EMPLOYMENT TRIBUNALS

Claimant: Ms Seelah Lingachetti

Respondent: Care UK Community Partnerships Limited

Heard at: London South (in private in person)

On: 29 November 2023

Before: Employment Judge Heath

Appearances
For the Claimant: In person
For the Respondent: M D O'Dempsey (Counsel)

RESERVED JUDGMENT

1. The claimant's claims are not struck out.
2. The claimant's claims are not made subject to deposit orders.

REASONS

Introduction

1. This matter was originally listed for a case management preliminary hearing on 21 August 2023. A final hearing lasting five days beginning 11 March 2024 had previously been listed. The claimant did not attend the case management preliminary hearing on 21 August 2023, as it appears she had technical difficulties.

2. EJ Rice-Birchall, the judge dealing with that preliminary hearing, relisted the matter, but as a public preliminary hearing, to deal with the following matters:

> *Was any complaint presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 and if so should it be*

dismissed on the basis that the Tribunal has no jurisdiction to hear it?

Further or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success?

Dealing with these issues may involve consideration of subsidiary issues including whether there was "conduct extending over a period"; whether it would be "just and equitable" for the tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about occurred.

3. A notice of hearing was sent out on 6 September 2023, stating that at the hearing "an Employment Judge will ***determine whether the claim is out of time and the case management***".

Procedure

4. No orders were made in respect of preparing this matter for an public preliminary hearing. The respondent prepared a 79 page bundle, but there were no witness statements dealing with the matters for determination.

5. Mr O'Dempsey fairly conceded at the outset of the hearing that the tribunal would not be able determine as preliminary issue whether the claims were in time, as the matter had not been properly prepared for the tribunal to assess the evidence, make findings of fact, apply the law and make the relevant determinations. However, he submitted that the tribunal was in a position to hear his application to strike the claims out on the basis of time bars, or in the alternative to make deposit orders on the same basis. The claimant agreed to this approach.

6. Prior to the hearing the respondent prepared a draft List of Issues ("LOI") where certain information was sought from the claimant in red font. I expressed the view to the parties that, broadly speaking, this was a useful LOI. I went through this document with the claimant in an attempt to clarify the issues in the claim. At certain points Mr O'Dempsey made appropriate observations of his own to clarify the issues.

7. I then went through paragraphs 11 to 15 of the claimant's Particulars of Claim, in which the question of time limits was addressed.

8. I asked the claimant about her financial means and she provided information.

9. Mr O'Dempsey made oral submissions in which he submitted that I should strike out the claimant's claims for being out of time, or in the alternative

made them subject to a deposit order. I gave the claimant over the lunch break to consider any response she wished to make. She made oral submissions after lunch.

10. I then reserved the decision in respect of these applications, and I when on to deal with case management of the case, working on the assumption (but not having decided the point), at this stage, that the claims would proceed. One relevant case management order I later made was to order the claimant to provide further information, which had been requested on four separate occasions by the respondent's solicitors over the course of the spring and summer of this year, and which the claimant had not responded to. I made this the subject of an Unless Order.

The law

Time limits

11. Section 123 EA provides:

> *(1) Proceedings on a complaint within section 120 may not be brought after the end of—*
>
> > *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> >
> > *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *…*
>
> *(3) For the purposes of this section—*
>
> > *(a) conduct extending over a period is to be treated as done at the end of the period;*
> >
> > *(b) failure to do something is to be treated as occurring when the person in question decided on it.*

12. The key question in determining whether there was conduct extending over a period is whether there was an ongoing situation or continuing state of affairs which amounted to discrimination (*Hendricks v Metropolitan Police Commissioner* [2002] IRLR 96). The claimant bears the burden of proving, by direct evidence or inference, that numerous alleged incidents of discrimination are linked to each other so as to amount to a continuing discriminatory state of affairs.

13. As to extending time, the Court of Appeal in *Abertawe Bro Morgannyg University Local Health Board v Morgan* [2018] IRLR 1050 observed that the wording of section 120(1)(b) "*such other period as the employment tribunal thinks just and equitable*" gives the Tribunal a wide discretion in considering whether to extend time. Leggatt LJ said that "*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reason for, the delay and (b) whether the delay has prejudiced the respondent (for example, by*

preventing or inhibiting it from investigating the claims while matters were fresh).”

