



EMPLOYMENT TRIBUNALS

Claimant: Cameron Bennett
Respondent: Equans Services Limited
Heard at: East London Hearing Centre (via CVP)
On: 22nd August 2023
Before: Tribunal Judge S Iqbal acting as an Employment Judge

Representation

For the Claimant: Mrs Carmen Bennett (Grandmother of the Claimant)
For the Respondent: Mr S Liberadzki, Counsel

RECONSIDERATION JUDGMENT

Upon the Tribunal's own initiative the Judgment dated 16th November 2023 is reconsidered and determined without a hearing

1. The factual background to this case can be found the Tribunal's Judgment and full written Reasons which have been provided to the parties separately. I therefore do not repeat the factual history here.

REASONS

2. In an email dated 25 September 2023, the Respondent sought written reasons of judgment dated 22nd August 2023 pursuant to (Rule 62(3) 2013 ET Rules of Procedure.
3. Accordingly these were provided on the 16th November 2023. However, on review of the email of the Respondent it was noted that the respondent additionally requested full written reasons on the decision specifically to:

v. Refuse the Respondent's application for strike out or a deposit order in respect of the claims for direct age discrimination and harassment (pursuant to rules 37 and 38 of the ET Rules, respectively) (which was presented at the Preliminary hearing on 22 August 2023, but is not addressed in the Judgment).

4. It was therefore considered that given the failure to consider this specifically the Tribunal ought to revoke the written reasons and reconsider its decision.

The Law

5. The rules relating to reconsideration applications are set out at 70 to 73 of the ET Rules of Procedure. As per rule 70, the Tribunal may reconsider any judgment where it is in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again. If there is no reasonable prospect of the original decision being varied or revoked the application is to be refused. There is an underlying public interest in the finality of litigation.
6. In **Ministry of Justice v Burton [2016]** ICR 1128 the Court of Appeal said, at paragraph 21: “... *the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily...*”
7. In **Outasight VB Ltd v Brown 2015 ICR D11**, EAT, Her Honour Judge Eady QC stated that the wording ‘necessary in the interests of justice’ in rule 70 gives Employment Tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, “*which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation*”.

Findings and Decision

8. The case was listed for a 2-hour preliminary hearing on the 22nd August 2023 for the Tribunal to consider the issues outlined in EJ Isaacson’s case management order of the 18th April 2023 at 2(ii) and (iii), in particular:
 - a) Whether the Tribunal should strike out all or any part of the claims under Rule 37(1) of The Employment Tribunals Rules of Procedure 2013 (The Rules) or alternatively make a deposit order pursuant to rule 39.
 - b) Further whether all or any part of the claims have been made outside the relevant time limits and, if so, whether time should be extended so as to permit the Tribunal to assume jurisdiction.
9. The hearing was held over Cloud Video Platform. A bundle of 154 pages was provided by the respondent for the hearing.

Whether the Tribunal should strike out the claim under rule 37(1)(a) and/or make a deposit order under rule 39.

10. By emails dated 4 April 2023 (further referring to their skeleton argument) the respondent made a written application for the claimant’s claims to be struck out

on the ground that the Tribunal does not have jurisdiction or alternatively to make a deposit order pursuant to rule 39.

Whether all or any of the claims have been brought outside relevant time limits.

11. The respondent says the Tribunal has no jurisdiction to hear most of the claimant's claim as the claimant presented these outside of the relevant time limits.

Relevant Law

12. The Tribunal has power to strike-out the whole or part of claim under Rule 37, at any stage of the proceedings, either on its own initiative or on the application of a party. The ground relevant to this application on which the Tribunal can strike out a claim, is that the claim has no reasonable prospect of success. Rule 37(1) provides that:
- (1) *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;*
 - (b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
 - (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
 - (d) *that it has not been actively pursued;*
 - (e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*
 - (2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*
 - (3) *Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.*
13. The process for striking-out under Rule 37 involves a two-stage test (*HM Prison Service v Dolby* [2003] IRLR 694, EAT; *Hasan v Tesco Stores Ltd* UAEAT/0098/16). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied.

