



EMPLOYMENT TRIBUNALS

Claimants: (1) Eiman Hussein
(2) Maya Mukamel
(3) Malgorzata Monika Milewicz
(4) Jane Hunt
(5) Cathy Lasher

Respondent: The Metanoia Institute

Heard at: London Central (in public; CVP)

On: 13 and 14 May 2024

Before: Tribunal Judge Peer acting as an Employment Judge

Representation:

Claimants: Mrs Sibon Phiri-Twaibu & Ms Abiola Onibonoje of United Legal Access

Respondent: Mr. Gareth Price of Counsel instructed by DAS Law

JUDGMENT having been sent to the parties on 15 May 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, 2013, the following written reasons are provided:

REASONS

INTRODUCTION

1. These proceedings concern 5 claimants; their claims were consolidated by order of Employment Judge JS Burns at a preliminary hearing on 14 March 2024 given the similar underlying factual matrix. EJ Burns ordered the claimants to serve further particulars of claim by 11 April 2024 and listed the required particulars in respect of each claimant in individual schedules. EJ JS Burns also made case management orders to prepare the case for an

open preliminary hearing and listed the proceedings for a two day open preliminary hearing on 13 and 14 May 2024 to consider:

- (1) whether or not the claims have been brought in time;
 - (2) whether or not to make an order striking out the claims on the grounds that they have been brought out of time,
 - (3) whether or not to make an order striking out any claims on the grounds that they have no reasonable prospect of success;
 - (4) whether or not to make an order striking out any claims on the grounds that the Claimants or any of them have failed to comply with the above order that they should provide further particulars of their claims
 - (5) whether or not to make an order requiring the Claimants or any of them to pay a deposit or deposits not exceeding £1000 per claim as a condition of permitting them/her to continue with any claim, on the grounds that it has little reasonable prospect of success.
2. The respondent, the Metanoia Institute, is a provider of higher education and training programmes in psychological therapies. The claimants all worked for the respondent in various capacities and resigned from their employment during 2023.
 3. The claimants do not bring identical claims but their claims concern a similar factual matrix. The factual matrix is the claimants' concerns about racism in their workplace and failures to address their concerns by senior management. As the respondent is a provider of education and training, the concerns of staff related both to experiences of staff and students.
 4. The complaints brought include primarily complaints of constructive unfair dismissal and detriment due to whistleblowing together with discrimination claims.

HEARING

5. The hearing before me was a two day public preliminary hearing and took place via CVP. There was no objection to the hearing proceeding as a remote hearing and the hearing proceeded effectively as a remote hearing.
6. It is relevant to note that in presenting their claims and participating in the proceedings at the preliminary hearing on 14 March 2024 the claimants acted as litigants in person. Thereafter they instructed legal representation. Ms Abiola Onibonoje and Ms Sibon Phiri-Twosibu of UnitedLegalAccess.com appear before me on behalf of the claimants. The respondent was represented by Mr Price of Counsel instructed by DAS Law.
7. The hearing was attended by all claimants save for the first claimant.
8. On 13 May 2024, the first claimant applied for the hearing to be postponed on medical grounds. The respondent did not object to postponement of the hearing in so far as it concerned the first claimant. There was no objection

from those instructed on behalf of the claimants to proceeding in relation to the other claimants. I do not need to rehearse the details of the first claimant's circumstances here. I granted the application and postponed in relation to the first claimant and directed that evidence of the medical grounds for postponement and in particular prognosis as to when the first claimant will be fit to participate in a hearing be provided within 14 days.

9. I had before me a 671 page hearing bundle (HB) prepared by the respondent. The respondent also provided a suggested agenda and a position statement. There were additional documents provided during the course of the hearing including a particulars of claim document from the second claimant, screenshot of email dated 13 March 2024 sending a claimant's hearing bundle to the tribunal for the preliminary hearing on 14 March 2024 and a copy of that bundle. A copy of the bundle used by the respondent at the preliminary hearing was also accessible to me on the tribunal file.
10. I also had before me written statements prepared by each of the claimants.
11. I intend no discourtesy to any of those who took part in the hearing in not referring to them at all times by their personal names and/or titles. I will refer to the claimants or respondent or second claimant (Mukamel) third claimant (Milewicz) fourth claimant (Hunt) fifth claimant (Lasher) as appropriate for ease of reference.
12. I heard oral evidence from the second, third, fourth and fifth claimants.
13. I heard submissions on behalf of the respondent from Mr Price.
14. I heard submissions on behalf of the second and third claimants from Ms Phiri and on behalf of the third and fourth claimants from Ms Onobonje.
15. I will not rehearse the evidence or submissions heard but will refer to the evidence given and submissions made as relevant when setting out my reasons and decisions.

