EMPLOYMENT TRIBUNALS

Claimant: Mr I Laing

Respondent: Solicitors Regulation Authority Limited

Heard at: Birmingham (hybrid on day 2) **On:** 2 March, 4 October 2023 & 2 January 2024 (in chambers)

Before: Employment Judge J Jones

REPRESENTATION:

Claimant: In person
Respondent: Mr C McDevitt (counsel)

RESERVED JUDGMENT
following a
PRELIMINARY HEARING IN PUBLIC

The judgment of the Tribunal is as follows:

1 The claimant's application to amend the claim dated 27 December 2022 is refused.

2 The claim was not presented within the applicable time limit. It is not just and equitable to extend the time limit. The claim is therefore dismissed.

REASONS

The procedural background

1. The claimant is a qualified solicitor and a level 2 accredited senior immigration caseworker. He is black. Following early conciliation via ACAS which ended on 16 September 2021, the claimant presented a claim to the Employment Tribunal on 18 September 2021 in which he alleged that the respondent, his regulatory body, had directly discriminated against, victimised and harassed him on the grounds of race and sex. The allegations arose out of two investigations into the claimant's conduct commenced by the respondent on 31 October 2019 (the first investigation) and 11 November 2020 (the second investigation) respectively and the subsequent revocation of his practising certificate on 16 April 2021 (the revocation complaint). To ensure no misunderstanding, the Tribunal records that neither investigation led to any action against the claimant and the revocation of his practising certificate was in the context of his own choice not to apply to renew it. The claims for discrimination were framed on the basis that the respondent owed duties to the claimant as a qualifications body in accordance with section 53 Equality Act 2010 (EqA), which it accepted.

2. In its response, lodged on 19 October 2021, the respondent denied discriminating against the claimant and also alleged that, pursuant to section 120(7) EqA the Tribunal did not have jurisdiction to hear the claimant's revocation complaint because, to paraphrase the legislation, he had a right of appeal against that decision. It was further alleged that the claims had been brought out of time (the time point).

3. The claims were the subject of case management by Employment Judge Meichen on 18 February 2022 who decided that there should be a preliminary hearing in public to determine, amongst other things, the time point and also whether the Tribunal lacked jurisdiction to determine the revocation complaint because of the effect of section 120(7) EqA.

4. A preliminary hearing in public duly took place before Employment Judge Connolly on 13 July 2022. The claimant did not attend. The Tribunal proceeded to determine the preliminary issue of jurisdiction under section 120(7) EqA in the claimant's absence, dismissing the revocation complaint having found, as set out in a reserved judgment dated 22 July 2022, that the operation of that provision meant that the Tribunal did indeed lack jurisdiction.

5. The time point was postponed to be heard at a further preliminary hearing in public. On 2 December 2022 Employment Judge Connolly directed that this further preliminary hearing was to determine:

   5.1 Whether the claim was presented out of time and, if it was, whether it was just and equitable to extend time;

   5.2 Whether it is appropriate to order the claimant to pay the respondent's costs incurred in respect of the postponement of the preliminary hearing on 13 July 2022.

   This further preliminary hearing in public was listed for 2 March 2023 with a time estimate of 1 day.

6. In the interim, by letter dated 27 December 2022, received by the Tribunal on 3 January 2023, the claimant made a number of further applications in writing. For the purpose of these Reasons, it was the fourth of these applications that is relevant. This was an application to amend the claim to include further claims of race discrimination by harassment and victimisation (the amendment point).

7. Specifically, the application to amend was to include 4 alleged acts of less favourable treatment, harassment or victimisation as follows (these are summarised here for succinctness):

   7.1 the conduct of counsel for the respondent at the preliminary hearing on 13 July 2022 in making false allegations against the claimant and/or misleading the Tribunal;

   7.2 the making of false allegations of express or implied dishonesty against the claimant by the respondent in a letter to the Tribunal dated 24 October 2022;

   7.3 the application by the respondent for an Unless Order on the wholly fabricated basis that the claimant had failed to comply with the case management order of Employment Judge Connolly dated 14 July 2022;

   7.4 the application by the respondent for a costs order arising from the postponement of the time point at the hearing on 13 July 2022.

   The application alleged that the respondent, its solicitors and counsel were responsible together for a continued course of conduct said to be direct race discrimination, victimisation and harassment.

8. On 17 February 2023 Employment Judge Connolly directed that the issue of how to proceed with the claimant's application to amend and, if appropriate, the determination of that application, was to be dealt with at the preliminary hearing on 2 March 2023. By letter of 24 February 2023 the respondent objected to the claimant's application to amend, giving reasons.

