



EMPLOYMENT TRIBUNALS

Claimant: Ms M Rafiq

First Respondent: Crystal Care Solutions Ltd

Second Respondent: Rebecca Hilditch

Third Respondent: Nathan Simpson

Heard at: Manchester Employment Tribunal (in public and by cvp)

On: 13 June 2024

Before: Employment Judge Cookson (sitting alone)

Representatives

For the claimant: in person

For the respondent: Mr Wyeth (counsel)

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

It is the judgment of the Tribunal that:

1. The Claimant has no reasonable prospect of establishing:
 - a. that alleged discriminatory acts of the Third Respondent were part of a course of conduct over a period that ended after 14 June 2023; or
 - b. that it is just and equitable to extend the time limit for bringing complaints of discrimination in relation to those acts.
2. The complaints of discrimination in relation to those acts are therefore struck out under Employment Tribunal Rule 37(1)(a).
3. Whether the Claimant's complaints against the First Respondent and the Second Respondent about alleged discriminatory conduct which happened on or before 13 June 2023 were part of a course of conduct over a period that ended after 14 June 2023 or that it is just and equitable to extend the time limit for bringing complaints of discrimination in relation to all or any of those acts,

will be determined at the final hearing and those complaints will not be struck out.

REASONS

1. This was a public preliminary hearing to consider an application by the respondent to strike out because she has no reasonable prospect of persuading the tribunal that some of her complaints were brought in time or that it would be just and equitable to extend time.
2. The claimant worked as a residential children's worker for the first respondent. She was in employment at the time of the first claim but was subsequently dismissed and then submitted a second claim relating to her dismissal. The claims have been joined. However, this judgment on a preliminary issue relates only to certain complaints in the first claim.

Background

3. The claimant undertook ACAS early conciliation between 13 and 15 September 2023. Her first claim was issued on 10 October 2023. Anything which happened before 14 June 2023 is potentially out of time unless it was part of conduct continuing over a period of time ending after that date or it is found to be just and equitable to extend time.
4. The claimant is Muslim. Although her claim form does not expressly refer to her race, ethnic origin or nationality, she referred to herself as being part of the Pakistani community when she explained her complaint to me.
5. The respondent is a specialist independent social care organisation that operates residential and supported living units for children, young people and young adults.
6. The claimant submitted a long narrative claim form. Some time has been spent identifying precisely what legal complaints have been brought. A number of claims have been withdrawn. This judgment deals only with the remaining claims.
7. The first claim form, as amended, with which this judgment is concerned, raises complaints of race, sex and religious belief discrimination including harassment. Some of the complaint relates to matters which happened before 14 June 2023. As well as complaints against former employer, the first respondent, she brings complaints against two individuals, Mr Simpson who was a colleague and peer, and Ms Hilditch who was her immediate manager. In particular all allegations against Mr Simpson relate to things which happened before 14 June. Most but not all of the individual complaints about Ms Hilditch relate to the time before 14 June.
8. The second claim relates only to issues arising out of the disciplinary process and the claimant's dismissal, including allegations of discrimination and all allegations in that claim were submitted in time. That claim is proceeding against the first respondent only.

9. A significant background to this case is that many of the claimant's complaints arise from her interactions with a child, WB, who was being looked after by the first respondent. WB is Muslim. There are disputed allegations and counter allegations about the extent to which the respondent supported WB or the claimant acted inappropriately, for example with the claimant alleging that WB had been fed non-halal food, and counter allegations suggestions the claimant had sought to place improper pressure on the child in terms of their religious observance, for example in terms of clothing choices. This had ultimately led to the involvement of the Local Authority Designated Officer (the LADO) in light of safeguarding concerns about the claimant's conduct and to the claimant's dismissal.
10. However the focus of the strike out application and for a deposit order applications relate to complaints in the first claim which do not concern WB except to the very limited extent that one of the complaints relates to the claimant's suspension in June for reasons arising out of her interactions with WB. Most the complaints instead concern the relationship between the claimant and colleagues against whom she made allegations of sex and religious belief discrimination in her narrative claim form.
11. At this hearing the claimant also made an application to amend her first claim to include an allegation of race discrimination against the second respondent, Ms Hilditch which is alluded to, but insufficiently pleaded. Having heard submissions from the claimant and the respondent's counsel and for reasons given at the time, I determined that it was in accordance with the overriding objective to allow the claimant to amend her claim to include that complaint on the basis that time is not determinative in an application to amend and the inclusion of that claim would then be subject to the consideration of the strike out application which is the subject of this judgment (or in the alternative a deposit order).

