



THE EMPLOYMENT TRIBUNAL

SITTING AT:
BEFORE:
BETWEEN:

**LONDON CENTRAL
EMPLOYMENT JUDGE ELLIOTT**

**Dr E Hussein
Mrs M Mukamel
Ms M Milewicz
Dr J Hunt
Ms C Lasher**

Claimants

AND

Metanoia Institute

Respondent

ON: 3 September 2024

Appearances:

For the Claimants: Ms A Onibonoje, foreign qualified solicitor

For the Respondent: Ms B Clayton, counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The first claimant's claim for race discrimination, as to direct and indirect race discrimination and harassment related to race, are out of time and the tribunal has no jurisdiction to hear them.
2. The second claimant's claims for race and religious harassment and direct race discrimination are dismissed on withdrawal.

REASONS

1. This decision was given orally on 3 September 2024. The first claimant requested written reasons.
2. This is the third preliminary hearing in these proceedings. The first took place before Employment Judge J Burns on 14 March 2024 and the second took place over two days on 13 and 14 May 2024 before Tribunal

Judge Peer sitting as an Employment Judge.

3. This issues for the tribunal at this preliminary hearing concern the first claimant Mrs Eiman Hussein who was unable to attend the hearing in May 2024. A postponement was granted in relation to her circumstances. The hearing is also to deal with case management which concerns all five claimants.

This remote hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.
5. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
6. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.
7. The participants were told that was an offence to record the proceedings.
8. I was satisfied Ms Hussein as the only witness was not being coached or assisted by any unseen third party while giving her evidence

This claim no. 2217082/2024

9. By a claim form presented on 8 December 2023 the claimant Mrs Hussein brought claims of constructive unfair dismissal, race discrimination in terms of direct race discrimination, indirect race discrimination and harassment related to race and whistleblowing detriment. The claimant's representative confirmed that there is no claim for religion and belief discrimination, although the box was ticked in section 8.1 of the ET1. This concurred with my understanding as there was no pleading to this effect.
10. The claimant worked from 1 June 2021 to 6 October 2023 as a Lecturer and Tutor. The claimant resigned from her employment giving three months' notice.
11. The respondent is a provider of Higher Education and Training Programmes in Psychological Therapies.

The issues

12. The issues for this hearing were identified at a preliminary hearing before Tribunal Judge Peer on 13 and 14 May 2024 to consider the following in

relation to Mrs Hussein's claims:

- a. which of the claims are in time to strike out those which are out of time;
 - b. whether any claims should be struck out as having no reasonable prospects of success
 - c. whether to order a deposit order if claims have little reasonable prospects of success.
 - d. Whether any of the claims should be struck out because of failure to comply with Orders made by Employment Judge JS Burns' on 14 March 2024.
 - e. case management to prepare the consolidated claims for trial.
13. It was accepted that the claim for constructive unfair dismissal was within time (respondent's position statement dated 11 May 2024 paragraph 13). It was also accepted that the claims for whistleblowing detriment were ostensibly in time. The time limitation in issue related to the race discrimination claim.
14. The parties informed me that issue (d) above was no longer in issue for the tribunal at this hearing.
15. There was insufficient time to deal with issues (b) and (c). There was a discussion about this which is recorded in a separate Case Management Summary of today's date.

Witnesses and documents

16. There was a bundle of documents of 267 pages. It was the bundle used for the preliminary hearing on 13 and 14 May 2024 with additions.
17. The tribunal heard from 1 witness, the first claimant Mrs Eiman Hussein. The witness statement from the first claimant covered the issues necessary for a full merits hearing rather than specifically for the issues for this preliminary hearing. The first claimant was permitted to give oral evidence-in-chief as to the circumstances surrounding the presentation of her claim. I was told that this had been permitted at the preliminary hearing on 13 and 14 May 2024 in respect of the other claimants.
18. There was a position statement from the respondent, produced by counsel who appeared for the respondent at the hearing in May 2024, and to which counsel Ms Clayton spoke and expanded upon. There were oral submissions only from Ms Onibonoje for the claimant. All submissions were fully considered together with any authorities referred to, whether or not expressly referred to below.

