



EMPLOYMENT TRIBUNALS

Claimant

Mr. W. Waithaka

AND

Respondent

Barclays Execution Services Ltd

HEARD AT: **Watford Tribunal**
(via CVP)

ON: 4 July 2023

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

Representation:

For Claimant: Mr. Johnston, Counsel

For Respondent: Ms Dobbie, Counsel

JUDGMENT having been sent to the parties on 7 October 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 (now Rule 60(3) of the Employment Tribunals Rules of Procedure 2024), the following reasons are provided:

REASONS

Background

1. This case was scheduled for a preliminary hearing to determine the following:

- 1.1. Whether the claimant's contention that the pre-termination acts of discrimination formed part of a continuing act with the post-termination acts of discrimination has no reasonable prospects of success and should be struck out (rule 37(1)(a) Employment Tribunal Rules of Procedure 2013.)
 - 1.2. Whether, in the alternative, the claimant's contention that the pre-termination acts of discrimination formed part of a continuing act with the post-termination acts of discrimination has little reasonable prospect of success and should be made the subject of a deposit order (rule 39 Employment Tribunal Rules of Procedure 2013.)
2. In listing this preliminary hearing, EJ Eeley had provided that the just and equitable extension element would be dealt with at the hearing *"if deemed appropriate by the Judge hearing the matter. The parties are at liberty to make representations at the start of the hearing as to whether it would be appropriate to determine the 'just and equitable' extension as a preliminary issue or whether the evidence on this issue is too inextricably bound up with the substantive evidence in the case so as to render this impracticable or undesirable"* [69].
3. Mr. Johnston submitted that even if I determine that there were no/little prospects of success of establishing that the pre- and post-termination allegations formed part of conduct extending over a period, it would be undesirable to then go on to deal finally with the issue of whether a just and equitable extension should be granted. His position was twofold:
 - 3.1. A Tribunal's assessment of the substantive merits of the pre-termination complaints (the subject of the later grievance) would be highly relevant in determining whether it would be appropriate for time to be extended – this should only be done after hearing all the evidence;
 - 3.2. The Claimant relies on his poor health as part of the case to extend time. Documentation shows poor mental health, and the Claimant refers to a deterioration over the same period of the pre-termination allegations – they are therefore inextricably linked.
4. I determined that it was practical and desirable to deal with both aspects. The Claimant had provided a comprehensive witness statement (in addition to very detailed amended particulars) dealing with all aspects, along with medical evidence, and was able to supplement this with oral evidence. The potential impact on time and resources also favoured the resolution of both preliminary aspects, given the number of pre-termination allegations.
5. There was only time within the allotted hearing time to hear evidence, submissions from both representatives in relation to the issue of continuing acts, and deliver an oral judgment on the first element. The judgment on the second element was

therefore reserved, and completed after written submissions were received from representatives.

6. The reserved judgment, dated 2 October 2024, was sent to parties on 7 October 2024. The delay is explained in paragraph 96. Within that judgment the first element of the hearing was referred to as: *“I heard oral submissions from both representatives in relation to the issue of continuing acts and delivered an oral judgment on that aspect. In that regard, reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision.”*
7. A request for written reasons in relation to that element was then requested on 14 October 2024. Therefore, these reasons deal only with that element. They can then be read in conjunction with the reserved judgment of 2 October 2024, for a complete picture.

Procedure, documents, and evidence

8. In advance of the hearing, I was provided with:
 - 8.1. An electronic bundle of 239 pages – documents within this included:
 - 8.1.1. The Claimant’s witness statement [184-202], with two documents appended:
 - 8.1.1.1. A table described by him as *“Appendix I – Reportable concerns not tackled in accordance with legal and regulatory requirements”* [203];
 - 8.1.1.2. A diagram described by him as *“Appendix II – How institutional racism has infected the Control Environment and impaired the efficacy of control processes, including those for handling of employee concerns and grievances (pre & post Oct 2021)”*, with and added note *“Source: Appendix 3, ISA 315 issued by the Financial Reporting Council. This is the same internal framework applied in BCBS 40 Framework for Internal Control Systems in Banking Organisations”* [204]
 - 8.1.2. His particulars of claim, as amended [207-227];
 - 8.1.3. His grievance dated 31 October 2021 [89-99]
 - 8.2. A table of allegations produced by the Respondent
 - 8.3. Opening note from Respondent counsel;
 - 8.4. Opening note from Claimant counsel;
 - 8.5. Joint authorities bundle