The respondent's applications for strike out

12. In brief summary, Mr Wyeth argued that it is clear that the claimant's claims against Mr Simpson which relate to harassment on grounds of sex and religion or belief, these all date from before 14 June 2023 and are therefore out of time. He argued that they are not connected to later events and there is no reasonable prospect of the claimant showing that this was part of conduct extending over time or that it would be just and equitable to extend time in relation to those complaints.
13. In relation to the complaints against Ms Hilditch, Mr Wyeth makes the same submission. Although it is less clear that these claims are out of time, he argues that the claimant has failed to suggest why the harassment complaints about interactions between staff should be related to the later complaints which relate to concerns being raised about the claimant's behaviour towards WB which led to a safeguarding concern and her suspension (and later dismissal). Accordingly he argues that there is no reasonable prospect of the claimant

establishing that there was conduct extending over time applying the principles in **Hendricks** and **Aziz**, cases referred to in the legal section below.

14. In considering whether the claimant has any prospect of persuading a tribunal to extend time, in brief summary Mr Wyeth argued that apply the relevant test of whether it is just and equitable the tribunal should consider the following:
 - a. Mr Wyeth acknowledged that in determining the strike out application I must take the claimant's case at its highest, but he argues even doing that, the claimant fails to show that she has reasonable prospects of success. He argued that although the claimant makes allegations and assertions, she has failed to address how she says she will meet the burden of proof to show that her claims were brought in time. He also argued that the claims on their face have little or no prospect of success and invited me to apply the same approach as that adopted in **Kumari v Greater Manchester Mental Health NHS Foundation Trust**. He argued that the claimant's allegations of harassment claims are weak and disputed that the claimant suggested why the alleged harassment is connected to her religious beliefs.
 - b. Mr Wyeth argued that although the claimant has referred to health reasons as being the reason why complaints were not raised earlier, citing depression and isolation, she has not explained what evidence she would offer in support. Mr Wyeth also pointed to the fact that the claimant did not take time off work for sickness and had raised workplace grievances. On that basis Mr Wyeth argues that the claimant has failed to offer any meaningful explanation for the delay in bringing her claim, which means that she has no prospect of time being extending on this basis.
 - c. In applying the balance of prejudice, Mr Wyeth submitted that account must be taken of the difficulty the respondents face in defending complaints about things which happened in December 2022, especially as Ms Hilditch says she has no recollection of the meetings at which it is alleged she used the racially derogatory and very offensive word ("Paki").
15. Mr Wyeth acknowledged that in the alternative to striking out a claim I could make a deposit order on the basis these complaints have little reasonable prospect of success, and he suggested that tribunals will often be tempted to do this in circumstances such as this. However, he argued that it must be recognised that the claimant has told me (and it is not disputed) that she has little disposable income. In those circumstances he argued I must recognise that there is little meaningful prospect of the respondent's recovering costs if a deposit order is made and complied with and the claims are not eventually upheld, and he invited me to take a robust approach the reasonable prospect of success arguments.

The claimant's submissions

16. The claimant made brief submissions arguing that all of the treatment she was subject to is connected. She described herself as being treated as the weakest link by the staff in the care-home. She was the focus of the jokes and comments which she argues is a consequence of hostility towards her because of her race and her religion and which also manifested in Mr Simpson touching her even though she had made clear she found that very distressing. She argued that the hostility of her colleagues towards her because of her religion and race is connected to the reason the safeguarding concerns. I understand her case to be that hostility led to what she argues were unwarranted safeguarding concerns, notwithstanding the later involvement of the independent LADO.
17. The claimant has told me that it will her case that the safeguarding concerns were raised after she had raised concerns about discriminatory conduct directed towards her with Ms Hilditch. The claimant also argued that there is direct connection between what she says was derogatory comments made about her hijab matching the curtains, about comments made to her about pork, dogs and offering her mince pieces containing alcohol which led to her concerns raised with Ms Hilditch which she says all relate to her religion, and that led to the safeguarding concerns. The claimant says that that it will be her evidence that when she made what she referred to as disclosures about her colleagues, she would face consequences from Ms Hilditch. She alleges that her colleagues and Ms Hilditch were trying to get rid of her. The claimant told me the safeguarding concerns raised were Ms Hilditch "getting her own back". That is why she says there was continuing conduct.
18. The claimant argues that Mr Simpson was allowed to make comments about "blowing up Dubai" (because of its laws relating to gay people) which she would not have been able to make and she makes a connection between that comment and her religion. I understand the claimant to suggest that Mr Simpson was goading her.
19. The claimant says that the treatment caused her anxiety and made her unwell and that the respondent is aware of that. When she was suspended she had been extremely frightened by the suggestions that she had radicalised WB or sought to do so and feared the police being involved. She told me that she lived in fear of the police breaking her door down. The claimant says that her mental health is the reason why she did not submit her claim form. She has not identified to in precise terms the medical evidence she would produce in relation to that.
20. The claimant will also say that she thought that her claims were in time having misunderstood how the limitation periods would apply.

The law

Striking out

21. A claim or response (or part) can be struck out on the following grounds by an tribunal on a number of grounds including that it is scandalous or vexatious or has no reasonable prospect of success — rule 37(1)(a)

The exercise of the discretion to strike out.