14. Tribunals are encouraged to “*assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular… ‘The length of, and the reasons for, the delay*’ ” (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 22).

15. Reviewing the authorities, the learned editors of *Harvey’s* set out a non-exhaustive list of factors that may prove helpful in assessing individual case:

    a. the presence or absence of any prejudice to the respondent if the claim is allowed to proceed

    b. the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;

    c. the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;

    d. the conduct of the claimant over the same period

    e. the length of time by which the application is out of time;

    f. the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of the claim;

    g. the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

16. Section 23 Employment Rights Act 1996 (“ERA”) provides:

> *(2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*
>
> > *(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*
> >
> > *(b)…*
>
> *(3)Where a complaint is brought under this section in respect of—*
>
> > *(a)a series of deductions or payments, or*
> >
> > *(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the*

deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

17. The test of practicability means what could have been done not what would have been reasonable. Reasonably practicable does not mean "reasonable" or "physically possible" but is analogous to "reasonably feasible" (see *Palmer and Or v Southend-On-Sea BC* 1984 ICR 372, CA). The burden of proof is on the claimant to show that it was not reasonably practicable to present the claim in time *Consignia v Sealy* [2002] IRLR 624.

Time limits and preliminary hearings

18. In the case of *E v X and others* UKEAT/0079/20 the EAT reviewed previous authorities and identified a number of key principles to be applied when time points are being considered at a preliminary hearing. I set them out in full:

    h. *In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form:* ***Sougrin****.*

    i. *It is appropriate to consider the way in which a claimant puts their case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial:* ***Robinson****.*

    j. *Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant:* ***Sridhar****.*

    k. *It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated; or (2) substantively to determine the limitation issue:* ***Caterham****.*

    l. *When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has*

established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: ***Lyfar****.*

m. *An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs:* ***Aziz; Sridhar.***

n. The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: ***Aziz****.*

o. In an appropriate case, a strike-out application in respect of some part of a claim can be approached assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required – the matter will be decided on the claimant's pleading: ***Caterham****.*

p. A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: ***Robinson****.*

q. If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: ***Caterham****.*

r. Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: ***Caterham****.*

s. Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: ***Caterham****.*

t. If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that

they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may be no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: ***Caterham***

Strike out and deposits

19. Rule 37 of the ET Rules provides:-

> *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;*

20. In *Mechkarov v Citibank NA* [2016] ICR 1121 the EAT summarised the principles that emerge from the authorities in dealing with applications for strike out of discrimination claims:

> *"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."*

21. The guidance in *Mechkarov* followed from a line of authorities including *Anyanwu v South Bank Students' Union* [2001] IRLR 305 and *Eszias v North Glamorgan NHS Trust* [2007] IRLR 603. *Chandok v Tirkey* [2015] ICR 527 shows that there is not a "*blanket ban on strikeout application succeeding in discrimination claims*". They may be struck out in appropriate circumstances, such as a time-barred jurisdiction where no evidence is advanced that it would be just and equitable to extend time, or where the claim is no more than an assertion of the difference in treatment and a differencing protected characteristic. *Eszias* also made clear that a dispute of fact also covers disputes over reasons why events occurred, including why a decision-maker acted as they did, even when there is no dispute as to what the decision maker did.

22. In *Ahir v British Airways plc* [2017] EWCA 1392 the Court of Appeal held that tribunal's should "*not be deterred from striking out claims, discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to*

liability being established, and also provided they are keenly aware of the danger in reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context".

23. Rule 39 ET Rules 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.*

24. In the case of *Hemdam v Ishmail* [2017] IRLR 228 the Court of Appeal gave guidance to tribunals on the approach to deposit orders. The guidance included:-

    a. The test for ordering a deposit is different to that for striking out under Rule 37(1)(a).

    b. The purpose of the order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and creating a risk of cost. It is not to make access to justice difficult or to effect a strike out through the back door.

    c. When determining whether to make a deposit order a tribunal is given a broad discretion, is not restricted to considering purely legal questions, and is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and reach a provisional view as to the credibility of the assertions being put forward.

    d. Before making a deposit order 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.

    e. A mini trial on the facts is not appropriate.

