EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001999/2024

Open Preliminary Hearing held at Aberdeen on 22 April 2025

Employment Judge McFatridge

Mrs D Ryan	**Claimant** **In person**
Aberdeen City Council	**Respondent** **Represented by:** **Mr Milne,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that

1. The tribunal does not have jurisdiction to hear the claimant's claims relating to public interest disclosure, race discrimination and age discrimination as they are time barred.

2. The claimant's claim of unfair constructive dismissal has little reasonable prospect of success and accordingly the claimant is ordered to pay a deposit of £250 as a condition of continuing to advance her claim of constructive unfair dismissal.

REASONS

1. The claimant submitted a claim to the tribunal in which she claimed that she had been unlawfully discriminated against on grounds of race and age by the respondent. She also claimed that she had suffered detriment as a result of making protected disclosures and that she had been unfairly constructively dismissed by them. The respondent submitted a response in which they denied the claims. They made various criticisms of the claims indicating amongst other things that any claim of discrimination or claim based on public interest disclosure was time barred. The matters were discussed at a case management preliminary hearing and it was agreed to fix an open preliminary hearing to deal with the issue of time bar and also whether the claim of constructive unfair dismissal should be struck out on the basis that it had no reasonable prospect of success or alternatively whether a Deposit Order should be made on the basis it had little reasonable prospect of success.

2. The preliminary hearing took place on 22 April. In advance of the hearing the claimant had indicated in correspondence that she did not intend to lead any evidence in relation to the time bar issue. At the hearing however when I prompted her again she decided that she did wish to give evidence herself. She then gave evidence in fairly short compass which essentially repeated the claims set out in her ET1 claim form. The parties then made full submissions. In this judgment I will set out the factual position adopted by the claimant at the hearing and provide my findings in relation to this before going on to briefly summarise the representations made by each party in relation to each of the points which I required to decide upon. I shall then set out my own view on the relevant factual and legal position before setting out my decision.

Factual findings

3. As noted above the claimant gave evidence on her own behalf although she had previously indicated she did not wish to do this. This resulted in her giving her evidence after the respondent had made their initial submissions. I did not consider this impacted on the fairness although it may have given the claimant some advantage. Essentially the claimant

repeated the claim as set out in the extensive Paper Apart to her ET1. Although the claimant goes back to 2016 in her ET1 and sets out various difficulties she had at that point her position in evidence was that the current matters essentially stemmed from an incident in 2019 when she was assaulted by a fellow teacher. It was her view that the respondent had dealt with this badly. The claimant had been involved in a substantial number of processes during which she had been represented by a union. She had changed unions over the period and also changed representatives within the union. For a substantial period she had been sitting at home doing what she described as "menial tasks" whilst an alternative post was being found for her. She had then agreed to take on a different type of role at St Machar. Unfortunately difficulties had arisen there. She had then been subject to a disciplinary investigation which had lasted over a year. During this time she had been suspended for a period and had been on sabbatical for a period. She had answered a number of questions from the investigation officer whilst on sabbatical. She was then told in January 2024 that she would be facing a disciplinary hearing but it was not until March that she received the full allegations. It was her position that her union rep had been asking for the details of the allegations during this whole period. It was then her position that she had received an email on 5 June 2024 which told her the outcome (J4, page 139). The email simply stated:-

> *"Further to the disciplinary hearing held yesterday which you attended with your TU representative Darren Wapplington, I write to confirm my decision.*
>
> *Having given full consideration to the issues that emerged during the course of the disciplinary hearing, I confirm my decision is that no disciplinary action is taken. However, I am recommending that you are counselled by your Line Manager in relation to improvements required, full details of which will be detailed in the outcome letter which you will receive within the next 5 working days.*
>
> *I note you are currently on sabbatical, and this will be deferred pending your return to work in August 2024."*

4. During her evidence at the hearing it was put to the claimant that she had also received a further email on 20 June 2024 (page 140) which enclosed with it a substantial four page letter setting out the disciplinary outcome and the findings (page 141-145). At the hearing the claimant was quite adamant that she had never received this second email and letter. In fact she accused the respondent of sharp practice by including this documentation in the bundle when she had never seen it before. It was the claimant's position that it was the letter of 5 June which had in her view been the final straw causing her to resign. She considered it inappropriate that whereas she had been found not guilty of any disciplinary offence it was still being recommended that she be counselled by her manager. The claimant had resigned as a result of this.

