Case Number: 1804607/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
A Pedro	v	Mr E Tejero

Heard at: Sheffield (by CVP) **On**: 16 January 2024

Before: Employment Judge A James

Representation

For the Claimant: Did not appear and was not represented

For the Respondent: Represented himself

JUDGMENT

(1) The claim is struck out because, both on the question of time limits, and on the merits, the allegations of race discrimination have no reasonable prospects of success (Rule 37 Employment Tribunal Rules of Procedure 2013).

REASONS

The issues

1. The issue which the tribunal had to determine is whether the claim should be struck out on the ground it has no reasonable prospect of success, because:

    (1) *it has been presented out of time;*

    (2) *the alleged treatment was not because of the protected characteristic of race;*

    (3) *the respondent would not be liable in any event under any provision of the Equality Act 2010 because he was not the employer of the claimant or any other person against whom proceedings can be brought.*

The proceedings

2. Acas Early Conciliation took place between 25 and 27 June 2023. The claim form was issued on 26 July 2023. The claimant makes claims for race discrimination.

3. A preliminary hearing for case management purposes took place on 10 October 2023. Employment Judge Jones concluded that there appears to be a number of problems with the claim, and hence it was listed for hearing today in relation to the above issues.

Relevant law

Postponements

4. Rule 30A of the Employment Tribunal Rules of Procedure 2013 provides that postponement of a hearing may only be ordered where the parties consent (and certain other criteria are met), the application was necessitated by an act or omission of another party or the tribunal, or there are exceptional circumstances.

Time limits - Equality Act 2010 claims

5. The relevant parts of section 123 EA 2010 provide:

(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) 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.

(3) 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.

6. Therefore, where a claim is presented outside the primary limitation period, i.e. the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable.

7. Time limits are to be applied strictly in Employment Tribunal proceedings. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. The onus is on a claimant to show to the tribunal that hers is a case in which the

time limit should, exceptionally, be disapplied (see *Robertson v Bexley Community Centre [2003] IRLR 434*, at para 25:

> *It also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*

8. As explained in *Caston v Lincolnshire Police [2010] IRLR 327*, para 26:

> *Plainly, the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour). Plainly, Schedule 3 of DDA does not give rise to a presumption in favour of extending time. In my judgment, Auld LJ's use of the word 'convince' in paragraph 25 of his judgment adds little.*

9. As set out by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*, 15 January 2021:

> *The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is 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 (as Holland J notes) "the length of, and the reasons for, the delay"*

10. In *British Coal Corporation v Keeble 1997 IRLR 336* the EAT said that in the discretion to extend time requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to:

> *a) the length of and reasons for the delay;*
>
> *b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
>
> *c) the extent to which the party sued had cooperated with any requests for information;*
>
> *d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
>
> *e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*

Strike out

11. Rule 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:

> *(1) An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds:*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success; ……*

12. Before making a strike out order in any of these situations, the tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing (r.37(2)). An application by a party for such an order should be made in accordance with the provisions of r.30.

13. The striking-out process requires a two-stage test (see *HM Prison Service v Dolby [2003] IRLR 694, EAT*, at para 15; approved and applied in *Hasan v Tesco Stores Ltd UKEAT/0098/16 (22 June 2016, unreported*). The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid.

14. The principles applicable to strike out applications are set out in numerous authorities, and recently in for example in, *Malik v Birmingham City Council, UKEAT/0027/19/BA*, 21 May 2019, Choudhury P, paras 29-33; *Cox v Adecco, UKEAT/Appeal No. UKEAT/0339/19/AT*, 9 April 2021, at para 28.

15. The general principle is that a Tribunal will not strike out discrimination claims except in the most obvious and plain case (*Anyanwu v South Bank Student Union [2001] 1 WLR 391*). The same approach applies in whistleblowing cases: see *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126*, at para 29, in which the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases.

16. However, self-evidently (and as *Anyanwu* and *Ezsias* themselves make clear) such cases must exist. The respondents argue that this is such a case.