The timeline and the submissions of the parties

25. I provided the parties with a brief chronology that I prepared prior to the hearing. The claimant has been ordered to provided further details, but some key dates are as follows, with an indication of how she frames certain claims (in brackets):

a. On 13 January 2021 the claimant began working as “bank” nurse having previously worked for the respondent in a permanent role.

b. The claimant alleges that she was not given payslips, and given incorrect wages in September 2021 (wages). She also says she was given a poor reference, (race discrimination).

c. In December 2021 she says she was not paid when she was shielding (wages).

d. On 14 December 2021 she was referred to as a “Coolie” (race - related harassment).

e. In March 2022 she was allocated low levels of staff on shifts (race discrimination). She says that derogatory remarks were made about her because of her Asian heritage (race related harassment).

f. In April 2022 various different people made various discriminatory comments (race -related and age-related harassment).

g. On 20 April 2022 a shift was cancelled (race discrimination).

h. In May 2022 the claimant did not work for the respondent as she was unable to log into their system. On 25 May 2022 a shift was cancelled (race discrimination).

i. On 16 June 2022 the claimant put in a grievance to the respondent’s CEO Mr Knight.

j. 30 June 2022 ACAS Early Conciliation commenced.

k. In July 2022 the claimant was not paid for training (wages).

l. Payslips not provided from September 2021 to August 2022, and paid incorrectly (wages).

m. On 10 August 2022 the claimant was provided an Early Conciliation certificate.

n. On 11 August 2022 the claimant was not paid for attending a meeting (wages). This was a meeting with Mr Taylor who was dealing with her grievance.

o. On 17 August 2022 her insurer referred her to Arc Legal.

p. On 30 August 2022 she was referred to DAS Legal.

q. In September 2022 she was not given a shift (race discrimination).

r. In late August or September 2022 the claimant was given an outcome to her grievance by Mr Taylor.

s. On 6 October 2022 the claimant presented her ET1.

26. The claimant also made a number of undated allegations, which she will provide details of pursuant to an Unless Order. She said that she was denied shifts, her complaints were not investigated, she was not given permanent shifts, she was paid less than other staff, she was falsely accused and scolded, and less qualified people were promoted. She alleges these were acts of race discrimination. She said that she was told that workers of other races have more rights than her, her shifts could be cancelled in favour of others and that she could go home if she questioned this; she was also falsely scolded and accused. She says that this was race related harassment. She also says she was told to work overtime and not paid for this (wages).

27. The claimant also expanded on a couple of points at the hearing. She said that her solicitors had been responsible for the delay. She said that the solicitor assigned to her did not work every day. She said she was trying to phone them every day in August. She said that she had spoken to a number of people at the solicitors firm. She said because of illness or holidays, solicitors could not deal with her claim. She also said that she had a problem with computers and the Internet. Mr O'Dempsey fairly noted the wording in paragraph 13a of the particulars of claim "*The deadline was missed and the claimant has issued her claim at the earliest opportunity*". The passive voice, in a document obviously pleaded by a legal professional, could possibly be an indication that the solicitors were at fault.

28. The claimant also referred to having experienced depression from 2018 which had got worse. She has been prescribed antidepressant medication (and was specific about the type of medication and the dose) and described her difficulty waking up, her lack of energy, her lack of sleep, headaches and stress. She said she found it difficult making decisions and was relying too much on her solicitors. She also described other physical health difficulties. She said that everything was a struggle, and depression has had an impact on her life, which she finds it impossible to control.