ISSUES FOR DETERMINATION

16. As discussed, and agreed with the parties at the hearing, the issues before me for determination are as follows:
 - whether to grant permission for the second claimant to amend her claim to include a claim of victimisation;
 - whether to grant permission for the third claimant to amend her claim to include a claim of constructive unfair dismissal;
 - whether any claims should be struck out on the basis that they are not brought within applicable time limits and discretion is not exercised to extend time

- whether any claims have no or little reasonable prospect of success and should be struck out or deposit orders made on that basis.

17. I am grateful to the representatives who appeared before me for their preparation and focus.

LEGAL FRAMEWORK

Time limits: Unfair Dismissal

18. A claim for unfair dismissal whether it is ordinary unfair dismissal or dismissal due to the making of a protected disclosure must be brought within the time limit laid down by statute in order for the tribunal to have jurisdiction to consider the claim. Section 111(2) of the Employment Rights Act 1996 (“the Act”) provides:

“Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal-

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”

19. Section 48(3) of the Act provides that for claims of detriment on the grounds of protected disclosure:

“(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”

20. In **Porter v Bandridge [1978] ICR 943, CA**, the Court of Appeal ruled that the claimant has the burden of showing precisely why it was that it was not reasonably practicable to present their claims in time. The court also noted that whilst ‘judicial glosses’ on the statutory test were designed to assist the first instance tribunal they must not become substitutes for the statutory test.

21. In **Palmer v Southend-on-Sea Borough Council [1984] ICR 372, CA**, the Court of Appeal explained the scope of the test as follows: *and to ask colloquially and untrammelled by too much legal logic – “was it reasonably feasible to present the complaint to the industrial tribunal within the relevant three months?” – is the best approach to the correct application of the relevant subsection.”*

Time limits: Discrimination

22. Section 123 Equality Act 2010 provides that discrimination claims:

- (1) ...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)(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 upon it.
- (4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

23. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA** provides 'cannot hear a complaint unless applicant convinces it that it is just and equitable to extend time ...exception rather than the rule' although in **Jones v Secretary of State for Health and Social Care 2024 EAT 2**, His Honour Judge James Tayler reviewed the authorities and emphasised the broad nature of the discretion and that all relevant factors needed to be considered and balanced.

24. **Miller and ors v Ministry of Justice and ors and another EAT 0003/15** sets out the principles referring to the broad discretion and the need to consider all the circumstances including the reasons for the delay, the cogency of evidence, the promptness with which a person acted when knew facts giving rise to cause of action and any advice received.

No reasonable prospects of success

25. In relation to strike out on the ground at Rule 37(1)(a) that a claim or response has no reasonable prospect of success, the test is not whether the claim or response is likely to fail and the tribunal must be able to properly conclude that the claim or response has no reasonable prospect of success on consideration of the available material. The facts relied on by the claimant (or indeed a respondent) must be taken at their highest and where there are conflicts of fact, a tribunal must be cautious to strike out at the preliminary stage.

26. In appropriate cases, strike outs can minimise the anxiety, expense and time inherent in taking claims to trial, **Abertawe Bro Morgannwg University Health Board v Ferguson** 2013 ICR 1108, EAT.

27. In **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL** the House of Lords emphasised that discrimination claims should not be struck out save in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

28. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126, CA**, the Court of Appeal referred to protected disclosure cases as requiring a similar approach to discrimination cases and that when the central facts are in dispute, it will be an exceptional case where strike out is appropriate.

APPLICATIONS TO AMEND

29. Having heard an application from the second claimant to amend her claim to include a complaint of victimisation and from the third claimant to amend her claim to include a complaint of constructive unfair dismissal, I decided not to exercise discretion to permit the amendments sought and gave reasoned orders refusing those applications at the hearing on 14 May 2024. The parties were sent my Record and Case Management Orders containing those orders and accompanying reasons.

