EMPLOYMENT TRIBUNALS

Claimant: **Ms Sameena Bashir**

Respondents: **(1) The London Borough of Barking & Dagenham**
(2) Three Angel Health Care Ltd
(3) Mr Arzumand Sabik
(4) Mr Godwin Ibeawuchi

RECORD OF A PRELIMINARY HEARING

Heard at: **East London Hearing Centre (in public by video link – "CVP")**

On: **04 July 2023**

Before: **Employment Judge R S Drake**

Representation

For the Claimant:	In person
For the 1st Respondent:	Mr T Pacey (of Counsel)
For the 2nd, 3rd and 4th Respondents	Mr C Johnson (Advocate)

JUDGMENT

1. The claims under the Equality Act 2010 ("EqA") in respect of events before 1 March 2022 are out of time and the Tribunal finds they were not presented within such further period of time as is just and equitable. Therefore, they are dismissed.

2. The claim in respect of an event occurring on 2 March 2022 (allegedly committed by R4 alone) is potentially in time, but it is separate and distinct from preceding events, and therefore it is not found to be part of a course of conduct capable of being aggregated with the preceding complaints. Moreover, when seen alone it is struck out under Rule 37 as having no reasonable prospect of success.

3. The claim of automatically unfair dismissal under Section 103A of the Employment Rights Act 1996 as amended ("ERA"), being a detriment the Claimant asserts was because the Claimant had made what she alleges was a protected disclosure as defined by Sections 43A to 43C ERA, is also out of time and the Claimant has not shown for the purposes of Section 111 ERA that it was not reasonably practicable

to present her claim in time nor that she presented it within a time the Tribunal can find reasonable. It is therefore struck out and dismissed.

4. No further case management Orders are necessary as the claims in their entirety are dismissed.

5. By consent, the title of R1 is amended so as to cite it as appears in the heading of this Judgment.

REASONS

Introduction

6. The scope of the issues for me to consider today are as set out in EJ Burns Case Management Orders promulgated at a Preliminary Hearing on 6 February 2023. He set today's hearing to consider – first, whether claims were in time and if not whether time may be extended under the relevant enabling subsections of Section123 EqA and Section 111 ERA, - and second, to consider whether on viewing the claims as pleaded they should be struck out under Rule 37 of Schedule 1 to the Employment Tribunals (Constitution & Rules) Regulations 2013 ("the Rules") as having no reasonable prospect of success - or whether any part of them should be subject to a Deposit Order being made under Rule 39 as having little reasonable prospect of success. I list key questions isolated and set out by EJ Burns to determine the above as follows:-

    6.1 Was R1 a hirer of the Claimant for the purposes of the Agency Workers Regulations 2010 ("AWR")?

    6.2 Was the Claimant an employee of R1 or R2 for the purposes of the automatic unfair dismissal claim which she asserts was because she made an alleged public interest disclosure?

    6.3 For the purposes of the EqA claims (direct race discrimination, sexual harassment, and victimisation), was the Claimant employed by R1 or R2 as defined by Section 83 EqA and/or were R1 or R2 the agent or principal of the other Respondents under section 109, and/or were R3 and/or R4 employees or agents of R1 and R2 for the purposes of Section 110 EqA?

7. EJ Burns had ordered that the parties exchange documents and statements in preparation for today's hearing on/or by 15 February 2023 I learned this had not been complied with by any party including the Claimant, but that it was common ground that a detailed and comprehensive Documents Bundle had been prepared with input from all sides and finalised on/or by Friday 30 June 2023. I also learned that witness statements had been disclosed between the parties shortly thereafter but not sent to the Tribunal until today. However, and bearing in mind I took care to ensure that the Claimant was not disadvantaged by being a "Litigant in Person" I specifically enquired as to whether she was ready to proceed today, and she confirmed she was. Notwithstanding this, I granted her no fewer than three breaks

including over lunchtime both to reconsider statements and evidence, and also to compose her thoughts and submissions. I assisted her where it was apparent she had difficulty in articulating points she wished to make to enable her to achieve equality of arms.

