EMPLOYMENT TRIBUNALS

Claimant: **Mr Khyber Afzal**

Respondent: **Mitie Limited**

Heard at: **Midlands West (By CVP)** **On: 10 March 2025**

Before: **Employment Judge Bansal**

Representation

Claimant: **In Person**
Respondent; Mr R O'Dair (Counsel)

RESERVED PUBLIC PRELIMINARY JUDGMENT

1. The claimant's application to amend his claim is refused.

2. The claim for notice pay is dismissed.

3. The respondent's application to strike out is refused.

4. The claimant is Ordered to pay a deposit of £100 not later than 21 days from the date of this Judgment is sent as a condition of being permitted to continue to advance the complaint as set out in Paragraph 64 of this judgment.

REASONS

Introduction

1. This Public Preliminary Hearing was listed to determine two applications, namely, (i) the claimant's amendment application made in an email dated 21 January 2025, and (ii) the respondent's application for strike out and/or a deposit order. This case was listed for final hearing on 3-11 March 2025 but this hearing was postponed to deal with these applications.

2. The claimant attended in person and was not represented. Mr Richard O'Dair of Counsel represented the respondent. The Tribunal was provided with a bundle of documents of 201 pages prepared by the respondent, a witness statement bundle containing statements of the claimant; and respondent witnesses Jade Bolland and Theresa Flanaghan. This statement bundle was

prepared for the purposes of the final hearing. At the start of the hearing there was confusion about the bundle. The claimant and Mr O'Dair had a bundle of 128 pages, which I subsequently learnt was the bundle prepared for the DRA hearing. I obtained a copy of this bundle and used this bundle for this hearing.

3. I heard submissions from both parties on the issues. These are not repeated herein. Mr O'Dair provided written submissions which he expanded orally.

Background Facts

4. The claimant describes himself as British Pakistani Pathan and is a Muslim. He confirmed he has experience in Human Resources and is CIPD Level 3 qualified.

5. The claimant was employed by the respondent as a HR Learning Coordinator from 21 November 2022 until 31 March 2023. Following a period of early conciliation commenced on 6 December 2023 which ended on 7 December 2023 the claimant presented a Claim Form (ET1) on 9 December 2023 bringing complaints for redundancy payment, direct discrimination on the grounds of race and religion or belief, notice payments and other payments.

6. By a response filed on 10 January 2024, the respondent resisted the complaints and raised preliminary issues namely, the claimant's lack of continuous service to make a claim for redundancy payment; the claim not been presented within the primary statutory time limits, and that it is not just and equitable to extend time.

7. The complaint for a redundancy payment was struck out by a Judgment dated 16 April 2024 on the grounds the claimant did not have an entitlement to a redundancy payment as did not qualify for this payment due to lack of continuous service.

8. In their response, the respondent set out the background facts to the claimant's employment as follows. The claimant was employed to work at its Hub in Birmingham as a Learning Support Coordinator. He was initially recruited on a 12 month fixed term contract starting on 21 November 2022 to end on 21 November 2023. On or about 15 November 2022 a decision was made that the work which the claimant was recruited to do was to be outsourced to a company called Wipro in India from 2023. This decision affected some 152 employees.

9. On the same date (i.e 15 November 2022) the claimant was informed by e-mail of this decision and that the end date of his fixed term contract was to be varied to 31 March 2023. The claimant was given an opportunity to agree to the variation or decline the position. The claimant by email on 21 November 2022 replied, *" Thanks for the update. I accept the offer of the contract until March 2022*." The claimant worked for the respondent from 21 November 2022 and left on 31st March 2023 on the expiry of his contract. The claimant did not raise a grievance in relation to the variation to the end date of his contract or any other issue relevant to his employment during the 6 month terms.

10. During the period from March 2023 to December 2023 the claimant applied for

roles with the respondent, with the last application made on 13 December 2023.

