



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000008/2023

5

Held in Edinburgh by Cloud Video Platform on 7 September 2023

Employment Judge Sangster

10 **Ms A Dickson**

Claimant

15 **Department for Work and Pensions**

**First Respondent
Represented by
Ms S Monan
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

- 25 1. The claimant's complaint of unfair dismissal is struck out, in accordance with Rule 37(1)(a) of the Employment Tribunals Rules of Procedure, on the basis that it has no reasonable prospect of success.
2. The respondent's application to strike out the complaints of failure to make reasonable adjustments, failing which for a deposit order to be made, is
- 30 refused.

REASONS

Introduction

- 35 1. The claimant's employment with the respondent terminated on 15 September 2020. She engaged in early conciliation from 27 October to 7 December 2022 and lodged her claim with the Tribunal on 4 January 2023.

2. Case management preliminary hearings took place in relation to the claim, before Employment Judge Sutherland, on 8 March 2023 (the **First Preliminary Hearing**) and 18 April 2023 (the **Second Preliminary Hearing**).

3. At the First Preliminary Hearing, Judge Sutherland noted that the complaints brought were for unfair dismissal and failure to make reasonable adjustments. The claimant's complaint of failure to make reasonable adjustments was noted as follows:

'The Claimant asserts that the requirement to effect regular attendance put her to the substantial disadvantage of being, or the risk of being, dismissed.

The Claimant asserts that the following reasonable steps would have avoided that disadvantage:

a. *in the period from June 2020 to her dismissal on 15 September 2020 she should have been given reduced hours (part-time working) and hybrid home and office working;*

b. *the appeal outcome intimated to her on 28 July 2022, ought to have been to re-instate her (and made the above changes to her hours and place of work); and*

c. *the appeal outcome intimated to her by the Employee Policy Group on 23 November 2022, ought to have been to re-instate her (and made the above changes to her hours and place of work).'*

4. At Second Preliminary Hearing, the claimant intimated that she wished to bring further complaints, namely of direct discrimination and victimisation. Judge Sutherland directed that the claimant required to provide further specification and particulars of those asserted complaints by 5 May 2023. She also ordered the claimant to provide the following, by 5 May 2023:

'further particulars of the facts upon which she relies in respect of her assertion that it was not reasonably practicable to bring a complaint of unfair dismissal within 3 months and in respect of her assertion that there should be a just and equitable extension of time in respect of her complaints of discrimination (in the event of any finding that there was not a continuing act).'

5. Due to an error by the Tribunal in relation to the claimant's email address, the claimant did not receive a copy of the note of the Second Preliminary Hearing at the time it was sent to parties. A copy was provided to the claimant by the respondent on 4 May 2023.
- 5 6. The claimant provided further particulars on 21 July 2023 (after several authorised extensions of time to do so) (the **Second Further Particulars**). This did not however address the basis upon which the claimant asserted that it was not reasonably practicable for her to bring her complaint of unfair dismissal within three months, or the basis upon which she asserted that there should be a just and equitable extension in respect of her complaints of discrimination (in the event of any finding that there was not a continuing act).
- 10
7. On 4 August 2023, the respondent applied to strike out the claimant's complaints of unfair dismissal and failure to make reasonable adjustments on the basis that they had no reasonable prospects of success and that the claimant had failed to comply with the Tribunal's orders. In the alternative they sought a deposit of up to £1000 in respect of the complaints.
- 15
8. Parties were informed that this application would be considered at the preliminary hearing listed to take place on 7 September 2023 (the **Third Preliminary Hearing**). The Third Preliminary Hearing was also listed to address the claimant's application to amend her claim to include complaints of direct discrimination and victimisation.
- 20
9. At the Third Preliminary Hearing, the respondent made a submission in support of their application for strike out, failing which a deposit order, reflecting the position set out in their correspondence dated 4 August 2023. It was submitted that, in accordance with s123(3)(b) of the Employment Rights Act 1996 (**ERA**), failure to do something is to be treated as occurring when the person in question decided on it. Failure to make reasonable adjustments is not a continuing act (*Humphries v Chevler Packaging Ltd* EAT0224/06). Time accordingly started to run when the decision was taken not to allow the claimant to work on a part time basis. This was, at the very latest, September
- 25
- 30

2020. The later decisions simply reiterate and reaffirm the decision already made.

10. The claimant was invited to make a submission in response. She stated that her view was that there was a continuing act or omission. She referenced the case of *Wells Cathedral School Ltd & another v Souter and another* UKEAT/0836/20 in support of her assertion that it was appropriate and reasonable for her to await the outcome of the internal procedures, before presenting a claim. It would accordingly be just and equitable to extend any time limits to reflect that.