The Hearing

9. The preliminary hearing proceeded in person on 2 March 2023. The claimant represented himself professionally and was courteous to the Tribunal. The respondent was ably represented by counsel. The respondent produced a 381-page file of documents. Page numbers in these Reasons are references to the pages of that file unless otherwise stated. Counsel for the respondent submitted a 14-page extract from Harvey dealing with the principles relevant to the exercise of the Tribunal's discretion to extend time in discrimination claims. The claimant submitted a 40-page indexed bundle of documents and a short skeleton argument.

10. The Tribunal heard argument first in relation to the application to amend, as, if granted, this might have had a bearing on the time point.

11. Having heard such argument the Tribunal declined the claimant's application to amend, giving oral reasons. These reasons are set out again below for the sake of completeness although there has been no application for them to be produced in writing by either party to date.

12. The Tribunal then went on to consider the time point. The claimant had not submitted a witness statement setting out why he brought the claim when he did and the reasons for any delay. However, with the consent of the respondent, the Tribunal adduced such evidence from him and counsel for the respondent cross-examined him. The preliminary hearing was then adjourned part-heard due to lack of time.

13. It is most unfortunate that it then took until 4 October 2023 for the preliminary hearing to be re-listed. It is even more unfortunate that when the hearing recommenced on that occasion, a further file of documents which the claimant had submitted to the Tribunal in hard copy was not before the Tribunal and was nowhere to be found. The claimant was understandably frustrated by this and did not wish the Tribunal to proceed to make a decision on the time point without having seen this file. The Tribunal concluded, in the interests of justice, and without dissent from the respondent, that the hearing should be postponed until the claimant's documentation could be found or replaced.

14. The claimant corresponds with the Tribunal and the respondent in hard copy only, a subject that was discussed at previous preliminary hearings. It appears that this

may have contributed to the Tribunal's inability to keep track of all pieces of correspondence received from him.. This observation should not be taken as a criticism of the claimant or of HMCTS – it is simply a neutral statement of the prevailing circumstances.

15. The parties agreed to exchange written submissions by 25 October 2023 and for the Tribunal to then make a reserved decision on the time point. The claimant was ordered to provide a further copy of his bundle of documents, which he duly did. At some point which is not apparent from the file before me, it appears that the original copy of the missing bundle then appeared as it sits on the file date-stamped 26 September 2023. Its contents were not in fact relevant to the time point regrettably, but that was not apparent when the parties were before the Tribunal and the claimant highlighted that it was missing.

Further applications to amend

16. Between the two hearings in March and October 2023, in a letter dated 29 August 2023, received by the Tribunal on 31 August 2023, the claimant made a further application in writing to amend the claim (the third application to amend). This time he wished to raise acts of alleged race discrimination, harassment and victimisation by the respondent on 29 May 2023 in allegedly refusing his written request to provide him with a practising certificate without conditions, not telling him about the fee he needed to pay to stay on the roll of solicitors and removing his name from the roll.

17. On 11 September 2023 the claimant wrote again to the Tribunal (received on 13 September 2023) enclosing a further copy of his letter of 29 August 2023 and also a copy of a further letter to the Tribunal dated 19 June 2023. The June letter also included an application to amend the claim to include complaints of direct discrimination, victimisation and harassment by the respondent in connection with correspondence dated 15 May 2023 apparently sent to a third party which the claimant said breached the Data Protection Act 1998. There is no evidence on the Tribunal file of the letter dated 19 June 2023 being received when first sent although the Tribunal does not conclude in the circumstances of this case that it wasn't. This application will be referred to as the "second application to amend", adopting chronological terminology.

18. On 28 September 2023 (received by the Tribunal on 29 September 2023) the claimant applied again to amend the claim – this time to allege both direct sex and race discrimination arising out of a letter from the respondent to him dated 27 September 2023 notifying the claimant of a further investigation into his conduct. The claimant also indicated his wish to add Mr Lewis Chatterley (Investigations officer from the respondent) and Mr Neil Rose, described by the claimant as

"Solicitor, Founder and Editor of *Legal Futures*" as parties. The basis upon which the latter could potentially be liable to the claimant for discrimination under the EqA was not specified and jurisdiction would be likely to have been in issue.