Claimant's complaints

11. At a preliminary hearing for case management held on 24 April 2024, Employment Judge Maxwell clarified the complaints and identified the individual allegations; made case management orders including listing this case for final hearing on 3 to 11 March 2025. The complaints pursued were identified as (i) direct discrimination on the grounds of race and religion or belief, (ii) victimisation and (iii) notice pay

12. In relation to the direct discrimination complaint, the alleged acts of less favourable treatment were recorded to be;
    (i) on 15 November 2022, varying the end date of the claimant's fixed term contract to 31 March 2023, forcing a change to the end date of the contract to 31 March 2023

    (ii) not accepting or rejecting the claimant's subsequent applications for employment (details to be provided);

    (iii) not upholding the claimant's complaint made in November 2023 and accepting it had acted unlawfully or discriminated against him.

13. In relation to the victimisation complaint, the protected act relied upon is the Claim Form presented on 9 December 2023. The conduct relied upon to be;

    (i) on 27 December 2023, by email the respondent confirmed that it would not engage in any discussion with him as he had made a Tribunal claim, and

    (ii) on 3 January 2024 by phone the respondent told the claimant that it would not engage in any discussion with him because he had made a Tribunal claim.

14. In relation to the notice pay claim, the claimant seeks payment of his notice pay.

15. Employment Judge Maxwell, also identified the Tribunal will need to determine whether the claims were presented in time.

16. By an amended response filed on 24 December 2024, the respondent resisted the complaints and contended the claim was presented 5 months and 9 days late, and therefore did not have jurisdiction to hear the claim, and that it would not be just and equitable to extend time.

17. By email dated 24 December 2024 the respondent confirmed they were pursuing the application for a strike out of the claim on the grounds of time bar, and it should be dealt with as a preliminary issue at the final hearing.

Claimant's Amendment application

18. By email dated 21 January 2025, the claimant presented an application for

amendment to include complaints of disability discrimination (the disability being back pain/sciatica), direct discrimination, indirect discrimination, victimisation, and sex discrimination. The application is in the form of a lengthy narrative of 7 pages, from which it has been difficult to determine the terms of the amendments sought.

19. By email dated 18 February 2025, the respondent opposed the amendment application contending it has been made very late and that it is unreasonable and unfair to the respondent to allow the claimant to continually seek to amend his claim.

Application for strike out

20. By email dated 3 March 2025, the respondent notified the Tribunal and the claimant that the respondent would be pursuing their application for strike out on the grounds the complaints do not have reasonable prospects of success. Further, in the alternative an application for a deposit order.

This Preliminary Hearing

21. This case was listed for final hearing on 3 to 11 March 2025. Due to lack of judicial resource this final hearing was postponed, and this preliminary hearing was listed to determine the claimant's amendment application and the respondent's strike out application.

Clarification of the Claimant's amendment application

22. At this hearing, the claimant clarified the amendment application was limited to adding two specific complaints. The claimant confirmed the claimed disability is back pain/sciatica and the complaints are for (ii) direct disability discrimination and (ii) for failure to make reasonable adjustments. The claimant explained that during the period of his employment, he was not aware he had a disability. He contended the factual basis of his complaint is that in approximately 2023, he was wearing a belt around his waist because of his back pain. He informed his Manager about his condition and that he struggled to perform some tasks (unspecified) because of the pain of sitting, standing and walking. He could not attend at the office and therefore continued to work from home. He also asserted the respondent failed to make reasonable adjustments in that he was still required to attend at the office despite his condition. According to the claimant this was direct disability discrimination, and a failure to make reasonable adjustments.

23. The claimant also complained he was not given alternative roles because of his alleged disability, and sex. He contended the less favourable treatment was not being given alternative roles, compared to his female colleagues. The female colleagues being Sheena, Theresa, Jan, Polly, Keelie, and Sarah.

24. I deal with each application below but first set out the applicable legal framework.

The Legal Framework

Amendment application

25. The Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of Rule 30 of the Employment Tribunal Procedure Rules 2024.

26. ***Harvey v Port of Tilbury (London) Limited (1999) ICR 1030*** articulated the following obligation on a party seeking permission to amend:-

"*As a matter of guidance going beyond the facts of this particular case we cannot over emphasise that where an amendment is sought it behoves the applicant for such an amendment to clearly set out verbatim the terms and explain the intended effect of the amendment which he seeks."*

27. The leading case of ***Selkent Bus Company Ltd v Moore [1996] IRLR 836*** confirms the Tribunals power to amend is a matter of judicial discretion. Mummery J said;
"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."