8. I noted all the following from the materials before me and from submissions made by the Claimant and the Respondents' representatives (in so doing I refer to documents in the agreed Bundle as "P1" etc):-

8.1 ACAS certified that Early Conciliation procedure had commenced in respect of all Respondents on 1 June 2022, and certificates of completion of which were issued in respect of R1 on 12 July 2022 and in respect of all other Respondents on 5 July 2022;

8.2 The Claimant had presented her ET1 (P1-16) commencing proceedings in respect of all heads of claim on 6 August 2022; Her Grounds of Complaint document (P17-43) reads as a very thorough (I described it respectfully as a "stream of consciousness" history) in true chronological form an account of the events about which she complains; It runs over 27 pages to no fewer than 135 paragraphs setting out a closely expressed in considerable detail history of her dealings with all the Respondents; In the last two pages (P42—43), it sets out no more than 10 paragraphs of how she argues the history she describes discloses/particularises her perceived causes of action; For today's hearing the Claimant also provided a 5 page and 43 paragraph witness statement; In both she seeks to argue that R1 and R2 are vicariously liable/responsible for the actions of all other Respondents who or which are individually liable; I read all this material and all the documentary evidence with great care especially during my deliberations after hearing more than 2 hours of oral submissions, mostly from the Claimant;

8.3 In terms, the complaints still being pursued following EJ Burns Orders are as follows:-

8.3.1 R1 was a hirer of the Claimant and was therefore by virtue of this alone vicariously liable as a principal for the acts of the other Respondents under Regulation 14 AWR;

8.3.2 R1 and R2 directly discriminated against her because of her race (she is Pakistani) by dismissing her complaints about the conduct towards her of R3 and R4 – i.e. that they harassed her sexually – I recorded that she accepted she was not arguing R1 and R2 had discriminated against her on grounds of sex per se, but only on grounds of race;

8.3.3 All Respondents had sexually harassed her, R3 and R4 directly, but for which R1 and R2 were vicariously liable under Section 110 EqA;

8.3.4 Victimisation by R1 and R2 in terminating her engagement after she had made complaints of sexual harassment by R4;

8.3.5 Automatically unfair dismissal under Section 103A because she had allegedly made several qualifying public interest disclosures to R1 and R2;

8.4 I emphasise that my conclusions are based upon my reading of the Claimant's ET1 Grounds of Complaint specifically and not on any forensic or similar testing of the merits of any substantive issues' evidence as such, as I do not have power to do so;

8.5 I recognise the Claimant's scholarship and diligence in the way she set out and presented her claims and arguments today, and also that she has a good grasp of how to make a case which she has done with vigour, but I find that she has perhaps misunderstood the scope of the law's limitations in how she seeks to frame her claims. I do not criticise her for this and applaud her candour in the expression of her case. I have done what I can in an unbiased way to enable her to give her presentation best effect.

Relevant Statutory Law

9. This is as follows in respect of EqA claims: -

Section 123(1) EqA provides -

"Proceedings on a complaint within Section 120 <u>may not</u> 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 of time as the Employment Tribunal thinks <u>just and equitable;</u>

Section 123(3) then provides: -

(a) Conduct extending over a period is to be treated as done at the end of the period."

10. In relation to the ERA claim: -

Section 111(2) ERA provides –

"An Employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal –

(a) before the end of the period of three months beginning with the effective date of termination or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was <u>not reasonably practicable</u> for the complaint to be presented before the end of that period of three months"

11. In relation to the issue of whether R1 ws a hirer of the Claimant, Regulation 5(1) of the Agency Workers Regulations 2010 ("AWR") provides as follows:-

> "*Subject to regulation 7 (qualification) an agency worker shall be entitled to the same basic working and employment conditions as he/she would be entitled to for doing the same job had he/she been recruited by the hirer other than by using the services of a temporary work agency and at the time the qualifying period commenced (as defined by regulation 7)"*

In this case, it is common ground that the Claimant qualifies.

Further, Regulation 14(1) provides as follows –

> *"a temporary work agency shall be liable for any breach of Regulation 5 to the extent that it is responsible for that breach."*

My emphases relevant to this case are added.

Relevant Case Law

12. The case law to which I am directed included the following:-

12.1 **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379** from which I note that the time limit for issue of proceedings "… *is a jurisdictional and not a procedural issue* … "which means that if a case is out of time and time is not extendable, the Tribunal simply has no power or jurisdiction to hear the claim; I deal with this in paragraph 13.1 below;

12.2 **Palmer & Saunders v Southend BC [1984] IRLR 119** from which I note inter alia that I am to consider the substantial cause (if shown) of the Claimant's failure to issue within the Primary Period, whether there was any impediment preventing issuing in time, whether or not the Claimant was aware of their right to issue a claim, whether the Respondent has done anything to mislead or impede the Claimant issuing their claim, whether the Claimant had access to advice, and lastly whether delay was in any way attributable to that advice. I deal with this in paragraphs 13.1 below;

12.3 **British Coal v Keeble [1997] IRLR 336** from which I note inter alia that I am to consider the length and reasons given for delay, the extent to which delay may affect cogency and recollection of evidence, any promptness of action by the Claimant once, after the Primary Period had expired, the Claimant became aware of the alleged facts which gave rise to their perceived cause of action, the steps taken once they knew of the possibility of taking action, and lastly the balance of prejudice to the Claimant of not allowing the claim to proceed and to the Respondent in allowing it to do so;

