EMPLOYMENT TRIBUNALS

Claimant: Mr K James

Respondent: Sky Subscribers Services Limited

Heard at: Cardiff (in person) **On:** 23 May 2024

Before: Employment Judge Brace

REPRESENTATION:

Claimant: In person (assisted by Ms E Purnell, Claimant's sister) **Respondent:** Ms B Clayton (Counsel)

PRELIMINARY HEARING IN PUBLIC
RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

Strike out on time limits

The application to strike out the claim is refused. The Tribunal will decide at the final hearing whether or not the claim was presented within the applicable time limit.

Written Reasons

Introduction

1. This was an in-person preliminary hearing conducted over the course of one day.
2. The preliminary hearing had been listed by me at the case management preliminary hearing on 12 April 2024 to consider the following:

a. Should the claim or any part of it be struck out because the Claimant has no reasonable prospect of establishing that:

i. there was discriminatory conduct over a period ending on or after 22 May 2023; or ii. it would be just and equitable to extend the time limit for bringing the claim?

b. If not, should the Claimant be ordered to pay a deposit of between £1 and £1000 as a condition of continuing with the claim or any part of it, because they have little reasonable prospect of establishing those things?

c. Any further case management necessary for the preparation of the case for the final hearing.

3. Directions had been given for the preparation of this preliminary hearing and the Claimant had also been directed to write by 19 April 2023 with any application to amend and this preliminary hearing also considered representations by the parties as to whether the Claimant should be permitted to amend his claim, if not struck out. The Tribunal was not being asked to substantively determine the limitation issue. A separate case management order deals with the application for a deposit order.

4. I had before me a witness statement from the Claimant and I was also selectively referred to a 183 page bundle ("Bundle") and references to the hearing bundle appear in square brackets below [ ].

5. The Claimant attended the hearing with family in support, including his sister who from time to time assisted the Claimant. What adjustments the Claimant needed for his disabilities were discussed, particularly for his severe visual impairment. The Claimant indicated that he was unable to read any paperwork and it was agreed that either I or the Respondent's counsel would read out relevant sections of his statement or the evidence in the preliminary hearing bundle, before asking the relevant question. The Claimant agreed that this was sensible and, at the end of the day's hearing agreed that there were no further adjustments that he would require for the final merits hearing, if the claims were permitted to proceed.

6. I also disclosed that I was a Sky customer and was no application for my recusal was made by either party.

7. Prior to hearing evidence, the list of issues set out in the case management order of 12 April 2024 was amended in that the dates in §3.1.1 and §3.1.3 were amended to January 2015.

8. As the Claimant is a litigant in person, what the hearing related to was explained to him. As the witness statement that he had prepared did not deal with the relevant issues in terms of limitation period and/or extension of time, with the agreement of the Respondent's counsel, I asked questions of the Claimant to

obtain further evidence in chief, which was then followed by the crossexamination of the Claimant by the Respondent's representative. **Facts**

9. The Claimant has a severe sight impairment, Retinitis Pigmentosa ("RP") an inherited eye condition. It is conceded by the Respondent that at all relevant times he was disabled by reason of RP, anxiety and depression.

10. The Respondent is part of the 'Sky' group of companies providing streaming on demand broadcasting, as well as broadband and telephone services to customers. The Claimant commenced employment in October 2010, with the Respondent's predecessor, FirstSource, an outsourced provider of customer services to customers of Sky. In July 2019, the Claimant's employment transferred to the Respondent under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

11. The Claimant tells me that from the commencement of his employment with FirstSource his eyesight had impacted on his ability to use IT necessary to undertake the role of customer service adviser. Assistive software, 'ZoomText' software, had been provided at the start of his employment following Access to Work involvement. He had been fully able to undertake the role of customer service advisor with that adjustment. By January 2015, the Claimant was undertaking all aspects of customer service. In that role, participated in a bonus and incentive scheme based on attendance and performance i.e. achieving sales targets.

12. In January 2015, Sky introduced a new customer interface system, known as 'STAN' that FirstSource were to use. It was instantly obvious that the Claimant was unable to use the new system as its features would not allow him to use his assistive software. He immediately raised a concern with his manager at the time, Ben Fennell-Jones, who in turn raised it with Sky. Sky indicated that they would investigate and provide an update.

13. As the Claimant was unable to use the screens and in turn unable to undertake the role of customer services adviser, he took on alternative duties of coaching managers, advising, briefing and supporting them pending resolution of the disadvantages he was facing in using the new STAN system. No evidence was before me and no findings of fact are made as to whether this was an agreed position with FirstSource, or the nature of any agreement.

