Case no: 3305139/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr. A. Wilson	AND	The Chancellor Masters & Scholars of the University of Oxford

HEARD AT: **Reading Tribunal** (via CVP) **ON:** 25 May 2023

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation:

For Claimant: Ms Ifeka, Counsel

For Respondent: Ms Danvers, Counsel

RESERVED JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. **The Claimant's application to amend her claim to include complaints under Regulations 5 & 7 of the Part-time Worker Regulations is refused;**
2. **The Respondent's application for strike out/deposit order of the direct sex and race discrimination claims against all alleged perpetrators, in relation to**

the prospects of establishing that any treatment was because of the protected characteristic, are refused;

3. **The Respondent's applications for strike out/deposit order relating to the sex and race discrimination complaints against three alleged perpetrators (PC TP, and CG), regarding the prospects of establishing that they were brought within time, are refused;**
4. **The Respondent's applications for strike out of the sex and race discrimination claims against three alleged perpetrators (DH, RA and CD), in relation to the prospects of establishing they were brought within time, are refused. However, the Respondent's applications for deposit orders regarding these claims succeed. These claims may only proceed if the Claimant complies with the terms of the Deposit Order (see separate order);**
5. **The Respondent's applications for strike out/deposit order of the victimisation claims against all alleged perpetrators, in relation to the prospects of establishing that any treatment was because of the protected act, are refused;**
6. **The Respondent's applications for strike out/deposit order of the victimisation claims against PC, TP, and CG, in relation to the prospects of establishing that they were brought within time, are refused.**
7. **The claim for unauthorised deduction from wages is dismissed upon withdrawal**
8. **The claims for race/sex discrimination and victimisation in relation to allegations referred to at the following parts of the original list of issues, are dismissed upon withdrawal:**
    - **8.1. 5(o)**
    - **8.2. 12(b)**
    - **8.3. 12(f) - 12(m)**
    - **8.4. 12(p)**

REASONS

1. This case was before me for a preliminary hearing, scheduled by EJ Hutchings at an initial preliminary hearing on 16 January 2023, to deal with:
    1.1. The Claimant's application dated 16 March 2023 to amend her claim to include claims for breach of Part-time Worker (PTW) Regulations.
    1.2. The Respondent's application dated 10 January 2023 to strike out part of the sex/race discrimination claims on the basis that out of time, and that the Claimant does not have reasonable prospects of demonstrating that those acts formed part of conduct extending over a period, or in the alternative for a deposit order to allow them to proceed
    1.3. Case management to progress this matter to final hearing
2. Since the listing was made, the Respondent had made a further application for strike out/deposit order, which they also wanted to be dealt with at this hearing. There is further discussion about this below.
3. I was provided with the following documents in advance of the hearing:
    3.1. Electronic bundle of 209 pages
    3.2. Respondent's opening note
    3.3. Claimant's skeleton argument
    3.4. Claimant's authorities bundle
    3.5. A draft list of issues from the Respondent dated 28 April 2023 (also at [183 – 190])
    3.6. A draft list of issues from the Claimant dated 22 May 2023 (also at [201 – 209])
    3.7. A spreadsheet of the Claimant's salary calculations

Relevant procedural history

4. On 10 January 2023 the Respondent made an application for strike out/deposit order of the Claimant's claims that appeared within a draft list of issues dated 16 January 2023 [107 – 123] at *"paragraph 4(a) to (i) (in respect of race discrimination) and similarly at paragraph 7 (in respect of sex discrimination)"* [91 – 92].
5. This was on the basis that *"the incidents of alleged direct race and sex discrimination which the Claimant claims occurred between 2008 and 2017, are out of time, and that the Claimant does not have reasonable prospects of demonstrating that those acts formed part of conduct extending over a period which ended on or after 22 April 2022, being the date of submission of the Claimant's claim."*
6. Ahead of the preliminary hearing on 16 January 2023, a draft list of issues had been prepared by the parties' representatives, which highlighted areas where there was still some disagreement. It was put forward on behalf of the Claimant that her ET1 included pleaded claims under the Part Time Worker's Regulations 2010. The Respondent disputed this, and so EJ Hutchings heard submissions from both representatives:

> *"12. From paragraph 15 of the List of Issues the claimant lists issues for a claim under the Part Time Worker's Regulations 2010 the right not to be treated less favourably than a full-time worker (regulation 5), and from paragraph 23 the right not to be subjected to a detriment (regulation 7). The respondent did not agree to these issues being included, stating that the claims are not 'pleaded', in that they are not claims in the ET1 or further information document of the claimant.*
>
> *13. In a statement to the Tribunal Ms Ifeka, representing the claimant, referred me to various paragraphs in the ET1 which referred to the claimant's part time contract (that she was employed on 0.5 FTE) and references to her allegations that the work she was required to undertake was that of a full-time role or more, as the claim under the Part Time Worker's Regulations 2010, which she submitted identified the essential elements of a claim. In summary, Ms Ifeka said the ET1 does not mention that the claimant was treated badly because she was a part time worker;*

accordingly the claim did not establish that the claimant was treated less favourably because she was a part time worker. Representing the respondent: Ms Danvers referred me to the Court of Appeal decision in The Housing Corporation v Bryant [1998] CA I.C.L.123 as case authority that the law required a causal link between events referenced and the claim being made, submitting this was lacking and as such no claim under the Part Time Worker's Regulations was pleaded.

7. The Judge determined that these claims were not pleaded:

> "*14. Applying the principle in Bryant I conclude that the facts referred to in the ET1 do not amount to a claim under the Part Time Worker's Regulations as there is no causative link established in the claim form. The words making the necessary causative link between the facts referred to establishing the claimant as a part time worker and the treatment of which she complains are absent from the application. The ET contains facts about the claimant's part time role and facts about why she considers she was treated less favourably; however, there is no link. Applying the guidance of the Court of Appeal 'the absence from the document of any such linkage must be fatal: because the issue of construction is whether the document makes a claim in respect of….', in this case, the regulations. In reaching this decision I am mindful that the claimant was not legally represented when she submitted her ET1. I am also mindful of the overriding objective. The ET1 is detailed, referenced by type of claim and well-structured with headings for each type of claim; there is no reference to a claim under the regulations and as such I find that it was not pleaded at the time the form was sent to the Tribunal."*

8. However, EJ Hutchings made provision for the Claimant to be able to make an application to amend her claim, and for that to be heard at this hearing, and ordered that any application be made by 17 March 2023.
9. EJ Hutchings also made other orders, including the following in relation to the list of issues dated 16 January 2023:

9.1. Provision of further information in relation to paragraphs 5(o)(ii), 5(o)(iii), 12(c), 12(d), 12(e), 12(f), 12(m), 12(n), 12(o), 12(p)