12.4 **Robertson v Bexley Community Centre [2003] IRLR 434** from which I note that application of S123(b) involves the exercise of a discretion which is an exception rather than the rule; this point is augmented by the EAT's decision in **Simms v Transco [2001] All ER 245** which is authority for the

proposition that whilst the fact a fair trial is impossible will most likely preclude extension of time, it does not follow that merely because a fair trial is still possible time should be extended – each case is fact specific; In short the guidance in Bexley incudes the point that time limits are to be construed strictly and there is no presumption in favour of extension. These decisions, together with that of the CA in **Abertawe Local Health Board v Morgan [2018] EWCA Civ 640** all serve to emphasise the importance of me not leaving out of my consideration any significant factor as mentioned below;

12.5 **Afolabi v Southwark BC [2003] ICR 800** from which I note that it is my duty to ensure no significant circumstance is left out of my consideration when considering whether to exercise my discretion or not and also that if I fail to take account of prejudice to a Respondent of allowing a claim to proceed out of time, I will be in error; I deal with the **Keeble, Abertawe** and **Afolabi** points in paragraphs 13.1 and 17 below;

12.6 **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** in which the CA held in relation to complaints involving continuing acts, that an Employment Tribunal had not erred in law in construing acts extending over a period as continuing acts of discrimination. It advised that concentration on concepts such as policy, rule, scheme, regime, or practice were too literal, whereas what should be considered was the actual content of different acts and whether they were distinct from each other as a succession of unconnected or isolated specific acts; I deal with this in paragraphs 13.2 below;

12.7 In a most recent CA decision **Adedeji v University of Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, it was held that the factors " … almost always relevant to consider when exercising discretion are (a) length of and reasons for delay and (b) whether the delay has prejudiced the Respondent by for example preventing or inhibiting it from investigating the claim while matters were afresh … " (my emphasis showing that it is both length and reasons for delay construed together, not disjunctively); I deal with this in paragraph 13.2 below;

12.8 With regard to the question of whether R1 and R2 were liable as principals for the actions of R3 and R4, I noted the Court of Appeal decision in **Kemeh v Ministry of Defence [2014] EWCA Civ 91** as explained by Mr Pacey. I note the detailed examination of the common law of Agency when applied in Employment contexts. Para 32 was specifically referred to me which reviews the law of Agency as quoted from the leading legal academic work "Bowstead & Reynolds on Agency" which I will not repeat here but which I paraphrase for ease of reference as saying that (though their Lordships and the EAT before them were referring to a Section in the relevant statute law at the time but which is now reproduced without change in Section 109 EqA) the definition of "anything done by an agent for a principal, with the authority of the principal" does not extend to parties as between whom the accepted common law defined relationship of "Agency" does not exist. I deal with this in paragraph 13.3 below.

Findings

13. I found the following: -

13.1 It was common ground that as all but one of the acts complained of occurred on or before 1 March 2022, the time for presentation of claims started running and expired on 31 May 2022 which was one day BEFORE Early Conciliation commenced which process then did not serve to extend time for claims to be presented. Thus, presentation of the ET1 on 06 August in respect of all claims was 67 days out of time.

13.2 It was thus for the Claimant to show in respect of the EqA claims that presentation of the claims was within such time as a tribunal could find just and equitable, and/or that I can conclude that the acts complained of were acts extending over a period of time.

13.2.1 Further it was for her to show in respect of the ERA claim that it was not reasonably practicable for her to issue her claims within time, and she had issued within a reasonable time thereafter.

13.2.2 Yet I heard and saw no evidence other than by hearing oral argument based on the premise that she chose to await conclusion of Early Conciliation with all Respondents which apparently ended on different dates; I did not find this argument persuasive to the extent necessary to enable me to extend the time limit.

13.2.3 I balanced this against the prejudice to the Respondents and found that the balance in favour of the Claimant did not outweigh that in respect of the Respondents.

13.2.4 The acts complained of did extend over a period of time but as pleaded they all appear discrete and separable, and do not extend beyond the limitation period cut-off date as identified above.