Relevant agreed dates

19. The claim form was presented on 8 December 2023. The dates of Early Conciliation were from 4 October 2023 to 10 November 2023.
20. The effective date of termination was 6 October 2023.

Findings on the time point

21. The claimant confirmed that there were three acts of direct race discrimination relied upon and the dates of those acts were 12 January 2023, 3 April 2023 and 15 April 2023. For indirect race discrimination the dates relied upon were January 2023 with the sending of a newsletter and an email of 15 March 2023. For the claim for harassment related to race the dates relied upon were the same as for direct race discrimination: 12 January 2023, 3 April 2023 and 15 April 2023.
22. The claimant's evidence for the reasons for the delay in presenting her claim were two-fold, firstly because she was aiming to exhaust all internal processes before commencing proceedings and secondly because she was traumatised by her experiences with the respondent and had severe anxiety.
23. Based on the claimant's evidence, I make the following findings of fact in relation to these matters.
24. In terms of seeking to exhaust all internal processes, the claimant's evidence was that when she received her grievance outcome on 21 July 2023, she lost all faith in the respondent. She was given a right of appeal against her grievance outcome and accepts that she chose not to appeal because she did not trust the procedure and did not feel that she was being listened to.
25. I find that the claimant lost faith in the respondent by 6 July 2023, which was the date of her resignation. Even if it was 21 July 2023, I find that from that point, she had decided that she was not going to exhaust all internal procedures before she brought a claim. This would have been the case if she had decided to use the internal procedure to appeal but she made a decision not to do so.
26. The claimant also said that she was suffering from severe anxiety and this also contributed to the delay in issuing proceedings. The claimant had two periods of sickness absence, one in April 2023 and one in May 2023, both periods were for less than a week and she self-certified. The claimant admitted that she did not see her GP for the anxiety related to these issues. She had 2 counselling sessions through the respondent's Employee Assistance Programme.
27. The claimant was not so unwell as to prevent her from working from May

2023 until her employment came to an end in October 2023.

28. The claimant accepts that she is a highly qualified professional who is able to juggle a number of things.
29. The claimant said she took a break in August 2023, for the whole month, 10 days of which was spent overseas visiting family. This left a further 21 days of that month during which I find it would have been possible for her to deal with the matter of bringing a claim.
30. Based on the pleadings I find that the claimant regarded the matters she complains about in these proceedings, as unlawful discrimination at the time that they happened.
31. Neither party made any submission as to the effect on cogency of evidence if time was extended.

Relevant law on the time point

32. Section 123 of the Equality Act 2010 provides that:
 - (1)proceedings on a complaint within section 120 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.
33. The just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that a tribunal will exercise its discretion to extend time. In **Robertson v Bexley Community Centre 2003 IRLR 434** the EAT said it was the exception rather than the rule.
34. In **Jones v Secretary of State for Health and Social Care 2024 IRLR 275** the EAT (HHJ Talyer) reviewed the authorities and cautioned against

over reliance on **Robertson v Bexley** in terms of it saying that time limits are 'exercised strictly' and that an extension of time should be 'the exception rather than the rule' as if these were principles of law. The EAT emphasised the broad nature of the discretion and that all relevant factors needed to be considered and balanced.