9.2. Deletion of paragraphs 12(b), 12(g), 12(h), 12(i), 12(j), 12(k), 12(l), 12(m), 12(n), 12(o), 12(p), 12(q), 12(r), 12(s), 12(t), 12(u), 18, 19, 22, 24 as these were not pleaded

10. In compliance with EJ Hutchings' orders, on 17 March 2023 the Claimant submitted:

10.1. An application to amend her claim [136 – 146] to add claims under regulations 5 and 7 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

10.2. Amended particulars of claim reflecting the amendments sought [147 – 165]

10.3. A revised list of issues [166 – 178]

11. Within the Claimant's revised list of issues an actual comparator for the sex discrimination claims was identified.

12. The amendment application also included:

12.1. Withdrawal of the unauthorised deduction from wages claim; and

12.2. Withdrawal of some allegations previously pleaded under race/sex discrimination and victimisation.

13. On 31 March 2023, the Respondent replied to the amendment application, opposing it.

14. On 28 April 2023, the Respondent accepted the Claimant's revised list of issues.

15. On 5 May 2023, the Respondent made a further application for Strike Out/Deposit Order in relation to:

15.1. All of the direct race and sex discrimination claims, on the basis that:

15.1.1. *"the Claimant's list of issues, as well as at paragraphs 12 to 36 of the Claimant's amended Particulars of Claim, now include no allegations that post-date September 2021. It is submitted that, as all allegations pre-date 13 November 2021 (being the date three months less one day prior to the Claimant's notification to ACAS of the claim), all of the Claimant's direct race and sex discrimination*

claims are out of time. Furthermore, the Respondent contends in respect of these allegations that it is not just and equitable for the Tribunal to extend time for the Claimant to bring proceedings in respect of those allegations" [191 – 192].

15.1.2. *"the Claimant has failed, in respect of each and every allegation of race and sex discrimination, to identify any factual basis from which the Tribunal could conclude, or infer, that she was treated less favourably 'because of' race or sex."*

15.2. All of the direct sex discrimination claims because *"the Claimant names at paragraph 10 of the agreed list of issues a female comparator and in the alternative a hypothetical comparator who is a "woman in materially the same circumstances as her" [our emphasis]. In those circumstances that claim is bound to fail."*

15.3. The victimisation claims on the basis that:

15.3.1. They are out of time (occurred prior to 13 November 2021) because *"the last of the allegations she makes allegedly occurred in "Autumn 2021". This allegation is about a failure on the part of Paul Chaisty of the Respondent to instruct students and staff to disregard comments made in March and May 2021. The Claimant does not specify exact dates, but it is assumed that her case is that he should have given this instruction at the start of the Michaelmas term (October 2021), and in any event on or shortly after 15 October 2021 when the Claimant wrote to Mr Chaisty to raise a number of issues".*

15.3.2. *"the Claimant has failed to set out any basis for her assertion that the acts and omissions complained of arose as a result of her bringing a complaint in relation to discrimination such as to satisfy the test for victimisation under Section 27 of the Equality Act 2010."*

16. The Respondent proposed that this application be dealt with at the same time as the first Strike Out/Deposit Order application.

17. The Claimant disagreed that the second application should be dealt with at the same hearing, nonetheless they submitted a written response opposing it, and addressed it within the skeleton argument provided for this preliminary hearing.
18. On 22 May 2023, the Claimant submitted a further list of issues [201 – 209] that sought to:

    18.1. Add specific complaints of direct race discrimination

    "(o) After the Claimant won the John Fell Fund grant in September 2021 to lead a major SSD interdisciplinary research hub project from October 2021 to March 2023 (recently extended to October 2023), did Tim Power and subsequently Chris Gerry and Erin Gordon continue to decline to pay her for her work on the project and was that act or omission continuing as at 13.11.2021? [APoC §42]

    (p) On or around 01.03.2022 (and on or around 17.05.2022) did Paul Chaisty ask the Claimant to develop a new curriculum for the REES language programme? [APoC §37]"

    18.2. Add further detail to the direct sex discrimination section:

    "The Claimant relies upon ***"the sexist culture of my department,"*** *"the general culture* ***prevailing in OSGA and in my unit, REES,"*** "[bold text is my emphasis to mark the additions].

    18.3. Change the sex discrimination comparator:

    "Prof Jan M. Fellerer, whom the Respondent employs as Associate Professor in Non-Russian Slavonic Languages in the Russian and Slavonic Studies Programme, within the Faculty of Medieval and Modern Languages, Humanities Division, University of Oxford"

    18.4. Add further protected acts to the victimisation claim:

    "The Claimant asserts that by way of her subsequent formal grievance, which was submitted on 01.09.2020 and went through three stages (departmental, divisional appeal, and Vice-Chancellor's

appeal, with the hearings taking place on 12.03.2021, 17.06.2021 and 22.10.2021, respectively), concluding on 25.03.2022, she did further protected acts. The Respondent is asked to confirm that it accepts that by way of her departmental grievance, divisional appeal and Vice-Chancellor's appeal the Claimant did a 'protected act.' [APoC §§51-52, §63-64, §66-67]."

18.5. Add further acts of victimisation:

"(g) On 23.01.2022 after the Claimant reviewed the Rulyova Russian Language review and communicated her concerns about it (including how it undermined her professional reputation in the eyes of students, staff and external consultants) to the Vice-Chancellor's Committee, did the Committee and Paul Chaisty ignore her requests to intervene? [APoC §64, §48]

(h) On 25 March 2022 did the Vice-Chancellor's Committee produce their outcome report on the last day of the Acas window, leaving no time for mediation with the Claimant? [APoC §66, §53]

(i) Did the University concentrate the Claimant's contractual teaching hours into two terms of the academic year meaning she worked over 48 and up to 70 hours a week on teaching-related work for 8 weeks at a time during two of the academic terms in each year; and take no action to rectify this arrangement; and was that omission ongoing as at 13.11.2021? [APoC §50]"

Order of the hearing

19. The proposed edits to the list of issues were significant – adding additional instances of discrimination/victimisation with new dates and perpetrators. As the purpose of this hearing was to consider amendment and strike out, it was necessary for me to be certain which issues were 'live' before dealing with those

applications. Effectively the edits to the list amount to proposed amendments, but had not been presented to the Tribunal in that way.

20. It then logically followed that the Claimant's amendment application be dealt with, as even if any aspects were granted the Respondent was still able to make representations about strike out/deposit order of these.

21. In relation to the two strike out/deposit order applications from the Respondent, whilst the Claimant had opposed the second being dealt with at the hearing, they had been able to consider it and respond to it in writing. It made best use of resources, and was in line with the overriding objective, to deal with both applications at the same time, particularly as the issues were of the same nature.