14. By the end of that month, the Claimant was removed from the customer advisor bonus and incentive scheme. When he raised this with his manager, he was told that it was likely that it was because he was not hitting his targets. A few days later, he spoke to a Paul Cavil, Ben Fennell-Jones' manager, who also informed him that he was not receiving bonus and incentive as he was unable to hit his targets. The Claimant considered this unfair as if staff were unable to hit targets as a result of technical issues, they did receive such incentivization.

15. The Claimant contacted RNIB within a month of the new STAN system who advised that he should give FirstSource an opportunity to put in place reasonable adjustments. He took no legal advice at this time.

16. In the summer of 2015, Ben Fennell-Jones informed the Claimant that Sky would be in contact to assess what adaptations could be made for the Claimant. At some point later that year the Claimant recalls receiving an update which did not work to enable the Claimant to use the system.

17. During such time, the Claimant says that First Source did nothing as they were reliant on Sky providing adaptive software or updating STAN to enable him to use the system.

18. He continued in the coaching role with infrequent updates on alternative software; in around late 2016 and again in early 2017 only. No adaptions were found to work with the STAN system that could be put in place. The Claimant was told by FirstSource that Sky needed to make any changes.

19. The Claimant over the years tells me that he had also repeatedly questioned why he was no longer receiving bonus and incentivization but by 2017 he had stopped querying. In around 2018, the Claimant was informed by another colleague, a Chris King, who also had a visual impairment, that he was receiving an incentive based on an average amount as he was unable to undertake his role due to a hardware issue. The Claimant queried this with Paul Cavil and was again told that he would not receive such incentivization, that the two positions were not comparable as the Claimant's was a software issue and not a hardware issue. The Claimant did not seek advice at that time. His primary concern was his job security.

20. In around 2018, the Claimant's line management changed and for around 6 months he reported to a Dilu Udding, before reporting to Aaron Cook, line management which continued up to the TUPE transfer in the July of 2019.

21. At the beginning of 2019, the Claimant became aware of the impending TUPE transfer and took advice from a solicitor in Caerphilly who advised of the transfer of rights and liabilities under TUPE. The Claimant was advised that if the system was not 'put right' after the TUPE transfer, that he should raise an informal grievance and 'see what happens'.

22. He took no other steps and he tells me that was not advised of time limits for bringing a claim, although I accepted this evidence I did find that it was more likely than not that he was advised of an ability to bring a claim - his evidence was that the solicitors did give him some information regarding costs of litigation.

23. The Claimant was optimistic that STAN system would be updated on the TUPE transfer and that software would enable the Claimant to then read the screen and undertake again the customer services advisor role. On the TUPE transfer, it was

immediately apparent that there was no change. At this time, the Claimant's line management changed to a Nicola Latte, who again raised the concern with IT.

24. The Claimant tells me that both Aaron Cook and Nicola Latte remain in the Claimant's employment.

25. Whilst updates on adjustments were provided over the months, including the possibility of an independent company to support with software in the autumn of 2019, the Claimant says none materialized.

26. In August 2019, the Claimant was referred to occupational health [100]. This was the first time that the Claimant had been referred to occupational health since January 2015. He was again referred in October 2019 [89]. On both occasions it was reported that he was fit for work but unable to perform full duties due to the ongoing IT issues

27. It appears undisputed that from January 2015 to April 2020, the Claimant continued in undertaking the alternative coaching duties, and throughout that time was not paid any bonus and incentivization packages. It also appears undisputed that throughout this time, albeit sporadically, FirstSource and subsequently the Respondent reverted to the Claimant regarding possible adjustments by way of assistive software although at no point were any provided that did enable the Claimant to use the system.

28. On 7 April 2020, the Claimant was sent home on full pay. Throughout 2020 the Claimant was referred to occupational health and on 29 October 2020 the Claimant raised a formal grievance regarding adjustments and losing out on bonuses and incentives, a copy of which was not included in the Bundle.

29. It is an agreed fact that the Claimant did not receive an outcome to that grievance until 26 October 2021 and despite the Claimant appealing that outcome, the Claimant did not receive an outcome to that grievance appeal until

    19 July 2023, nearly two years later. The Claimant has not returned to work since April 2020 and has been provided with no alternative work. He continues to receive full pay.