17. As Lord Hope set out in *Anyanwu*, at para 24: *"The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail'.*

18. See further for example, the Court of Appeal's judgment in *Ahir v British Airways plc [2017] EWCA Civ 1392* at paras 15-16:

> *Employment tribunals should not be deterred from striking out claims, including 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…*

19. And, at para 24 of Ahir, per Underhill LJ:

> *… where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so.*

20. See also *Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1,* CA at para 77:

> *… there is no absolute rule against striking out a claim where there are factual issues - see, eg Ahir v British Airways plc [2017] EWCA Civ 1392. Whether it is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed.*

21. Finally, as put by HHJ Tayler in *Cox v Adecco*, at para 28(1) "*No-one gains by truly hopeless cases being pursued to a hearing*" (see also the authorities cited at *Malik* at paras 32-33 which make the same point).

Conclusions

Application to postpone

22. On 8 January 2024 the claimant emailed the tribunal as follows:

> *Good morning,*
>
> *I will not be able to attend the Preliminary Hearing on 16/1/24 due to other commitments.*
>
> *I ask the Tribunal if this hearing could be moved to another date,*
>
> *Grateful for your help,*
>
> *Looking forward to hearing from you,*

23. Mr Tejero responded on 12 January 2024:

> *Unfortunately I have not been able to cancel the locum pharmacist I had booked for the preliminary hearing on the 16th of January.*
>
> *Because of this case being for something that happened over five years ago and that this preliminary hearing had been arranged for the 16th of January three months ago, I would like the Tribunal to ask Ms Pedro for justified evidence of her cancellation of this date. Otherwise I'd like to attend on the 16th as previously arranged.*
>
> *I will wait for the reply from the Tribunal.*

24. The postponement application was refused by Employment Judge Jones on 15 January 2024. The letter refusing postponement states:

> *… a party has an obligation to prioritise the conduct of litigation. The date for the preliminary hearing was fixed as long ago as 10 October 2023 with the parties. Neither objected to the date. The Tribunal is not prepared to postpone the hearing because the claimant has other commitments. The hearing shall proceed as listed*.

25. The claimant sent an email to the Employment Tribunal on 15 January 2024 at 10:39 in which she states:

> *I cannot attend the hearing tomorrow*
>
> *I ask if another date can be set for the hearing*

26. Then in a further email sent to the tribunal on the same day at 12:47 the claimant states:

> *If the tribunal proceeds with the hearing tomorrow without my presence I will present a complaint as I asked for the hearing to be postponed.*
>
> *Looking forward to hearing from you about another date for the hearing,*

27. Mr Tejero joined the hearing today. He wants it to continue so that, ideally, it can be resolved today. Although there was no further formal application before the tribunal to postpone, the Judge nevertheless considered whether

it was appropriate to continue with the hearing. He decided that it was, in circumstances where there has been no proper explanation from the claimant as to what her 'other commitments' are, preventing her from attending today's hearing. Her conduct appears to shows disrespect for Employment Tribunal proceedings. The Judge was originally listed to hear two other cases today. Those have been postponed because of a shortage of judges. This case was allocated to Employment Judge James instead. Judicial resources are scarce and parties are expected to prioritise Employment Tribunal hearings. Hearings will not be rearranged simply for the convenience of the parties. There are no exceptional circumstances justifying the postponement of this hearing and the other potential reasons for postponement set out in Rule 30A do not apply.

28. A decision having been made to continue with the proceedings, the Judge adjourned briefly, in order to consider the witness statement prepared by the claimant for the hearing; the witness statement prepared by the respondent, and the bundle of documents put together by the claimant for the hearing. He also considered the content of emails sent by the parties to the tribunal, attaching those documents. The conclusions on the issues before the tribunal are set out below.

Time limits

29. As noted above, factors which are potentially relevant to the exercise of discretion in relation to time limits are set out in the *Keeble* case. There is no evidence at all from the claimant in relation to those factors.

30. During the period September 2017 to April 2018, the claimant was placed with pharmacies by a recruitment agency which the respondent to these proceedings managed. The claimant has had no employment relationship with the respondent, or the recruitment agency he managed, since April 2018.

31. In her witness statement to this tribunal, the claimant provides no explanation why it has taken her over five years to commence Acas Early Conciliation and then bring this claim to the employment tribunal, when the usual time limit is three months. It would be a wholly exceptional case for it to be just and equitable for the tribunal to extend the usual time limit by that amount. Such exceptional circumstances might include, for example, where a respondent had concealed information form the claimant from which they might be able to discover the alleged discrimination.

