



EMPLOYMENT TRIBUNALS

Claimant: Miss I Caine

Respondents: (1) Cayley Primary School
(2) London Borough of Tower Hamlets

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 12 July 2023

Before: Employment Judge Gardiner

Representation

Claimant: Mr David Stephenson, counsel
Respondent: Ms Rachel Owusu-Agyei, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. In relation to case number 3204226/2022 the Claimant's sex discrimination, age discrimination and direct disability discrimination claims are dismissed upon withdrawal.
2. In relation to case number 3204226/2022 none of the Claimant's allegations of direct race discrimination; harassment related to race; victimisation; failure to make reasonable adjustments and harassment related to disability are struck out as having no reasonable prospect of success.

REASONS

1. The Claimant brings a discrimination claim in relation to her employment at Cayley Primary School as a Learning Support Assistant. Because of the statutory framework governing employment at the School, both Respondents have legal responsibility for employment liabilities.

2. At a Preliminary Hearing on 16 January 2023, Employment Judge Elgot listed a Preliminary Hearing, which was heard on 12 July 2023, to decide whether any of the complaints in case 3204226/2022 should be struck out on time limit grounds. Since then the Claimant has issued two further cases, which have now been consolidated with this claim. These are 3200333/2023 and 3201348/2023. Those claims do not form part of this strike out preliminary issue.
3. At the hearing on 12 July 2023, the Tribunal clarified that the issue to be decided was whether any of the complaints should be struck out on the ground that there was no reasonable prospect of success, given the operation of statutory time limits.
4. A bundle of relevant documents had been prepared for the Preliminary Hearing which comprised 153 pages. In addition, the Claimant had prepared a witness statement and was cross examined on its contents. No evidence was provided on behalf of the Respondent.
5. There was insufficient time for the Tribunal to hear submissions, deliberate and announce a decision at the conclusion of the hearing. Accordingly, directions were given for written submissions from both counsel. It was indicated that a decision would be made on the papers in the light of the submissions from both counsel.
6. The Respondent's counsel provided written submissions dated 5 August 2023. The Claimant's counsel provided her written submissions dated 25 August 2023. I am grateful to both for the detailed and clear way in which they have structured their submissions. May I apologise for the delay in providing this outcome to the parties and any inconvenience caused.
7. The Claimant presented her claim on 19 July 2022. Previously she had requested ACAS Early Conciliation on 9 May 2022 (Day A) and an Early Conciliation Certificate had been issued on 20 June 2022 (Day B).
8. As listed in the most recent list of issues, the Claimant makes 34 allegations against the Respondent. The most recent list of issues is the Updated Schedule of Allegations sent by the Claimant to the Tribunal on 18 July 2023. As is clear from the Respondent's response to that document dated 21 July 2023, there remain minor disputes between the parties as to certain factual details of the issues in that list. Neither party suggests that those remaining disputes prevents me from adjudicating on the time limit strike out issue.
9. It is common ground between the parties that any acts or omissions occurring before 10 February 2022 are prima facie out of time, unless it can be shown that they were part of a continuing act or there should be a just and equitable extension of the primary limitation period.
10. The Respondents ask that the Tribunal strike out:

- a. The Claimant's failure to make reasonable adjustments and disability related harassment claims;
 - b. The detriment relied on at allegation 27 (victimisation);
 - c. All allegations of direct race discrimination/harassment related to race that predated 10 February 2022.
11. In addition, there is an issue of whether the Claimant should be permitted to widen the ambit of her claim in her updated Schedule of Allegations as set out in the Respondents' response document.
12. It is unnecessary for me to make specific factual findings given that no final determination is being made as whether there was a continuing act or whether it would be just and equitable to extend time. I am entitled to take the Claimant's case at its highest in order to decide whether in relation to any particular allegation there is no reasonable prospect of the claim succeeding, given the operation of statutory time limits. I am not being asked to decide whether to make a deposit order on the basis that a particular allegation has little reasonable prospect of success.

Relevant legal principles

13. Section 123 Equality Act 2010 is in the following terms:
- (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.
 - ...
 - (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.
14. Conduct extending over a period is to be treated as done at the end of that period. The Tribunal must consider whether the conduct complained of is:
- "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed." (*Commissioner of Police of the Metropolis v Hendricks* [2003] I.C.R. 530 at paragraph 52).