5. Some days after the hearing the claimant wrote to the tribunal saying that she had been going through her records and she now accepted that she had in fact received the email of 20 June together with the letter attached to it and that she had been mistaken in her evidence at the tribunal to the effect that she had not received this.

Observations on the evidence

6. I had no doubt the claimant was giving evidence which she considered to be truthful in setting out her view on matters. It was clear that she felt aggrieved at the way she had been treated virtually since the inception of her employment with the respondent. Prior to receiving the correspondence sent in after the date of the tribunal I would have been prepared to accept her evidence that she had not in fact received the letter of 20 June until she had found it in the bundle. In the light of her letter however I consider that it is more likely than not that she did receive this letter but had simply forgotten about it by the date of the hearing. I do not consider that she was in any way trying to mislead the tribunal. As I indicated during the course of the hearing I had understood that in her case she was relying on things said in the letter of 20 June as being part of the final straw and indeed this had been the respondent's understanding of the position but she was absolutely clear that it was the letter of 5 July she was relying upon.

7. I had invited the claimant to give evidence on the basis that she might have more to say about precisely why she did not lodge her discrimination and or whistleblowing claims within three months of the various incidents occurring. The claimant could really add very little to this in the way of evidence other than to express surprise that anyone would be expected to lodge their claim within a three month period or when a grievance was still ongoing. She confirmed that the timeline following her resignation was essentially as set out in her Paper Apart. She had requested legal assistance from the union virtually straight away. The union had carried out a merit assessment and on 1 August she had been advised that she did not have a case. She appealed the decision and received a final decision from the union on 3 September to say that they definitely would not be providing legal assistance. She did not say that she had been unaware of any time limit or that there had been any difficulty with the specific advice provided by the union on this point.

Representations

8. Both parties had sent in written submissions. The respondent's submission was that the last act averred by the claimant was 5 June 2024. This was when the claimant was told that there would be no disciplinary action but that there would be a recommendation that she be given counselling by her line manager. The respondent's representative set out the relative dates, the early conciliation certificate having been applied for on 24 September and the certificate issued on 5 November 2024. The claim was received by the tribunal on 29 November 2024. The early conciliation certificate would cover any actions which took place on or after 25 June 2024 but anything prior to that would be time barred. It was their view that the tribunal should apply the line of authority in ***Robertson v Bexley Community Centre*** in exercising its discretion and noted that in that case the tribunal said that the exercise of discretion was the exception rather than the rule. They referred to the case of ***Adedeji v University Hospitals Birmingham NHS Foundation*** [2021] EWCA Civ 23. With regard to the length of and reason for the delay they noted that in this case taking the claimant's claims at their highest there was a continuing course of conduct which ended on 5 June. The claim had not been submitted

within three months of the end of this period. It was up to the tribunal to decide whether or not it was just and equitable to extend time. Whilst the delay between 5 June and 25 June was not particularly long it was clear that in this case the claimant is making allegations going back around nine years. She has indicated provisionally that she would be seeking to lead evidence from around 40 witnesses. This is a very substantial claim going back over a lengthy period. During the whole of that period the claimant was represented by a union. The claimant could have raised her discrimination and whistleblowing claims at any time but she did not. By the time the claimant was given the disciplinary outcome the claimant had been on sabbatical and suspended for a year. Her whistleblowing claim was dated 16 March 2021, the last and only alleged act of age discrimination is stated to be 6 March 2023. There is no real averred evidence of race discrimination although the claimant has confirmed she wished to make further averments to substantiate this claim.