9. In relation to the table of allegations, item 26 had no date. Having identified that this was said it have taken place in March 2019, this was relocated to 'minus 1' on the table, so the allegations were correct chronologically.

Facts

10. By way of a claim form presented on 5 September 2022 [5], following early conciliation between 9 June 2022 and 18 July 2022 with "Barclays PLC and its subsidiaries" and "Barclays Bank PLC", and then between 12 August 2022 and 5 September 2022 with the Respondent [55], the Claimant brought claims of direct race discrimination, harassment related to race, and post-termination victimisation.
11. The table of allegations set out:
- 11.1. A chronology;
 - 11.2. The allegation;
 - 11.3. The person/people involved;
 - 11.4. The category of complaint
12. The first pre-termination allegation relied on by the Claimant is said to have happened in 2019. The last pre-termination allegation is said to have taken place in October 2021, with the EDT being 31 October 2021.
13. The table is replicated below for ease and will be referred to in the findings of fact. There was one amendment agreed in the hearing - allegation 26 had no date, but was identified to have taken place in March 2019, so was nominally relocated to 'minus 1' on the table, so the allegations were correct chronologically.

	DATE	ACT / OMISSION	PERSON INVOLVED	PARA OF ET1
1	Jan 2020	IdW criticising C for not involving him in the RST process sooner	IdW	57.1.1
2	Feb / Mar 2020	IdW telling C that neither he nor any of his reports wanted to be C's line manager	IdW	57.2.1
3	March 2020	RH and IdW blaming C for the failure of the model to gain compliance	RH and IdW	57.1.2
4	Mar / Apr 2020	IdW requiring C & his team to do the project of bringing the PRA 110 within model policy compliance	IdW	57.4.1
5	Q2 2020	Not being consulted in the review of top female talent	None	57.2.2
6	Apr / June 2021	IdW and RH failing to respond to requests by C to engage with the IVU in order to agree a reasonable time period for achieving model compliance	IdW and RH	57.3.1
7	June 2020	DL blaming C for his own failure to deliver interim controls output to deadline	DL	57.1.3
8	June 2020	IdW blaming C for DL's failure to deliver interim controls output to deadline	IdW	57.1.4
9	June 2020	IdW refusing to retract his allegation/ apologise even when C showed it was not his fault	IdW	57.1.5
10	June 2020	RH failing to escalate C's concerns in relation to the treatment of Swati Kapoor by Lloyd Nelson	RH	57.3.2