10 **Relevant Law**

11. The Tribunal has power to strike-out the whole or part of claim under Rule 37 of the Employment Tribunals Rules of Procedure.

12. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18) given the draconian nature of the power.

13. Similarly, in *Anyanwu and anor v South Bank Student Union and anor* 2001 ICR 391, HL, the House of Lords was clear that great caution must be exercised in striking-out discrimination claims given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

14. In considering whether to strike-out, the Tribunal must take the claimant's case at its highest and assume the claimant will make out the facts they offer to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA* 2016 ICR 1121, EAT).

Decision

Strike Out Under Rule 37(1)(c)

15. The Tribunal considered the respondent's application for strike out of the claim under Rule 37(1)(c), namely for non-compliance with any order of the Tribunal. The Tribunal noted that

- 5 a. Whilst the claimant had not confirmed the identity of a comparator(s) in her Second Further Particulars, she had stated that she understood that 34% of staff work less than full time hours and that she couldn't quote a direct comparator, as she was unaware of the reasons each individual worked part time hours. She confirmed at the preliminary hearing that she was, as a result, relying on a hypothetical comparator.
- 10 b. Whilst the claimant had not expressly addressed, under a separate heading, the issue of the facts upon which she asserted it could be inferred that the reason for the less favourable treatment was because she was disabled, it is clear, reading her further particulars as a whole and the note of the Second Preliminary Hearing, that the claimant's position is that she relies upon the fact that around 1/3 of the respondent's staff work part time and many of these individuals are not disabled.
- 15 c. Again, while she had not expressly addressed, under a separate heading, the facts upon which it could be inferred that the reason for the detrimental treatment asserted was because she had done a protected act, it is clear, reading her further particulars as a whole, that the claimant's position is that this should be inferred from the timing of the decision of the Employee Policy Group.
- 20 d. The claimant did fail to provide further particulars setting out the basis upon which she asserted that it was not reasonably practicable for her to bring her complaint of unfair dismissal within three months, and the basis upon which she asserted that there should be a just and equitable extension in respect of her complaints of discrimination. She had however attached a 4 page document to her ET1 addressing this.
- 25 Additional information was provided by the claimant orally at the Third Preliminary Hearing.
- 30

- 5 e. Strike out is a draconian measure which should not be undertaken lightly. Tribunals must consider whether striking out is a proportionate response to the non-compliance (***Blockbuster Entertainment Ltd v James*** [2006] IRLR 630). In light of the above, the Tribunal concluded that strike out for non-compliance with the Tribunal's orders was not proportionate.

Strike Out Under Rule 37(1)(a)

- 10 16. The Tribunal then considered the respondent's application for strike out of the claim under Rule 37(1)(a), on the basis that it had no reasonable prospects of success. The Tribunal considered each element of the claim separately and reached the following conclusions.

Unfair Dismissal Complaint

- 15 17. The relevant time limits in relation to complaints of unfair dismissal are set out in s111(2) ERA.
18. These provisions state that a Tribunal shall not consider a complaint unless it is presented to the Tribunal before the end of three months beginning with the effective date of termination, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
- 20 19. The question of a what is reasonably practical is a question of fact for the Tribunal. The burden of proof falls on the claimant. Whether it is reasonably practicable to submit a claim in time does not mean whether it was reasonable or physically possible to do so. Rather, it is essentially a question of whether it was 'reasonably feasible' to do so (***Palmer and Saunders v Southend-on-Sea Borough Council*** [1984] IRLR 119).
- 25 20. Whether the claim was presented within a further reasonable period requires an assessment of the factual circumstances by the Tribunal, to determine whether the claim was submitted within a reasonable time after the original
- 30

time limit expired (*University Hospitals Bristol NHS Foundation Trust v Williams* UKEAT/0291/12).

21. The claimant's complaint of unfair dismissal was presented on 4 January 2023, nearly 2 years and 4 months after she was dismissed on 15 September 2020.
22. In her ET1 and at the Third Preliminary Hearing, the claimant stated that her evidence in relation to whether it was reasonably practicable for her to submit her complaint of unfair dismissal by 14 December 2020 and, if not, whether she submitted it in a reasonable period thereafter will be as follows:
- a. She was represented by her trade union from April/May 2019 onwards.
 - b. She was aware there was a 3 month time limit to submit claims to the Employment Tribunal.
 - c. She was aware that her trade union had not, in the three months following her dismissal, submitted a claim to the Employment Tribunal on her behalf.
 - d. She was seeking to exhaust the internal processes, namely an appeal against dismissal and a claim under the Civil Service Compensation Scheme, before presenting a claim to the Employment Tribunal.
 - e. She lodged an appeal against her dismissal on 29 September 2020. No action was initially taken in relation to this, while the claimant explored her entitlements under the Civil Service Compensation Scheme. The appeal was accordingly held in abeyance until October 2021.
 - f. The claimant was advised by her trade union, in April 2021, that it was her responsibility to lodge an Employment Tribunal claim, if she wished to do so. The claimant and her trade union representative discussed, at that time, that any claim lodged would likely be deemed to be lodged out of time.