14. A Tribunal should be slow to strike-out a claim where one of the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18 and *Cox v Adecco* UKEAT/0339/29 [2021] ICR 1307) given the draconian nature of the power.
15. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume he will make out the facts he offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA* [2016] ICR 1121, EAT).
16. In considering the original discrimination which is considered out of time and where discriminatory constructive dismissal is alleged, the test is whether or not the discrimination materially influenced the fundamental breach of contract: *Lauren De Lacey v Wechsels Ltd ta The Andrew Hill Salon*: UKEAT/0038/20/VP (V).
17. In *E v X, L and Z* UKEAT/0079/20 (10 December 2020, unreported) the Employment Judge considered striking out of a claim which raised whether the claimant could rely on the concept of 'acts extending over a period'. (see [47] and [50]).
18. In considering whether to extend time I consider what s123 Equality Act 2020 says:
 - (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) *Proceedings may not be brought in reliance on section 121(1) after the end of –*
 - (a) *the period of 6 months starting with the date of the act to which the proceedings relate, 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.*
 - (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.

Submissions

19. Mr Liberadzki on behalf of the respondent relied on the skeleton argument dated 4 April 2023 and made oral submissions at the hearing. I asked the parties to address me on the test set out in *De Lacey v Wechsels* UKEAT/0038/20/VP.
20. The Respondent sets out that the claimant has little or no reasonable prospect of proving the Respondent's behaviour particularly the claimed lack of welfare support during his period of sickness from March 2019 until July 2020 was capable of meeting the high threshold of conduct which objectively viewed was calculated as likely to destroy this or seriously damaged their relationship of mutual trust and confidence or that any such conduct was the cause of his decision to resign. A number of other matters were flagged as detailed in the skeleton argument, including the Claimant's complaint about his hours on return being changed, not being allowed to start later to miss rush hour, the Respondent's action in initiating capability proceedings, the treatment at the hands of Mr Brown in contrast to Mr Murphy and the Claimant not raising a grievance on resigning.
21. In respect of direct age discrimination/harassment it was considered the latest possible date of the allegation put by the claimant was in the two weeks after he returned to work in July 2020, during which period that Liam Brian was his line manager. Therefore given the early conciliation dates were from 7 October to 27 October 2021 and the claim was lodged on the 20 December 2021, any complaint prior to 1 September 2021 was out of time and it was not just and equitable to extend the time given Mr. Brown had left the business and the respondent would be prejudiced in having to answer the allegations against him. Additionally there was no evidence to demonstrate the Claimant was too unwell to initiate tribunal proceedings earlier with the support his own family and the appellant's better and further particulars did not disclose a link between his age or any named comparator.
22. It was further submitted that the Claimant had further failed to give any substantive detail insofar as his claim that there had been failure to make reasonable adjustments.
23. The Claimant's response was that a number of the allegations made are not supported by any documentation as they arise as a result of verbal requests and therefore would need to be tested by way of evidence. Additionally, in relation to the incidents he relies on which amount to age discrimination during the period January 2019 through to December 2019, he states he did not act in relation to these matters as at the time he was trying to return to work.

Decision

Strike out application

24. In considering an application for strike-out, the case law is clear, the Tribunal should take a claimant's case at its highest because it is being asked to strike-out the claim without hearing any evidence.
25. There is no dispute that the unfair claim for constructive dismissal is brought in time, however, it's argued that it has little or no prospects of success for reasons outlined above on behalf of the Respondent.
26. I have firstly considered whether the other heads of damages; in particular age and disability discrimination as well as the Claimant's claim for reasonable adjustment are out of time as they potentially impact on this aspect of the claim.
27. I find that the matters raised by the Claimant insofar as direct disability discrimination and a failure to make reasonable adjustments are concerned, arguably contribute to the dismissal. In particular I have considered the case of *De Lacey v Wechsels* which I referred the parties to. This case looked at recent events, which when added to the potentially discriminatory acts over a period of time may have caused the employee to resign thus raising a claim for constructive dismissal.
28. I note the matters raised by the Claimant in relation to disability discrimination include firstly in 2019, a breakdown as a result of continuing belittling comments as well as not being provided with notes to review/agree matters discussed at the capability hearing in 2021, he says are incidents which contributed to his eventual resignation (§4.1 - further and better particulars).
29. Further in relation to reasonable adjustments, I note the Claimant highlights the PCP of making him start work at 0700 – 1130 during his period of phased return, with the disadvantage that there was no one else around at that time to meet him to update him on the changes to the company (including a name change).
30. Firstly, I am satisfied that the incidents described are capable of amounting to potentially discriminatory acts over a period of time which may have caused the Claimant to resign, which therefore brings these matters in time and as such the Tribunal has jurisdiction to consider them.
31. Having heard from both parties insofar as the nature of the incidents are concerned, including the matters relied on by the Claimant in relation to his constructive dismissal, I consider whether the claims ought to be struck out. I find at this stage the Respondent has failed to demonstrate that the Claimant's claims have no reasonable prospect of success. I find the questions involve the hearing of evidence and findings of fact which can only therefore properly be resolved at a full merits hearing.