28. The guidance in ***Selkent*** provides for consideration of the nature of the amendment, the timing and manner of it and the applicability of time limits. The key question a Tribunal is asked to determine is where does the balance of injustice/prejudice lie if an application to amend is granted or refused.

29. This is reflected in the Presidential Guidance on Case Management and was recently confirmed by the EAT in ***Vaughan v Modality Partnership 2021 IRLR 97.***

30. In ***Ladbrokes racing Ltd v Traynor EAT/0067/06*** the EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise. The Tribunal will it need to consider; (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

31. Where an application raises arguably new causes of action a Tribunal should consider the extent to which the new complaints are likely to involve substantially different areas of enquiry and the greater the differences between the factual and legal issues raised the less likely it will be permitted ***(Abercrombie Yeah v Aga Rangemaster Ltd [2013] EWCA Civ 1148, CA)***

Strike Out

32. Rule 38(1) of the Employment Tribunal Procedure Rules 2024 provides;
" The Tribunal may, on its own initiative or on the application of a party,

strike out all or part of a claim, response or reply on the following grounds:-
(a) that is scandalous or vexatious or has no reasonable prospect of success;
(b) that the manner in which the proceedings have been conducted by or on behalf of either party has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued.

33. Rule 38(2) provides 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.

34. The well-known case of ***Anyanwu v South Bank Students Union 2001 IRLR 305*** underlined the importance of not striking out claims for an abuse of process except in the most obvious of cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in a plural society.

35. In the case of ***Mechkarov v Citibank NA (2016) ICR 121***, the guidance given was that: "(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is *"conclusively disproved by"* or is *"totally and inexplicably inconsistent"* with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

36. Further the EAT gave guidance in ***Cox v Adecco Group UK Limited 2021 ICR 1307*** in relation to strike out applications against litigants in person. This case identified the following principles;
(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but special care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional

information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

37. The guidance from the EAT in ***Hasan v Tesco Stores UKEAT/0098/16*** is that the Tribunal must undertake a two stage exercise when considering whether to strike out a claim. Firstly, it must consider whether any of the grounds in Rule 38(1) have been made out. If it finds that a ground is made out it must then decide whether to exercise its discretion to strike out a claim.

Deposit Order

38. The Tribunal has the power to make deposit orders against any specific allegations or arguments that it considers has little reasonable prospect of success under Rule 40:
"(1) W*here at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim, response or reply, has little reasonable prospect of success, it may make an order requiring a party ("the depositor") to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument ("a deposit order")."*

39. Rule 40(2) requires a Tribunal to 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. Under Rule 40(3), the Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

41. Under Rule 40(4), if the paying party fails to pay the deposit by the date specified, the specific allegation or argument to which the deposit order relates shall be struck out.

42. When considering making a deposit order, the case of ***Wright v Nipponkoi Insurance Europe Limited UKEAT/0113/14*** is helpful. In this case it was held that, when making deposit orders employment tribunals should stand back and look at the total sum awarded and consider the question of proportionality before finalising the orders made. It was noted in that case that the employment judge did not make the maximum awards that he could have done, but made orders which gave rise to a total sum that seemed

proportionate when taking account of the number of allegations to which the orders related and the claimant's means. This was a proportionate view on the totality of the award and a conclusion that was entirely open to the employment judge as an exercise of his discretion.

Analysis and conclusion

Amendment Application

43. I have firstly considered the claimant's amendment application applying the principles set out in ***Harvey*** and ***Selkent.***

44. Firstly, considering ***Harvey*** the claimant has not provided sufficient particulars in respect of his disability discrimination and failure to make reasonable adjustments to be able to discern the precise nature and terms of the complaints.

45. In considering the ***Selkent*** principles, I deal with these below.

    a. The nature of the amendment.

46. The complaints of direct disability discrimination and sex discrimination are entirely new causes of action not previously made or even intimated. This is not a re-labelling exercise. These complaints raise new facts which will require a new line of enquiry and investigation. For example, the issue of the claimant's disability status will need to be considered by the respondent, and if disputed by the respondent will need to be first determined at a preliminary hearing. In relation to the sex discrimination complaint, this will require an investigation into which employees were offered alternative roles and if so, why.

    b. The applicability of time limits and manner of application.