22. Establishing one of the specified grounds on which a claim or response can be struck out is not of itself determinative of a strike-out application. Tribunals must take a two-stage approach. First the tribunal must first consider whether any of the grounds set out in rule 37(1)(a)–(e) have been established; and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out.
23. Rule 37 allows an employment judge to strike out a claim where one of the five grounds is established, but it does not require a judge to strike out a claim in those circumstances. In **Bahad v HSBC Bank plc** 2022 EAT 83 the EAT noted that in many cases it may be a ‘relatively short step’ from determining that a claim has no reasonable prospect of success — the ground for strike-out relied on in that case — to exercising the discretion to strike out.
24. In deciding whether to order strike-out, tribunals should have regard to the overriding objective of dealing with cases ‘fairly and justly’, set out in rule 2 of the Tribunal Rules. This includes, among other things, ensuring so far as practicable that the parties are on an equal footing, dealing with cases in ways that are proportionate to their complexity and importance, and avoiding delay. It has to be recognized that strike out is a severe sanction, given that fundamental rights and freedoms concerning access to justice are at stake.
25. In terms of striking out a claim (or apart of it) because it has no reasonable prospect of success, the test is not whether ‘on the balance of probabilities’ the claimant was unlikely to succeed in her claims. Instead, the question is the claimant has no reason prospect of success, in other words only a fanciful prospect of succeeding.
26. It is not for the tribunal to determine questions of fact in deciding a strike out application. The tribunal should take the claimant’s case at its highest, unless contradicted by plainly inconsistent documents, and care must be taken assessing a case from a litigant in person which may be badly or inadequately pleaded. If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate and a tribunal must carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it.
27. The strike out application in this instance relates not to an assertion that the claimant’s complaints have no reasonable prospect of success on their merits as such, but rather on the ground that the claimant has no reasonable prospect of persuading the tribunal that the acts complained were part of conduct continuing over time such that her complaint was brought in time or that it would be just and equitable to extend time.

28. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date of the act complained of, as this sets the time limit running. Where the act complained of is a single act of discrimination, this will not usually give rise to any problems. However the question of when the time limit starts to run is more difficult to determine where the complaint relates to a continuing act of discrimination, such as harassment, or to a discriminatory omission on the part of the employer, such as a failure to confer a benefit on the employee.
29. S.123(3) EqA makes special provision relating to the date of the act complained of in these situations. It states that:
- a. conduct extending over a period is to be treated as done at the end of that period — S.123(3)(a)
 - b. failure to do something is to be treated as occurring when the person in question decided on it — S.123(3)(b).

The meaning of conduct extending over a period of time

30. The starting point in understanding what is conduct extending over time is the case of **Barclays Bank plc v Kapur and ors** 1991 ICR 208, HL, which drew a distinction between a continuing act and an act that has continuing consequences. The House of Lords held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.
31. In **Commissioner of Police of the Metropolis v Hendricks** 2003 ICR 530, CA, the Court of Appeal 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' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. In that case the claimant, who was a female police officer, claimed that she had suffered sex and race discrimination throughout her 11 years' service with the police force. She made nearly 100 allegations of discrimination against some 50 colleagues. In determining whether she was out of time for bringing complaints in respect of these incidents, the EAT upheld an employment tribunal's ruling that no 'policy' of discrimination could be discerned and that there was, accordingly, no continuing act of discrimination. However, the Court of Appeal overturned the EAT's decision, holding that it had been side-tracked by the question whether a 'policy' could be discerned in this case. Instead, the focus should have been on the substance of the claimant's allegations that the Police Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the police force were treated less favourably. The question was whether that was an act extending over a period, as distinct from a succession of

unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

32. The correctness of this approach was confirmed by the Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548, CA. In that case L brought 17 complaints of race discrimination against the Trust concerning the way in which it had investigated complaints of bullying and harassment made against her by a colleague. The Court of Appeal upheld the tribunal's decision on the particular facts of the case but importantly in reaching its decision, the Court clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in **Hendricks**. Tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.
33. The Court of Appeal in **Aziz v FDA** 2010 EWCA Civ 304, CA found that in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.
34. In **Worcestershire Health and Care NHS Trust v Allen** 2024 EAT 40 the EAT observed that there is no requirement that the 'conduct' extending over a period for the purpose of S.123(3) must all relate to the same protected characteristic. The EAT could see nothing in the language of the relevant provisions that would prevent the entire course of the racist and sexist behaviour constituting conduct extending over a period for time limit purposes. There is also no reason why conduct extending over a period cannot involve a number of different types of prohibited conduct, such as a mixture of harassment and direct discrimination. It may be more difficult to establish that there has been discriminatory conduct extending over a period where the acts that are said to be linked relate to different protected characteristics and different types of prohibited conduct, but there was no absolute bar that prevents there being conduct extending over a period in such circumstances. However applying **Hendricks**, for there to be conduct extending over a period there must have been an ongoing situation or a continuing state of affairs that was discriminatory.