9. The respondent's representative noted that the claimant was not making any kind of case that she was ignorant of the time limit or that she had received wrong advice from her advisers. With regard to prejudice the respondent referred to the fact that if the claim of discrimination and whistleblowing were allowed to proceed this would involve considerable enquiry on their part going back many, many years. The claimant herself had indicated that around 40 witnesses would be required. There is clearly substantial cost to the respondent if the case is allowed to proceed. They referred again to the ***Adedeji*** case in saying that the tribunal should have regard to the consequence of granting the application to extend time in that this would potentially open up requirement for the tribunal to hear evidence about matters considerably in the past.

Claimant's submissions on time bar

10. The claimant previously set out her position in an email dated 18 March 2025 to the tribunal. At the hearing she reiterated her view that there was a continuing act of discrimination over a lengthy period. She said that she had been under huge stress for a number of years. She had been expected to work in an extremely hostile environment. She had been referred to Occupational Health on various occasions. There had been a

lengthy period when she had been at home working on menial tasks which were given to her whilst the respondent were looking for a suitable post. In her written submissions she alleged that the council had consistently delayed proceedings and referred to the public interest in child safety and the pattern of victimisation that followed her whistleblowing.

The respondent's submissions on strike out

11. With regard to the constructive unfair dismissal claim the respondent's position was that the claimant resigned in a letter dated 27 June which was sent by email dated 28 June. They therefore accept that the claim is submitted in time however it was their position that the claim ought to be struck out in terms of section 38(1) of the Employment Tribunal Rules 2024. It was their view that the central facts of the matter were not in dispute. There was a disciplinary process. In the bundle they submitted the policy, the investigation report and the outcome which was communicated by the email of 5 June 2024 together with subsequent letter of 20 June 2024 intimating the decision in detail. They referred to the case of ***Mechkarov v Citibank N.A.*** UKEAT/0041/16 [2016] ICR 1121 as authority for the proposition that if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents then it may be struck out. They also referred to the case of ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 [2018] IRLR 833. In their view it was irrelevant that there was a dispute about the rights and wrongs of what happened in the disciplinary process; the relevant legal issue was whether the way in which the disciplinary processes were conducted constituted or contributed to a repudiatory breach of the contract of employment. It was their view that on any view of the disciplinary process which was undertaken in this case the claimant's allegations fell far short of establishing that a repudiatory breach of contract had taken place. The respondent's representative set out the allegations of misconduct which were put against the claimant as being *"it is alleged that between February 2023 and May 2023 you engaged in appropriate behaviour/conduct that has a bearing on your role within the council and does not show any change from previous advice shared with you in an executive summary of a grievance raised in May*

2021." The grievance was investigated and the claimant was given a full opportunity to participate in the investigation and provide any mitigation or support of her position. They then set out the respondent's findings which were set out in the letter dated 20 June 2024 which stated:-

> *"Having given full consideration to the issues that emerged during the course of the disciplinary hearing I confirm my decision is that no disciplinary action is taken. A few aspects of the allegations were acknowledged by you and or corroborated by a third party however your interpretation or recall of most of the events differs from the witnesses who provided statements. The number and nature of complaints which has been raised over a relatively short period of time independent of each other does raise questions about your understanding of collegiate working and your ability to conduct yourself in an appropriate professional manner in the workplace. I am therefore recommending that you are counselled by your line manager in relation to the improvements required."*

They point out that no disciplinary action was taken against the claimant. It was their view that there was absolutely nothing in the decision of the disciplinary which could possibly be regarded as a final straw. The claimant's position in her letter of resignation is noted as being:-

> *"I have been constructively unfairly dismissed since I have no choice but to resign as I cannot accept the conditions or returning to work following my sabbatical and the disciplinary process that ran concurrently through 2023/24. I don't believe this disciplinary process should ever have been commissioned and it was my final straw."*

They noted that the claimant objected to a recommendation to receive counselling for her line manager. It was their position this was a supportive matter and could in no way be regarded as a final straw. It was their position that the unfair constructive dismissal claim should be struck out as having no reasonable prospect of success. It was their position that given the admitted facts in this case there was no possibility whatsoever of a tribunal holding the claimant's claim. The issue which the

tribunal would require to determine would be whether the application of the respondent's disciplinary process, its conduct and its outcome was sufficient to be deemed a repudiatory breach of contract entitling the claimant to resign and claim constructive unfair dismissal. It was the respondent's position there was no realistic prospect of this happening.