WITHDRAWAL BY THIRD CLAIMANT

30. The third claimant told the tribunal that the pension contributions she had complained about had been paid. The third claimant withdrew that complaint. There was therefore no need to discuss or consider the extent to which the tribunal had jurisdiction to consider that complaint. The third claimant's complaint related to pension contributions was dismissed upon withdrawal.

RESPONDENT'S STRIKE OUT APPLICATIONS

Third claimant's victimisation claim

31. The third claimant started working for the respondent on 10 October 2016. On 21 July 2023 she resigned. Her employment ended on 20 October 2023 when her notice period expired. Early conciliation commenced on 5 October 2023 and ended on 10 November 2023. The third claimant's claim for was presented on 8 December 2023 and included complaints of victimisation and detriment caused by whistleblowing.

32. The respondent submits that the third claimant's victimisation claim is bound to fail and should be struck out as having no reasonable prospects of success. The respondent submitted that even taking the facts pleaded at their highest as required, the second and fourth protected acts relied on by the claimant as set out in her further particulars of claim (HB346-348) at paragraphs 11 and 14 could not be considered as 'protected acts' under the Equality Act 2010.

33. Paragraph 11 of the further particulars of claim does not set out at any point any acts or words spoken by the third claimant and in so far as it identifies any interaction of the third claimant it refers to her attending a meeting on 19 May 2023 at which events at a training day were reported. Paragraph 14 refers to emails sent by the third claimant in response to an email of 15 June 2023 asking if she had intended to include an external on an email she had

sent. In paragraph 14 the third claimant writes that in her emails (the dates and times are not specified but the emails are in the HB from page 503 onwards) she refers to 'I clarified that it was not my intention to include anyone external. In subsequent emails, I reiterated that the inclusion of the external examiner was not intentional' and 'I asked whether the member of staff who initiated two other threads was also being investigated.'

34. A protected act is defined at section 27 of the Equality Act 2010. There is no discernible basis as to how what is relied upon and set out in writing by the third claimant as her second and fourth protected acts amount to 'protected acts' as defined at section 27 Equality Act 2010. Section 27(2) lists as 'protected acts' four actions. At the relevant point in time, the third claimant had not brought proceedings under the Equality Act or given evidence in connection with proceedings under the Equality Act. In so far as she relies on 'doing any other thing for the purposes of or in connection with this Act' or 'making an allegation (whether or not express) that A or another person has contravened this Act' it is entirely unclear how this is the case when considering what is written at paragraphs 11 and 14 of the third claimant's further particulars of claim. Although 'doing something' is to be given a wide interpretation, I have concluded that paragraph 11 does not disclose any action by the third claimant. Although an allegation need not be express, there does need to be words which can be regarded as related to and complaining about contravention of the Equality Act. I have concluded that paragraph 14 and the information pertaining to the sending of emails to externals cannot be sensibly construed as a protected act.
35. In circumstances where the allegations are of detriment due to the second and fourth protected acts and the further particulars of claim do not provide particulars that can possibly be construed as protected acts there cannot possibly be any causal link established and such allegations have no reasonable prospects of success. Accordingly, I decided to strike out the third claimant's complaints of detriment due to the making of the alleged second and fourth protected acts under Rule 37(1)(a) because they have no reasonable prospects of success.

Fourth claimant's victimisation claim

36. The fourth claimant started work with the respondent on 1 September 2019. The fourth claimant worked as a part time Senior Lecturer in Counselling. She resigned on 31 May 2023. Her employment ended when her notice period expired on 31 August 2023. EC notification is understood to have been on 16 November 2023 with the claim being presented on 25 January 2024.
37. On the evidence presented by the fourth claimant which I accept, I find that the fourth claimant did not attend the workplace during periods of sick leave between 17 March to 1 May and 7 June to 31 July 2023. I further find that she was on annual leave in August until her contract terminated. In oral

evidence, the fourth claimant said that she contacted ACAS in late October/early November.