Preliminary hearings on time limits in discrimination cases

35. The principles which should be considered when jurisdictional time issues are considered by HHJ Ellenbogen J in **E v X, L & Z** UKEAT/0079/20/RN and UKEAT/0080/20/RN and previously by HHJ Auerbach in paragraphs 58-66 of **Caterham School Limited v Rose** [2019] UKEAT/0149/19. These paragraphs were quoted in paragraph 46 of **E v X**, albeit that Ellenbogen J disagreed with one point.
36. In essence there are two different types of public preliminary hearing about time limits. The first type is a determination of time limits as a preliminary issue under rule 53(1)(b). This will involve hearing evidence, making findings of fact and applying section 123 Equality Act 2010 to determine the issue once and for all. In general such a hearing may be appropriate where the only issue is

whether the claimant should be granted a just and equitable extension of time, since the evidence required is unlikely to overlap with the substantive evidence needed at the final hearing. However, if it is reasonably arguable that there was an act extending over a period, the tribunal must not determine that issue until it has heard all relevant evidence (**Aziz v. FDA** [2010] EWCA Civ 304). The evidence required to determine that is very likely to overlap with the evidence required at the final hearing.

37. The second type of hearing is consideration under rule 53(1)(c) of striking out under rule 37 on the basis that the claimant has no reasonable prospect of success in establishing that the claim (or relevant part of the claim) has been brought within time. Such consideration may be commonly combined with consideration of a deposit order under rule 39 as an alternative on the basis that the claimant's time limit contention has little reasonable prospect of success. This type of hearing is more likely to be appropriate for a continuing act argument than a just and equitable extension because rather than determine the issue the tribunal will consider is whether it is reasonably arguable that the alleged discrimination formed part of an act extending over a period. 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. Although such a hearing can sometimes be dealt with on the basis of the pleaded case alone or it may be appropriate in such strike out applications for the claimant to provide a witness statement and give oral evidence as part of demonstrating that he or she has a prima facie case on the point. It is unlikely, however, that evidence from the respondent will be needed.

Just and equitable extensions of time

38. Of course, in terms of deciding whether the claimant has a reasonable prospect of establishing that time should be extended it is essential to have regard to the case law on how that discretion must be exercised.
39. In **Abertawe Bro Morgannwg University Local Health v Morgan** [2018] EWCA CIV 640 Leggett LJ said this *"it 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 a list of factors to which the Tribunal is instructed to have regard, and they will be wrong in those circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list. 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 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. The position is to that where a Court or Tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under Section 7(5) of the Human Rights Act 1998.*

40. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 ICR D5, CA the Court of Appeal set out guidance on how to approach the application of the list of factors referred to in the **British Coal Corporation v Keeble** case. [1997] IRLR 336. In **Adedeji** the Court of Appeal cautioned that **Keeble** does no more than suggest that a comparison with S.33 might help 'illuminate' the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. The Court of Appeal emphasised that the "Keeble" factors should not be taken as the starting point for tribunals' approach to 'just and equitable' extensions and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, these may well include factors considered in Keeble – for example the length of, and the reasons for, the delay is always likely to be a relevant consideration but ultimately the question is what is just and equitable.
41. This means the exercise of the discretion to extend time because it is just and equitable to do so involves a multi factual approach, taking into account all the circumstances of the case in which no single factor is determinative of the starting point. In addition to the length of the delay, the extent to which the weight of evidence is likely to be affected by the delay, the merits, and the balance of prejudice; other factors which may be relevant include the promptness with which a claimant acted once he or she knew factors giving rise to the course of action and the steps taken by the claimant to obtain the appropriate legal advice once the possibility of taking action is known.
42. It is well known that in the judgment of the Court of Appeal in **Robertson -v- Bexley Community Centre** it was said that in relation to the exercise of discretion, '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 the discretion is the exception rather than the rule.' However I have also reminded myself that that does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. In the same judgment Lord Justice Auld said "The Tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision". The law does not require exceptional circumstances, it simply requires, that an extension of time should be just and equitable – **Pathan -v- London South Islamic Centre** EAT 0312/13. What the Robertson reminds tribunals is that if a party seeks the exercise of judicial discretion it is for them to show that the discretion should be exercised in their favour. In other words, the onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit and the extension must be justifiable.
43. In terms of relevant factors, as well as the length of delay and the reasons for it, other relevant factors will usually include the balance of prejudice between the claimant and the respondent. The prejudice to a claimant is perhaps obvious.

