EMPLOYMENT TRIBUNALS

Claimant: Ms J Burrell

Respondent: Central and North West London NHS Foundation Trust

Heard at: Watford

On: 4 & 5 March 2024

Before: Employment Judge McTigue

Representation
Claimant: In person
Respondent: Ms C Meenan, Counsel

JUDGMENT

1. The claim is struck out under Employment Tribunal Rule 37(1)(e) because it is no longer possible to have a fair hearing in respect of it.

REASONS

BACKGROUND

1. This is a claim brought by Ms Burrell ("The Claimant") against Central and North West London NHS Foundation Trust ("The Respondent").

2. The claimant is employed as a Contact Centre Administrator by the respondent. That is apparent from what appears in her ET1 claim form. She claims that she has been subjected to disability discrimination by the respondent, specifically under sections 13, 15 and 21 of the Equality Act 2020. ACAS was notified using the early conciliation procedure on 25 April 2021 and the early conciliation certificate was issued on 6 June 2021. The ET1 was presented on 22 June 2021.

3. The claim has already been the subject of two Preliminary hearings and the chronology is as follows.

4. On 19 July 2022 a preliminary hearing took place before Employment Judge ("EJ") Allen in advance of which both parties prepared case management agendas and draft lists of issues. At that hearing EJ Allen listed the case for a 10-day final hearing scheduled to commence on 4 March 2024. Following that hearing the parties were ordered to prepare an agreed list of issues. They were unable to do so. All other case management orders were then stayed by EJ Allen pending a further case management hearing.

5. On 7 December 2022 a second preliminary hearing took place before EJ Tuck. At that preliminary hearing the claimant applied to amend her ET1 to add a claim that a member of the respondent's staff took a photograph of her car and reprimanded her for failing to show her staff ID on the dashboard. The claimant said this was an act of direct discrimination because of her disability. After a lengthy discussion with EJ Tuck the issues for the Final hearing were, on the face it, agreed. However, following the preliminary hearing on 8 December 2022 the claimant indicated that she was making another application to amend her claim.

6. At the hearing on 7 December 2022 EJ Tuck directed that a one-day preliminary hearing take place on 22 February 2023 to determine the claimant's application to amend her claim and also whether the claimant's claims had been presented within the time limit set out in section 123 of the Equality 2010, including such further period as is just and equitable.

7. On 17 February 2023, the one-day preliminary hearing scheduled for 22 February 2023 was postponed and relisted for 5 May 2023. The postponement was occasioned by the claimant's ill health. I should note that when postponing the preliminary hearing EJ Quill ordered that, "if the claimant seeks a further postponement on medical grounds then she will have to supply detailed medical evidence which confirms (a) can she attend hearings (b) can she prepare documents for the litigation and (c) if not, why not and (d) when she will be well enough to do so." I note that as those orders appear somewhat unfortunately not to have been complied with fully when further postponement applications were made.

8. On 11 April 2023 the claimant applied to postpone the rescheduled preliminary hearing of 5 May 2023 due to her ill-health. The preliminary hearing was relisted for 30 June 2023. That was the second postponement of the preliminary hearing.

9. On 4 June 2023 the claimant applied for a postponement of the preliminary hearing scheduled for 30 June 2023 due to her ill health. which was granted. The preliminary hearing was relisted for 8 September 2023. That was the third postponement of the preliminary hearing.

10. On 3 September 2023 the claimant applied for a further postponement of the preliminary hearing listed for 8 September 2023 on the grounds of ill health. Regional Employment Judge ("REJ") Foxwell granted the postponement and ordered that the preliminary hearing be relisted with an additional issue i.e. whether the claim should be struck out because a fair trial is no longer possible. That was the fourth postponement of the preliminary hearing. It appears no date for the relisted preliminary hearing was provided at that point.

11. On 19 January 2024 the respondent wrote to ET noting that there remained outstanding preliminary issues and that the final hearing, scheduled to commence 4 March 2024, was approaching.

12. On 21 and 24 January 2024 the claimant emailed the ET and also supplied medical evidence indicating that she was again seeking a postponement of the hearing of 4 March 2024.

13. On 8 February 2024 REJ Foxwell converted the 10-day final hearing scheduled to commence 4 March 2024 to a 2 day public preliminary hearing in order to consider all outstanding issues and applications.

14. On 21 February 2024 the respondent indicated that it would be applying for a deposit order at the preliminary hearing in the event the claimant's claims were not struck out.

ISSUES

15. The issues I had to consider were as follows:

   a. Whether the claim should be struck out because a fair trial is not possible
   b. The claimant's application to amend her claim
   c. Whether the claimant's claims have been presented within the time limit set out in section 123 Equality Act 2010, including such further period as is just and equitable
   d. The respondent's application for a deposit order.