Claimant's submission

12. The claimant's submission was that essentially she had been subject to a very lengthy period when she had been treated badly. Her view was that the disciplinary had been protracted over a lengthy period. The allegations were vague and that the last straw had been the suggestion that she needed counselling. Her view was that her motivation throughout had been to do what was right for the council. She believed she was a good teacher and she had been exposed to working in a hostile environment. Her position was that because she raised concerns she was victimised and that the contents of the disciplinary were simply the latest examples of that victimisation. She felt that at the end of this process of victimisation it was entirely inappropriate for the council to say that she was the one who needed counselling.

Discussion and decision

Time bar

13. The respondent argued that the discrimination claims and the claim relating to public interest disclosure was time barred. There are two different legal provisions which apply to the time limit in respect of these claims. So far as the claim of having suffered detriment due to making public interest disclosures is concerned the relevant time limit is contained in section 48 of the Employment Rights Act 1996. Section 48(3) states:-

> *"An employment tribunal shall not consider a complaint under this section unless it is presented –*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

14. So far as the complaints of discrimination are concerned the provisions are set out in section 123 of the Equality Act 2010. This states:-

"Subject to sections 140A and 140B 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."

15. Given that the tests are different it is as well to deal with them separately and I will deal with the whistleblowing claim first. Essentially I understood the claimant's claim to be that she made various protected disclosures over the period from 2017 onwards. These included various matters she reported to the Head Teacher at various schools and that she suffered a number of detriments going back as far as 2021. She states that she was off with work related stress from August 2021 onwards. She was then at home for several months until she took a post at St Machar and it was her position that she raised issues regarding child safety there also. I understood her position to be that the detriment was the whole of the disciplinary process which ended when she received the disciplinary outcome on 5 June 2024. I agree with the respondent that even if we are to take the whole process up to the date of the disciplinary outcome as amounting to detriment then the claim is still time barred by around 20 days. The *"not reasonably practicable"* test is a very strict one. The higher courts have over the years provided considerable guidance to tribunals on how to apply it. It is a two stage test. First of all the tribunal has to decide whether or not it was reasonably practicable for the claim to be lodged within the initial three month period. If the tribunal decide it was not and only if the tribunal finds it was not then the tribunal moves on to the second stage of deciding whether it was submitted within a reasonable period after that.

16. The case of ***Palmer and Saunders v Southend-on-Sea Borough Council*** [1984] IRLR 119 CA stated that the meaning of the words reasonably practicable lies somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. The best approach is to read practicable as the equivalent of feasible and to ask was it reasonably feasible to present the complaint to the employment tribunal within the relevant three months. The case of ***Marks & Spencer plc v Williams-Ryan*** [2005] IRLR 562 CA means that one should be looking at this from the claimant's own individual point of view and saying was it reasonably feasible for this particular claimant in those particular circumstances to submit the claim in time. The case of ***Dedman v British Building and Engineering Appliances Ltd*** [1973] IRLR 379 CA deals with a situation where an individual states that they were ignorant of the time limit in a particular case. In that situation the tribunal requires to look not only as to whether as a matter of fact the claimant was ignorant of the time limit but whether such ignorance was itself reasonable.

17. In this case having read the claimant's written submission together with her ET1 and heard her evidence in full there is absolutely nothing before me which could lead me to find that it was not feasible for her to submit her claim in time. The timeline is set out in her own ET1. She was in dispute with her employers over a period of years. During most of this time she is represented by a union but she takes no action in the face of what she now states to be detrimental treatment linked to having made protected disclosures. She resigned. She was aware of her right to go to a tribunal because she asked her union if they would provide her with legal assistance for this purpose. She had by this time been represented by her union throughout the whole process. Her union decline to provide legal assistance. She appeals this decision and is advised of the outcome on 3 September. There was absolutely nothing to stop the claimant putting in a claim on her own or at least starting ACAS conciliation on her own which is what she eventually did on 24 September. There was absolutely no reason she could not have done this earlier. The claimant did not at any point suggest that she was in fact ignorant of the time limit but even if she was such ignorance would have on the information before me been unreasonable. She could easily have asked her trade union at

any point during the previous six years when they have been representing her. In my view it is clear that the first part of the test is not met and that the tribunal has no jurisdiction to hear the claim relating to whistleblowing.

18. With regard to the discrimination claims the claimant ticked the boxes on her form claiming race discrimination and age discrimination. In her Agenda the only thing she has said about her age discrimination claim is that she is 58 years of age. She has not specifically set out who she wishes to compare her treatment with and she has not set out why she considers that her treatment had anything to do with her age. Her claim of race discrimination appears to be based not on her own race but on her making complaints about what she perceived as racist comments and attitudes towards children of different ethnicities by her colleagues. Whilst these may properly have formed part of a whistleblowing claim (provided this was made in time) it is hard to see how this can be a claim directed against discrimination by the employer towards the claimant. She has not narrated anything which says her own race has anything to do with it. The above having been said and taking her claims at their highest the claimant appears to narrate a sequence of events and considers she has been poorly treated over a period up until the point where she receives her outcome of the disciplinary on 5 June. I agree with the respondent she would have required to have started early conciliation before 4 June in order to be in time and she did not. My discretion in respect of the discrimination claims being dealt with under section 123 is much wider than my discretion for the whistleblowing claim under the Employment Rights Act. I agree that the case of ***Adedeji v University Hospitals Birmingham NHS Foundation*** [2021] EWCA Civ 23 provides helpful guidance to tribunals as to the correct approach. I am required to adopt a multi-factorial approach taking all relevant matters into account. I disagree with the respondent that the case of ***Robertson v Bexley Community Centre*** [2003] EWCA Civ 576 in some way puts the burden on the claimant to show that there is a good reason for the extension. What that case does is confirm that there is no presumption either way. I am required to look at the various factors and weigh these up.

19. With regard to the length of and reason for the delay I agree with the respondent that the ***Adedeji*** case allows me to look at matters in the round and whilst on the face of it a delay of 20-odd days might appear minor it is clear that if the claims proceed the claimant will be seeking to lead evidence and the tribunal will require to make factual enquiry in relation to matters which happened many, many years ago. Cogency of the evidence is quite clearly going to be affected by the delay in this case. With regard to the reason for the delay I would agree with the respondent that the claimant has really shown no good reason whatsoever for the delay. She was fully advised by her union. There was absolutely nothing what the claimant has said which indicates why she did not start early conciliation before she did. I agree with the respondent that I am entitled to take into account the apparent relative merits of the claim. The claimant's claim appears to be difficult to make out. It is clear that she is unhappy with the way she was treated over a lengthy period but there is very little in her pleadings which link these with any protected characteristic of hers. We have her own statements that her union who had been supporting her throughout the disciplinary process believed that she did not have a case. It is clear that it is no minor thing if the claimant is unable to pursue her claim through the tribunal but on the other hand it is very clear that there would be severe prejudice to the respondent if the claim were allowed in late. The claim is lengthy and complex. Additional work is going to be required to flesh out the claim particularly as the claim based on public interest disclosure cannot proceed in any event. In all the circumstances I consider that the respondent's arguments in this case prevail and that justice and equity supports not adjusting the time limit. Accordingly the discrimination claims will be struck out on the basis that they are time barred as will the claim of detriment arising from making public interest disclosures.

Strike out – unfair constructive dismissal

20. The respondent accepted that the claim of constructive unfair dismissal was in time. Their position was that the claim had no reasonable prospect of success. I consider that they are correct in their references to the cases of **Mechkarov** and ***Kaur***. I am entitled to look at all the information before

me. If it is a case which clearly has no reasonable prospect of success then Rule 38 does permit me to strike it out.

21. I have looked through the minutes of the disciplinary and the outcome. These show that whatever the rights and wrongs of the matter the respondent does appear to have approached matters in a broadly correct way.