They are not able to pursue their complaint. In **Miller and ors v Ministry of Justice and ors and another** EAT 0003/15 Mrs Justice Elisabeth Laing set out five key points derived from case law on the 'just and equitable' discretion. In terms of the balance of prejudice, she explained that the prejudice that a respondent will suffer from facing a claim which would otherwise be time-barred is 'customarily' relevant. Elisabeth Laing J elaborated that there are two types of prejudice that a respondent may suffer if the limitation period is extended: (i) the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and (ii) the forensic prejudice that a respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

44. The EAT provided important further clarification on this issue in **Concentrix CVG Intelligent Contact Ltd v Obi** 2023 ICR 1, EAT. The employment tribunal found that the claimant had been sexually harassed by her line manager on three separate occasions. It went on to find that these three incidents amounted together to conduct extending over a period, and accordingly time for presenting a complaint to the tribunal in respect of all of them ran from the date of the last incident. Calculating limitation in that way, these complaints had been presented one day out of time. The tribunal decided it was just and equitable to extend time. The respondent appealed in respect of the decision to extend time. One of the grounds was that the tribunal had erred in its approach to the question of forensic prejudice to the respondent. This ground succeeded. The EAT found that the tribunal had erred by confining its consideration of that question to whether any such prejudice had been occasioned by the complaints being one day out of time, and by failing to take into account its own earlier findings about forensic prejudice when determining a complaint of racial harassment relating to one of the three incidents found to amount to sexual harassment (which was found to be a one off incident and the complaint about that had been submitted 4 months out of time).
45. The EAT in **Concentrix** also considered whether the tribunal's approach to extension of time must be 'all or nothing' in cases where a series of discrete discriminatory incidents are said to amount to conduct extending over a period, but which is still out of time,. HHJ Auerbach suggested that if the tribunal considers that issues of forensic prejudice render it not just and equitable to extend time in relation to the whole compendious course of conduct, the tribunal may then need to give further consideration to whether it is alternatively just and equitable to extend time in relation to the most recent incident in its own right, standing alone, on the basis that the same forensic difficulties might not arise, or arise so severely, in relation to it. The EAT emphasised, however, that the assessment of merits must have been properly reached by reference to identifiable factors that are apparent at the preliminary hearing, taking account of the fact that the tribunal does not have all the evidence before it, and is not at the stage conducting the trial. The EAT reasoned that, just as it is not an error to take 'real time' forensic prejudice into account, so, conversely, in a case where there may be an issue of such potential forensic prejudice if time were to be extended, the tribunal would err in principle if it failed to consider that aspect, as it would fail to take into account a relevant consideration.

46. Mr Wyeth in his submissions specifically draw my attention to the decision in **Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132, K**, a litigant in person, presented complaints of direct race discrimination and/or harassment to a tribunal that were all out of time. In reaching its decision not to extend time, the employment tribunal weighed in the balance its view that the merits of K's complaints appeared to be weak (although not so weak that they had no reasonable prospect of success). In the EAT's view, the exercise of the 'just and equitable' discretion to extend time involves consideration of a different question and the application of a different test, in different circumstances.

DISCUSSION AND CONCLUSIONS

47. This hearing had been listed to determine if the claimant had a no (or little) reasonable prospect of success in showing her discrimination complaints which relates to incidents before 14 June 2024 had been brought in time because the claimant had been subject to conduct extending over time or because it would be just and equitable to extend time.

48. I emphasise that because to some extent the submissions I had heard often seemed to concentrate more on the merits of the claims. Although merit is something that may be relevant in considering time, it is important to be clear that I was not deciding whether to strike out the complaints because they had no reasonable prospect of success. Nor was I deciding there was conduct extending over time or if I should exercise discretion and find it was just and equitable to extend time.

The claim against Mr Simpson

49. Looking at the complaints in question: In relation to the alleged discriminatory conduct by Mr Simpson none of his alleged discriminatory conduct towards the claimant happened on or after 14 June 2023.

50. The very last incident referred to by the claimant in relation to Mr Simpson is that on 13 June 2023, when she says that Mr Simpson told colleagues said "she's [referring to the claimant] been suspended, she's going to get investigated for radicalisation". It is not in dispute that the claimant was suspended in light of allegations about her conduct towards WB very shortly afterwards. The claimant does not allege that Mr Simpson took the decision to suspend her. She does not allege it was allegations he had made which led to her suspension. Her complaint is about the fact he told colleagues before the claimant had been told that she was being suspended, and what he said.

51. The other allegations made against Mr Simpson relate to things which happened around Christmas in December 2022 and earlier when the claimant says Mr Simpson encouraged her to eat mince pies knowing they contained alcohol, made comments about pork, pigs and dogs and made comments about Dubai, and things which happened in April 2023 and May 2023 when he had made comments suggesting that it looked like the claimant was carrying a

bomb and asking the claimant if she would accept a rainbow scarf from a child as a gift. The claimant also makes allegations that Mr Simpson had touched her knowing that as a Muslim woman she would not want to be touched by a man and despite her repeatedly saying she did not want to be touched.