30. Whilst the Claimant's medical records were not included in the Bundle, he has provided such records to the Respondent as well as an impact statement and the Respondent has conceded that the Claimant is disabled by reason of anxiety and depression as well as RP.

31. The Claimant entered into a period of early conciliation with the Respondent on 21 August 2023 that ended on 2 October 2023 [1]. On 2 November 2023, the

Claimant filed his ET1 bringing claims of disability discrimination in respect of his employment as a Customer Service Advisor with the Respondent [2].

Law

Time limits s.123 Equality Act 2010 ("EqA 2010")

32. s. 123(1) EqA 2010 provides that a claim must be presented to the tribunal before the end of the period of three months starting with the date of the act to which the complaint relates.

33. The three-month time limit for bringing a discrimination claim is not absolute: employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so — S.123(1)(b) EqA 2010.

34. The above time limit is modified if there is a course of conduct extending of a period and the claim is brought within three months of that period: s. 123(3); or if the tribunal considers it just and equitable to extend time. Strike out

35. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

"*Striking out*

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..."

36. In terms of the relevant law I take into account, in particular,

    a. Choudhury J summary of the approach to strike out in **Malik v Birmingham City Council** UKEAT/0027/19 (para 29-32);

    b. paragraph 24, part of Lord Steyn's speech, of the House of Lords' decision in **Anynanwu v Southbank Student Union [2001] ICR 391;**

    c. paragraphs 29 to 32 of the Court of Appeal's decision in **North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330**.

37. I reminded myself that the power to strike out discrimination claims should only be exercised in rare circumstances and not where the central facts are in dispute.

38. The unreported case of **E v X, Land Z** UKEAT/0079/20, which considered the striking out of a claim in the context of an argument that the conduct complained of constituted 'conduct extending over a period' and the guidance in the judgment from Ellenbogen J was also considered, which referenced **Aziz v FDA** 2010 EWCA Civ 304 CA.

Submissions

39. Both parties had prepared written submissions which I incorporate, by way of reference, into these written reasons. The Respondent's written submissions included references to a number of authorities which were also considered. Both parties were also provided with the opportunity to provide oral submissions.

Conclusion

40. It is essential to determine the date on which the act of discrimination complained of took place. The claim form had been considered by both Judge Moore at the first case management preliminary hearing on 9 February 2024 and again by me at the second preliminary hearing on 12 April 2024. An agreed list of issues had been included in both, and it was the list of issues included in the case management order, updated with correct dates that was considered.

41. The Claimant brought claims, both arising from disability (s.15 EqA 2010) and failure to comply with the duty to make reasonable adjustments (s.20/21 EqA 2010) in relation to matters that had started in January 2015 with the introduction, by the Respondent's predecessor, FirstSource, of a new customer interface system and the subsequent removal of the Claimant from its bonus and incentivization scheme.

42. The Claimant claimed that from January 2015, on the implementation of the new computer system, he has not been able to undertake his role and had suffered a disadvantage not least from not being able to undertake his role and/or be paid the bonus and incentivization. He has claimed that no adjustments at all have been put in place since January 2015 that enabled him to return. The first referral to occupational health appears not to have taken place until four and a half years' later in August 2019. The Claimant has been sent home since 2020 and has been provided with no work or ability to return to work since then. He has waited 3 years for his grievance, brought in October 2020 in respect of lack of adjustments and losing out on bonuses and incentives.

43. The focus of my initial deliberation was on whether there was continuing discrimination extending over a period of time or a series of distinct acts formed part of an act extending over a period. I considered the House of Lords decision in **Barclays Bank plc v Kapur and ors** 1991 ICR 2018 HL, noting that there is a distinction between a continuing act and an act that has continuing

consequences which held that where an employer operates a discriminatory regime, practice or principle, then such a practice will amount to an act extending over a period.

44. I also considered the CA's judgment in **Hendricks** (as approved by the CA in **Lyfar** and **Aziz,**) that made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to ' continuing acts' and that the focus should be on the substance of the Claimant's allegations as opposed to an existence of a policy or regime.

45. I considered whether the substance of the Claimant's allegation was that the Respondent was responsible for an ongoing or continuing state of. At this summary stage, the test is whether or not that contention is reasonably arguable and if it is not, the relevant allegations can be struck out. If it is, the question of time limits and continuing acts is not definitively resolved but is deferred to the final hearing (**E v X, L and Z**).