That was also the order in which I dealt with the applications .

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

16. In respect of the strike out application, the tribunal heard evidence from Ms Florence Mordi on behalf of the respondent. She is a HR Business Partner for the respondent. She gave evidence under affirmation and was cross examined by the claimant. There was an agreed tribunal bundle of 591 pages plus Appendices A, B, C and D. The appendices were documents added by the claimant at the start of the hearing as she was not happy all her relevant documentation had been included. I was also provided with a bundle of authorities by the respondent. The respondent provided written submissions in advance of the hearing. Both sides made oral submissions.

17. The claimant said she had insufficient time to prepare for the hearing as the bundle and witness statement of Ms Mordi was only provided recently to her by the respondent. I do not accept that. The bundle was provided to the claimant for this hearing on 21 February 2024 as well as Ms Mordi's witness statement. The bundle has also been provided to the claimant prior to the other numerous postponed preliminary hearings. In terms of Ms Mordi's witness statement, it is in substantially the same terms as a statement previously prepared by Mr Richard White of the respondent. Mr White's statement was

provided to the claimant in advance of the preliminary hearing scheduled for 8 September 2023. On that occasion he was due to give evidence as Ms Mordi was unavailable. The claimant was clearly aware of the contents Mr White's statement from September 2023 as she added to the bundle as Appendix C stating it was relevant for the purposes of this hearing.

18. However, I recognised the claimant was a litigant in person and gave her time to prepare on the first day. As a consequence, we did not start the substantive hearing until 2pm. When we came back at 2pm, Ms Mordi was sworn in. The claimant then said she had not fully prepared questions for Ms Mordi. To accommodate this, I gave the claimant a further thirty minute break to assist her. She indicated she was happy with that arrangement

19. I also recognised the claimant is a disabled person. I had regard to the Equal Treatment Bench Book. I asked her if she needed any adjustments today. She did not indicate that she needed any specific adjustments but said that she may get confused. The claimant also indicated to me that she has asthma and was permitted to leave the room in the afternoon on 4 March 2024 to use her inhaler. This did not permit the Tribunal with any problem.

<u>THE LAW</u>

20. Rule 37 of the Employment Tribunals (Rules of Procedure) Regulations provides as follows:

> *"37.—(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".*

21. When considering whether to strike out a claim, the tribunal must first consider whether any of the grounds set out in rule 37(1) have been established; and then, having identified any established grounds, it must decide whether to

exercise its discretion to order strike-out. This two-stage approach was confirmed in **Hasan v Tesco Stores Ltd EAT 0098/16, EAT**.

22. In deciding whether to order strike-out, tribunals should have regard to the overriding objective of dealing with cases ‘fairly and justly’, set out in rule 2 of the Tribunal Rules.

23. Whilst the striking out of discrimination claims should be rare because of the public interest importance of such claims being determined after examination of the evidence (see **Anyanwu v South Bank Student Union [2001] 1 W.L.R. 638: UKEAT/0128/19/BA** – albeit in a different context) that will be a permissible step where there can no longer be a fair hearing, including within a reasonable time frame (see **Peixoto v British Telecommunications plc EAT 0222/07** and **Riley v Crown Prosecution Service 2013 IRLR 966, CA**).

24. Strike-out must be a proportionate response, and cases alleging abuse of process or discrimination were only to be struck out in the most obvious and plainest of cases. In **Anyanwu v South Bank Student Union [2001] 1 W.L.R. 638,** Lord Steyn stated that:

> "24. …For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

25. Article 6 of the European Convention on Human Rights lays down the right to a fair trial, including the right to have a trial within a reasonable time. The tribunal notes the comments of Peter Gibson LJ in **Andreou v The Lord Chancellors Department [2002] EWCA Civ 1192:**

> “46. The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights , having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days…”

26. The tribunal must consider whether striking out the claim is a proportionate response. The Court of Appeal case of **Blockbuster Entertainment Limited v James [2006] IRLR 630 (CA)** considered a tribunal's decision to strike out a claim on the basis of reasonable conduct. At paragraph 21 Sedley LJ noted that:

    "It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see **Re Jokai Tea Holdings [1992] 1 WLR 1196**, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact — if it is a fact — that the tribunal is ready to try the claims; or — as the case may be — that there is still time in which orderly preparation can be made."

27. In **Riley v Crown Prosecution Service 2013 IRLR 966, CA**, the claimant's depression prevented her from attending to her claim, and this was for a period of indefinite duration. Longmore LJ said as follows in paragraph 27 of his judgment:

    "27. It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable time". That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in Andreou v The Lord Chancellors Department which are as relevant today as they were 11 years ago…"

SUBMISSIONS

28. The respondent made written submissions which were supplemented with oral submissions. I incorporate the respondent's written submissions into this these reasons by reference.