29. Mr O'Dempsey submitted that the multiple requests for further information were a relevant factor for the tribunal to take account of in considering applications to strike out or for a deposit. The failure to provide particulars makes it difficult for the claimant to show that there was a reasonable prospect of her establishing an act extending over a period. He submits that waiting for the result of an internal investigation is not good enough reason to delay putting in the claim. He submits that DAS is a large insurer which surely would have been able to provide cover if her nominated solicitor had been sick or on holiday. There was no evidence of any misleading information being given to the claimant. Even if the solicitors missed the deadline negligently, this would not constitute exceptional and persuasive circumstances. The respondent, he says, is prejudiced. The claimant has put her claim in a vague way and a lot will depend on oral evidence. The matter is already getting stale and the respondent is at risk of losing a limitation defence, and the prospect of losing finality of litigation. He applies to have all claims struck out, or in the alternative

subject to a deposit order as there is either no, or little prospect of the claimant establishing her claim was in time.

Conclusions

The deadline

30. Looking at the chronology, Date A, for early conciliation purposes, is 30 June 2022. Date B is 10 August 2022. The last allegation under the Equality Act 2010 is the cancellation of the shift on 25 May 2022. The whole of the Early Conciliation would be within the three month limitation period for this claim. An extension under section 140B(3) Equality Act 2010 (i.e.. not counting the 41 days between Date A and Date B) would be to 4 October 2022.

31. The last pleaded deduction from wages allegation before ACAS Early Conciliation process is the failure to pay when shielding in January 2022. However, the claimant makes further allegations for non-payment of wages in July and 11 August 2022.

Acts extending over a period

32. In respect of the wages claims, on the face of it, and taking the claimant's case at its highest but looking at it critically, the claimant appears to be alleging that there was an ongoing failure to provide her with payslips and concurrent failure to pay her correct wages. I note that the claimant is due to provide further information in respect of when the underpayments were made and how much. Until such clarity is given, it is impossible for me to say that the claimant has little or no prospect of establishing a series of underpayments from October 2021 to August 2022.

33. In respect of the Equality Act 2010 claims, taking the claimant's case at its highest, it does appear to be the case that the claimant is alleging that senior managers treated her less favourably in the allocation of shifts over a period of time. She also appears to be alleging that these managers made racially derogatory remarks and age related comments along with other members of staff. Whether she will establish this on the evidence in due course is another matter, but, despite the shortcomings in the pleadings, I cannot conclude that there is little or no prospect of the claimant establishing an act extending from December 2021 to 25 May 2022.

Just and equitable/not reasonably practicable extension

34. As set out above, the claimant has some reasonable prospect of establishing that there is a series of deductions to August 2022. In the circumstances, it would appear that she does not need to rely on the reasonably practicable extension under section 23(4) ERA. Had I been required to consider this, I would have concluded that there is not little or no reasonable prospect of the claimant establishing such an extension. It was not my function to conduct a mini trial on these issues, but the

combination of waiting for the grievance outcome, the problems with the solicitor and the claimant's depression have a bearing on this issue. For the purposes of the applications to strike out I have taken the claimant's assertions at face value and at their highest. For the purposes of the deposit application I have subjected her assertions to somewhat more critical analysis. Her specificity about her medication, and the symptoms she describes of her depression lead me to the conclusion that there is some (as opposed to little or no) reasonable prospect of her establishing that her illness in conjunction with other matters made it not reasonably practicable for her to put her claim in on time.

35. In respect of the Equality Act 2010 claims, the matters I have referred to in the previous paragraph (the grievance, solicitors and her state of health) lead me to the conclusion that there is some reasonable prospect of the claimant establishing that it would be just and equitable to extend time to present her claimant to present her claims. The extension in this case would be a short one.

36. I make the point that I have not made findings of fact, but looked at the pleadings and heard the submissions of the parties, and it will be for the tribunal at the final hearing, if time points are in issue, to look at the evidence, make findings of fact, apply the law and reach conclusions on the time issues. All I have done here, is determine that it is not my conclusion that there is little or no reasonable prospect of the claimant establishing that her claims were brought in time.

37. I also record that I am not unsympathetic to Mr O'Dempsey' s submission that the claimant's failure to plead her case clearly is problematic. However, I have addressed that issue by imposing an Unless Order.

38. In all the circumstances, I refuse the respondent's applications to strike out the claims, or to make the claims subject to deposit orders. In the circumstances, I will not set out the information I received about the claimant's means during the course of the hearing.

Employment Judge **Heath**
Date: 11 December 2023

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/