List of issues

22. The Respondent suggested that the additions are designed to bring some of the claims within time by way of more recent acts that could be said to bring previous acts in time as a course of conduct extending over a period. I was referred to *Parekh v The London Borough of Brent [2012] EWCA Civ 1630,* where Mummery LJ said:

"31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see Land Rover v. Short Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see Price v. Surrey CC Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in Hart v. English Heritage [2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for

example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays.

32. While on the matter of appeals I would add that, if a list of issues is agreed, it is difficult to see how it could ever be the proper subject of an appeal on a question of law. If the list is not agreed and it is contended that it is an incorrect record of the discussions, or that there has been a material change of circumstances, the proper procedure is not to appeal to the EAT, but to apply to the employment tribunal to reconsider the matter in the interests of justice."

23. They say that it was open to the Claimant's representatives to request a variation to the case management orders as provided for at paragraph 20 of EJ Hutchings' CMOs [127], but instead they chose to file a new list.
24. It is asserted on behalf of the Claimant that the status of the list of issues has been misunderstood, that it does not form part of the pleadings, and cannot be seen as finalised in any event. They say it is capable of being edited without needing a specific amendment application.
25. Having considered all of the submissions, with reference to the law, it was clear to me that the additional aspects were not in the minds of the Claimant/her representatives at or after the preliminary hearing in January, where there was significant judicial input/oversight. Whilst a list of issues is not necessarily definitive, and may be subject of agreed edits, that is not what has occurred here. There have been multiple attempts at finalising a list of issues, and ultimately that had happened by 28 April 2023. There is no good reason that these matters were added so late, nor why any additions sought were not addressed transparently.
26. It is important that the issues are crystalised at an early stage, in particular in circumstances where there is then going to be a preliminary hearing to, for example, determine applications such as strike out.

27. I therefore determined that the list of issues remains as EJ Hutchings approved. The rest of the hearing proceeded on this basis, using the list of issues as agreed at 28 April 2023 [166 - 178].

Claimant's application to amend

Overview

28. The Regulation 5 claim is set out at paragraph 68 – 70 of the amended particulars of claim [161 – 162], and Regulation 7 claims at paragraphs 71 – 72 [162-164]. These include reference to the original claim form and particulars, and the further and better particulars provided in September 2022.
29. In relation to Regulation 5, the Claimant asserts that she was treated less favourably than a comparable full-time worker in relation to:
    29.1. remuneration on her Grade 6 pro rata salary and hours of work
    29.2. working on differently graded part-time contracts to perform similar duties as a full-time worker.
30. She says that she was treated this way because she was a part-time worker who was diligent and conscientious and who wanted to work for the Respondent.
31. For the Regulation 7 claim, the Claimant submits that she was subjected to detriments after telling various managers that her part-time contract hours were insufficient to perform her duties and/or that her salaried grade was too low for my duties.
32. Essentially the Claimant's position is that the core facts upon which the proposed Part-time Regulations amendments rely on were pleaded by the Claimant in her Particulars of Claim, in relation to other heads of claim, and this is simply a case of relabelling/relocating the cause of action. I was referred to multiple parts of the ET1 and particulars of claim that appear under a broad heading of "alleged discrimination", and additional sub-categories.

33. As such, it is submitted that time limits do not apply as these are not new claims. Or, in the alternative, that it would be just and equitable to extend time.
34. The Respondent opposes the application on the basis that the claims are not simply relabelling, and that in any event the necessary link between the alleged treatment and the reason for this being the Claimant's part-time worker status is missing from the pleadings. They submit that these points have already been determined by EJ Hutchings, and that this must be treated as a full amendment application.

Law

Amendment

35. The employment tribunal has a broad discretion to allow amendments at any stage of the proceedings under rule 29 of the Tribunal Rules. The discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly in accordance with rule 2.
36. I reminded myself of the relevant case law:

Vaughan v Modality Partnership [2021] ICR 535

37. The EAT underlined that the core test is the balance of hardship and injustice in allowing or refusing the application which it explained in the following terms:

"what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding." It will therefore be necessary for the parties to make submissions on the specific practical consequences of allowing or refusing the amendment sought.

Selkent Bus Co v Moore [1996] ICR 836

38. In determining an amendment application, a Tribunal must conduct a careful balancing exercise of all relevant factors.

39. The EAT outlined the following three areas of consideration: (1) the nature of the amendment, in particular whether it was, at one end of the scale, a mere relabelling of facts already pleaded, or at the other, a wholly new claim; (2) the effect of the amendment on a time limit, in particular whether made out of time; and (3) the timing and the manner of the application. These are examples of factors that may be relevant to an application and should not be taken as a checklist.
40. A Tribunal may also take account of the merits of the claim, having made such an assessment by reference to identifiable factors that are apparent at the preliminary hearing, taking account of the fact that it does not have all the evidence before it and is not conducting the trial (see Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132).
41. Where an application raises arguably new causes of action a Tribunal should consider the extent to which the new complaints are likely to involve substantially different areas of enquiry and the greater the differences between the factual and legal issues raised the less likely it will be permitted (see Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148, CA).
42. The parties also referred me to the following:
    42.1. Foxtons Ltd v Ruwiel UKEAT/0056/08 Time limits will only be relevant if the amendment involves a new cause of action, not if it amounts to a relabelling of facts already pleaded. However, an amendment only amounts to 'mere relabelling' if all of the necessary facts are already pleaded including the causal link between the unlawful act and reason for it
    42.2. Amey Services Limited v Aldridge and ors UKEATS/0007/16/JW It would be an error for a tribunal to allow amendments without first ensuring they are properly paticularised.
    42.3. Transport and General Workers Union v Safeway Stores Ltd [2007] 6 WLUK 59 Delay in making an application may be a discretionary factor for the Tribunal to consider:

Part Time Worker Regulations

43. Regulation 5 - Less favourable treatment of part-time workers

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker–

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if–

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

(4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime.

44. Regulation 7 - Unfair dismissal and the right not to be subjected to detriment

...

(2) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are–

(a) that the worker has–

(i) brought proceedings against the employer under these Regulations;

(ii) requested from his employer a written statement of reasons under regulation 6;

(iii) given evidence or information in connection with such proceedings brought by any worker;

(iv) otherwise done anything under these Regulations in relation to the employer or any other person;

(v) alleged that the employer had infringed these Regulations; or

(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations, or

(b) that the employer believes or suspects that the worker has done or intends to do any of the things mentioned in sub-paragraph (a).

(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subjection to any act or deliberate failure to act, is that mentioned in paragraph (3)(a)(v), or (b) so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the worker is false and not made in good faith.

(5) Paragraph (2) does not apply where the detriment in question amounts to the dismissal of an employee within the meaning of Part X of the 1996 Act.

Submissions

45. The written application and objections were supplemented by a written skeleton/note and expanded on in oral submissions in this hearing. What follows is a summary of the parties' positions.