47. Whilst applicable time limits are not determinative of an amendment application they are relevant to the balancing exercise. This application to amend has been made significantly out of time. This application was formally made on 25 January 2025, some 37 days before the listed final hearing on 3-11 March 2025, and 13.5 months from the date of presentation of the claim. It is clear there are time limit issues to be determined

48. I accept the Tribunal does have a broad discretion to hear a discrimination complaint out of time under Section 123(1)(b) of the Equality Act 2010. However, the claimant has offered no explanation for the delay in making this application and the basis upon which the Tribunal could reasonably conclude that it is just and equitable to extend time. In his submission the claimant confirmed he was aware of the applicable time limits because eof his CIPD Level 3 qualification.

    c. The balance of injustice and hardship.

49. I have had regard to the guidance given by Underhill LJ in the case of ***Abercrombie v Aga Rangemaster Ltd (2014)ICR 20.*** The Court of Appeal

stressed that Tribunals should when considering applications to amend that arguably raise new causes of action, focus *"not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old; the greater the difference between the factual and legal issues raised by the new claim and by the old the less likely it is that it will be permitted."*

50. I am persuaded that if the proposed amendments are allowed the respondent would be put to considerable expense of first having to consider the disability issue which if contested will require a preliminary hearing; having to respond to the new complaints/allegations; having to conduct further investigation and adduce additional evidence including about knowledge of the alleged disability, which may affect the cogency of the evidence and prejudice the respondent particularly if any potential witnesses are no longer in the employment of the respondent; and is bound to extend the length of the listed final hearing.

51. Thus I have taken into consideration all of the relevant circumstances and the overriding objective to deal with matters proportionately, and the public interest in ensuring finality of litigation. I am satisfied there would be injustice and hardship to the respondent in granting this application. Conversely, by refusing the proposed amendments the claimant will not be caused prejudice because he will be able to continue with his pleaded case. Accordingly, the claimant's amendment application is refused.

Application to strike out claim for notice pay

52. I next considered the claim the respondent's application to strike out this claim. As Mr O'Dair submitted this complaint has been presented out of time. This complaint should have been brought within the primary limitation period of 3 months (not including any extension for ACAS early conciliation) starting from the date of termination of the contract (i.e 23 March 2023). The claimant did not engage with ACAS for early conciliation until 7 December 2023, which means the claimant does not benefit from any extension of time. Therefore, the primary time limit expired on 22nd June 2023. The claim is therefore significantly out of time.

53. The test for extending time is whether it was not reasonably practicable to bring the claim in time. I am guided by ***Southwark LBC v Afolabi (2003) IRLR 220 (CA)*** and ***Palmer v Southend-on-Sea BC (1984)*** *ICR 372 (CA)* which confirmed the limitation period for breach of contract claims is 3 months from the date of termination and an extension may only be granted where it is not reasonably practicable to bring the claim in time.

54. I have also considered the case of ***Balls v Downham Market High School (2022) IRLR 217 (EAT)*** which confirmed that strike out is a draconian measure and should only be used where the case has no reasonable prospect of success.

55. The burden is on the claimant to prove why he did not comply with this time limit. The claimant has provided no explanation or offered any evidence that it was not reasonably practicable for him to present this claim in time. By his

own admission he was aware of the time limits to present a claim. I therefore dismiss this claim.

Strike Out application

56. Mr O'Dair confirmed the respondent's strike out application is made on the grounds of time bar, and/or no reasonable prospects of success. In the alternative the respondent seeks a deposit order on the grounds the complaints have little reasonable prospects of success.

57. Firstly, on the time point, Mr O'Dair submitted that as the claimant engaged with ACAS on 9 December 2023 the complaints which occurred earlier than 9 September 2023 are out of time. Therefore the job applications made by the claimant between January 2023 to the end of March 2023 are out of time, although he accepted the complaint about the job applications made in November 2023 are in time. Mr O'Dair further contended that the alleged acts of less favourable treatment, namely (i) variation of the contract and (ii) the job applications made between January 2023 to the end of March 2023 cannot form part of a continuing act because there is a huge gap in the chronology between the end of March 2023 and November 2023. The claimant has put not forward any facts or argument that the complaints can amount to a continuing act.