19. The Tribunal confirmed to the parties in writing on 2 October 2023 that the purpose of the hearing on 4 October 2023 was to complete the hearing of the time point which was part-heard. The Tribunal indicated at the outset of the hearing on 2 October 2023 that it was not going to extend the remit of that hearing to hear and determine the second, third and fourth applications to amend. The claimant wished the Tribunal to do so but the respondent opposed this proposed course. In declining the claimant's request to change the agenda for the resumed preliminary hearing, the Tribunal took account of the fact that the hearing dealing with the time point was already well under way, the respondent had attended the hearing expecting that this was the issue that was to be considered and there was a risk that it would not be possible to complete the determination of the time point if 3 further applications to amend by the claimant were interposed. The Tribunal also noted that there was a gap of over 2 years between the last of the acts of discrimination claimed in the existing proceedings (being the handling of the claimant's complaints about the second investigation ending in March 2021) and the first of the acts of discrimination which the claimant sought to add by the second to fourth applications to amend (being the letter of 15 May 2023). The claimant was able to commence fresh proceedings in relation to those additional matters if he wished to do so.

The amendment point (first application)

20. The legal principles applicable to the determination of the application to amend (first application) were these. It is a matter for the Tribunal's discretion whether to permit the amendment of a claim. This discretion must be exercised in accordance with the overriding objective of the Tribunal Rules of Procedure, namely, to deal with cases fairly and justly.

21. The key case on amendments is **Selkent Bus Co Ltd v Moore** [1996] ICR 836 (see also **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650). This states the Tribunal's discretion should be

> "exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions… the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it … It is impossible and undesirable to attempt to list [the factors to be considered] exhaustively, but the following are certainly relevant: … the nature of the amendment, whether the claim is out of time and if so, whether time should be extended under the

applicable statutory provision; and the extent of any delay and the reasons for it".

The "core test" is the balance of prejudice, injustice and hardship that would be occasioned by granting or refusing the amendment. It is not a tick list exercise: **Vaughan v Modality Partnership** [2021] ICR 535**, EAT.**

22. The Tribunal considered the nature of the amendment sought to be made. This was to introduce "new claims". The claimant sought to introduce 4 factual matters arising out of the ongoing conduct of the proceedings which had not, by definition, occurred at the time the original claim was submitted.

23. Initially the Respondent argued that there was no basis for these new claims in law under EqA. The Tribunal disagreed. The wording of section 53 of the EqA was potentially wide enough to cover conduct by the respondent that fell within the broad definition of "subjecting the claimant to a detriment".

24. However, the Tribunal did accept that from a legal point of view the complaints which the claimant sought to add by way of amendment, would be unlikely to succeed because of the doctrine of judicial immunity.

25. In summary, this principle states that the conduct of legal proceedings by a party cannot be the subject of separate legal claims. The respondent relied upon **Darker and others v The Chief Constable of the West Midlands** [2000]UKHL44. The facts of that case concerned the way in which the law treats the actions of police officers in investigating a case, but the Tribunal found that this different factual matrix did not render it irrelevant to the claimant's allegations here, although the claimant urged this distinction upon the Tribunal.

26. In **Darker** Lord Hope of Craighead set out the nature and purpose of judicial immunity from proceedings. He described it as the core immunity. It is an immunity which is regarded as necessary in the interests of the administration of justice and is granted as a matter of public policy. It is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceedings in a court of justice. The same immunity is given to the parties, the advocates, the jurors and the Judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and proper cause.

27. If the claimant is granted leave to include the 4 new claims of discrimination arising from the preliminary hearing on 13 July 2022 and the ongoing conduct of these

proceedings, then he will immediately face an application by the respondent to strike them out on the grounds that the conduct complained about is the subject of judicial immunity. Based on the principles set out in **Darker** such an application would, in the Tribunal's judgment, have a reasonable prospect of success. The first issue relates to the conduct of counsel during the hearing on 13 July 2022 in arguing her client's case. The second issue relates to correspondence with the Tribunal about compliance with case management orders. The third and fourth complaints are in connection with applications made to the Tribunal for case management orders. These are things said or done by a party "in the ordinary course of proceedings".

28. If the application is granted then counsel and the solicitors for the respondent will face claims of discrimination arising out of the way in which they have conducted this claim on behalf of the respondent which, whether with or without merit, they will be obliged to disclose to managers, insurers and regulators. They would be hampered in their ability to defend their actions by their duties of confidentiality to their client. There would be stress and professional cost to the lawyers involved.