15. So far as the discretion as to whether to allow a claim to proceed on grounds that it was submitted within such further period as the Tribunal considers just and equitable, in *Adedeji v University Hospital Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 Underhill LJ cautioned against a mechanistic approach to what he described as “a very broad general discretion”. He added:

“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”. If it checks those factors against the list in *Keeble*, well and good; but I would not recommend taking it as the framework for its thinking.”
16. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised (*Chief Constable of Lincolnshire Police v Caston* at paragraph 31 per Sedley LJ).
17. There are two main types of prejudice that a Respondent may suffer if the limitation period is extended:
 - a. The obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence; and
 - b. The forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused for example, by fading memories, loss of documents and losing touch with witnesses.
18. The relevant legal principles to consider where the Tribunal is considering strike out an Equality Act 2010 claim on grounds of time limits were summarised by Ellenbogen J in *E v X and others* UKEAT 0079-2—RN (December 2020) as follows:
 - 1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: Sougrin;
 - 2) It is appropriate to consider the way in which a claimant puts his or her 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;
 - 3) 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;
 - 4) 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;

- 5) 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;
 - 6) 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;
 - 7) 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;
 - 8) 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 ;
 - 9) 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;
 - 10) 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;
 - 11) 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;
 - 12) 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;
 - 13) 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 make 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 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.
19. It is not my role at this Preliminary Hearing to decide whether the Claimant's allegations amount to a continuing act. That will require a consideration of the evidence, findings of fact and the application of the law to those facts. That will need to be considered at a Final Hearing. Rather it is whether the Claimant has established a prima facie case that the various incidents relied upon were part of an

act extending over a period or were capable of being part of an act extending over a period (*Lyfar v Brighton and Sussex University NHS Trust* [2006] EWCA Civ 304 per Hooper LJ at paragraph 10). Another way of expressing the same test is that the claimant must have a reasonable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs (*Aziz v FDA* [2010] EWCA Civ 304 at paragraph 36 per Jackson LJ).

20. I turn to consider each of the distinct types of complaint in turn, applying the preceding case law, and in particular the caution advised in paragraph 13 of *E v X*, and what Ellenbogen J described as the high strike out threshold, particularly in cases involving fact specific allegations of discrimination.
21. I also note that the Respondent has not put in any specific evidence of particular prejudice that it will suffer in having to deal with any allegation, other than making a general submission about the passage of time on witness recollection.

Direct race discrimination/Harassment related to race

22. Each of the factual allegations of direct race discrimination are also advanced as allegations of harassment related to race. Therefore they fall to be considered together
23. The allegations of direct race discrimination span the period from October 2015 to 12 May 2022. Several allegations up until 2021 are made against Lisa Samuel in her role as Head; thereafter further allegations are made against Mr Clifford in his role as Head, ending with the most recent allegation, on 12 May 2022. Therefore, there is a common link between the first and last allegation in the sequence, namely that they are allegations against the Head Teacher. They concern the opportunities she was given for training, career progression and promotion and the lack of recognition she received for her additional work and duties. It is also alleged that there is a failure to investigate and remedy allegations of race discrimination. The sequence ends within the three-month limitation period.
24. In addition, the allegations against Mrs Nancy Gray span the period from 1 October 2015 until 10 February 2022 ie within the three month limitation period.
25. It is true that there are gaps of several months between individual incidents. However, the Claimant's case is that in relation to each of the incidents she has been treated less favourably than a comparable white employee, Mrs Nancy Gray, was treated, such that there is an ongoing connection. She also alleges a discriminatory state of affairs that black staff are not afforded the same opportunities as white colleagues to develop their careers as white colleagues. Whether individual allegations are acts extending over a period depends as much on the connection between the allegations as on the breadth of the gaps.
26. The extent of the periods of time between proven acts of direct discrimination and harassment cannot be determined until the Tribunal has adjudicated on the

allegations at a Final Hearing. Furthermore, the extent of the connections between any such proven acts cannot be determined at this point, nor what factual findings there will be of a continuing discriminatory state of affairs during any gaps. It may be that any proven allegations are isolated and unconnected acts of less favourable treatment by different people over a long period.

27. Taking the Claimant's case at its highest, the Claimant has established a prima facie case that there was conduct extending over a period, ending within three months of the date on which ACAS Early Conciliation was initiated. To adopt a phrase used by Mummery LJ in *Commissioner of Police for the Metropolis v Hendricks* [2003] I.C.R. 530, CA at paragraph 49, "it is too soon to say that the complaints have been brought too late".
28. As a result, I do not strike out the Claimant's allegations of direct race discrimination and harassment related to race on the grounds that they have no reasonable prospect of success, because of time limit issues.