58. Mr O'Diar also submitted the victimisation complaint has been made out of time as this was added as an amendment at the preliminary hearing held on 24 April 2024. The alleged acts of victimisation relied upon occurred on 27 & 3 January 2023.

59 The respondent's position is that if these complaints are not struck out then in the alternative a deposit order should be made as the claims have little prospects of success.

60. The claimant in reply responded that he does not accept the complaints are out of time or that the alleged conduct of the respondent does not form part of a continuous course of conduct. As to the merits of his complaints the claimant is adamant that he has been subjected to unlawful discrimination.

61. In reaching my decision, I have been mindful of the following principles, namely;
    (a) not to conduct a mini-trial on the issues;
    (b) the overriding objective which requires fairness between the parties and a proportionate approach to the claims;
    (c) that striking out a claim is one of the most draconian powers a Tribunal can exercise, since it brings the claim to an end and prevents a claimant's case being determined on its merits;
    (d) the claimant is a litigant in person;

62. I have carefully considered the respondent's position about time point on the discrimination complaints. I do not strike out the complaints which prima facie appear to be out of time for the reason this issue should be determined with the liability issues after evidence and submissions are heard. The claimant is alleging that there was a continuing course of conduct over a

period of time. That issue should be determined based on the evidence heard. There is no proper basis on which I could decide that there is no reasonable prospect of the claimant persuading the Tribunal that it is just and equitable to extend time. For the avoidance of doubt, I express no opinion one way or the other about whether the claimant is more likely to succeed or to fail on the time point. That is not the test that applies for strike out purposes.

63. On the merits of the discrimination complaints I accept the claimant has the initial burden to prove facts from which the Tribunal could conclude that the claimant was treated less favourably because of his race and religion or belief. I accept discrimination cases are fact sensitive, and where there is a dispute on facts evidence will need to be heard and tested to ascertain the facts before a decision can be reached on the merits. I am conscious not to conduct a mini-trial.

64. However, on a preliminary assessment I find the principal complaint that the on 15 November 2022, the claimant was forced to agree to vary the fixed term contract to 6 months because of his race and religion to be weak. I have considered the factual situation and the relevant email exchange between Ms T Flanagan and the claimant. It is clear from this exchange that the respondent had to vary the term of the contract because of a decision made to outsource the work to India. The claimant was given the opportunity either to withdraw from the contract or agree to the variation. The claimant unconditionally accepted the variation and did not state that he was being forced to accept this proposed change. He could have refused. There is no evidence that he was forced to accept the change. Further, the claimant has ignored the fact that this decision to outsource the work affected some 142 employees irrespective of their individual protected characteristics. Thus a mere assertion that the difference in treatment was because of a protected characteristic is not sufficient to prove discrimination. I therefore find the claimant will struggle to show a prima facie case on the facts. Accordingly, I find this complaint has little reasonable prospects of success and the threshold for making a deposit is met.

65. I have noted that the making of a deposit order does not automatically follow from a finding of little reasonable prospect of success. I must still consider whether it is in keeping with the overriding objective to make such an order. I find that it is for the following reasons, (i) cases need to be dealt with justly and fairly, that includes saving unnecessary expense, and (ii) justice requires the Tribunal's resources are allocated fairly between all parties whose cases need to be heard by the Tribunal Service. There needs to be some deterrent to having to allocate the Tribunal's resources to hearing weak claims.

66. It is not, however, the purpose of a deposit order to make it difficult for the paying party to find the sum payable and to thereby achieve a strike out by the 'back door'. The claimant was first reluctant to disclose his current financial situation. However, he confirmed he currently works as a delivery person with Just Eat. He said he earns about £50 per week, at best. He is on Universal Credit of £400 per week. His rent is paid and he has no savings. He did not give an indication of his disposable income. I take into account that it would be wrong to order a deposit which is greater than his disposable

income. I therefore set the amount of the deposit order at £100 payable within 21 days of the date on which this judgment is sent to the parties.

67. I draw the claimant's attention to the guidance note at the end of this judgment and strongly recommended that he takes advice as to the potential consequences of a deposit order.

68. The other complaints of discrimination and victimisation shall proceed as I do not consider it appropriate to strike out those complaints and/or to make a deposit order. The case will proceed to final hearing on **20 to 28 April 2026** as listed.

Approved By
Employment Judge Bansal
9 June 2025