38. The fourth claimant's particulars of claim document sets out that she brings claims of unfair dismissal, victimisation and detriment due to whistleblowing.
39. The respondent submits that the claim for victimisation as particularised in the further particulars of claim is out of time as the last act complained of was in June 2023 and as such any claim needed to be presented by 29 September 2023 and there is no basis to exercise just and equitable discretion to extend time for the complaint to proceed. The fourth claimant accepts that the claim is out of time in circumstances where the last act of detriment complained of is in June 2023 but requests an exercise of discretion on a just and equitable basis to permit the complaint to proceed.
40. During oral evidence, the fourth claimant explained that she had not presented her complaint at the time or during the period June 2023 to January 2024 because of poor health. She said that she had not understood the import of EJ JS Burns' case management order that any witness statement needed to explain why it would be just and equitable to extend time. The fourth claimant has legal representation and in submissions made on her behalf an apology was extended to the tribunal for failing to recognise that any explanation as to why it would be just and equitable to extend time ought to have been included in her written statement.
41. Whilst the apology is noted, the fourth claimant has not adduced evidence to demonstrate that she was in poor health during the whole of the relevant period. The fourth claimant was open that during August 2023 she was not on sick leave but on annual leave until her notice period expired and I have found that to be the case. There is no evidence available that explains what the fourth claimant was doing in the period between September and her contact to ACAS in November with the claim being presented in January 2024 being then some four months out of time.
42. The fourth claimant invites the tribunal to consider that the period of four months is a period for which it is just and equitable to extend time. That is such further period of time which exceeds the original 3 month time period laid down in statute within which all claims of discrimination are expected to be presented. I have limited evidence as to the circumstances and why it took such further period of time to present the claim on which to exercise my discretion.
43. The respondent submits that there is prejudice if the claim proceeds. The fourth claimant gave oral evidence that much of what she alleged was not the subject of any documentary evidence. There is likely to be some forensic prejudice to the respondent in defending the claim and indeed the fourth claimant is likely to face some difficulty in presenting her claim bearing in mind the standard and burden of proof provisions which will apply when the evidence is primarily the recollections of those involved in the events which

took place prior to June 2023 when work to prepare grounds of resistance and witness evidence can only begin in late May/June 2024 if the claim proceeds with trial not likely to take place until 2025. The necessary findings on the evidence will be based primarily on oral testimony in the absence of documents. I have also taken account of the fact that the fourth claimant also advances a whistleblowing claim which relies on the same alleged detriments.

44. The fourth claimant's victimisation claim was not presented within the applicable time limit. I concluded that an exercise of discretion to extend time is not warranted. Accordingly, the claim is dismissed.

Fourth claimant's whistleblowing claim

45. The respondent submits that the fourth claimant's whistleblowing claim is bound to fail on the basis that the fourth claimant has made no allegations of detriment due to whistleblowing.

46. Paragraph 21 under the 'Whistleblowing' heading starts 'I believe I made the following protected disclosures' and refers to disclosures in January 2023 and on 2 May 2023 when she returned to work. Paragraph 22 starts 'as result' and refers to the fourth claimant becoming unwell and resigning due to her role as an ally to Black staff and the unreasonable workload. She was on sick leave until 31 July 2023 and her employment ended on 31 August 2023. In oral evidence, the fourth claimant said that detriments alleged are also the same as those alleged in relation to her victimisation claim set out at paragraph 20 (a) to (h) of the further particulars of claim notwithstanding that she does not set this out in writing anywhere on that document. There is no real explanation provided as to why this is the case. The submission was made that the further particulars of claim at paragraph 20(a) to (h) highlighted the detriments as a result of the disclosures made. The only way in which this can be understood is due to the fourth claimant's oral evidence given at the hearing.

47. Adopting a formal and technical approach, I would consider that the failure to properly and clearly plead particulars of all the alleged detriments as due to whistleblowing does result in the conclusion that the claim is bound to fail. The hearing has however clarified the fourth claimant's position and in all the circumstances, I have concluded it would be draconian bearing in mind the case law I refer to above to strike out the whistleblowing claim at this stage on the basis it has no reasonable prospects of success.

Fifth claimant's claims

48. The fifth claimant started working for the respondent on 1 June 2012. She was working full-time as a Director of Studies – Humanistic when she resigned on 31 May 2023. Her employment ended on 31 August 2023 on expiry of her notice period.

