



EMPLOYMENT TRIBUNALS

Claimant: Ms M Kolade
Respondent: Whittington Health NHS Trust

Heard at: Reading Employment Tribunal (by video)
On: 16 January 2026
Before: Employment Judge George

Representation

Claimant: No attendance (having been given notice of the hearing)
Respondent: Ms. S Firth, counsel

JUDGMENT ON STRIKE OUT APPLICATION

The respondent's application to strike out the claim on the basis that, having regard to the statutory time limits, the claimant has no reasonable prospect of showing that the conduct about which she complains prior to 12 April 2024 was part of conduct extending over a period which ended on or after 12 April 2024 is refused.

REASONS

1. In circumstances where the claimant was not present and not represented at the hearing, although I gave oral reasons at the hearing for my decision to refuse the respondent's application to strike out the claim, I volunteer full written reasons so that the claimant and her representative may understand the reasons for the decision. The circumstances which led to me proceeding in the claimant's absence are explained in the record of preliminary hearing which accompanies this judgment.
2. I had available to me a preliminary hearing file prepared by the respondent (referred to as pages 1 to 453); a statement of Ms. Wilshire for the respondent; the respondent's skeleton argument (RSKEL) and the claimant's written submissions (CSUB). I heard oral argument from Ms. Firth for the respondent. I also had available the claimant's postponement application (with supporting documentation) and some documents which had been provided separately to the hearing file: an outcome letter dated 18 January 2021; an email dated 18 January

2022 and the respondent's appeals policy.

3. Ms. Firth described the issues that I have to consider today on the respondent's application in this way:
 - a. The first question required me to consider whether there were no reasonable prospects of the claimant establishing that the facts alleged amounted to conduct over a period ending no more than three months before presentation of the claim (taking into account the effects of early conciliation). That is what the claimant must show in order for the full breadth of her claim to be in time.
 - b. If I decide that the claimant has no reasonable prospects of establishing that there was a continuing act such that the older parts of the discrimination/victimization complaints are in time, the second question was how to decide the just and equitable question? Should it be determined on a strike out basis (so that it could be revisited at a final hearing) or as a substantive preliminary issue (so that it could not be revisited at a final hearing)?
 - c. The final question, which would depend on the answer to question 2, would be to determine either whether it was just and equitable to extend time or, alternatively, whether there were no reasonable prospects of a just and equitable argument succeeding. In other words I should first decide what was the appropriate question and then answer it.
4. I heard her argument on whether there were no reasonable prospects of establishing there was conduct over a period. However, the respondent has made clear that they were arguing in the alternative that a deposit should be ordered on the basis that there was little reasonable prospect of the claimant establishing that connection. I have decided only that issue (para.2(i)(a) in the order of Employment Judge Smeaton) and have adjourned the preliminary hearing part heard to consider the remaining issues for today's hearing.
5. The Employment Tribunals Procedure Rules 2024 include the following:

“38.— Striking out

(1) 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 any of the following grounds—

- (a) that it 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 the claimant or the respondent (as the case may be) 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;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim, response or reply 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.”

6. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out a claim where the central facts are in dispute because discrimination cases are so fact sensitive. The same point was made by the Court of Appeal in the protected disclosure case of Ezsias v N Glamorgan NHS Trust [2007] I.C.R. 1126 CA where Maurice Kay LJ said this at paragraph 29

“It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words “no reasonable prospect of success”. It would only be in an exceptional case that an application to an employment tribunal 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 were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.”

7. Furthermore, there is a public interest in ensuring that allegations of discrimination are heard and determined after appropriate investigation of the circumstances because of the great scourge that discrimination, whether on grounds of sex, race or other protected characteristic, represents to society. Therefore at this preliminary stage the question is whether the claimant has no reasonable prospect of establishing the essential elements of her claim, taking into account the burden of proof in respect of each of those elements and bearing in mind the danger of reaching such a conclusion where the full evidence has not been heard and explored: see Underhill LJ in Ahir v British Airways Plc [2017] EWCA Civ 1392 para.16.