Victimisation

29. The Claimant's allegations of victimisation are numbered allegation 27 and allegations 35-39. Allegations 35-39 are in time. Allegation 27 is the only allegation that the Respondent contends should be struck out.
30. Allegation 27 is worded as follows: "Mrs Nancy Gray (20.5.21) and Ms Lisa Samuels (10.6.21) not giving the Claimant minutes of discussions when she raised concerns". This particular allegation is also pursued as an allegation of direct race discrimination and harassment related to race.
31. If the identical factual allegation is held to be within time for the purposes of a direct race discrimination or harassment complaint (as forming part of a course of conduct), it is very likely that it will be considered just and equitable to extend time to be decided on its merits, even if it does not form part of conduct extending over a period with the later alleged acts of victimisation (from 10 January 2022 onwards).
32. Therefore, I do not find that the victimisation complaint in allegation 27 has no reasonable prospect of success because of the operation of statutory time limits.

Failure to make reasonable adjustments

33. In a claim for failure to make reasonable adjustments, time starts to run from the date on which the Respondent did an act inconsistent with making the adjustment. Time will start on the expiry of the period in which the Board might reasonably have been expected to make the adjustment (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 per Leggatt LJ at paragraph 11).
34. The failure to make reasonable adjustments claim is set out at paragraph 21 of the Claimant's claim. It relates to failure to give her enough time to plan, organise and

complete her workload in the light of difficulties caused by dyslexia. It relates to the particular practice of recording notes of meetings on the system within the allotted time which the Claimant alleges put her at a substantial disadvantage and should have been adjusted. She says that this practice put her at a disadvantage in relation to seventeen meetings over the period from 28 September 2021 until 10 February 2022.

35. It is at least arguable that there was a separate failure to make a reasonable adjustment in relation to each of the seventeen meetings that are referred to in the list of issues. If so, then there were seventeen different discriminatory omissions which arguably formed part of an act extending over a period.
36. Furthermore, the extension required to the primary three month limitation period in relation to the earliest alleged failure to make reasonable adjustments is four months. In circumstances where this alleged failure was repeated thereafter for the next four months; and where no specific prejudice has been identified by the Respondent, I cannot find that the Claimant has no reasonable prospect of showing that the primary limitation period will be disapplied to enable these claims to be determined on their merits.
37. Therefore, I do not strike out the failure to make reasonable adjustments claim.

Harassment related to disability

38. The only allegation of harassment related to disability concerns an incident on 2 February 2022 where the conduct of Mrs Nancy Gray is criticised. It is alleged that she dismissed the Claimant's dyslexia, stating that it was not a disability and that it was only minor. Taking the Claimant's case at its highest, if the allegation is proved, this is potentially an allegation of harassment related to disability.
39. This allegation appears to be 8 days out of time. In considering whether it would be just and equitable to extend time for a period of 8 days, the Tribunal will balance the injustice to the Claimant if she is not permitted to advance such a claim against the injustice to the Respondents in having to meet a claim that is out of time. It is not for me to carry out that balancing exercise at this hearing. Rather I have to consider whether there is no reasonable prospect of the balancing exercise being resolved in favour of the Claimant. For her part, if the statutory three month time limit is not disapplied, then the Claimant has potentially lost a valuable complaint which if proved would lead to an award of injury to feelings. By contrast, the Respondent has not identified any particular prejudice that it would suffer in having to deal with this allegation on the merits. Mrs Nancy Gray will need to give evidence on other matters at the Final Hearing including an alleged incident of direct discrimination and harassment that is said to have occurred eight days later and within the statutory time limits. There is no evident prejudice to the Respondents in having to deal with an issue of harassment related to disability as set out in allegation 33, which has been identified at this stage.

40. Therefore, I do not find that there is no reasonable prospect that a Tribunal will decide that it would be just and equitable to disapply the statutory time limit. The operation of this time limit does not indicate that the claim has no reasonable prospect of success. It would not be appropriate to strike out the harassment related to disability allegation because of statutory time limits.

Conclusion as to strike out

41. As explained in relation to each types of complaint, I do not strike out any of the allegations in case 3204226/2022. The issue of whether there is a continuing act and of whether it would be just and equitable to extend time will need to be determined at the Final Hearing.

Resolution of the remaining disputes about the Updated Schedule of Allegations

42. I do not consider it appropriate to resolve the remaining disputes as to the allegations that the Claimant should be permitted to advance on the papers without a further hearing. It would be appropriate to list a Preliminary Hearing so that an appropriate list of issues can be prepared for all three claims containing sufficient particularity. Given that such a Preliminary Hearing will be adjudicating on the allegations to be advanced in three separate consolidated claims, it is appropriate for the Preliminary Hearing to have a time estimate of 1 day.
43. The parties are to co-operate to ensure that they have formulated the issues that need to be decided at any Final Hearing with sufficient precision and they have narrowed the remaining disputes in advance of such a Preliminary Hearing.
44. It would be appropriate for that hearing to be listed taking into account the availability of the parties' representatives. It is not necessary for that hearing to be listed before Employment Judge Gardiner.

**Employment Judge Gardiner
15 March 2024**