52. The claimant is somewhat vague about her case against Mr Simpson as an individual. She says that the conduct is all connected because it was all related to her religion, but she has not explained in any meaningful way how the allegation of telling colleagues that the claimant was to be suspended is connected to the comments and touching. None of the complaints brought against Mr Simpson are brought in time.
53. The claimant also gave somewhat vague reasons for not bringing her complaints against Mr Simpson earlier. The claimant says that she was unwell but she has not explained what medical evidence she would present in support of that. The claimant was in work throughout this period. She was well enough to be in work. The claimant has not explained what evidence she says she would rely upon to explain what changed which meant she went from being too unwell to contact ACAS to being able to approach ACAS in September and lodge a claim in October. The claimant had previously raised internal grievances and she knew to contact ACAS before she issued proceedings before her dismissal. Although the claimant does not have to show that she was unable to lodge a claim or even give any reason for not acting earlier, the reasons for a claim not being brought in time are usually a relevant factor that a tribunal will have to consider in considering whether to exercise its judicial discretion and extend time for the complaints.
54. I accept Mr Wyeth's submission that in balancing the prejudice to Mr Simpson and the claimant it is relevant to take into account Mr Simpson is a former colleague of the claimant, employed at the same level as her. He was not a manager. He now faces serious allegations about his conduct a number of which have been brought many months after they are alleged to have happened. I accept there is a particular prejudice to him as an individual in facing those allegations outside the time limits set by Parliament and the claimant has failed to explain why in those circumstances she says that she will be able to show that the balance of prejudice should be found to fall in her favour, so that it would be just and equitable to extend time for her complaints.
55. The claimant has not explained to me how she says that the earlier comments made by Mr Simpson are connected to him telling other staff about her suspension.
56. When I consider how the tribunal at a final hearing would apply the provisions s123 of the Equality Act to determine jurisdiction, I accept Mr Wyeth's arguments that the tribunal would have to balance the prejudice to Mr Simpson of answering the out of time allegations and the prejudice to the claimant in not being able to pursue these complaints given and that taking into account how the claimant says she would argue her there is no reasonable prospect of the claimant persuading a tribunal to extend time because it is just and equitable to do so and in these circumstances her complaints against Mr Simpson should be struck out under Rule 37.

Ms Hilditch

57. Turning to the complaints against Ms Hilditch the first allegation is that Ms Hilditch had used the highly offensive word “Paki” while talking to the claimant about her conduct in December 2022 and that she made comments about the claimant’s hijab matching the curtains in April 2023. It is then alleged that the claimant’s suspension was a discriminatory act. Ms Hilditch was the suspending manager.
58. The claimant told me that she says that she was subject to conduct extending over a period of time by Ms Hilditch, because Ms Hilditch was hostile towards her after the claimant had challenged her about the conduct which the claimant says she was subject to within the care home. The claimant alleges that the subsequent suspension and disciplinary action is linked to that and Ms Hilditch’s perception of her religion.
59. Mr Wyeth argues that the claimant has done no more than make a series of allegations and that the claimant has failed to address what facts she will rely upon to show that she was subject to conduct extending over time in relation to these allegations. However, whilst it is true that the claimant did not seem to be well prepared to make submissions at this hearing, she has told me that she has evidence in an audio recording which evidence the hostility she faced and it clearly this is case where much will turn on witness testimony. The claimant told that me that it will be her evidence that Ms Hilditch raised the concerns about the claimant’s conduct towards WB as a result of the hostility and to get back at the claimant for raising the earlier concerns.
60. I accept that in terms of conduct extending time, there *may* be a connection between acts of hostility towards someone because of their Pakistani heritage and because they are Muslim which may mean there has been conduct extending over time. In other words there is potential connection between conduct related to different protected characteristics. I also accept there connection between ridiculing the claimant for wearing a hijab (which is what I understand is the essence of the “curtains comment”) and the claimant’s race and religion. That connection was disputed by the respondent. I accept that there may also be a risk between the subsequent disciplinary allegations about the claimant’s alleged risk to child WB given it is said that risk is related or connected to the claimant’s religious devotion and that being imposed on WB (which I understand the claimant disputes). It seems to me that these are allegations which require the evidence to be heard. In terms of the allegations of conduct extending over time against Ms Hilditch and the first respondent, I consider that these are issues which should be considered in light of all of the evidence at the final hearing. I am not persuaded that there is little or no prospect of the claimant persuading the tribunal that she was subject to conduct extending over time or that would be just and equitable to extend time.
61. To be clear to the claimant, I am not saying that I consider that she has a good prospect of showing that she was subject to conduct extending over time or that it would be just and equitable to extend time for any out of time complaints. She

will bear the burden of proof to show conduct extending over time and the burden to persuade a tribunal to exercise discretion for any complaints which are out of time. It is important that she recognises the significance of those burdens. Rather than saying I have decided that the claimant has a good case in relation to these matters, I have simply determined that she has a better than no or little reasonable prospect of success.

Employment Judge Cookson

DATE 16 August 2024

FOR THE TRIBUNAL OFFICE

DATE: 20 August 2024

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.

Sources of Guidance

Note: some of these may not be relevant to this case.