Nature

46. The Claimant asserts that this is simply relabelling, with the core facts already pleaded, except for the specific comparators. In particular they say that she:
    46.1. Complained that when she was hired on a part-time contract at a Grade 6 salary she was required to perform the work of 1.0 FTE at Grade 8 [8.1 ET1 and PoC].
    46.2. Complained that as early as 2008 and especially since 2019 she had worked across different part-time contracts on different grades and rates of pay to perform the same research [38-40 POC].
    46.3. Complained that she was not given sufficient contract hours (as paid dedicated research hours) to prepare research grant applications [34-35 PoC].
47. Specific reference to detriment and less favourable treatment as a part-time worker have now been included at paragraph 44 [156] and 67 [161] of the amended particulars.
48. The Respondent relies on EJ Hutchings' previous decision that this could not be considered relabelling, for the reasons set out at above. They submit that the claims are still insufficiently paticularised and missing the necessary causative link. They say that the Claimant has had four opportunities to properly particularise - ET1; further particulars; first list of issues; and now the amendment application – and should not be given another.
49. They go on to identify that the Claimant could have easily said her treatment was because of her PTW status if that's what she'd intended, even if not in legal terms.

Timing & manner of application

50. The Claimant relies on being unrepresented until the PH in January 2023, and the application being made by the date EJ Hutchings permitted, with the Respondent on notice since the previous PH. Additionally, they say that as the final hearing is so far away, and no case management orders have been made, there is little effect on the case by adding these claims.
51. The Respondent's position is that whilst the Claimant was unrepresented when the ET1 was presented, she was able to set out a detailed claim, including for matters outside of the ET jurisdiction. They say if she had intended to make the PTW claim, she would have done so initially.

Time limits

52. The Claimant's position is that the claims are merely relabelling of facts within the original claim, so time limits do not need to be considered. In the alternative, it is submitted that:
    52.1. Many acts are continuing conduct so still in time; or
    52.2. It would be just and equitable to extend time, particularly because, the Claimant was unrepresented until just before the preliminary hearing in January 2023
53. The Respondent's position is that as new claims, they are out of time, and it is not just and equitable to extend time. They identify that the last act relied on for the Regulation 5 claim was in 2019, and for the Regulation 7 claim October 2022 *[I note that this post-dates the presentation of the claim, and the provision of FBP. As does an allegation in September 2022, although that is referred to in the FBP].*

Merits – Regulation 5 claim

54. On behalf of the Claimant, it is said that she has clearly set out the ways in which she says she was treated, and she says that she was treated this way because she was a part-time worker who was diligent and conscientious, and who wanted to work for the Respondent.

55. The Respondent's position is that the causative link that EJ Hutchings identified as missing is still not pleaded. They say that the Claimant has not provided anything to allow the Tribunal to establish that the alleged treatment was done 'on the ground that' she was a part-time worker. They also submit that 'on the ground that' means the same as 'because of' (Amnesty International v Ahmed [2009] ICR 1450 (EAT) and so the cases as to establishing the relevant state of mind for direct discrimination cases will apply.

Merits – Regulation 7 claim

56. It is submitted on behalf of the Claimant that she has clearly set out the allegations she relies on under Regulation 7(3) and has precisely set out the detriments she has suffered [162].
57. The Respondent's position is that none of the things the Claimant alleges she said/did, even if found to have happened, amount to any of the protected acts within Regulation 7. Further, the Claimant has not identified which of the provisions in Regulation 7 are said to apply.
58. They also say, as with the Regulation 5 claim, the Claimant has not provided anything to allow the Tribunal to establish that the alleged treatment was done 'on the ground that' she was a part-time worker.

Prejudice and hardship

59. The Claimant says that the prejudice to her is significant if not allowed to bring these claims. She relies on:
    59.1. Personal: her health has been badly affected causing her to be on sick leave, and the Respondent may start capability proceedings; she faces losing her contracts
    59.2. Public interest: this is a world class university, and many other employees will be in the Claimant's position
60. The Claimant says that the prejudice to the Respondent is minimal as:

60.1. The only additional enquiry relates to contracts;

60.2. There are the same witnesses as for other complaints, plus 2 comparators

61. The Respondent says that the prejudice falls more greatly on them because:

61.1. They will incur additional costs clarifying the claims as they are still unclear; and a further preliminary hearing may be necessary if there are more problems with this;

61.2. They will then incur additional costs and inconvenience in having to deal with a wider scope of enquiry, which includes 7 acts and 12 detriments (not all of which are already claimed under other heads of claim);

61.3. The costs involved are particularly important given the Respondent's charitable status.

62. The Respondent dismisses the public interest argument, submitting that whilst it may be of interest to the Union supporting the Claimant, it is not for Tribunal to involve themselves in this.

63. The Claimant submits that reliance on charitable status is misleading as the Respondent is the number one university in the world, with significant income and assets in the last financial year.

Discussion

Nature

64. The written amendment application [144] repeats the argument that it is simply a case of relabeling:

"34. In summary, the core facts upon which the proposed Part-time Regulations amendments rely were pleaded by the Claimant in her Particulars of Claim. She did not plead the comparators upon whom she now relies, Prof Jan M. Fellerer and Dr Tamar Koplatadze, because she was not represented and did not know that she needed to do so. While the amendment "relocates" these facts under

new causes of action it is simply "a substitution of other labels for facts already pleaded": Selkent, 843G"

65. I accept that many of the details now relied on in relation to the PTW allegations are already present under various discrimination causes of action. However, this does not address the lack of detail regarding the causative link. That aspect *cannot* be relabelling, as it is absent from the original claim. EJ Hutchings (and the Respondent's representatives) had previously identified the lacking detail. Despite this, the required details have not been provided within the application or proposed amended particulars. A simple statement that treatment was because of PTW is insufficient.
66. I agree with EJ Hutchings' previous identification of this as more than a relabeling exercise.
67. I also note that the Claimant asserts [163] that presentation of her claim to the Tribunal amounts to an act under Regulation 7, and submits detriments occurring in September and October 2022 [164]. *Those* elements clearly cannot have been pleaded in the claim submitted in April 2022, and are entirely new.

Timing & manner

68. As set out above, the application repeats the relabelling argument that was already rejected by EJ Hutchings. It is not appropriate/correct procedure to remake that argument before me.
69. Whilst EJ Hutchings permitted an amendment application to be made by 17 March 2023, and this is the date upon which it was made, that does not negate the potential effect on time limits, if the relabelling argument fails.
70. The way in which the application sought to insert matters that were clearly not in contemplation at the time of the claim is also problematic.

Time limits

71. PTW claims must be presented within 3 months of the less favourable treatment complained of, or the last act/failure to act if a series of allegations is made.