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11	July 2020	IdW criticising C for the manner in which C raised the issue of a handover of the PRA 110 project	IdW	57.1.6
12	July 2020	IdW failing to support the handover of the PRA 110 project from the Claimant's team to the funding assessment team and unfairly criticising C for raising the issue	IdW	57.3.3
13	July 2020	IdW failing, from July 2020 onwards, to reallocate the said project to the funding assessment team	IdW	57.4.2
14	Jul / Aug 2020	IdW asserting that C's concerns with Kathryn McLeland were in fact performance issues with C	IdW	57.1.7
15	Aug 2020	IdW criticising C for having failed to raise an incident with Swati Kapoor with him	IdW	57.1.8
16	Aug 2020	IdW giving C unfavourable feedback during the recruitment exercise for Finance Director role	IdW	57.5.1
17	Sep 2020	GD stereotyping the behaviour of "educated Africans" and describing C that way	GD	60
18	Oct 2020	IdW asking C to identify two roles in his team for offshoring to Chennai and ignoring C's concerns	IdW	57.3.4
19	Q4 2020	IdW excluded C from the PRA 100 audit prep project	IdW	57.2.3
20	Dec 2020	IdW reasserting that the concerns C raised in July '20 were performance issue with C	IdW	57.1.9
21	Jan 2021	IdW raising his voice at C and saying others had a negative view of him	IdW	57.2.4
22	Feb 2021	DF telling C his work was low priority and DF could not spare time to meet	DF	57.2.5
23	Feb 2021	DF excluding C from the PRA 110 audit remediation project and Liquidity Transformation Project	DF	57.2.6
24	March 21	DF recruiting a director above C thereby reducing C's status	DF	57.2.7
25	May 2021	DF placing reliance upon misleading information provided by IdW during the course of the recruitment exercise for the new Director role	DF	57.5.2
26	Undated	IdW assigned the Director role that he had applied for, to Rob Hone, who had not applied for the role	IdW	57.5.3
27	26 Aug 2021	Being placed at risk of redundancy		57.6.1
	10 Sept 2021	C signed off sick		
	11 Oct 2021	C raised complaints about racial exclusion		
28	Oct 2021	having the termination of his employment treated as a redundancy rather than an agreed exit		57.6.2
	31 Oct 2021	EDT (and C provided further details in respect of his race grievance)		
29	Jan 2022	MH failing to deal with the Claimant's grievance in a timely manner and/or in accordance with the Respondent's grievance policy	MH	57.7.1
30	Jan – Jun 2022	MH or JG failing, at any stage prior to 29.06.22, to identify that they did not have access to emails that C had included within his original correspondence with R's Raising Concerns team in Oct 2021	MH and JG	57.7.2
	13 May 2022	Anything wholly before this date is prima facie out of time		
31	Jan – Nov 2022	MH failing to provide an outcome to C's grievance	MH	57.7.3
32	Nov 2022	MH Not upholding any part of the grievance related to race	MH	57.7.4
33	Apr 2023	PS not upholding C's grievance appeal	PS	57.7.5
34	Apr 2023	PS asserting within his grievance appeal outcome letter that there was "nothing to support" the Claimant's allegations that he had been treated poorly because of his race and/or because he had made complaints of discrimination	PS	57.7.6

KEY TO COLOUR CODING IN TABLE

Matters categorised as "being repeatedly subjected to unfair and/or unwarranted criticism by members of the Respondent's senior management" (para 57.1)

Matters categorised as "being repeatedly excluded by senior management and/or undermined in his role." (para 57.2)

Matters categorised as "being repeatedly unsupported by senior management." (para 57.3)

Matters categorised as "being required to undertake additional onerous tasks falling outside his team's remit" (para 57.4)

Matters categorised as "being repeatedly undermined and/or unsupported in his attempts at career progression" (para 57.5)

Matters categorised as "The manner in which his departure from the Respondent was handled" (para 57.6)

Matters categorised as "The Respondent's failure to deal with his grievance appropriately" (para 57.7)

Matters categorised as harassment (para 60)

Summary of allegations

14. The first pre-termination allegation relied on by the Claimant is said to have happened in 2019. The last pre-termination allegation is said to have taken place in October 2021, with the EDT being 31 October 2021.
15. In July 2020, the Claimant first emailed Kathryn McLeland (Group Treasurer) in order to raise his and his team's concerns that they were being subjected to exclusion and unlawful discrimination. Allegations minus 1 – 12, therefore pre-date submission of this complaint.
16. On 11 October 2021, the Claimant emailed Kathryn McLeland raising concerns about racial exclusion. This was passed to the Respondent's 'Raising Concerns Team' and was treated as a grievance. Following a request for more information, the Claimant replied on 31 October 2021, [89] which formed the basis of the grievance.
17. All of the pre-termination allegations are expressed as complaints of direct race discrimination [220-222].
18. Some of the pre-termination allegations are also expressed as detriments in relation to complaints of victimisation [224-225].
19. All of the post-termination allegations are expressed as complaints of direct race discrimination, and as victimisation detriments [223 & 225-226].
20. All of the post-termination allegations relate to the Respondent's failure to deal with the Claimant's grievance appropriately. None of the pre-termination allegations relate to the handling of the grievances.
21. None of the alleged perpetrators of pre-termination allegations are indicated in the post-termination allegations.

Direct race discrimination

22. Allegation minus 1 has the same alleged perpetrator as allegations 1, 2, 3, 6, 8, 9, 10 – 16, and 18 – 21. Across those allegations, there are five different categories of matter:
 - 22.1. Matters categorised as "being repeatedly subjected to unfair and/or unwarranted criticism by members of the Respondent's senior management"
 - 22.2. Matters categorised as "being repeatedly excluded by senior management and/or undermined in his role"
 - 22.3. Matters categorised as "being repeatedly unsupported by senior management."
 - 22.4. Matters categorised as "being required to undertake additional onerous tasks falling outside his team's remit"
 - 22.5. Matters categorised as "being repeatedly undermined and/or unsupported in his attempts at career progression"
23. Allegations 3 and 6 have the same secondary alleged perpetrator, who is also indicated in allegation 10. Those cover:

- 23.1. Matters categorised as “being repeatedly subjected to unfair and/or unwarranted criticism by members of the Respondent’s senior management”;
- 23.2. Matters categorised as “being repeatedly unsupported by senior management.”
- 24. Allegations 14, 15 16, 18 to 21, 27 & 28 are duplicated as victimisation detriments. In relation to race discrimination, the following is relevant:
 - 24.1. 14, 15 and 20 involve the same alleged perpetrator and are all categorised as “being repeatedly subjected to unfair and/or unwarranted criticism by members of the Respondent’s senior management”;
 - 24.2. 16 and 25 are both categorised as “being repeatedly undermined and/or unsupported in his attempts at career progression”, but involve different alleged perpetrators;
 - 24.3. 19 and 21 – 24 are all categorised as “being repeatedly excluded by senior management and/or undermined in his role”
 - 24.3.1. 19 and 21 relate to the same alleged perpetrator
 - 24.3.2. 22 – 24 relate to the same alleged perpetrator
 - 24.4. 25 relates to the same alleged perpetrator as 22 –24 but is isolated in nature as categorised as “being repeatedly undermined and/or unsupported in his attempts at career progression”
 - 24.5. Allegation 17 is isolated nature – harassment – and alleged perpetrator
 - 24.6. No individual is identified for allegations 27 and 28. They are both categorised as “the manner in which his departure from the Respondent was handled”.

Victimisation

- 25. Some of the pre-termination allegations are also expressed as detriments in relation to complaints of victimisation.
- 26. The Claimant relies on the following protected acts [224]:
 - 26.1. The Claimant raising concerns with Kathryn McLeland in July 2020 that he and his team were being excluded and/or discriminated against because of his race.
 - 26.2. The Claimant subsequently reiterating the same concerns to Kathryn McLeland in August 2021.
 - 26.3. The Claimant's email to Kathryn McLeland of 11th October 2021 in which he raised concerns about being subjected to less favourable treatment because of his race, which was subsequently treated as a grievance by Barclays' Raising Concerns team.

- 26.4. The Claimant's email to Barclays' Raising Concerns team of 31st October 2021 in which (within the attachment to his email) he provided specific examples of less favourable treatment to which he alleged he had been subjected because of his race
27. The Respondent admits that each of these constitute protected acts pursuant to section 27(2) EqA 2010 [238] but denies subjecting the Claimant to any detriments.
28. In relation to the first and second protected acts, the Claimant relies on the following pre-termination allegations as detriments: 14; 15; 16; 18; 19; 20; 21; 27; and 28.
- 28.1. Allegation 28 is the only pre-termination allegation that is said to have occurred after the second protected act.
29. In relation to the third and fourth protected acts, the Claimant relies on all of the post-termination allegations (29 – 34) as detriments.

Harassment

30. Allegation 17 is the only pre-termination allegation categorised in this way and is the only allegation against this individual.
31. None of the post-termination allegations relate to harassment.

General

32. Aside from allegation 17, the Claimant does not allege any inherently discriminatory act(s).
33. The Claimant describes the Respondent company as institutionally racist, and refers to the following in support of this:
- 33.1. A report commissioned by the Barclays Bank UK (BBUK) PLC board in 2018/2019 on the issue of race, which he says *"revealed the organisation to be institutionally racist. The report indicated that the prejudice was particularly acute towards black employees, who as a result reported significantly depressed engagement scores"* [187]
- 33.1.1. This was not specifically quoted or provided
- 33.2. Race at Work Action plan, which was launched in October 2020
- 33.2.1. An un-referenced screenshot of a table/chart is provided showing in the Jnr-Snr category, White colleagues are 3.4 times more likely to be promoted than Black colleagues
- 33.3. The exclusion of Black employees from senior leadership positions at the Respondent

- 33.4. The Respondent's underpayment of Black employees – he says. “they earn 20% less per hour and 50% less in bonus pay” [197]
34. Aside from allegation 17, the Claimant does not allege any inherently discriminatory act(s).
35. The Claimant states *“the foundation of all my claims is that there was an institutional failure on the part of the Respondent to address my concerns which I had consistently raised about the treatment to which I was subjected and, indeed, I was subjected to further detriments because I had raised such concerns”* [197; C/WS:36]. This is maintained by his representatives.

The law

36. I reminded myself of the relevant legislation and caselaw.

Strike out

37. Rule 37 of the Employment Tribunal Rules of Procedure 2013 (at the time of oral judgment)

“(1) At any stage of proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of claim or response on any of the following grounds –(a) that it is scandalous or vexatious or has no reasonable prospect of success;

...

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”

38. Sharma v NewCollegeNottingham EAT 0287/11

The EAT held that an employment tribunal had erred in concluding that the claimant's race discrimination claims had little reasonable prospect of success, solely on the basis that the contemporaneous documentation was inconsistent with the claimant's account, when there were underlying factual disputes.

Deposit orders

39. Rule 39 of the Employment Tribunal Rules of Procedure 2013 (*at the time of oral judgment*)

“(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

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

40. Van Rensburg v Royal Borough of Kingston-upon Thames UKEAT/0095/07

When determining whether to make a Deposit Order a tribunal is not restricted to a consideration of purely legal issues, but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward.

41. Mr. Johnston also referred me to Tree v South East Coastal Ambulance Service NHS Foundation Trust UKEAT/0043/17 (4 July 2017, unreported).

Continuing acts

42. 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'. The focus should be on the substance of the claimant's allegations and whether there 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.

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

The Court of Appeal confirmed that the approach in Hendricks is correct. In deciding whether there is 'conduct extending over a period' the Tribunal 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.

44. Aziz v FDA [2010] EWCA Civ 304, CA

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'.

45. E v X and ors EAT 0079/20

It is not essential that a complaint of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions. The question at the preliminary stage is whether the Claimant has established a reasonably arguable basis for the contention that the various acts are continuing acts or constitute an ongoing state of affairs.

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

46.1. Ma v Merck Sharpe & Dohme Limited [2008] EWCA Civ 1426

46.2. Sougrin v Haringey Health Authority [1992] ICR 650, CA

46.3. Robinson v Royal Surrey County Hospital NHS Foundation Trust
UKEAT/0311/14/MC

46.4. Sridhar v Kingston Hospital NHS Foundation Trust
UKEAT/0066/20/LA

46.5. Caterham School Limited v Mrs K Rose UKEAT/0149/19/RN

47. In relation to grievance processes specifically, Ms Dobbie referred me to:

47.1. Eke v Commissioners of Customs and Excise 1981 IRLR 334, EAT

47.2. Conteh v Parking Partners Ltd 2011 ICR 341, EAT

47.3. Reynolds v CLFIS Ltd 2015 ICR 1010, CA

47.4. Alcedo Orange Ltd v Ferridge-Gunn 2023 EAT 78

Prospects of success

48. A v B and anor 2011 ICR D9, CA.

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

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

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

50. Ezsias v North Glamorgan NHS Trust [2007] ICR 1126

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

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

This expanded on the guidance given in *Ezsias*, stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect

of success, the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a question of asking whether it is possible that the claim will fail. It is a high test.

52. Ms Dobbie also referred me to the following specific case law:

- 52.1. HM Prison Service v Dolby [2003] IRLR 694, EAT (at paragraph 15)
- 52.2. Jaffrey v Department of the Environment, Transport and the Regions [2002] IRLR 688 at paragraph 41, (EAT)
- 52.3. Croke v Leeds City Council UKEAT/0512/07
- 52.4. Sivanandan v Independent Police Complaints Commission and another UKEAT/0436/14
- 52.5. Silape v Cambridge University Hospitals NHS Foundation Trust EAT 0285/16
- 52.6. Ahir v British Airways plc 2017 EWCA Civ 1392

Submissions

53. Parties' positions were set out in their opening note/skeleton argument and supplemented by oral submissions. I do not replicate them here, but a summary is set out below.

Claimant

54. It is accepted on behalf of the Claimant that:

- 54.1. There is no overlap between the individuals who feature in the post-termination allegations and any of those who feature in the pre-termination allegations;
- 54.2. He cannot draw any direct links between any of the individuals involved in the post-termination allegations and any of those involved in the pre-termination allegations

55. The complaints cover that there was an institutional failure and an institutional way that people were dealt with when they raised a complaint. As these are the subject of the grievance and appeal, and the handling of these, it is reasonably arguable for the Claimant to say that conduct extending over a period.

56. There is a proper evidential basis from which a Tribunal could conclude that the handling of Claimant's grievance amounted to a continuation of unfavourable/less favourable treatment to which he had been subjected within the pre-termination allegations.

Respondent

57. The pre-termination allegations and the Post-Termination Allegations are wholly distinct strands with no crossover.
58. All of the pre-termination allegations relate to day-to-day treatment by various individuals, and don't relate to the Claimant's overarching complaint that the Respondent failed to deal with race discrimination when raised.
59. Allegations minus 1 to 12 are further distinguished in that they pre-date the complaint in July 2020, so can't be a continuing act.

Conclusions

General

60. The specific issue to be determined was whether the pre-termination acts of discrimination formed part of a continuing act with the post-termination acts. It was not a question of whether the pre-termination acts themselves formed part of a continuing course of conduct. Although inevitably some consideration of their own connection is inevitable, particularly when considering prospects of success.
61. It was put forward on the Claimant's behalf that his claims relate to a failure to deal with complaints and treatment experienced after a complaint. Therefore, a complaint is a pre-requisite. This is not a situation where an unrepresented Claimant has not expressed himself clearly, and he's unwittingly ended up with a narrow argument. It is a position that he has put forward, which has been maintained and relied on within documents and submissions prepared on his behalf.
62. Whilst a Tribunal *may* be able to draw inferences from evidence suggesting institutional racism, taking the Claimant's case at its highest, he makes no specific assertion that any of alleged perpetrators was motivated by race. This is particularly relevant when there are no inherently discriminatory act(s) alleged, aside from within allegation 17. This is not a situation where an allegation of a discriminatory act or comment is made, and denied by an alleged perpetrator, and witness evidence (whether in statement form or as a result of cross-examination) will therefore be determinative of what happened. The primary evidence in relation to the individual allegations is the Claimant's, and he has provided a detailed account already.

63. Similarly, none of the post-termination allegations relate to inherently discriminatory acts.
64. Taking his evidence at its highest, the Claimant relies on the assertion of institutional racism within the Respondent company support that his allegations must be because of his protected characteristic, and that this is sufficient to connect pre-termination allegations with the post-termination allegations which arise from the handling of a grievance that considered the earlier allegations. From the available material, it is not reasonably arguable that the various acts are continuing acts or constitute an ongoing state of affairs.