49. I find that she was signed off work in April 2023 for reasons of work related stress and did not return to work until her employment ended although she tried to do so based on her oral evidence which I accepted. I also find based on the oral evidence given that the fifth claimant commenced employment on 1 September 2023 with a new employer.
50. The fifth claimant's further particulars of claim document sets out that she brings claims of constructive dismissal, detriment due to whistleblowing, direct religion discrimination and victimisation as a result of raising issues of race discrimination.
51. The respondent's position is that the fifth claimant's claims of direct religion discrimination and victimisation are out of time. In relation to the direct discrimination claim, the last act relied upon relates to October 2022 although it was clarified in oral evidence that there was an allegation relating to events in February 2023. In oral evidence, the fifth claimant struggled to recollect details of the alleged incidents and who was involved. In relation to the victimisation claim, the last detriment complained of is 29 June 2023 at a graduation day at which the fifth claimant alleges she was made to feel alienated and unwelcome. In oral evidence, she was able to name three people who allegedly did not acknowledge her on the graduation day. The respondent submits that these claims ought to have been presented by the end of September 2023.
52. The respondent also submits that even with the further particulars of claim document the allegations of protected acts are not particularised. In oral evidence, the fifth claimant explained that she was a member of the Equality Diversity and Inclusion (EDI) Committee from the academic year 2020/21 until her employment ended and would bring up issues at every meeting. The fifth claimant is therefore relying on multiple protected acts over a lengthy period of time which are yet to be fully particularised or set out with any precision at all.
53. Again, an apology was given for the failure to address any reasons as to why time should be extended on a just and equitable basis for presenting these claims. The fifth claimant accepts that they are presented out of time. There was no real reason advanced as to why time should be extended other than that the fifth claimant had been impacted due to her experiences in the workplace. I appreciate that the fifth claimant unlike the other claimants had worked for the respondent for a lengthy period of time and was no doubt grappling with her employment ending in the circumstances in which it did. However, the nature of tribunal claims is that claimants are presenting claims about difficult experiences which have impacted them often in grave ways and all are subject to the time limit provisions even if the just and equitable discretion is broad.
54. I note the evidence that the fifth claimant was fit to work on 1 September 2023 as she commenced new employment on that date. There is no detail in evidence as to her circumstances until she did present her claim out of

time in January 2024 some four months late. The tribunal is asked to infer that the impact on her was such that she was not in a position to file until four months later.

55. I have considered the balance of prejudice. I note the forensic prejudice to the respondent and that the factual circumstances in the fifth claimant's discrimination claims are somewhat different and will require the pursuit of some different lines of enquiry. The prejudice to the respondent is therefore of lengthier and more costly trial. I note the prejudice to the claimant in not being able to bring her discrimination claims in this context. The claimant's claims of constructive unfair dismissal and detriment due to whistleblowing will however proceed to trial.

56. The fifth claimant's complaints of direct religion discrimination, religion related harassment and victimisation were not presented within the applicable time limit and there was no basis on which to exercise my just and equitable discretion to extend time. Accordingly, those claims are dismissed.

SUMMARY

57. I therefore gave the following judgments:

- (1) The third claimant's claim for pension contributions is dismissed upon withdrawal.
- (2) The third claimant's victimisation complaints of detriment due to the alleged second and fourth protected act are struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.
- (3) The fourth claimant's complaint of victimisation was not presented within the applicable time limit. It is not just and equitable to extend time. the claim is therefore dismissed.
- (4) The fifth claimant's complaint of direct religious discrimination and religion related harassment was not presented within the applicable time limit. It is not just and equitable to extend time. the claim is therefore dismissed.
- (5) The fifth claimant's complaint of victimisation was not presented within the applicable time limit. It is not just and equitable to extend time. the claim is therefore dismissed.

Tribunal Judge Peer acting as an Employment Judge

Date 14 June 2024

**Case No: 2217082/2023;
2217084/2023;2217086/2023;
2200793/2024;2210502/2024**

JUDGMENT SENT TO THE PARTIES ON

19 June 2024

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FOR THE TRIBUNAL OFFICE

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