29. The claimant submitted that she could not have a fair trial if her claim were struck out. She stated that the right to a fair trial under Article 6 of the ECHR also applied to her. She submitted that the claim should not be struck out just because the respondent's witnesses were refusing to co-operate and that it was important that the matter proceed to a final hearing as the respondent was registered as an advocate for disabled people.

CONCLUSIONS

30. I now turn then to my conclusions.

<u>The Respondent's application to strike out the claim</u>

31. I accept that Ruth Davis and Jeanette Downer are the most significant witnesses in this case. They appear at numerous times in the list of issues which EJ Tuck sought to agree with the parties on 7 December 2022. However, neither of these individuals now work for the Trust and they are not co-operating with the Respondent's defence.

32. Ms Davis left the employ of the respondent in June 2021 and the respondent has had no contact with her since June 2022. Notwithstanding that, the respondents have tried chasing her in November 2022 and August 2023.

33. Ms Downer retired on 30 June 2021 and on 9 August 2023 indicated that she was no longer available for this case and unable to assist further (page 134).

34. This is the case even though the respondent has offered to compensate Ms Downer for the time she will lose preparing and giving evidence. During cross examination of Ms Mordi, the claimant said that making a payment to Ms Downer was akin to bribery. I reject that as Ms Mordi's evidence indicated that the payment was not in respect of Ms Downer giving specific evidence that was supportive of the respondent but was instead to compensate her for the giving of evidence. If anything, the offer of payment by the respondent demonstrates to me the lengths the respondent has gone to secure witness availability for a final hearing in respect of this matter.

35. I should also state that Tina Saunders has left the employ of the respondent. The claimant has made allegations against Ms Saunders in respect of an incident that allegedly occurred on 12 August 2019 but Ms Saunders left the employ of the respondent in March 2021. She has not returned any of the respondent's phone calls and the respondent has no details of her new employment or her personal email address.

36. It is apparent to me that a significant amount of time has now passed since the alleged incidents listed in EJ Tuck's list of issues. The consequence of that is that given the passage of time since the incidents, memories have inevitably faded and witness recollections will be vague. I am of course aware that one way to address the fading of memories is to look at documents created contemporaneously around the time of the alleged allegations. There is, however, a further problem in that regard which I now turn to.

37. Ms Mordi gave evidence which I accept that Ruth Davis deleted all of her emails prior to leaving the respondent and that these documents are no longer available to the respondent. I also accept that the respondent has taken extensive efforts to retrieve the emails in question from their IT system. This included involving the Chief Executive of the respondent and also NHS Digital. Obviously, some relevant emails of Ms Davis may be in the claimant's possession, but the respondent will not be in a position to check the accuracy of the contents of those emails or read those emails in relation to the surrounding context. Clearly when reading an email it is important to see the whole email chain in question and not one email in isolation. Context is crucial.

38. I therefore consider that the respondent has established one of the strike out grounds applies. I now must consider whether to exercise my discretion.

39. I take into account the fact that Article 6 of the European Convention on Human Rights lays down the right to a fair trial, including the right to have a trial within a reasonable time. I have checked with the Listings Team in Watford and if I were to relist this matter for a 10-day final hearing today, it would first be listed around October 2025. Such a listing would result in the claim not being heard until over four years after the presentation of the Claim Form. More importantly some of the issues in the case involve consideration of events which allegedly occurred from October 2018 onwards. The vast majority of alleged events occurred in 2019 or 2020. That would mean evidence being heard about events which happened a substantial number of years previously. As I have already said it is plain that recollections will have already faded. A further delay of at least 17 months will only affect the cogency of the evidence even more so. The effect of all that would not be to have a fair trial and certainly not one within a reasonable time frame.

40. I consider whether a lesser option than strike out is a possibility here. I have considered whether witness orders should be ordered in respect of those witnesses who are unwilling to attend. However, this would mean that the respondent would be faced with those witnesses possibly being hostile. The issuing of witness orders would also not overcome the problems caused in this case by the passage of time, the dimming of witness memories and the missing emails of Ms Davis.

41. I can only conclude taking all of those matters into account that regrettably there is no longer any prospect of a fair hearing taking place and the only course that I can take is to strike out the claims. This is not a decision that I have taken lightly given the important public interest in discrimination claims being substantively determined but I cannot determine that there is any lesser course that would achieve a just result for both parties.

42. For all of those reasons, I have struck out the claims under Rule 37(1)(e).

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Employment Judge McTigue

Date: 5 March 2024

REASONS SENT TO THE PARTIES ON

20/3/2024

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FOR THE TRIBUNAL OFFICE