46. Whilst I note that the Claimant has not expressly pleaded a continuous act, he is a litigant in person and it is sufficiently clear to me from the original ET1 claim form that the Claimant considers this to be an ongoing state of affairs.

S.15 EqA 2010 Complaints

47. Whilst I accept that the introduction of the new customer interface system, which could not be used by the Claimant (§3.1.1 List of Issues,) could reasonably be viewed in isolation, as a one off act that had continuing consequences, I did not conclude that the same could be said about the complaint of:

    a. failure to take appropriate advice and/or ignore the Claimant's suggested referrals to the RNIB/Access (§3.1.2); or

    b. the removal from the bonus and incentive scheme and (§3.1.3).

48. It does appear that the Claimant was referred to occupational health at some point in 2020, but had not been referred at all prior to that date or indeed after. Additionally, I did not conclude that the complaint that, on an ongoing basis there was a failure to keep in touch with the Claimant, refer him to occupational health

or undertake welfare checks (§3.6.1) could only be reasonably be interpreted being only limited to that period after the Claimant had been sent home in April 2020.

49. Whilst I accept that the Claimant has identified dates of the specific acts complained of (§3.1.4/ 5 and §3.1.7-9,) and that it is accepted that the Claimant's line management over the years did change, I was not persuaded that this was significant at this preliminary stage as whilst relevant, it is not conclusive (**Aziz**).

50. I did not accept that on a reasonable interpretation of the claim, that the complaint at §3.1.8, in relation to the failure to address the Claimant's grievance in a timely manner, ended on the conclusion of the first stage of the grievance on 26 October 2021. Rather, taking into account the respondent took a further two years to resolve the appeal brought by the Claimant in relation to that grievance, a more reasonable interpretation of that would be that the 'grievance' included all internal grievance stages. In this case the outcome of the Claimant's grievance appeal which was not communicated until around 19 July 2023, a date that was 'in time'.

51. I concluded that it was reasonably arguable that the Respondent was responsible for an ongoing situation or continuing state of affairs in which all alleged discrimination formed part of an act extending over a period, rather than a series of one off acts. I decline to strike out the s.15 EqA 2010 complaints. The appropriate course is for the Tribunal to decide at the final hearing whether or not the claim was presented within the applicable time limit.

S.26 EqA 2010 Complaints

52. Whilst the time limits set out in the Equality Act 2010 can give rise to problems for claimants being able to comply with inadvertent failure to make reasonable adjustments, the Court of Appeal in:

    a. **Abertawe Bro Morgannwg University Health Board v Morgan** 2018 ICR 1194 CA noted that employment tribunals have the 'widest possible discretion' under s.123(1)(b) EqA 2010 to allow discrimination to be brought within such period as they think just and equitable; and in

    b. **Kingston upon Hull City Council v Matuszowicz** 2009 ICR 1170 CA stressed that the power to extend time should be considered in situations where "*the employer were to seek to lull the employee into a false sense of security by professing to continue to consider what adjustments it ought reasonably to make, at a time long after the moment has arrived.. when the employee is entitled to make a claim and time has started to run"*.

53. It appeared to me that both the current respondent and the previous employer, FirstSource, had committed to putting in place adjustments to accommodate the Claimant's disability over a period of years. This was likely to be a factor in determining whether time should be extended even if it were accepted that time had been triggered in relation to the specific PCPs at dates well before 22 May 2023.

54. Whilst brief live evidence was taken from the Claimant during this hearing, not just in terms of what he was told regarding adjustments, but also the state of his mental health at various times throughout his employment, the Bundle did not include the Claimant's medical records or impact statement that had been

provided to the Respondent in compliance with the disability directions that had been given.

55. I remind myself that the Claimant's case must ordinarily be taken at its highest and I should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts. Albeit a considerable number of years have passed, the Claimant's disability, not just in relation to his vision but also in relation to his mental health, is an additional factor to be taken into account when considering any application to extend time. This was not a clear case that the Claimant had no reasonable prospect of demonstrating that time would not be extended in his reasonable adjustments claims (or, for the avoidance of doubt, s.15 EqA 2010 claims).

56. I therefore decline to strike out the Claimant's claims of failure to make a reasonable adjustment under s.20/21 EqA 2010 reasonable adjustment. Again, the appropriate course is for the Tribunal to decide at the final hearing whether or not the complaints were presented within the applicable time limit or, if it was just and equitable to extend time having heard the totality of the evidence.

Employment Judge Brace
24 May 2024

Judgment sent to the parties on:

……
For the Tribunal:

……