- (1) More information about Employment Tribunals can be found via <https://www.judiciary.uk/courts-and-tribunals/tribunals/employment-tribunal/employment-tribunal-england-wales/>, including a link to the [Employment tribunal procedure rules - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/employment-tribunal-procedure-rules)
- (2) Presidential Practice Directions and Guidance can be found at this link: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/, including guidance on case management, remote hearings, postponements, dispute resolution, compensation for injury to feelings, pension loss, and witnesses giving evidence from abroad by video
- (3) Further information, including copies of regional leaflets about sources of free advice, can be found here: <https://www.judiciary.uk/courts-and-tribunals/tribunals/employment-tribunal/employment-tribunal-england-wales/further-information/>
- (4) The parties may also find the following guidance helpful:
 - On the question of whether the claimant was a disabled person under the Equality Act 2010, the Tribunal will have regard to the Secretary of State's Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) available at <http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf>
 - In Equality Act cases Tribunals often have regard to the Equality and Human Rights Commission's Code of Practice on Employment available at <https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>
 - The Equal Treatment Bench Book is a guide to Courts and Tribunals on steps that can be taken to ensure a fair hearing. It is available at: <https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>
 - Ten short video guides produced by BPP Law School providing an overview of Employment Tribunal procedures, including what happens at a hearing, can be found here: <https://vimeo.com/user/71831050/folder/4038961>

Annex Complaints and Issues

DRAFT LIST OF ISSUES TO BE FINALISED

1. Time limits

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before **14 June 2023** (in relation to first claim) may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. ***Unfair dismissal – second claim not discussed at all at this hearing***

Dismissal

2.1 *It is not disputed the claimant was dismissed*

Reason

- 2.2 *Has the respondent shown the reason or principal reason for dismissal?*
- 2.3 *Was it a potentially fair reason under section 98 Employment Rights Act 1996? The respondent relies on the potential reason related to conduct.*
- 2.4 *If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*
 - 2.4.1 *The respondent genuinely believed the claimant had committed misconduct;*
 - 2.4.2 *there were reasonable grounds for that belief;*
 - 2.4.3 *at the time the belief was formed the respondent had carried out a reasonable investigation;*
 - 2.4.4 *the respondent followed a reasonably fair procedure;*
 - 2.4.5 *dismissal was within the band of reasonable responses.*

3. Remedy for unfair dismissal

- 3.1 *Does the claimant wish to be reinstated to their previous employment?*
- 3.2 *Does the claimant wish to be re-engaged to comparable employment or other suitable employment?*
- 3.3 *Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*
- 3.4 *Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*
- 3.5 *What should the terms of the re-engagement order be?*
- 3.6 *What basic award is payable to the claimant, if any?*
- 3.7 *Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*
- 3.8 *If there is a compensatory award, how much should it be? The Tribunal will decide:*
 - 3.8.1 *What financial losses has the dismissal caused the claimant?*
 - 3.8.2 *Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

- 3.8.3 *If not, for what period of loss should the claimant be compensated?*
- 3.8.4 *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*
- 3.8.5 *If so, should the claimant's compensation be reduced? By how much?*
- 3.8.6 *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*
- 3.8.7 *Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?*
- 3.8.8 *If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*
- 3.8.9 *If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?*
- 3.8.10 *If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*
- 3.8.11 *Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?*

4. Wrongful dismissal / Notice pay

- 4.1 *What was the claimant's notice period?*
- 4.2 *Was the claimant paid for that notice period?*
- 4.3 *If not, [can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?]*

5. Disability – the claimant has indicated she wants to amend her claim to bring complaints about disability discrimination but these have not been explained – not discussed at this hearing

- 5.1 *Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about [specify the relevant period]? The Tribunal will decide:*

- 5.1.1 *Did s/he have a physical or mental impairment: []?*
- 5.1.2 *Did it have a substantial adverse effect on his/her ability to carry out day-to-day activities?*
- 5.1.3 *If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*
- 5.1.4 *If so, would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?*
- 5.1.5 *Were the effects of the impairment long-term? The Tribunal will decide:*
 - 5.1.5.1 *did they last at least 12 months, or were they likely to last at least 12 months?*
 - 5.1.5.2 *if not, were they likely to recur?*

6. Harassment related to religion or belief (Equality Act 2010 section 26)

- 6.1 Did the respondent do the following alleged things:
 - 6.1.1 On 30 December 2022 N Simpson knowing telling the claimant mince pies were alcohol free to get her to eat them
 - 6.1.2 On 30 December 2022 N Simpson saying to the claimant that he would bring his dogs [to the home] the following day and “*pork chops and pig and stuff*”
 - 6.1.3 On 1 January 2022 N Simpson saying to the claimant he would not visit Dubai and would blow it up because they do not accept gay people
 - 6.1.4 On 5 April 2023 (during a visit to the Trafford Centre when the claimant was carrying WB’s medicines in a box) making a gesture about her exploding prompting a colleague to ask “*why can you joke about her carrying a bomb and I can’t*”
 - 6.1.5 On 28 April 2023 R Hilditch saying to the claimant “*are you going to change your scarf to match the curtains*”
 - 6.1.6 On 27 May 2023 N Simpson asking the claimant if she would accept a rainbow scarf and pressing her to say if she would accept it as a gift from a child
- 6.2 If so, was that unwanted conduct?
- 6.3 Was it related to the claimant’s religious belief?