13.3 The one matter of complaint occurring later than 1 March (i.e. on 2 March 2022) was an alleged act of harassment by R4; It was not an act which the Claimant says was perpetrated directly by R1 or R2, but she asserts that they were vicariously liable for it under Section 110 and by virtue of the hirer relationship and the effect of Regulation 14 AWR; This requires consideration of AWR and I conclude as follows:-

13.3.1 In the pleadings the most the Claimant says of R1 (P18 – para 5) is that it was the end user of her services, that it was the ultimate source of R3 and R4's pay and that and it was thus a hirer; I can see why she says so and I agree;

13.3.2 The Claimant assumes from this however that this shows she had rights under AWR as against R1, which is an argument I can understand but those rights are limited as indicated above in para

11 i.e., as to terms and conditions enjoyed as if she were an employee, not as to the fixing of vicarious liability. Liability for the acts of others is limited to acts of breach of provision of employment terms; It is not expressly extended to create vicarious liability under Regulation 14. This latter limits liability fixed upon a hirer to matters for which it is actually, not assumed to be, responsible - from which I infer that what is meant is "direct" not "indirect" or "vicarious responsibility"; If the hand of direct control of R3 and/or R4 is with R2, then it cannot be said R1 is "responsible"; the fact that the indirect source of payment of R3 and R4 is ultimately R1, does not in law make R1 "responsible" for the acts of R3 and R4 – to do so would stretch the bounds of the existing common law concept of vicarious liability, and such degree of stretch is not specifically provided for in AWR itself; The Regs would have said so if that was what the statutory draftsman and Parliament intended;

13.3.3 The Claimant serially pleads the existence of an intervening party between R1 and her – (inter alia by way of example P18 paras 6, 7, and 8 refer); She does not plead a direct relationship with R1 as employer save as hirer under AWR but I see and conclude that she misinterprets the extent of liability she assumes exists;

13.3.4 The Claimant serially pleads that not R1` but R2 engaged R3 and R4 – (inter alia by way of example again P18 para 5, P20 para 17, P21 paras 21 and 24 refer); She does not plead any relationship whatsoever between her and R2 such as to confer any rights accruing to her against them;

13.4 Thus, I cannot find that on her pleading in the Grounds of Complaint the Claimant is arguing a triable cause of action against R1 in respect of the actions of R2, and especially R3 and R4, as in respect of the limited terms of Reg 14 AWR, R1 does not have sufficient privity of relationship with R3 and/or R4 so as to be responsible for their actions: Similarly, I do not see how from her pleading the Claimant can argue that R2 is vicariously liable if it were not the employer of R3 and R4. . Section 109 EqA specifically fixes liability on a party such as R2 if the party committing an actionable act were doing so "in the course of employment". Thus, the Tribunal does not have jurisdiction to hear the claims founded on AWR against R1, nor founded on Section 109 EqA in respect of both R1 and R2. This conclusion deals with the first question posed by EJ Burns referred to in paragraph 6.1 above;

13.5 On the basis of the Claimant's pleading (P18 para 6) of her Grounds of Claim, she says that she was engaged by a party other than R1 or R2 to work for R1; Thus, by her own pleading (P18 para 5), she says she was not an employee of R1 or R2; Therefore, this addresses EJ Burns' question referred to in paragraph 6.2 above.

13.6 With regard to the question posed by EJ Burns (referred to in paragraph 6.3 above) I have already found that on her own pleading, the Claimant does

not say she was an employee of R1 or R2; Going further into the more detailed aspect of the questions posed, I find as follows:-

13.6.1 The Claimant pleads a number of causes of disagreement of approach and attitude as between her and R3/R4 as to how to deal with Child A, and much more serious allegations against R4, but that apart from the event occurring on 2 March 2022, all she pleads precedes that date and so all of her complaints in respect of the actions of R3 precede the cut-off date, and are prima facie out of time: The complaint against R4 relating to 2 March 2022 is out of time against him as the time limited for presentation of claim expired on 05 August 2022, given that Early Conciliation in respect of him concluded on 05 July 2023;

13.6.2 Many of the Claimant's complaints against R3 and R4 relate to disagreement as to how they worked with Child A who was the minor with whom they were all working to manage his welfare and behaviour, but these do not as pleaded sound as or amount to complaints giving rise to liabilities or duties in law owed to the Claimant by R3 or R4, even less R2, with whom the Claimant had no pleaded relationship of any kind whatsoever; R2 is pleaded as having engaged R3 directly and R4 indirectly through another third party according to the Grounds of Claim before me; The Claimant cites a number of complaints (for example at P22 para 33 and P24 para35 – "they were not fulfilling their role of supervising Child A") which illustrates the basis upon which she subjectively grounds many of her complaints; However, these do not form a basis in law of any cause of action accruing to her against them as such; This is because there is no privity of contract nor any common law or statutory basis for duty or liability attaching as between her and them;