72. Having determined above that these claims are not simply relabelling, they are new claims. Therefore, the primary limitation period had expired even at the time of identifying the amendment at the January hearing.
73. In relation to any continuing conduct and/or a just and equitable extension of time, the strength of those arguments are partly reliant on the merits of the claims (discussed below).
74. I do not accept that the Claimant's unrepresented status prior to the previous preliminary hearing affected her ability to correctly identify the claims. Her form and accompanying particulars (and further information that followed) was extremely thorough, and she had clearly been able to conduct detailed research.

Merits – Reg 5

75. In addition to the amended particulars of claim, I note that the application says: *"she complained that although one of her duties on her part-time teaching contract was to prepare research grant applications, she was not given sufficient contract hours (as paid dedicated research hours) to perform this duty, which was less favourable treatment when compared to comparable full-time employees whose position would inevitably include a generous allocation of paid research hours"* [144]. This is extremely vague language, apparently based on assumptions rather than facts. The Claimant would need to establish that the contract hours she was given for research amounted to less pro rata than a full-time worker.
76. The necessary information is not contained within the application or amended particulars. Although exact figures may not be available until full document disclosure has taken place, *some* level of detail is required at this stage.
77. It is not enough that someone happens to be a part-time worker who is also allegedly treated less favourably. Without the necessary information regarding the causative link between the part-time role and the alleged less favourable treatment the merits of the claim are low.

Merits – Reg 7

78. The grounds on which a part-time worker cannot be subjected to a detriment are set out in Regulation 7(3). The Claimant relies on telling her managers that *"my part-time contract hours were insufficient to perform my duties and/or that my salaried grade was too low for my duties"* [162] on 6 occasions between 2008 and 2020, and again upon presentation of her claim to the Employment Tribunal. The latter would relate to Regulation 7(3)(a), although as discussed above this is a later addition. It is not set out what subsection(s) the Claimant asserts her other acts fall into.
79. Without the necessary information regarding the causative link between the part-time role and the alleged less favourable treatment the merits of the claim are low.

Prejudice/hardship

80. Subject to the outcome of the strike out/deposit order applications, the Claimant has multiple existing claims, some of which relate to issues of the Claimant's contract and grading. This is therefore not a situation where the Claimant will be prevented from accessing justice at all if the amendment is refused. Whilst she may be prevented from bringing specific part-time worker claims, she can still ventilate the contractual issues within the existing claims and by way of background information.
81. Conversely, if the amendment is allowed the Respondent would have to defend claims that I have determined have little merit as pleaded. That would create additional work in terms of preparation, and for the Tribunal to consider, when ultimately the prospects of establishing the necessary elements are low.

<u>Conclusions</u>

82. Having considered all of the factors above, I consider that the prejudice falls more on the Respondent in having to address complaints which are still not fully articulated, despite previous judicial intervention and an opportunity to set out the application in writing and orally at this hearing.

83. Looking at the claim holistically, the Claimant's complaints are factually represented within the existing discrimination claims, and she will be able to fully ventilate those at the final hearing.
84. The Claimant's application to amend her claim to include claims under the Parttime Workers Regulations is refused.

Respondent applications for Strike Out/Deposit Order

Overview

85. The first application relates to the 2008 – 2017 allegations and was based on whether they were in time only. The second application extends the application to *all* claims, and is on the additional basis that the Claimant has failed to satisfy the statutory test in relation to discrimination and/or victimisation.
86. The applications are therefore on the grounds that there are no/little prospects of the Claimant establishing that:
    86.1. they were brought within time;
    86.2. that the treatment was because of a protected characteristic / protected act
87. In relation to deposits, the Respondent's initial application requests a deposit of £1000 for the relevant aspects of the claim to continue. The position has developed somewhat within the Respondent's opening note whereby the following is requested:
    87.1. that the claims against each of the alleged perpetrators were brought in time (6 deposits in total);
    87.2. that each of the alleged acts of race discrimination will be held to be 'because of' race (14 deposits in total); and
    87.3. that each of the alleged acts of sex discrimination will be held to be 'because of' sex (14 deposits in total).
88. The Claimant's position on deposit orders is no proper basis for doubting that the Claimant can establish facts essential to her claims. and that a deposit order would significantly restrict her access to a fair trial and to justice.

89. I took sworn oral evidence from the Claimant in relation to her means, and noted that her income is from one part-time contract and a fixed-term contract which is due to expire in January 2024. Her accessible cash is limited. She has a property with a mortgage, and there is equity in that home.

Direct discrimination

90. The timeline of race/sex discrimination claims pleaded are as follows:

90.1. Chris Davies (CD)

90.1.1. July-September 2008;

90.1.2. May 2009;

90.1.3. March-May 2010;

90.1.4. February 2011; and

90.1.5. June 2013

90.2. Roy Allison (RA)

90.2.1. May/June 2013;

90.2.2. June 2014; and

90.2.3. February 2015

90.3. Dan Healey

90.3.1. June 2017

90.4. Chris Gerry (CG)

90.4.1. Sept 2018; and

90.4.2. May 2020

90.5. Tim Power (TP)

90.5.1. April 2021;

90.5.2. July / August 2021; and

90.5.3. August/September 2021

90.6. Paul Chaisty (PC)

90.6.1. August/September 2021

Victimisation

91. The Respondent accepts that the Claimant did a protected act on 9 May 2020 when she submitted a grievance, but disputes that any alleged treatment was because of that act.

92. The timeline of victimisation complaints pleaded are as follows:

92.1. Chris Gerry (CG)

92.1.1. 6 June 2020;

92.1.2. January-September 2021;

92.1.3. 5 March 2021; and

92.1.4. May 2021

92.2. Tim Power (TP)

92.2.1. August 2021

92.3. Paul Chaisty (PC)

92.3.1. Autumn 2021

THE LAW

Strike out

93. Rule 37 of the Employment Tribunal Rules of Procedure 2013

"(1) At any stage of proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of claim or response on any of the following

94. grounds –(a) that it is scandalous or vexatious or has no reasonable prospect of success;

…

(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."

Deposit orders

95. Rule 39 of the Employment Tribunal Rules of Procedure 2013:

"(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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

96. *Van Rensburg v Royal Borough of Kingston-upon Thames UKEAT/0095/07*
When determining whether to make a Deposit Order a tribunal is not restricted to a consideration of purely legal issues, but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward.

Time limits

97. s. 123 Equality Act 2010:

"...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."

98. I reminded myself of the relevant case law:

Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548, CA

99. In deciding whether there is 'conduct extending over a period' the Tribunal will have to consider if there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts.

Aziz v FDA [2010] EWCA Civ 304, CA

100. One relevant but not conclusive factor is whether the same or different individuals were involved in the incidents.

101. The parties also referred me to the following case law:

E v X and ors EAT 0079/20

102. "Nor is it essential that her complaint 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"

Robertson v Bexley Community Centre [2003] IRLR 434, CA

103. "It is 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."

Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194

104. "18. … [I]t is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980 , section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see Keeble), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Afolabi. …

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

Prospects of success

105. I reminded myself of the relevant case law:

A v B and anor 2011 ICR D9, CA,

106. The Court of Appeal held that an employment tribunal was wrong to strike out an employee's claims of sex discrimination on the basis that they had no reasonable prospect of success. The Court concluded that there was a 'more than fanciful' prospect that the employer would not be able to discharge the 'reverse' burden of proof to show that the employee's dismissal was not sex discriminatory.

Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL

107. The House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases, because discrimination claims are generally fact-sensitive, and it is a matter of public interest that they should be fully examined to make a proper determination.

Ezsias v North Glamorgan NHS Trust [2007] ICR 1126

108. The Court stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

Balls v Downham Market High School and College [2011] IRLR 217 (EAT)

109. This expanded on the guidance given in *Ezsias*, stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a question of asking whether it is possible that the claim will fail. It is a high test.

110. The parties also referred me to the following specific case law:

Chandok v Tirkey UKEAT/0190/14/KN

111. "There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867): "…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Patel v Lloyds Pharmacy Ltd UKEAT/0418/12/ZT

112. "Neither Anyanwu nor Maurice Key LJ's observations, however, require an Employment Judge to refrain from striking out a hopeless case merely because there are unresolved factual issues within it. In such a case I believe that the correct approach is that which I have adopted, namely to take the Claimant's case at its reasonable highest and then to decide whether it can succeed."

Mechkarov v Citibank NA [2016] ICR 1121

113. *"14 …*

(1) only in the clearest case should a discrimination claim be struck out;

(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

(3) the claimant's case must ordinarily be taken at its highest;

(4) if the claimant's case is conclusively disproved by or is totally and inexplicably inconsistent with undisputed contemporaneous documents, it may be struck out; and

(5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

Tayside Public Transport Co Ltd v Reilly [2012] CSIH 46 XA132/11

114. It would be a serious error to decide a strike out on limited documentary evidence – let alone to conduct a mini trial of the oral evidence – when a full panel, properly convened at a later date for the final hearing, would have the opportunity to consider fuller documentary and oral evidence.

Submissions

Time

115. In relation to the claims being within time, the Respondent suggests that I start with the most recent allegations. If I find no/little prospects of establishing those were brought in time, this will inform the decision on the older claims.

116. They submit that as the most recent claims of direct race/sex discrimination - against Paul Chaisty (PC) - are in August/September 2021, and that is more than

3 months less 1 day before the Claimant started ACAS conciliation, these are out of time and consequently all preceding complaints must also be.

117. In relation to victimisation the Respondent's position is that the most recent allegation – against PC - in 'Autumn 2021' must be referring to the start of the academic term in October 2021, which is more than 3 months less 1 day before the Claimant started ACAS conciliation. As a result, they submit that this complaint is out of time and, and all preceding complaints must be too.

118. The Claimant relies on there being a course of conduct extending over a period, beyond the last stated act, and after 13/11/21 (3 months less 1 day before the Claimant started ACAS conciliation). She therefore submits that all complaints are in time. It is submitted that the whole claim is framed in that way, and that it is not necessary for this to be explicitly stated.

119. In the alternative, if any complaints are determined to be out of time, the Claimant says it would be just and equitable to extend time in the circumstances.

120. The Claimant's position in relation to a course of conduct is applicable to all heads of claim.

121. The Respondent disputes this because there are multiple different decision makers, often with large gaps in between, and no allegations of collusion between the perpetrators.

Merits – sex & race

122. The Claimant asserts that her department was structurally sexist biased against Russian and Eastern Europeans, and that her line managers' treatment of her was influenced by their unconscious discriminatory attitudes.

123. It is submitted on her behalf that in order to decide if acts happened or statements were made, and what inferences can or should be drawn from the exchange, the Tribunal will have to assess the Claimant's evidence and that of the relevant Respondent witnesses, and weigh up their credibility, along with reviewing any documents that support/undermine an allegation.

124. The Respondent submits that there are no/little prospects of success of the Claimant establishing that any alleged treatment was because of race or sex as pleaded, because she hasn't shown material that the Tribunal could conclude that this.

Merits – victimisation

125. The Respondent submits that the Claimant has not set out a basis for asserting that she was treated in the way she alleges because of any protected disclosures – the causal link.

126. The Claimant's position is that the alleged treatment post-grievance is clearly set out within the claim. It is submitted that the Tribunal must test the evidence to determine if she was subjected to any of the alleged detriments, and if those were because of her protected act.

Discussion

Sex and race discrimination

PC

Time

127. I agree that the Respondent's suggestion of dealing with PC first is a logical approach.

128. Whilst the last allegation against him - 'August/September 2021' - is clearly outside of the primary time limit, the Claimant's case is that there was a course of

discriminatory conduct, extending over a period of time, which continued up to and after ACAS conciliation began. Determination of whether that is the case will require evidence.

129. Alternatively, even if that is not found, she contends that it would be just and equitable to extend time. A Tribunal considering that aspect will take a multi-factorial approach, assessing the balance of prejudice, the explanation for delay, and the length of the delay. It is possible, in the circumstances - a Claimant who was unrepresented at the time, presenting a complaint that at most is 2 or 3 months late, in a situation where a whole category of claims is potentially excluded – that a Tribunal may exercise its discretion to extend time.

130. Therefore, there is more than little prospects of this complaint being found to be in time.

Merits - sex

131. Having specified a female comparator this complaint as set out is bound to fail. I note that:

131.1. There was no comparator before EJ Hutchings;

131.2. The next list of issues added a hypothetical comparator of a woman;

131.3. the list of issues on 17 March 23 added a specific comparator who is a woman;

131.4. it is only after the Respondent's second strike out application highlighted the errors, that a male comparator was inserted.

132. The inaccuracy was not an isolated error, and it was not one made by the unrepresented claimant, but by her experienced legal representatives. Not only was the initial error on the hypothetical comparator repeated, but compounded when an actual female comparator was added. There were multiple opportunities to notice and correct the defect, but this was only attempted once the Respondent had pointed it out. Even then, the correction was by way of an amended list of issues, rather than an admission that a mistake had been made.

133. I also note that the although the error regarding the comparator had been in the lists of issues for some time, with lots of back and forth, and the Respondent had not raised it until their second strike out application.

134. Whilst the list of issues may not be pleadings themselves, they are the distillation of the pleadings into the issues to be determined by the Tribunal. It is important that they accurately represent the complaints. The time taken by the parties to finalise that list demonstrates that importance.