22. In order to show that she was constructively dismissed the claimant has to prove on the balance of probabilities that the respondent's conduct amounted to a repudiatory breach of contract. Although the claimant has not specified this I understand her to be saying that their conduct taken as a whole over the period amounted to a breach of the implied term of trust and confidence. The claimant is referring to the fact that the letter advising her that no disciplinary action would be taken also indicated that she should be given informal counselling by her manager and that she considered this to be the last straw. At the end of the day an employer is contractually entitled to carry out a disciplinary process. During the course of such a process it is inevitable that things will be said or done which may cause annoyance to the employee. In certain circumstances it may be that if an employer raises disciplinary proceedings which then result in no action this could amount to a breach of contract if there was manifestly no grounds for raising the disciplinary proceedings in the first place. That is not the case here. What we have here is a situation where the claimant had been the subject of numerous complaints from colleagues. She had received complaints from a number of different workplaces. An employer in that situation is not in breach of contract if they instigate proceedings with a view to investigating matters. If at the end of the day they decide that no disciplinary action is warranted then that is all to the good. There has not been a breach of contract to instigate them in the first place in the type of situation we have here. There is really nothing in the context of the disciplinary process to indicate that the respondent did anything wrong. The claimant refers to various statements by her trade union representative but on the basis of the information available to me I do not agree with him. I also observe that the claimant has reported that the trade union are not prepared to support the claimant's unfair constructive

dismissal claim in this case. In the claimant's own words they have done so because they did not consider she has a claim.

23. The claimant indicates that the final straw was the letter of 5 June. I have thought about matters carefully and whilst I consider it highly unlikely that it is ever going to be a breach of contract for an employer to suggest to a line manager that they might wish to provide informal counselling to a member of staff about how that member of staff should interact with their fellow employees and how to work collegiately with others I can also see that in certain extreme circumstances this may be something which is bitterly resented by an employee. This would really only be the case if that employee could show that the suggestion was entirely unwarranted and without merit. In this case I have to say that having read the disciplinary investigation report and the disciplinary outcome I think it is highly unlikely that the claimant would be able to show this. Whilst it is highly unlikely the claimant will succeed in showing this I believe that I cannot say at this stage that it is completely impossible. I would have to find that it was completely impossible for the claimant to demonstrate this before I would be entitled to make a finding that the claim had no reasonable prospect of success.

24. At the end of the day however I believe that the claimant's unfair constructive dismissal claim comes into the category of having very little prospect of success rather than the category of having absolutely no reasonable prospect of success. I feel that this is as far as I can go without having heard any evidence in relation to the claimant's allegations. In the circumstances therefore I consider that I am not in a position to strike out the claim of constructive unfair dismissal. During the course of the hearing I enquired of the respondent whether it was their secondary position that if the claim of constructive unfair dismissal was not struck out they would be seeking a Deposit Order. They indicated that this was very much the case. My view is that whilst it would be inappropriate to strike out the claim as having no prospect of success this is very much a case where a Deposit Order is appropriate.

25. I invited the claimant during the course of the hearing to provide evidence as to her means. The claimant only indicated that she was no longer working as a teacher and did not provide any further information.

26. I advised the claimant of the import of a Deposit Order at the hearing but feel it is as well to repeat it here. The effect of the order is that the claimant will require to pay the deposit as a precondition of proceeding with her claim. If she does not pay it the claim will be dismissed. If she does pay it then if she wins her claim then the deposit will usually be returned to her. The most important effect of a Deposit Order however is that where a Deposit Order has been made there is a very high likelihood that if the claimant does not win, the claimant will be ordered to pay all or part of the respondent's expenses in the action. This will be on the basis that the claimant has been clearly told by me that her claim has little reasonable prospect of success. If she proceeds in the face of that advice then the respondent is entitled to expect that their costs in having to successfully defend such a claim should be met by the claimant.

27. Having considered matters in the round I believe that a deposit of £250 is appropriate in this case. A separate order will be sent detailing when and how this should be paid if the claimant wishes to proceed.

Employment Judge McFatridge

Date of Judgment: 29 April 2025

Date Sent to Parties: 9 May 2025