13.6.3 The Claimant's evidence as to why she did not present her claims before 06 August 2022 is scant to say the least; She says that she awaited completion of Early Conciliation process in respect of all Respondents, but this argument does not show why this prevented her for issuing claims within time limits despite access to advice from ACAS. It does not of itself show that she presented her claims within a period which I can find just and equitable for the purposes of EqA, nor that it was not reasonably practicable to do so within primary limitation periods for the purposes of ERA as amended; Her submissions on this point were brief, though I sought to assist her in presenting whatever arguments she wished to advance; I recognise her candour in this respect, but it does not help her;

13.6.4 I cannot find on the pleadings a basis for concluding that the Claimant has pleaded a basis for saying that the Claimant was "employed" (as defined by Section 230 ERA nor by Section 83 EqA in respect of either R1 or R2; This conclusion therefore answers the question posed by EJ Burns set out in paragraph 6.3 above; Further,

because I have concluded that R1 and R2 were not principals responsible for the actions of R3 or R4 in relation to the Claimant under AWR, they cannot be potentially liable under the claims against them as pleaded for the actions of R3 and R4; Thus the claims against them have no prospect of success;

13.6.5 The complaints against R3 and R4 are time barred and I am not satisfied on the basis of the evidence, arguments, and submissions before me that the Claimant has shown that it is just and equitable to extend time to enable her claims against them to proceed.

13.7 On the claims as pleaded, I cannot find that the Claimant has shown that she pleads that she was employed by R1 or R2 as defined by and for the purposes of Section 83 EqA and/or or that R1 or R2 were agent or principal of the other Respondents under section 109 EqA, and/or that R3 and/or R4 employees or agents of R1 and R2 for the purposes of Section 110 EqA; It must follow that claims against them in this respect have no reasonable prospect of success. This addresses the question raised by EJ Burns as referred to in paragraph 6.3 above;

Conclusions

14. All but the last identified cause for complaint are out of time. I had insufficient persuasive evidence before me explaining why proceedings had not been presented before 06 August 2022 in relation to any of the the Respondents but for what I inferred was explanation that the Claimant awaited completion of Early Conciliation process in respect of all parties did not conclude until at the latest 12 July 2022, The claims are out of time and insufficient justifying evidence is before me to explain this fact.

15. The time limit for presenting EqA claims goes to jurisdiction and proceedings may not be brought if out of time subject to such further time being thought just and equitable. Similarly., claims under ERA are out of time and may not be considered useless a Tribunal concludes that a Claimant has shown lack of reasonable practicability to present a claim.

16. I have not had established to me the substantive cause for delay in presenting the claims – I accept Mr Pacey's submissions on this point which is that there is an absence of explanation. I do not find that the reliance on the argument that awaiting final responses from all Responded to early Conciliation process explains why with access to advice from many sources, proceedings were still not presented until 06 August 2022.

17. The explanation I have before me for delay is not persuasive. There is absolutely no evidence of lack of practicability to issue in time. I have also turned to the issue of balance of prejudice. I accept that if time were extended, the Respondent would have the weighty task of preparing to defend the claims and meet the Claimant's evidence and that the claims are stale to the extent that what the Claimant is actually challenging is attitudes of mind rather than a case which can be supported effectively by documentary weight in favour of the Respondent. Alternatively, I also

recognise that if the claims were not allowed to proceed, then the Claimant would have no right of redress for what she sees subjectively as wrongs committed by individuals in the employ or control, of any of the Respondents. If that were the case, then it might seem rare for any Claimant's case not to survive time challenge. I balance in this case the absence of cogent reason for explaining delay notwithstanding competent advice and personal perspicacity on the Claimant's part against prejudice of not pursuing the claims.

18. I cannot find that Section 123(3)(a) applies and thus brings into play any of the events now found to be out of time by linkage to the last event as I have already found I cannot recognise such linkage in nature or content of the events. This leaves the last event as the only event in time and this in turn brings into play consideration of Rule 37.

19. I have found that the last event complained of is thinly pleaded. I conclude that the Claimant's pleadings are not self-proving and nor that they disclose triable causes of action. Thus, it does not cause me to find that they have any reasonable prospect of success when seen alone. I am persuaded by Mr Pacey's submission that where a claim is legally misconceived, striking out is fully justified. There are no contentious facts which might tend to necessitate an alternative conclusion. What happened is not necessarily agreed, and what is not agreed is the effect of what happened and its legal significance.

20. Accordingly, I conclude that –

    20.1 The claims as against R1 and R2 must be struck out as having no reasonable prospect of success.

    20.2 The claims as against all Respondents must be struck out as out of time and in my judgment, they have no reasonable prospect of success.

Employment Judge R Drake
Date: 06 July 2023