135. I have carefully considered the implications for the Claimant if her claims are stuck out because of errors made by her representatives. She would be prevented from bringing a whole head of claim. But subject to the outcome of the other applications, the same complaints are made for race discrimination.

136. Whilst the error was of the Claimant's representatives, the Respondent's representatives could also have noted the issue at an earlier stage, during the multiple reviews of the list of issues. It would have been clear that the comparators were a mistake, and that the Claimant's intention could not have been to compare herself to another woman in this claim. This is not a situation where the Respondent is surprised by facing a particular claim – if the error was only noticed at the point the second strike out application was made, up until that point they were expecting to face a sex discrimination claim.

137. In relation to the merits more broadly - whether the Claimant can establish that the alleged treatment was because of her sex – the issue is whether the Claimant can establish that the alleged treatment was because of her sex. The Claimant is entitled to rely on the culture of the department, in the absence of overtly racist acts/comments. The Tribunal will need to decide if they can draw an inference that this influenced any decisions. They will have to consider the subjective motivations of the alleged perpetrator in order to determine whether the less favourable treatment was in any way influenced by the Claimant's race. The tribunal will be required to examine evidence as to what the relevant mental processes were in order to identify what operated on the actor's mind and caused them to decide to act in that particular way. In the absence of something that

conclusively disproves the Claimant's assertion, this can only properly be done by hearing evidence from the relevant witnesses.

138. I cannot conclude that there are no prospects of the Claimant establishing this. Equally, at this point, I also cannot say that there are low prospects.

Merits - race

139. The issue here is whether the Claimant can establish that the alleged treatment was because of her race. The Claimant is entitled to rely on the culture of the department, in the absence of overtly racist acts/comments. The Tribunal will need to decide if they can draw an inference that this influenced any decisions. They will have to consider the subjective motivations of the alleged perpetrator in order to determine whether the less favourable treatment was in any way influenced by the Claimant's race. The tribunal will be required to examine evidence as to what the relevant mental processes were in order to identify what operated on the actor's mind and caused them to decide to act in that particular way. In the absence of something that conclusively disproves the Claimant's assertion, this can only properly be done by hearing evidence from the relevant witnesses.

140. I cannot conclude that there are no prospects of the Claimant establishing this. Equally, at this point, I also cannot say that there are low prospects.

TP

Time

141. The prospects of this complaint being found to be in time is affected by the situation regarding PC above. Had I found no/little prospects of PC being in time, this would have weakened the position in relation to TP being in time.

142. Additionally, the argument on behalf of the Respondent relates to the Claimant's ability to establish a course of conduct extending across the alleged

perpetrators – here TP to PC. The Respondent's general position is that there is no link between decision makers/alleged perpetrators. However, I note that in relation to PC and TP the allegation regarding redesign of the Russian Language Programme for 2021-22 in August/September 2021 is a joint allegation. This has the potential to bridge the gap between these two actors.

143. There are more than little prospects of the complaint against TP being found to be in time.

Merits - sex

144. I adopt the findings in relation to PC at paragraphs 131 - 138 above.

Merits - race

145. I adopt the findings in relation to PC at paragraphs 139 - 140 above

CG

Time

146. The prospects of this complaint being found to be in time is affected by the situation regarding TP and PC above. Had I found no/little prospects of these being in time, this would have weakened the position in relation to CG being in time.

147. Additionally, the argument on behalf of the Respondent relates to the Claimant's ability to establish a course of conduct extending between the perpetrators – here CG to TP. Generally, they say there are large gaps in time between what is said to be done by each actor. However, here I note that there is significant crossover between dates of allegations. TP's first is April 2021, and there are allegations against CG that are very close in time pre-dating this (March

2021) and post-dating (May 2021). This has the potential to bridge the gap between these two actors.

148. The ultimate prospects of establishing the course of conduct may be affected by the determinations in relation to the allegations against TP – e.g. without those is there a course extending between CG and PC? However, at this stage I have determined that TP complaints remain.

149. In any event, I also note some crossover in dates between CG and PC where the first against PC is August/September 2021 and the last against CG is January – September 2021.

150. There are more than little prospects of the complaints against CG being found to be in time.

Merits - sex

151. I adopt the findings in relation to PC at paragraphs 131 - 138 above.

Merits - race

152. Race: I adopt the findings in relation to PC at paragraphs 139 – 140 above

<u>DH</u>

Time

153. The argument on behalf of the Respondent relates to the Claimant's ability to establish a course of conduct extending between the perpetrators – here DH to CG. Unlike with the actors above, there is a large gap in time between the allegations against DH and CG. The allegation against DH is June 2017, and the first against CG is more than a year later in September 2018.

154. The Claimant says gaps in time are linked because she alleges that the discrimination is a continuing act beyond the date the act is committed. In this

instance, where there is one complaint (made up of 3 parts – a refusal and 2 statements), a Tribunal will need to determine if there was indeed a continuing act of discrimination, or if this is simply an act that has continuing consequences. I cannot say that there are *no* prospects of establishing a continuing act, as this would need to be informed by evidence, but given the specific nature of the complaints the prospects do not appear strong.

155. The ultimate prospects of establishing the course of conduct may be affected by the determinations in relation to the allegations against CG – e.g. without those is there a course extending between DH and TP/PC? However, at this stage I have determined that CG complaints remain.

156. Taking everything into account, I cannot say that there are *no* prospects of establishing a continuing act, as this will be informed by evidence, but given the specific nature of the complaints the prospects do not appear strong.

157. There are little prospects of success of establishing that allegations in June 2017 are in time (as part of conduct extending over time) when the next alleged acts are over a year later in September 2018, and by another person (CG).

Merits - sex

158. I adopt the findings in relation to PC at paragraphs 131 - 138 above.

Merits - race

159. I adopt the findings in relation to PC at paragraphs 139 - 140 above

RA

Time

160. The argument on behalf of the Respondent relates to the Claimant's ability to establish a course of conduct extending between the perpetrators – here RA to

DH. As with DH to CG above, there is a large gap in time in between the allegations against RA and DH. The last allegation against RA is February 2015, and the one against DH is over 2 years later in June 2017.

161. The Claimant says gaps in time are linked because C alleges that the discrimination is a continuing act beyond the date the act is committed. A Tribunal will need to determine if there was indeed a continuing act of discrimination, or if this is simply an act that has continuing consequences. I note that in relation to allegations about regrading, in *Sougrin v Haringey Health Authority 1992 ICR 650, CA*, the Court of Appeal held that a decision not to regrade an employee was a one-off decision or act, even though it resulted in the continuing consequence of lower pay for the employee who was not regraded.

162. I cannot say that there are *no* prospects of establishing a continuing act, as this will be informed by evidence, but given the specific nature of the complaints the prospects do not appear strong.

163. Having determined there are little prospects of DH being found to be in time (as conduct extending over a period), this further weakens prospects of the RA complaints being connected to the later complaints if DH falls away.