6.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. **Direct religious belief discrimination (Equality Act 2010 section 13)**

7.1 The claimant is a Muslim.

7.2 What are the facts in relation to the following allegations:

7.2.1 N Simpson raising concerns about the claimant (see note below)

7.2.2 The claimant being suspended

7.2.3 The claimant being subject to a disciplinary investigation and subsequent process

Note: the claimant says these allegations were false – if the claimants says it is the fact they were false that is discriminatory she must say so

Does the claimant rely in the matters set out above as acts of direct discrimination because of her religious belief if they are not found to be harassment related to religious belief? If so who is the comparator

7.3 Did the claimant reasonably see the treatment as a detriment?

7.4 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances with a different religious belief. ***The claimant says she was treated worse than [names of comparators] or The claimant relies on a hypothetical comparison – claimant to confirm.***

7.5 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of her religious belief?

7.6 If so, has the respondent shown that there was no less favourable treatment because of religious belief ?

8. **Direct race discrimination (Equality Act 2010 section 13)**

8.1 The claimant is of Pakistani heritage.

8.2 What are the facts in relation to the following allegations:

8.2.1 On 30 December 2022 RH using the word “Paki” to the claimant (apparently in the context of challenging the claimant about something she had said and saying “well I couldn’t call you a Paki”)

8.3 Has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different race was or would have been treated? The claimant says she was treated worse than *[names of comparators and/or The claimant relies on a hypothetical comparison.*

8.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of race?

8.5 If so, has the respondent shown that there was no less favourable treatment because of race ?

9. **Harassment related to religion (Equality Act 2010 section 26)**

9.1 Did the respondent do the following things:

9.1.1 On 28 April 2023 R Hilditch make a comment about the claimant’s hijab not matching the new curtains

9.2 If so, was that unwanted conduct?

9.3 Did it relate to the claimant’s religious belief

9.4 Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

9.5 If not, did it have that effect? The Tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

10. **Harassment related to sex (Equality Act 2010 section 26)**

10.1 Did Nathan Simpson do the following things:

10.1.1 **[on claimant to be specific about date(s) but all seem to predate December 5 2022 – see page 50 in preliminary bundle]** touch the claimant despite her making clear that she did not want to be touched

10.2 If so, was that unwanted conduct?

10.3 Did it relate to sex?

10.4 Alternatively was it of a sexual nature?

Note the claimant refers to this as sexual harassment but she does not seem to suggest that it was sexual in nature although she was somewhat unclear. The claimant's objection seems to be based mainly on the fact that as a Muslim she objects to being touched by a man, but Mr Simpson refused to accept that – the claimant may wish to consider if this is in fact better framed as religious belief discrimination.

10.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

10.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

[Alternatively]

10.7 Was the unwanted conduct of a sexual nature or related to gender reassignment or sex?

10.8 Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

10.9 Did the respondent treat the claimant less favourably because the claimant rejected or submitted to the conduct?

10.10

11. *Discrimination arising from disability (Equality Act 2010 section 15)*

11.1 *Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?*

11.2 *If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:*

11.2.1 *[date and brief details including name of person responsible]*

11.3 *Did the following things arise in consequence of the claimant's disability:*

11.3.1 *[e.g. the claimant's sickness absence between date and date]?*

11.4 *Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things? / Did the respondent [e.g.] dismiss the claimant because of [e.g.] that sickness absence]?*

11.5 *If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?*

11.6 *If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:*

11.6.1 *[]*

11.7 *The Tribunal will decide in particular:*

11.7.1 *was the treatment an appropriate and reasonably necessary way to achieve those aims;*

11.7.2 *could something less discriminatory have been done instead;*

11.7.3 *how should the needs of the claimant and the respondent be balanced?*

12. Victimisation (Equality Act 2010 section 27)

12.1 Did the claimant do a protected act as follows:

12.1.1 PA1: On 5.12.22 inform Ms Hutchins that she had been sexually harassed by Mr Simpson

12.1.2 PA2: on 5/6.6.23 raise concerns [with Ms Hutchins] about child WB being given non halal meat to eat

12.1.3 *[the documents in the bundle refer to other occasions when C raised concerns – none were identified to EJ Cookson as protected acts – if any of them are relied upon those must be inserted by the claimant here in similar format to above]*

12.2 Did the respondent do the following things:

12.2.1 NS make allegations about the claimant (see query above)

12.2.2 Suspend the claimant

12.2.3 Subject the claimant to a disciplinary process

12.3 By doing so, did it subject the claimant to detriment?

12.4 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

12.5 If so, has the respondent shown that there was no contravention of section 27?

13. Remedy for discrimination or victimisation

13.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

13.2 What financial losses has the discrimination caused the claimant?

13.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

13.4 If not, for what period of loss should the claimant be compensated?

13.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

13.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

13.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

13.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

13.9 Did the respondent or the claimant unreasonably fail to comply with it by [*specify breach*]?

13.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

13.11 By what proportion, up to 25%?

13.12 Should interest be awarded? How much?