32. The Judge has concluded that such wholly exceptional circumstances do not apply in this case, particularly where the claimant has applied to postpone a hearing relating to the question of time limits one week before it is due to take place, because she has unspecified 'other commitments'. In the absence of any relevant evidence before the tribunal relating to the question of time limits, the Judge concludes that it is inherently unlikely that a tribunal would in due course hold that it is just and equitable to extend the usual three month time limit. Therefore, on the question of time limits, the claim has no reasonable prospect of success and the Judge has concluded that it is appropriate that it should be struck out.

The prospects of success of the allegations

33. In box 8.1 of the claim form, the claimant has ticked the race discrimination box. In box 8.2 she states:

> *I am originally from Portugal, Eduardo Tejero a pharmacist from Hull found me work as a locum pharmacist with Lloyds pharmacy in Hull. He put at Hull International House where he called very, very early in the morning to work urgent shifts for Lloyds. Then he rented me a house which I have to pay him in cash. He also signposted me to someone who sold me a car who had had an accident. Also, he signposted to Rod Tucker a pharmacist who was just exploiting me. He also signposted to a pseudo accountant Sarah Jackson who was the start of complaints and troubles.*
>
> *I presently have at HMRC against accountants the last problem with HMRC happened on 20/6/23. Eduardo Tejero put me into a lot of troubles with GPHC because did not provide me adequate training and I was doing wrong things at Lloyds pharmacy without my knowledge.*
>
> *Eduardo got advantage of me for his benefit because I am an EEA pharmacist and I am originally from Portugal and initially I did not understand well how pharmacy works in the UK and he "tagged" me with the label "EEA" and signposted me to others so that they could take advantage of me too. It seems Eduardo did the same with many other EEA pharmacists.* [There is then a link to an online article].

34. Box 9.2 states:

> *I would like to see the employment laws regarding EEA pharmacist recruitment reviewed and that GPHC provided a full one-year training for these pharmacists and that Home Office provide to these pharmacists full support with HMRC, NI, housing, cars, etc*

35. The allegations made in Box 8,.2 are vague and unparticularised. There appears to the Judge to be a number of matters about which the claimant complains, which do not appear to be connected with her employment. These include, for example, the respondent providing the claimant with rented accommodation; the car bought by the claimant from a car dealer, who the respondent gave her the contact details for; and similarly alleged problems with work carried out for the claimant by an accountant, the name of whom the respondent gave the claimant the contact details for. To the extent that the claimant is asking the tribunal to adjudicate on those matters, such claims have no reasonable prospect of success because they are not matters that this tribunal has any jurisdiction in relation to.

36. Insofar as the claimant complains about a lack of training, the respondent explained to the Judge that neither he nor the recruitment agency he ran had any obligations to give training to the pharmacists they placed with pharmacies. The claimant was not treated differently to any others. As for training in relation to the specific drug (Clozapine) that the claimant wrongly dispensed and in relation to which she was subsequently subjected to professional misconduct proceedings, the respondent was not qualified to give such training in any event. It was the claimant's responsibility to ensure that she was authorised to dispense any of the drugs that she prescribed, whilst working for a pharmacy. On the basis of the discussion at this hearing and there being no counter explanation from the claimant, the Judge

concludes that the allegation of race discrimination in relation to an alleged lack of training has no reasonable prospect of success. Again, in the circumstances of this case, the Judge considers that it should therefore be struck out.

37. The claimant alleges that the respondent took '*advantage of me for his benefit because I am an EEA pharmacist and I am originally form Portugal and initially I did not understand well how pharmacy works in the UK and he "tagged" me with the label "EEA" and signposted me to others so that they could take advantage of me too*'. This allegation is wholly unparticularised. Had the claimant joined this hearing, the Judge would have wanted to find out more about this part of her claim. Since she has not participated, it has not been possible to do so. That allegation still being entirely unparticularised, the Judge again concludes that it has no reasonable prospect of success and should be struck out.

38. Finally, as for the matters about which the claimant complains in Box 9.2, again these are matters over which the tribunal has no jurisdiction and for that reason any such claims have no reasonable prospects of success.

39. For all of the above reasons, on the basis of the information before the employment tribunal today, it is concluded that none of the allegations of race discrimination have any reasonable prospect of success on the merits and should be struck out for that reason as well.

40. Given the decision in relation to the first two issues, it was not considered proportionate or necessary to consider the question of employment status. No findings are made or conclusions drawn in relation to that issue.

Employment Judge A James
North East Region

Dated 16 January 2024

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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