- 5 g. She contacted Acas, to commence early conciliation, on 8 April 2021. They informed her that any claim submitted at that time may be considered to be out of time. She did not lodge a claim with the Tribunal at that stage. She decided, instead, to seek a review of the decision made in relation to the compensation payable under the Civil Service Compensation Scheme.
- 10 h. She appointed a solicitor, in August/September 2021, to represent her in relation to her claim for compensation under the Civil Service Compensation Scheme. They requested that the respondent reconsider their decision under the Civil Service Compensation Scheme and progress the claimant's appeal against dismissal.
- i. It was confirmed, by letter dated 12 November 2021, that the decision under the Civil Service Compensation Scheme would not be reconsidered and the claimant had received her full entitlement.
- 15 j. The claimant's appeal was then progressed and she was informed that her appeal was unsuccessful on 28 July 2022.
- k. On 10 October 2022, the claimant's trade union submitted concerns to the respondent's Employee Policy Group. The Employee Policy team issued their decision on 23 November 2022.
- 20 23. In light of these points, the Tribunal concluded that, even if a Tribunal were to determine that it was not reasonable for the claimant to lodge her complaint of unfair dismissal in the period from 15 September to 14 December 2020, as she was awaiting the outcome of internal proceedings (which is, in itself doubtful, given that the claimant will say that she was aware of the time limit
- 25 to lodge a complaint and was represented by her trade union throughout), there is no prospect of a Tribunal finding that the claimant lodged her complaint of unfair dismissal in such further period as was reasonable. The claim was not lodged until 4 January 2023. There were no internal proceedings ongoing in the period from 29 July to 10 October 2022, and from
- 30 23 November 2022 to 4 January 2023. In addition, the claimant knew of the time limits for lodge a claim, was initially being advised by her trade union

and, in August/September 2021 engaged a solicitor who provided the claimant with advice, which also included advice in relation to her appeal against her dismissal. The claim of unfair dismissal accordingly has no prospects of success.

5 24. The Tribunal is mindful of the case law that Tribunals should be slow to strike out complaints where the claimant is representing themselves. This is a case however where the Tribunal has concluded that, even if the claimant proves all that she offers to, the Tribunal will not have jurisdiction to hear the complaint of unfair dismissal. It is accordingly proportionate that it be struck
10 out at this stage.

25. The claim of unfair dismissal is accordingly dismissed.

Complaint of Failure to Make Reasonable Adjustments

15 26. In her ET1 and at the Third Preliminary Hearing, the claimant stated that her additional evidence (in addition to that stated at paragraph 22 above), in relation to whether her discrimination complaints were lodged timeously, or within such further period as the Tribunal considers just and equitable, will be that the discriminatory acts relied upon form a continuing act of discrimination. Given that the last act occurred on 23 November 2023, the complaint was, she asserts, lodged in time.

20 27. The Tribunal had considerable doubt as to whether the claimant would be able to establish that the acts asserted amounted to a continuing course of conduct, for the purposes of s123(3)(a). That does not however mean that the complaints of failure to make reasonable adjustments, arising in the period up to 27 July 2022, have no/little reasonable prospects of success. Even if the
25 complaints are found to be lodged outside the requisite time limit, Tribunals have discretion to extend the time limit for lodging a claim where it is just and equitable to do so. That discretion is wide (**Robertson v Bexley Community Centre** [2003] IRLR 434). The factors which are relevant to the exercise of the discretion, and how they should be balanced, are for the Tribunal to
30 determine on a case by case basis. (**DCA v Jones** [2007] IRLR 128 and **Miller v The Ministry of Justice** UKEAT/0003/15/LA).

28. In these circumstances, it cannot be said that there is no reasonable prospect of a Tribunal determining that it is just and equitable to extend the time limits in respect of any instance where the respondent failed to make reasonable adjustments, should this be established and should it be determined that there was not a continuing course of conduct. Nor can it be said that there is little reasonable prospect of this. It is quite possible that a Tribunal could find that it is just and equitable for time to be extended, if the allegations of failure to make reasonable adjustments are established. In light of these conclusions, the respondent's applications for strike out of the complaints of failure to make reasonable adjustments, and that in the alternative a deposit is ordered, are refused.

20

Employment Judge: Sangster
Date of Judgment: 11 September 2023
Entered in register: 14 September 2023
and copied to parties