoing for four years, with time limits clearly on the table, I take the view that seeking to find out the claimant's reasons during the course of the hearing, is not in accordance with the overriding objective. The respondent has no notice of what the claimant will say and correspondingly does not have time to prepare as to how it might address that without a

further adjournment.

h. This is not a time limitation hearing as such. It is to assess prospects of success including the prospects of success on the just and equitable issue.
i. If there were just and equitable reasons, it is hard to understand why, in the course of 4 years of litigation, the claimant would have failed to raise those reasons before today.

The relevant law

43. In relation to strike out, Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides as follows:

(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.

44. In relation to a deposit order, Rule 39 provides

(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.

45. **I**n ***Anyanwu v South Bank Students' Union 2001 ICR 391*** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. It may be necessary to determine whether discrimination is to be inferred. Where central facts are in dispute, the tribunal should only exercise the power to strike out in exceptional cases ***Ezsias v North Glamorgan NHS Trust 2007 IRLR 603.***

46. In ***Balls v Downham Market High School and College 2011 IRLR 217***

the EAT said that the test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that 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 a high test. If can be unfair to strike out if there are crucial facts in dispute and there has been no opportunity to test the evidence. Strike out is a draconian power.

47. There is no blanket prohibition on the strike out of claims presented under the Equality Act 2010 and the tribunal is entitled to strike a claim out where it has reached a tenable view that the claim cannot succeed (see ***Jaffrey v Department of the Environment, Transport and the Regions 2002 IRLR 688*** at paragraph 41 – Mr Recorder Langstaff (as he then was)).

48. The claimant's case must be taken at its highest when considering a strike out application, the test does require that there is a reasonable, rather than merely fanciful, prospect of success and if the Tribunal is satisfied that there is no such reasonable prospect then strike out is available even where there are disputes of fact - ***Ahir v British Airways plc 2017 EWCA Civ 1392, CA*** (Underhill LJ)***.*** This point was also made in ***Kaur v Leeds Teaching Hospitals NHS Trust 2018 IRLR 833.***

Conclusions

49. One of the central issues in this matter is the awareness on the part of the decision makers of the claimant's resignation on 4 March 2019.

50. It is not in dispute that the claimant's last day in employment was 4 March 2019 when she resigned. The claimant resigned whilst suspended and pending the outcome of a disciplinary investigation. The disciplinary hearing was arranged for 4 March 2019 and the claimant resigned by email at 09:21 that day. The respondent's position is that because it was an external email it went into the email quarantine service and it was not released until the morning of 5 March 2019. At 10:57 on 5 March the claimant sent a further email saying that her resignation was with immediate effect on 4 March 2019.

51. The resignation email was sent to four officers of the respondent and to the claimant's union representative Mr Neckles. The officers of the respondent were: Mahmood Siddiqui, Director for Transport, Highways, Leisure and Parks and the dismissing officer, Kay Odubanjo, HR Business Partner, Patrick Draper, HR and Sarah Quartey.

52. The statement of Satpaul Mall, an Infrastructure & Systems Engineer in the IT Service says that checks revealed that the claimant's resignation email and the follow up email of 5 March 2019 went to a quarantine section of the IT system and were released on Tuesday 5 March 2019 during that morning. A systems report was attached to his statement and formed part of the bundle. The system cannot show when the emails

were read. It can only show when it was delivered to the recipient's inbox after being released from quarantine.

53. The claimant does not accept the respondent's evidence on this but does not say why, other than that she wants to obtain her own report to seek to challenge it.

54. The claimant accepts that she has not yet obtained an IT report and said in submissions that it may be as a result of such a report she may not have a good challenge. Nevertheless she wishes to challenge whether the respondent's officers knew or did not know about her resignation when the decision to dismiss was made. To quote from the claimant's submissions "*she should be given the opportunity to have a crack at that*".

55. This has been a central piece of this litigation for four years. The claimant does not set out any reason why she says that the respondent's IT evidence might be flawed, just that she wants to "*have a crack at it".*

56. The claimant then needs to go on to show that if she is right and that the dismissing officer knew about her resignation, the decision carry on with the disciplinary hearing and to dismiss her was because she had assisted her colleague with a discrimination complaint. The causal link has not been made clear by the claimant. No facts have been put forward from which the tribunal could be asked to conclude, in the absence of any other explanation, that it was because of the protected act.

57. There is no complaint about the initiation of the disciplinary proceedings. The complaint is that the continuation of the disciplinary process in the light of the resignation, was because the claimant had done the protected act. If the commencement of the disciplinary proceedings is not in issue, it is hard to understand how the continuation of those proceedings becomes an act of victimisation in the light of the resignation. The claimant has not put forward what she says is the causal link, namely what it was about the protected act that caused Mr Siddiqui or any other officer of the respondent, to go ahead with that hearing on 4 March 2019.

58. The claimant has the further issue of time limits. On a different test, which I accept is stricter, the claimant was found to be out of time on her unfair dismissal claim. She has known throughout these proceedings that time limits are an issue and she has not in 4 years put forward the reasons why it might be just and equitable to extend time.

59. The respondent also raises the issue under section 108(1) EQA which says that you have to look at it as if the contract is continuing. The respondent submitted that resignation is therefore irrelevant. I see some force in the claimant's argument that this does not stop her from arguing that continuation of the disciplinary process was because of a protected act, but the difficulties with the causal link still remain.

60. The claimant rightly points out that the tribunal must be slow to strike out a discrimination claim where there are central disputes of fact.

61. The claimant's case is that in the light of the resignation, it was victimisation to continue with the disciplinary process because she did a protected act. She does not allege that it was victimisation to start the process and this means that somehow the fact of the resignation brought the protected act into the picture and caused the respondent to go ahead with the hearing on 4 March 2019 and dismiss.

62. I find that the claimant has no reasonable prospects of success in convincing the tribunal of this. No basis has been put forward as to why, if the respondent knew about the resignation, this meant that the protected act came to the fore and they decided that because she had helped her colleague with a discrimination claim, they would proceed to dismissal.

63. The claimant has the additional hurdle of showing that the respondent's officers were even aware of the resignation. She makes no suggestion of why the respondent's evidence might be unreliable or false, simply that she wants to have a crack at it.

64. The claimant also has the time point against her and although her solicitor wished to find out from her during this hearing whether there might be just and equitable reasons, no such reasons have been put forward for a hearing which has been in preparation for many months and when time limits have been in issue since the outset.

65. The combination of these three reasons leads me to find that the victimisation claim has no reasonable prospects of success and should be struck out.

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Employment Judge Elliott
Date: 22 August 2023

Judgment sent to the parties and entered in the Register on: 22/08/2023

_____ for the Tribunal