Age Discrimination

32. In considering the age discrimination separately, the Claimant set out his better particular claims at page 59-62, that he was discriminated on the basis of his age

during a period where Liam Brown was his manager. These are clearly out of time insofar as the current action is concerned, therefore the parties have raised whether it was just and equitable in all the circumstances to extend time.

33. The Claimant stated that he had been with the company for seven years and these incidents between September 2018 through to January 2019, happened before he was off work and at the forefront of his mind was returning to work, which meant that he did not act to bring these matters any earlier.
34. Whilst it is clear the matters are out of time, I have a wide discretion in considering these matters, including the potential strengths of the claims as well as whether acts occurring after that time limit have expired can still be included in the claim if they can be said to be part of "*conduct extending over a period*".
35. I have considered the matters complained of by the Claimant which include for example, comments made by his manager, Mr. Brown insofar as the issue of drugs testing, permission to take breaks as well as, walking around and talking to others during his lunch break. All of these the Claimant says occurred as a result of his age and that no one outside of his age bracket i.e., 20-26 would have been treated in a similar manner.
36. The Respondent submitted that there was no good reason to extend time as the Claimant had not demonstrated he was unable to bring the claim without support any earlier due to ill health or any other reason. They further submitted there was prejudice to the Respondent as the Claimant relied on verbal comments made and that there was no documentary trail but additionally these matters related to alleged comments/Behaviour of a former employees who had left late in 2020, i.e., the Claimant's manager, Liam Brown.
37. I have considered the totality of the matters presented against whether or not it would be just and equitable to extend time and also considering the balance of prejudice to the Respondent. I find I am satisfied, according the Claimant with the benefit of doubt that given the timeline of the Claimant's time of work due to (his claimed) ill-health and the period in which he returned to work and eventually resigned may have caused him to delay bringing such a claim. In any case he had in his ET1 ticked age discrimination as a claim but simply not articulated. When I consider this against the fact he has clearly identified Liam Brown who was responsible for the incidents and the fact that there appear to be other individuals such as Conway Crosson who remain employed with the Defendant, who advised the Claimant on matters he complains of as discriminatory, then there is no prejudice to the Respondent, simply because Liam Brown has left the company. In all the circumstances I am satisfied that it is just and equitable that this claim is included and therefore time ought to be extended.
38. Whilst, not dealt with at the oral hearing, I have now considered, in light of the strike out application made in relation to age discrimination, whether this claim has no reasonable prospects of success. However, for the reasons that I have already identified above, I am satisfied that the matter can only be properly resolved at a full merits hearing.

Deposit order application

39. The Tribunal has the power to make a deposit order pursuant to rule 39(1) of the Rules:

39.— Deposit orders

- (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.*
40. The alternative application for a deposit order was considered for all parts of the claims i.e. the constructive unfair dismissal, direct disability discrimination, reasonable adjustment claim. But for the reasons set out above, I cannot determine the merits of the claim without hearing the evidence and I find that the threshold of there being little reasonable prospect of success is therefore not met at this stage ([Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07](#))
41. In relation to age discrimination, I have also now considered, in light of the application made by the Respondent, that at this stage it cannot be said that the claim has little reasonable prospects of success as I am satisfied that the matter can only be properly resolved at a full merits hearing.
42. I do not make a deposit order in this case in relation to any allegation or argument raised in the claimant’s claim.

My Conclusions

43. Consequently, for those reasons, reconsideration of my original decision under rules 70 and 71 of the ET Rules of Procedure this Judgment replaces the revoked decision and addresses the outstanding issues, with the reasons as outlined above.

**Tribunal Judge S Iqbal acting as an
Employment Judge
Dated: 23rd January 2024**

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