35. There has been a tendency in time limit cases to consider the factors set out by the EAT in **British Coal Corporation v Keeble 1997 IRLR 336** reflecting the provisions of section 33 of the Limitation Act 1980 in relation to extending time for personal injury claims. This was cautioned against, by Lord Justice Underhill in the Court of Appeal in **Adedeji v University Hospital Birmingham NHS Foundation Trust 2021 EWCA Civ 23**, where he said (at paragraph 37): "*The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.*"
36. The Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050** said that "*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).*"
37. The tribunal must therefore consider:
 - a. The length and reasons for the delay
 - b. The extent to which the cogency of the evidence is likely to be affected by the delay
 - c. The prejudice that each party would suffer as a result of the decision reached
38. Delay caused by a claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings may justify the grant of an extension of time but it is merely one factor to be weighed in the balance: **Robinson v Post Office 2000 IRLR 804** approved by the CA in **Apelogun-Gabriels v London Borough of Lambeth 2002 IRLR 116**.
39. The claimant relied upon the decision of the EAT in **Wells Cathedral School Ltd v Souter EAT/0836/20**. In that case HHJ Auerbach said that in cases involving a delay whilst a claimant pursues an internal process there is a need to strike a balance between the desire to encourage the internal resolution of disputes without the need to issue a tribunal claim and the need for finality in legal proceedings.

40. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96***. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The question is whether the incidents are linked to each other and whether they are evidence of a continuing discriminatory state of affairs.

Decision on the time point

41. I have found above that by 21 July 2023 the claimant was no longer seeking to resolve matters through an internal process. I base this on her decision not to invoke the internal process to appeal. The claimant had lost faith in the respondent to resolve matters and she disengaged from the internal process. This was a decision she was entitled to make but it leads me to the conclusion and finding that she was not engaged in an internal process and this was not the reason that she failed to present her discrimination claims within time.
42. Similarly, whilst not discounting the anxiety and stress the claimant says she experienced, it was not enough to cause her to see her GP or to prevent her from working from May 2023 onwards.
43. To be within time the discrimination claim, at its latest, was due to be presented by 14 July 2023. This is based on the last date relied upon within the discrimination complaints of 15 April 2023. Even if there was a continuing act, the claim is nearly 5 months out of time. Because Early Conciliation was not commenced until 4 October 2023, the rules to not operate to extend time.
44. The delay is long and I find that the claimant has not made out her reasons for the delay.
45. In terms of the prejudice to the parties, if time is extended the respondent will have to face two additional factual areas of claim which are not included in the constructive unfair dismissal claim. This concerns what I will describe as the “room-naming” issue and the newsletter issue. This will increase the length of the evidence and the matters the tribunal will have to deal with. It is always the case that there is a prejudice to a claimant if time is not extended because she loses the opportunity to bring that part of her claim and if time is extended it is a prejudice to the respondent in having to defend that part of the claim. In this case if the application is refused the claimant retains her claims for constructive unfair dismissal and whistleblowing detriment. I find that the balance of prejudice lies in favour of the respondent in having to deal with these

claims which are out of time and including the factual issues surrounding whether these two one-off matters amounted to a provision, criterion or practice or not. It significantly widens the scope of enquiry.

46. There was no submission from the claimant on the prejudice to her other than the inability to pursue this part of her claim.
47. In terms of merits, there were some submissions about the claim for indirect discrimination and whether, as the respondent describes it, one-off acts can amount to a provision, criterion or practice under section 19 Equality Act 2010. I raised with the parties the case of *Ishola v Transport for London 2020 IRLR 368* and I noted that there would need to be a factual enquiry as to whether the one-off acts relied upon, being the email of 15 March 2023 and the newsletter in January 2023 were capable of amounting to a PCP under section 19. For the purposes of the time point, I find that whilst it is not impossible for a one-off act to amount to a PCP, it requires a strong basis in evidence which is not immediately apparent as the case currently stands.
48. For these reasons I find that it is not just and equitable to extend time for the race discrimination claims and the tribunal has no jurisdiction to hear them. The claimant was not awaiting the outcome of an internal process because she disengaged from that process in July 2023 and she was not so unwell as to not be able to deal with it during the primary limitation period to 14 July 2023 or thereafter. I have found that the balance of prejudice lies in favour of the respondent.

**Employment Judge Elliott
Date: 3 September 2024**

Judgment sent to the parties and entered in the Register on: 11 September 2024
_____ for the Tribunal