29. Weighing up the hardship to the claimant in refusing the amendment with the hardship to be suffered by the respondent if it were granted, and in the exercise of the Tribunal's discretion, the balance of prejudice is clearly in favour of rejecting the application to amend. The new claims would be likely to be struck out for lack of jurisdiction so the loss to the claimant in not being able to pursue them is small. There are also other remedies available to the Claimant in relation to the conduct complained of. If an application for costs has been made against him on an inappropriate basis, then it will be rejected, and the claimant may himself seek further relief. If there has been mischief, or worse, in the other submissions made by the respondent in writing or in person, then the Tribunal Rules also provide a remedy for that within these proceedings.

The time point

30. The applicable time limits for claims of discrimination are set out in section 123 of the EqA which reads as follows:

123 (1) Subject to section 140B 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.

(2) ….

(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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

31. Time limits in employment claims are often described as jurisdictional. In other words, if a time limit is not complied with, an Employment Tribunal does not have the power to go on and decide the case irrespective of its merits. The time limits for Tribunal claims are short and the Tribunal can, therefore, extend time in exceptional circumstances to avoid injustice. The tests to be applied by a Tribunal to permit an extension of time are different in different types of case. In discrimination claims, the test is whether or not the Tribunal considers it "just and equitable" to extend time. This is a question of discretion for the Tribunal but that discretion must be exercised carefully having fully considered the balance of hardship between the parties. The following case law describes some of the principles that apply to the Tribunal's decision-making process.

32. First, there is no presumption that Tribunals should extend time – it is the claimant who must persuade the Tribunal that it is just and equitable to do so**: Robertson v Bexley Community Centre***,* [2003] IRLR 434.

33. Generally, the remedy of Employment Tribunal proceedings is considered to be sufficiently well known that ignorance of such recourse will not normally be accepted as an excuse for non-compliance with any time limit (**Partnership Ltd v Fraine** UKAEAT/0520/10, **John Lewis Partnership v Charmaine** UKEAT/0079/11 and **Walls Meat Co Ltd v Khan** [1979] ICR 52). The statutory time limits are to be considered sufficient for a claimant to investigate their options promptly and issue proceedings within the necessary 3-month period.

34. A Tribunal can take into account the potential merits (or lack thereof) of an out of time complaint but it must do so with appropriate care and always bear in mind that it does not have all the evidence, particularly in a discrimination claim –

Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132.

35. It can be a useful exercise to consider the factors set out in section 33 Limitation Act 1980 in considering the exercise of discretion in relation to time limits. These factors are: the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the respondent has cooperated with any requests for information, the promptness with which the claimant acted once they knew of the facts giving rise to the claim; and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action, although this list should not be applied slavishly - **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA, Civ 27.

36. The acts of discrimination complained of by the claimant were:

    36.1 the institution on 31 October 2019 of the first investigation into the allegation that the claimant failed to report his discharged bankruptcy to the respondent, which ended with no further action on 11 December 2019;

    36.2 the institution on 11 November 2020 of the second investigation into the claimant's alleged conduct during proceedings in Manchester Employment Tribunal brought by him against the Citizen's Advice Bureau, which ended with no further action on 27 January 2021;

    36.3 the way in which the respondent dealt with the claimant's complaints about the second investigation (in particular how it dealt with data) between January and March 2021.

37. Assuming that the claimant could show that these separate matters formed a "continuing act", the last act complained of occurred on 3 March 2021 when the respondent wrote to the claimant in response to his request for rectification under Article 6 of the General Data Protection Regulations (GDPR) (p36).

38. Allowing a few days for the claimant to receive this letter by post, he would have needed to commence early conciliation by, at the very latest, the second week of June 2021 for the claim to have been in time. The precise date does not matter for the purpose of this consideration, on the facts of this case. The claimant actually commenced early conciliation on 16 September 2021, more than three months later. Taking account of the fact that the time limit for discrimination claims is three months, this is a substantial delay.

39. The Tribunal heard oral evidence from the claimant and asked questions to elicit from him the reason for his delay in lodging the claim, about which his witness

statement was silent. The claimant said he knew of the applicable time limits. He knew how to commence proceedings in the Employment Tribunal, having done so before. He had commenced proceedings in the County Court against the SRA in approximately August 2021 raising alleged race discrimination.

40. Between December 2019 and January 2021, the claimant wrote a number of letters and emails of complaint to the SRA about the events which formed the subject matter of his later claim, alleging discrimination. By 27 January 2021 this correspondence was marked "Notice of Intended Proceedings" (p209) and included the allegation that he had been subject to "continued direct discrimination on grounds of race and sex contrary to the Equality Act 2010" adding that he was "deeply upset [with] feelings injured and aggrieved by the "less favourable treatment" that [he] was subjected [to]". On 11 February 2021 the claimant followed this up with a detailed letter to the respondent headed "Pre-Action Letter 2" (p213-7) seeking a formal apology, financial compensation and the rectification of his records with the SRA. The thrust of his complaints in that correspondence were that the matters which led to the second investigation were themselves unfair and unjust to him, rather than addressing the point now made in these proceedings that the respondent should not have even investigated the issues before dismissing them, and only did so because of his race or sex.