164. Taking everything into account, there are little prospects of success of establishing that allegations between May/June 2013 and Feb 2015 are in time (as part of conduct extending over time) when the next alleged acts are over two years later in June 2017 and by another person (DH).

Merits - sex

165. I adopt the findings in relation to PC at paragraphs 131 - 138 above.

Merits - race

166. Race: I adopt the findings in relation to PC at paragraphs 139 - 140 above

CD

Time

167. The argument on behalf of the Respondent relates to the Claimant's ability to establish a course of conduct extending between the perpetrators – here CD to RA. Here, there is crossover with the first RA allegation in May/June 2013, and the latest allegation against CD in June 2013.

168. However, whether CD is in time is also dependent on determinations regarding the previous allegations. Having determined that there are little prospects of RA and DH being found to be in time, the cumulative effect weakens the case in relation to CD, particularly if any of the other actors fall away.

169. This means there are little prospects of success of ultimately establishing CD allegations are in time (as part of a course of conduct).

Merits - sex

170. I adopt the findings in relation to PC at paragraphs 131 - 138 above.

Merits - race

171. I adopt the findings in relation to PC at paragraphs 139 – 140 above

Victimisation

PC

Time

172. The position that PC is out of time is based solely on an interpretation of "Autumn 2021", and that must mean the relevant term which began in October

2021. It may be natural for the Respondent, as an educational institution, to interpret the phrase "Autumn 2021" based on school terms, but that is not the only possible interpretation. Additionally, the Claimant's position is that the discriminatory state of affairs continued beyond the date of the alleged act.

173. These are all arguable matters requiring evidence. Even if the Tribunal ultimately finds the Respondent's interpretation is correct, the difference in time between the two positions is within the range where they may determine it is just and equitable to extend time.

174. Therefore, there are more than little prospects of it being established that the claims are within time.

Merits

175. The Respondent accepts that the Claimant did a 'protected act' by way of submitting her informal grievance on 9 May 2020. The dispute is whether PC acted in the way alleged and, if so, if that amounted to a detriment. These are arguable matters requiring evidence.

176. Although the bar is lower than for strike out, I do not have a proper basis for finding, on the material before me, that the Claimant is unlikely to establish these facts. This means it is not appropriate for me to decide that this claim has little reasonable prospect of success.

<u>TP</u>

Time

177. The position that TP is out of time depends partly on the issues with PC related to "Autumn 2021" - if I had found that to have no/little prospects of success of being found to be in time, I was likely to find that TP had similar prospects. I refer to my determination in paragraph 160 above in relation to this.

178. Additionally, the argument on behalf of the Respondent relates to the Claimant's ability to establish a course of conduct extending across the alleged perpetrators – here TP to PC. The Respondent's general position is that there is

no link between decision makers/alleged perpetrators. However, I note that the allegation against TP in August 2021 relates to the same alleged failure as that against PC a few months later.

179. These are arguable matters requiring evidence. Therefore, there are more than little prospects of it being established that the claims are within time.

Merits

180. The Respondent accepts that the Claimant did a 'protected act' by way of submitting her informal grievance on 9 May 2020. The dispute is whether TP acted in the way alleged and, if so, if that amounted to a detriment. These are arguable matters requiring evidence.

181. Although the bar is lower than for strike out, I do not have a proper basis for finding, on the material before me, that the Claimant is unlikely to establish these facts. This means it is not appropriate for me to decide that this claim has little reasonable prospect of success.

CG

Time

182. The position that TP is out of time depends partly on the issues with PC and TP - if I had found either/both of these to have no/little prospects of success of being found to be in time, I was likely to find that CG had similar prospects. I refer to my determination in paragraphs 160 and 165 above in relation to this.

183. Additionally, the argument on behalf of the Respondent relates to the Claimant's ability to establish a course of conduct extending across the alleged perpetrators – here CG to TP. The Respondent's general position is that there is no link between decision makers/alleged perpetrators. In relation to timings, I note that the allegation against TP in August 2021 occurs within the period of time covered by the January – September 2021 allegation against CG. Additionally, the

May 2021 allegation against CG relate to the comments that are then the subject of the alleged subsequent failures against TP and PC. It is possible for the course of conduct to extend without overt collusion.

184. These are arguable matters requiring evidence. Therefore, there are more than little prospects of it being established that the claims are within time.

Merits

185. The Respondent accepts that the Claimant did a 'protected act' by way of submitting her informal grievance on 9 May 2020. The dispute is whether CG acted in the way alleged and, if so, if that amounted to a detriment. These are arguable matters requiring evidence.

186. Although the bar is lower than for strike out, I do not have a proper basis for finding, on the material before me, that the Claimant is unlikely to establish these facts. This means it is not appropriate for me to decide that this claim has little reasonable prospect of success.

Conclusions

187. There are more than little prospects of the direct discrimination complaints against all alleged perpetrators being found to be because of sex.

188. There are more than little prospects of the direct discrimination complaints against all alleged perpetrators being found to be because of race.

189. There are more than little prospects of the direct sex and race discrimination complaints against PC, TP, and CG being found to be in time.

190. There are little prospects of the direct sex and race discrimination complaints against DH, RA, and CD being found to be in time. These claims may only proceed if the Claimant pays a deposit order.

191. There are more than little prospects of the victimisation claims against all alleged perpetrators being found to be in time, and because of the protected act.

SUMMARY

192. The Claimant's application to amend her claim is refused.

193. The Respondent's application for strike out/deposit order of the race and sex discrimination claims, against all alleged perpetrators, in relation to the prospects of establishing that any treatment was because of the protected characteristic, are refused.

194. The Respondent's applications for strike out/deposit order relating to the race and sex discrimination complaints against PC TP, and CG, regarding the prospects of establishing that they were brought within time, are refused.

195. The Respondent's applications for deposit orders regarding the race and sex discrimination claims, against DH, RA and CD, in relation to the prospects of establishing they were brought within time, succeed. These claims may only proceed if the Claimant complies with the terms of the Deposit Order (see separate order).

196. The Respondent's applications for strike out/deposit order of the victimisation claims, against all alleged perpetrators, in relation to the prospects of establishing that any treatment was because of the protected act, are refused.

197. The Respondent's applications for strike out/deposit order of the victimisation claims, against all alleged perpetrators, in relation to the prospects of establishing that they were brought within time, are refused.

198. A separate Deposit Order will be sent to the parties, which will contain my reasons in respect of the Claimant's means.

199. Separate case management orders will be sent out in relation to the continuing claims, and those that will continue following compliance with the deposit order, to progress the case to the final hearing.

Case no: 3305139/2022

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Employment Judge Douse

Date: 7 May 2024

JUDGMENT SENT TO THE PARTIES ON

7 May 2024

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL