



# EMPLOYMENT TRIBUNALS

**Claimant:** Agnieszka Wilshire

**Respondent:** (1) Bourne Education Trust  
(2) James Newman

## RECORD OF A PRELIMINARY HEARING

**Heard at:** London South (by video)

**On:** 5 February 2025

**Before:** Employment Judge D Wright (sitting alone)

### Appearances

For the claimant: Mr Wilshire, Claimant's husband and lay representative

For the respondent: Mr Green, Counsel

## STRIKE OUT JUDGMENT

1. The Respondent's applications to strike out the claim of direct race discrimination are dealt with as follows:
  - 1.1 Did the Second Respondent ask the Claimant if she was a Teaching Assistant (TA) at a meeting on 5 December 2017? This complaint is struck out as being out of time. It would not be just and equitable to extend the time limit to bring the claim.
  - 1.2 Did Nicola Heaney make a xenophobic instruction by email on 21 November 2018? This complaint is struck out as being out of time. It would not be just and equitable to extend the time limit to bring the claim.
  - 1.3 Did Hayley Berry tell the Claimant to bring in her passport for inspection in September 2020. This complaint is struck out as being out of time. It would not be just and equitable to extend the time limit to bring the claim.
  - 1.4 Did the Second Respondent inform the Claimant on 28 May 2021 that he may cease EAL provision at the school? This complaint is struck out as being out of time. It would not be just and equitable to extend the time limit to bring the claim.

- 1.5 Did the Claimant have her EAL duties removed from her in 2021? This complaint is struck out as being out of time. It would not be just and equitable to extend the time limit to bring the claim.
- 1.6 Did Andy Collins invite the Claimant to a meeting of 21 March 2022 in relation to her grievances, and in so doing ask her if she had any specific needs if she was “not proficient in the English language”. This complaint is struck out as being out of time. It would not be just and equitable to extend the time limit to bring the claim.
- 1.7 Did the Second Respondent orchestrate the Claimant’s dismissal? The strike out application on this point is dismissed.
2. The Respondent’s applications to strike out the claims of direct age discrimination are dismissed.
3. The Respondent’s application to strike out the claim for breach of contract is dismissed.
4. The Respondent’s application to strike out the claim relating to a flexible working request is allowed. The claim was out of time, and it was reasonably practicable to issue the claim within the time limit.

## REASONS

5. With respect to 1.1 above I find that this claim is some five and a half years out of time. I considered whether it was part of a continuing course of conduct, but the next PLEADED allegation is not until some 11 months later and in my view the two allegations are not linked by time or by content of the allegation. I note that the Claimant argued passionately at the hearing that there were other instances (which might be categorised as “micro-aggressions” or outright discrimination) but these were not part of the pleaded claim. I therefore find that this allegation is out of time. The prejudice against the Respondent in having to respond to an allegation of a single comment made over seven years ago now is enormous. When considering the “just and equitable” test I also take into consideration that I am of the view (as I am permitted per *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132) that the Claimant would have little reasonable prospect of succeeding on this head of claim. Overall I find that it would not be just and equitable to extend time for this allegation and strike it out for lack of jurisdiction.
6. With respect to 1.2 above I find that this claim is some four and a half years out of time. I considered whether it was part of a continuing course of conduct, but the next PLEADED allegation is not until nearly two years later and in my view the two allegations are not linked by time or by content of the allegation. I find that it would be prejudicial to the Respondent to require them to go back to an allegation over six years ago now to give evidence as to the meaning of the comments and their mindset. I also considered the prospects of this claim. Whilst the alleged comments might be argued to be xenophobic, any direct discrimination would be against the potential students who needed EAL support

rather than against the Claimant. As such I find that there were little to no prospects of succeeding on this head of claim. Overall I find that it would not be just and equitable to extend time for this allegation and strike it out for lack of jurisdiction.

7. With respect to 1.3 above I find that this claim is some two and a half years out of time. I considered whether it was part of a continuing course of conduct, but the next PLEADED allegation is not until nearly 8 months later and in my view the two allegations are not linked by time or by content of the allegation. I repeat the above points about prejudice to the Respondent about extending time, although in this instance that prejudice is weaker. I also consider the prospects of the Claimant succeeding on this claim of direct discrimination on the basis of race, whilst slightly higher than before, are still low because the Respondent appears to have a valid reason to check the right to work status of people with expired passports on file. Overall I find that it would not be just and equitable to extend time for this allegation and strike it out for lack of jurisdiction.
8. With respect to 1.4 above I find that this claim is some two years out of time. I consider that it is arguable that it is part of a continuing course of conduct with 1.5. The difficulty though is that 1.5 is also out of time. I then considered whether either of these could be considered to be part of a continuing course of conduct with 1.6, whilst not strong there is an argument that they are as 1.6 is linked to the grievance brought (at least in part) in relation to 1.4 and 1.5. 1.6 is also out of time by a year and two months. I do not consider that it is arguable that 1.6 is part of a continuing course of action with 1.7 which is the only claim in time. I note the Claimant's arguments that the conduct of the entire grievance process extends the time limits here, but I respectfully disagree. There are no other PLEADED allegations of race discrimination in relation to the grievance process. If the Claimant wanted to rely on other acts of discrimination in order to bring these older ones into time, then she needed to have pleaded them. I then went on to consider the just and equitable test. Again the respondent would be somewhat disadvantaged due to the passage of time, albeit not fatally so in relation to 1.4, 1.5 and 1.6. However, there is no good reason put forward. The Tribunal and appeal courts have repeatedly found that "not wanting to rock the boat whilst employed" and "wanting to wait for the grievance process to be completed" are not factors which usually automatically extend the deadline, although they are factors I can consider in the just and equitable test. I give some weight to those arguments of the Claimant here. However, I find that the Claimant has little reasonable prospects of successfully arguing that any of these three allegations are race discrimination as the Respondent has put forward very plausible reasons to explain each one. Therefore, when I weight it all in the balance, I am of the view that it would not be just and equitable to extend time for this allegation and strike it out for lack of jurisdiction.
9. With respect to 1.7 above this allegation is in time. It is argued by the Respondent that the Claimant has no prospects of arguing this point is related to race discrimination. I disagree, particularly in light of the case law cited below which notes that discrimination claims often turn on oral evidence. I am of the view that the Claimant does not have great prospects of shifting the burden on this point, but there is an argument to be made, and one strong enough (just) to

avoid a deposit order being made. Therefore I dismiss the application to strike out this allegation.

10. With respect to paragraph 2 above, the Claimant makes a number of allegations that the respondent discriminated against her on the grounds of age. Of these, only 2.9 is in time. I am very much of the view that the Claimant will struggle significantly to show that the decision to dismiss her amounted to discrimination on grounds of age, at least to the extent required to shift the burden. However, I am reminded of case law including *Anyanwu v South Bank Student Union* [2001] ICR 391, [2001] UKHL 14 and *Chandok v Turkey* UKEAT/0190/14/KN which both cautioned against striking out discrimination claims as they often turn on oral evidence. These cases did not create a blanket ban but certainly urged caution when considering such applications. I accept that it is theoretically possible that evidence will come to light that the Respondents' actions were acts of age discrimination and therefore take the view that it cannot be said that the Claimant has no prospects of success on 2.9 above. However, I do take the view that there are little reasonable prospects of success and have made a deposit order in relation to this claim.
11. As far as 2.1 – 2.8 above go on the face of it, these are all out of time. However, there is an argument to be made that there was a continuing course of conduct, in particular between 2.3 and 2.8. There is furthermore an argument that the allegations in 2.1 and 2.2 are repetitive actions each time the failure to provide CPD or record appraisals correctly occurred, rather than it being an act with a continuing impact on the Claimant. Therefore, there is an argument that these are in time, and that they would bring the other out of time claims with them due to an overlap in time periods. This should be tested in light of the evidence at a final hearing. I am of the view that such an argument is unlikely to succeed, but not sufficiently so as to strike out the claims. It was also argued that the Claimant has no prospects of linking these acts to age discrimination in such a way as to shift the burden of proof. For the reasons set out above I find that this is arguable, and so I cannot say the Claimant has no prospects of success on these points. I have made a deposit order in relation to these claims.
12. With respect to paragraph 3 above, the Claimant brings a claim that the Respondent's actions in changing the nature of her work amount to a breach of contract. When asked which clause of the contract was breached the Claimant said that it was the part with the job title in, when viewed in conjunction with the job description. I find, considering the caselaw referred to in the Claimant's written submissions, that it is arguable that the Claimant was employed as an EAL teacher and that changing her role to focus primarily on classroom teaching of subjects with which she was not familiar could amount to a breach of contract. There are certainly arguments which could be made against this interpretation, but I am of the view that it cannot be said that the Claimant has no, or little reasonable prospects of success.
13. With respect to paragraph 4 above. There was some dispute as to whether the Claimant's request for flexible working met the criteria to be deemed a formal request and to engage statutory protection. I find that I do not need to determine this point. On the assumption (but not finding) that the request was valid, then it was made on 5 October 2021. The Respondent would have been required to

respond to the request within two months. It is admitted that no response was given to the application (other than an acknowledgement that it had been made) and therefore the Respondent would have been in breach of their duties as of 6 December 2021. I find that this is the relevant date for calculating jurisdictional time points. The Claimant argues that the time has not started running on this claim (or at did not start running until the dismissal) because no response was given. I do not accept this argument as I have found that the breach would have occurred on 6 December 2021 when the Respondent failed to respond within the statutory time frame. The claim therefore needed to have been issued by 6 March 2021. I find that it was issued over two years late. The Claimant has given no satisfactory reason as to why it was not issued in time and I therefore find that even if the claim had prospects, it was reasonably practicable to issue the claim in time. In relation to this claim I am unable to consider whether it would be just and equitable to extend the time limits, having found that it was reasonably practicable to issue the claim in time I am bound to strike it out for lack of jurisdiction.

*D J Wright*

5 February 2025

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Sent to Parties.  
26 March 2025