41. The lengthy particulars of claim lodged by the claimant at the Tribunal with the claim form on 18 September 2021 are dated 1 September 2021 (p39). The claimant confirmed that this was when he wrote them. In them, the claimant makes reference to the time limits for bringing discrimination claims, asserts that he has been subjected to a "continuing course of discrimination" and adds that it would be just and equitable to extend the time for him to lodge his claims, quoting the case of **Wilson Barca LLP v Shirin** UKEAT/0276/19/BA.

42. The claimant told the Tribunal that the reason for his delay was his "state of mind at the time" and "where he was personally at that stage". He referred to his claim form which set out the mental and emotional distress and depression he experienced at the time (p18, paragraph 8 refers). He said the revocation of his practising certificate was "catastrophic", adding that time limits were "furthest from his mind" and that he was not in a fit state to conduct litigation in 2021. The claimant stated that "at some point, I decided to give it a shot" as he "just couldn't give up on it". It was not clear whether this was his motivation for starting proceedings in the County Court in August 2021 or the later Employment Tribunal proceedings in September 2021. The claimant stated that after he had started his claim in the County Court he did some research and realised that he could bring a claim in the Tribunal. He said that the "primary claim" was about the retention of false information on his file which was a claim he had to bring in the County Court.

43. The claimant was not able to provide an explanation for the delay between him writing the particulars of claim on 1 September 2021 and submitting them on 18 September 2021 (after 2 days of ACAS early conciliation).

44. The respondent is the statutory regulator of solicitors, including the claimant. It has an obligation to carry out investigations into issues of alleged misconduct by solicitors. The claimant has not identified any facts from which the Tribunal could conclude that the institution of the first investigation (relating to the non-disclosure of his discharged bankruptcy) was because of his race or gender. It is not clear how he claims those who decided to investigate this matter were aware of his race. The investigation led to no further action. The claimant had made a disclosure to the respondent relating to his bankruptcy on one occasion in 2014. It is common ground that the first investigator, Kim Castro, did not have that document on file when she instituted the investigation.

45. The second investigation was prompted by an online allegation that the claimant had asked for a male judge during Employment Tribunal proceedings. It is not alleged, nor would it be likely to be sustained if it was, that this alleged conduct was not within the remit of the regulator to investigate. The investigators were different to the first investigation – Ruth Ellway and Callum Jordan. Again the investigation led to no further action.

46. The claimant has not identified any actual comparators simply stating his belief that he would have been treated differently if he had been white or a woman because the respondent is institutionally sexist or racist. Such blanket assertions would not assist him to prove facts from which a Tribunal could conclude that he has been treated less favourably because of a protected characteristic or protected act.

47. The third allegation, relating to the way in which the claimant's complaints about the handling of his data were dealt with, involved a different officer of the respondent again – David Adams. Once again the claimant has identified no material from which a Tribunal could conclude that Mr Adams' conduct was linked to the claimant's race or sex, or his knowledge of any prior allegation of discrimination.

48. If time is extended to permit these claims to proceed, the four individuals whose conduct and decision-making is criticised by the claimant would have to give evidence about events that they were involved in 4 or 5 years ago. This would be extremely difficult and raises the risk that memories will have faded so as to render evidence less reliable and the Tribunal's task extremely difficult. Two of these individuals no longer work for the respondent.

49. The delay would also have an impact on the cogency of the claimant's evidence.

50. For the avoidance of doubt, in considering the impact of delay on the memories of parties, the Tribunal took account of the fact that parts of the delay at least in the progress of this case since its issue have been due to events beyond the claimant's control.

51. Balancing all of these factors, the Tribunal carefully weighed the relative hardship to each party and concluded that the prejudice to the respondent if the claims proceeded out of time would outweigh the prejudice to be suffered by the claimant if they do not. The Tribunal was not satisfied that it would be just and equitable to extend time to permit the claims to proceed and they are accordingly dismissed as out of time.

52. The parties are thanked for their patience in awaiting promulgation of this decision.

53. If the respondent wishes to pursue its costs application arising from the postponement of the hearing on 13 July 2022 then it will be remitted to be heard by Employment Judge Connolly who dealt with that hearing. This is the subject of a separate order.

Employment Judge J Jones
24 January 2024