That said, where it is plain that a discrimination claim has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail: Anyanwu para.39 per Lord Hope. Such an example is given in the quotation from Ezsias.

8. I have been helped by the Guidance in the decision of E v X and others; L v X and others (UKEAT/0079/20 & UKEAT/0080/20) para.50 where the key principles on dealing with time points at a preliminary hearing are distilled and read it in full. But I have particular reference to sub-paragraphs 5 through to 9 of

Mrs Justice Ellenbogen's summary of the relevant authorities:

- "5) When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: *Lyfar*;
- 6) An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: *Aziz*; *Sridhar*;
- 7) The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: *Aziz*;
- 8) In an appropriate case, a strike-out application in respect of some part of a claim can be approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required — the matter will be decided on the claimant's pleading: *Caterham* (as qualified at paragraph 47 above);
- 9) A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: *Robinson* and paragraph 47 above;"
9. Amongst what is said in those paragraphs is that the framing of the test that I was having to consider today was whether the claimant has established a prima facie case the learned judge comments that it may be advisable for oral evidence to be called. However, in an appropriate case (see sub-paragraph 8), she states that a strike out application in respect of some part of a claim can be approached "assuming, for that purpose, the facts to be as pleaded by the claimant. In that event no evidence will be required". That is what I am asked to decide, assuming the facts to be as pleaded by the claimant are there no reasonable prospects that the claimant will establishing the necessary link between individual alleged acts of discrimination or victimization such that they will be found by a Tribunal at final hearing to be conduct extending over a period.
10. The framing of that test is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be a continuing act or constitute an ongoing state of affairs. Are the complaints capable of being part of an act extending over a period: Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA para.10. I am reminded of the case of Aziz v FDS [2010] EWCA Civ which said, the fact that different individuals may have been involved is a relevant but not a conclusive factor.
11. I should consider the claimant's case at its highest although I can do so critically including considering whether any aspect of the case is implausible or, indeed, inexplicably contrary to the contemporaneous documentation (see E v X para.32).

12. I therefore approach this decision on the basis that I should assume the facts to be as pleaded by the claimant unless they are wholly implausible or inexplicably contrary to the uncontested contemporaneous documentation.
13. I take into account the explanation of that concept in particular in the well-known case of Hendricks v Metropolitan Police Commissioner [2003] 1 All ER 654, CA where it is advised that the focus should be on the substance of the complaints made, in that case that the Commissioner was responsible for an ongoing situation, or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would start to run from the date when each specific act was committed. Where omissions are alleged the position is slightly more nuanced but the principle is the same. The concept is that one can, where evidence supports it, infer from a series of connected acts that there is a continuing state of affairs against a backdrop of which the claimant is treated less favourably from time to time.
14. I am very conscious that I am at a preliminary hearing stage. I have had a hearing file running to 453 pages. I have considered some specific documents in it that file which are part of the documentary evidence in the case. I am not testing whether the conduct was, on the facts, discrimination or victimisation because that would otherwise contravene the authorities that state I should take the claimant's case at its highest.
15. I do think that it is convenient, as the respondent's representative has done, to divide the arguments into two strands; the grievance strand and the failure to appoint stand.
16. After the belated further and better information provided on the morning of the hearing before Employment Judge Smeaton, work was done to consolidate a list of issues which is described in her order as final (page 130 to 135). I have taken the particulars of detriment from the list at List of Issues 2.1; the same detriments are relied on for the direct sex discrimination complaint, the direct race discrimination complaint and the victimisation complaint.
17. The alleged failure to appoint to particular positions are set out in the sex discrimination complaint as List of Issues 2.1.1 and 2.1.2. They are easily understood to be that of being denied an opportunity to secure a vacant post of contracts and material managers on three occasions: in July and December 2019 and in July 2020. I am told that the appointing manager on each of those occasions was the same individual.
18. Then in List of Issues 2.1.2 it is alleged that, on 19 April 2024, the claimant was denied the opportunity of securing the vacant position of Sterile Services and Materials Manager. There are three individuals named in relation to that – none of whom are said to be responsible for the previous three decisions not to appoint. I infer that there was an appointment panel of three. Those are Ms Firth's instructions.
19. All of the detriments alleged in relation to the grievances (List of Issues 2.1.3 to

the end) are all merely described as failure to uphold the grievance or dismissing the appeal.

20. It is argued by Ms Firth on behalf of the respondent that the equivalent allegations to List of Issues 2.1.4, 2.1.6 and 2.1.9 (sex discrimination in the outcome of the claimant's grievance appeals) should be removed from the equivalent sections in the race discrimination and victimisation complaints on the basis that they are not part of the claim when the claim form is given a fair reading as a whole. The respondent, as they were asked to do by Judge Smeaton, wrote to the claimant stating that they considered that if she wished to pursue those allegations that could only be done by way of amendment.
21. A date by which any amendment application should be made was set. No amendment application was made by that date. There is no reference to this debate in the claimant's written submissions, possibly because Employment Judge Cowen directed the tribunal to write (on 7 January 2026) to say that no application to amend could be made in time to be considered at today's hearing.
22. Of course, the mere fact that Judge Cowen said it was too late for it to be considered at today's hearing may mean that it could not be considered prior to the respondent's strike out application being considered. But it does not preclude the claimant from making an application to amend at a later date. That is not something that is time limited once and for all in the way that bringing the original claim is. Nevertheless, among the factors that would be taken into account on any amendment application would be the manner and timing of that application. The fact that the claimant had been alerted by the respondent to an alleged need to amend the claim if she wished to pursue those complaints would, no doubt, be taken into account on any amendment application if one is made in the future.
23. However, it is not actually clear to me that an amendment application is needed to argue that the grievance appeal is an act of race discrimination within the scope of the existing claim form. Paragraph 3.4 of the particulars attached to the claim form refers to her appealing to no avail. I do not decide that now, I have not heard argument on it. What I do think, however, is that it is not right for me to disregard those points within the list of issues when considering whether there are no reasonable prospects, or little reasonable prospects of the claimant showing that there was a continuing act. Justice requires that, while not making a definitive decision on whether there needs to be an amendment application or not, I should not exclude them from consideration on the strike out and deposit order applications.
24. Taking the pleaded case about the grievances at its highest, and the limited amount of documentary evidence that I have been taken to today, this appears to be the position about the pleaded grievance detriments:
 - a. I accept that, for the reasons that Ms Firth explained, the documentary evidence tends to suggest that it would be found at a final hearing that there were only three. To do that I need to evaluate the documents to a limited extent but I consider that to be with the a limited amount of critical evaluation of the claim which is permitted on a strike out application or a deposit order application. The email dated 18 January 2022 apologising

for a delay in providing an outcome and the Appeal outcome letter dated 18 January 2021 which appears to be an attachment to that email means that it is highly likely (to the point of obvious) that date in List of Issues 2.1.5 should refer to 18 January 2022 – the outcome of the grievance dated 5 October 2020. The grievance meeting for that grievance was held on 7 January 2021 (page 311) so the alleged detriment List of Issues 2.1.7 in fact refers to the same outcome letter by which issues raised in the grievance and the grievance meeting were determined by the decision maker. The respondent took me through the chronology which, on the face of it, shows not four but three grievances (see the chronology in RSKEL para.8). Nevertheless, the final decision complained about is the failure to uphold the claimant's grievance dated 24 May 2023 by a decision on 5 October 2023. The relevance of this clarification of the number of grievances (which I shall still referred to as grievance 1, 2 and 4) is when considering what they were about – to the extent that is relevant to the strike out and deposit order arguments.

- b. These particular dates have been provided through further information; the reference in the claim form is only to a failure to uphold grievances (see page 30 paragraph 2.1.14 (sex discrimination) paragraph 2.2.13 (race discrimination) and paragraph 2.3.10 (victimisation). The only other reference to the grievances in the particulars of claim is paragraph 3.4 which complains that the outcome was negative.
- 25. The evidence produced in the hearing file does, on the face of it, show that the outcome to grievance 2 was probably sent to the claimant on 18 January 2022. That means that List of Issues 2.1.5 is inexplicable contrary to the contemporaneous documents to the extent that the dates seem likely to be shown to be incorrect. Furthermore, List of Issues 2.1.7 is inexplicably contrary to the contemporaneous documents because the documents disclosed thus far tend to show that there was no grievance 3. For me to exclude List of Issues 2.1.7 is within a critical evaluation that is appropriate at this preliminary stage.
 - 26. The further and better particulars (page 90) allege that Grievance 1 was about equal pay and job promotion. Grievance 2 is said (8th bullet point on page 90) to be about health and safety matters, discrimination and harassment and bullying. What is called Grievance 4 is referred to in the further and better particulars (pages 90 – 91) but there is no pleaded case on what it was about. The allegations there simply say that they were determined and that the appeals were determined.
 - 27. The respondent argues that the only grievance about a failed application for the Contracts and Materials Manager post was Grievance 2 and they argue there are no reasonable prospects of the claimant showing that the Grievance 2 outcomes were acts of discrimination and, therefore, it is safe to ignore them for time purposes.
 - 28. If we were at a final hearing, assuming that the claimant proved that job rejections were acts of discrimination, I accept that she would have to show either that the three Contracts and Materials Manager post rejections (the last of which was in July 2020 nearly 4 years before she contacted ACAS) were linked to the rejection

of her application for the Sterile Services and Material Managers posts despite the decisions involving different individuals and a large gap in time or, that they were linked to the grievances which were conducted in the meantime. The respondent's arguments today are that she has no reasonable prospects of showing those connections and therefore no reasonable prospects of the complaints about the Contract and Materials manager posts being found to be in time (subject to any just & equitable extension of time). I accept their argument that, in principle, a failure to promote is a complaint about an act with continuing consequences rather than a continuing act in itself. Something is needed to connect them either to the grievance outcomes or to the final failure to appoint.

29. Grievance 1 is about alleged bullying by the manager who is alleged to be responsible for the failure to appoint, and it includes an allegation of disability discrimination. The claimant states that the appeal against this grievance was determined on 16 November 2020.
30. The scope of Grievance 2 can be judged by the outcome dated 18 January 2022. There was a finding that some of the situations that were established met the definition of workplace bullying but not on protected characteristic grounds. There is also this sentence:

“The claimant has been passively discriminated against when applying for the role of the Sterile Services Manager.”

31. Paragraph 3.2 in the outcome refers to the implausibility of her being unsuccessful on three applications had she been developed and supported. So, I read that as there being an outcome in Grievance 2 that the claimant had not been developed and supported over a period of time and that that had adversely affected her promotion prospects.
32. Grievance 4 seems to concern specific allegations against Tanesha Balgobin (see the outcome letter at page 364). One of the points was upheld and one point partially upheld. It seems to be a conduct based allegation and, on the face of it, there is no connection with the failures to appoint.
33. The primary point that the respondent makes is that these can be fairly ignored because there are no reasonable prospects of the claimant succeeding and showing that each decision was discrimination. They argue that when one steps back and looks at them critically in a way that it is permissible to do even in the way of a strike out application, there are no reasonable prospects on their merits so they can be ignored for time purposes because they are only relevant if discriminatory or victimisation.
34. Mr Neckles, in his written submissions, argued that this was impermissibly to consider an alternative ground for a strike out than one that the claimant had been prepared to meet. I took that to mean that I need to consider whether there were no reasonable prospects of the claimant succeeding in the grievance based detriment complaints before deciding which complaints are in scope of the continuing act allegations and that that basis for strike out was not one the claimant was prepared to meet.

35. I agree that that particular argument is not on the list of preliminary issues. It is not specified that I should consider whether there are no reasonable prospects of the claimant succeeding on the grievance based detriment complaints on their merits.
36. There is a tension between the bold assertion in the claim form and the further and better particulars that the grievances were not upheld and the outcome documents themselves which do not dismiss all of the claimant's complaints. The claimant has not pinpointed what the decision maker did wrong in relation to the specific various grievance outcomes or, indeed, appeal outcomes, and it is hard in the absence of input from or on behalf of her to see exactly what the arguments are. However, they were not wholly upheld. They were not upheld in full.
37. I understand why Mr Neckles argues that the claimant is not prepared to meet this argument. As it happens, I think there are reasonable prospects of the claimant succeeding in showing that the factual basis of the allegation is made out or that there was a detriment to her in respect of the outcomes because they were not upheld in full. There is also a considerable amount of underlying factual disputes which would need to be the subject of analysis in evidence and argument in order to consider, on a case by case basis, whether a different outcome was less favourable treatment on grounds of sex, race or, indeed, on grounds of the claimant having made a discrimination complaint. I therefore reject the argument that these complaints are doomed to fail. That is not amenable to determination on a strike out application.
38. Nevertheless, the grievance documents are informative in connection with the way the claimant argues that there was a continuing act because, setting aside the merits of any individual complaint, I need to consider whether the claimant has no, or little, reasonable prospect of persuading a tribunal that there was conduct extending over a period from July 2020 to April 2024 between the group of unsuccessful applications for Contracts and Materials Manager posts and the final failure to appoint incident. I also then need to consider whether there are no, or little, reasonable prospects of the claimant showing that there was conduct extending over a period punctuated by the grievance decisions which are acts that, in terms of a simple timeline, come between the two temporally separate failure to appoint incidents.
39. I disagree that there is a necessary distinction between a failure to appoint and a complaint about it. The claimant's representative's written submissions argue that this is a case of multiple failures to appoint a woman of colour and a failure to respond adequately when she complained about it. That is the way her claim is articulated in the written submissions; Mr Neckles argues that the claimant's pleaded case is that she was repeatedly blocked from progression and that complaints (grievances) about that blockage were rejected and the same protected characteristics underpin both.
40. This argument is flawed in my view. First, that is not the pleaded case about the grievances. The pleaded case is that the grievances were not all about what is termed "the blockage" in the submissions. Secondly, when you look at the grievance documents that have been put in the preliminary hearing file, the grievances were not about the complaint that she now makes about sex or race

discrimination in relation to the failure to promote. Had, on the face of it, the allegation within the claim form actually been what Mr Neckles alleges it was, then his argument that there are strong prospects of a connection may well have had merit. Had the documents tended to show that when the tribunal gets into the detail – regardless of the pleaded case – that is what the evidence will be then that argument may well have had merit.

41. Nevertheless, I am conscious that at this preliminary stage I have had to engage substantively (if superficially) with the contemporaneous documentation to reach this point. Strike out is a Draconian step. The consequence of a strike out judgment is that the claimant does not have a decision on the merits of the case. I need to be persuaded that there are *no reasonable* prospects of the claimant showing that there is a continuing act as she alleges. There is a realistic possibility that the pleaded case might be fleshed out in a way which could amount to the required connection. The respondent's argument requires me to engage too much with the underlying evidence and consider the likelihood of the claimant proving her pleaded case and I am not satisfied that the test in rule 38 is met.
42. I should like to apologise to the parties for the delay in providing these reasons which was due to competing pressure of judicial work.

Approved by:

Employment Judge George

27 March 2026

JUDGMENT SENT TO THE PARTIES ON

30 March 2026

FOR THE TRIBUNAL OFFICE

Notes

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www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/