Allegations

65. As the first complaint by the Claimant was in July 2020, anything that pre-dates this cannot be connected to the fundamental basis of the Claimant's claims, let alone to the post-termination acts. Those allegations are relevant in that they form the basis of the complaint in July 2020 but are not examples of a failure to deal with a complaint or of treatment following a complaint.
- 65.1. Therefore, there are no reasonable prospects of success of establishing that **allegations minus 1 to 12** are part of a continuing act with the post-termination acts.
- 65.2. These allegations are therefore out of time and may be struck out, unless an extension of time is just and equitable.
66. As the Claimant accepts that there is no overlap or direct link between the individuals who feature in the post-termination allegations and any of those who feature in the pre-termination allegations, the nature of the connection has to be considered for the remaining allegations. In relation to personnel, I also note that there is no assertion that any of the individuals named in the pre-termination were linked or colluded together.
67. The only nexus appears to be that the complaints relate to grievance and appeal complaints which is insufficient.
68. In light of the findings in relation to allegations minus 1 to 12 above, **allegation 13** stands alone within the pre-termination matters. This is because it is isolated in person and nature, being the only pre-termination matter relating to being required to undertake additional onerous tasks falling outside of the Claimant's team's remit (the only other was allegation 4).
- 68.1. This further disconnects it from the post-termination allegations;
- 68.2. It is therefore not reasonably arguable that this can be part of a conduct extending over a period, and there are no reasonable prospects of success of establishing it is part of a continuing act with the post-termination acts.

68.3. This allegation is therefore out of time and may be struck out, unless an extension of time is just and equitable.

69. Allegations 14 to 16, 18 to 21, 27 & 28 are expressed as dual allegations of race discrimination and victimisation detriments. Those elements are connected to each other in that, the detriments are alleged to have occurred after the Claimant raised complaints of racial exclusion. As race discrimination complaints, they span a range of categories. On the basis of this, and the general conclusions above, they are more clearly individual events that flow from protected acts, and it is not reasonably arguable that this can be part of a conduct extending over a period.

69.1. There are no reasonable prospects of success of establishing that these are part of a continuing act with the post-termination acts.

69.2. These allegations are therefore out of time and may be struck out, unless an extension of time is just and equitable.

70. Allegation 17 does allege an inherently discriminatory act (the only allegation to do so), but is isolated nature in nature and person.

70.1. This further disconnects it from the post-termination allegations;

70.2. It is therefore not reasonably arguable that this can be part of a conduct extending over a period, and there are no reasonable prospects of success of establishing it is part of a continuing act with the post-termination acts.

70.3. This allegation is therefore out of time and may be struck out, unless an extension of time is just and equitable.

71. Allegations 22 to 25 are clearly connected by person, and aside from 25 are connected in nature. However, last alleged act is May 21, even if there were a continuing state of affairs it's clearly not persisting for many months before the termination in October 2021.

71.1. This further disconnects then from the post-termination allegations;

71.2. It is therefore not reasonably arguable that these can be part of a conduct extending over a period, and there are no reasonable prospects of success of establishing it is part of a continuing act with the post-termination acts.

71.3. These allegations are therefore out of time and may be struck out, unless an extension of time is just and equitable.

Summary

72. The claimant's contention that each of the pre-termination allegations formed part of a continuing act with the post-termination allegations has no reasonable prospects of success.

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73. All of these allegations are therefore individual acts which are out of time and will be struck out unless it is just and equitable to extend time. In relation to this element, representatives must provide written submissions within 14 days of the date of the preliminary hearing, and a determination will then be made.

Employment Judge Douse

Date: 25 January 2025

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JUDGMENT SENT TO THE PARTIES ON
27 January 2025
AND ENTERED IN THE REGISTER
FOR THE TRIBUNAL