



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**AND**

**Respondent**

Mr R Khan

Camden and Islington NHS Foundation Trust

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

**On:** 26 May 2022

**Before:** Employment Judge Stout

## **Representations**

**For the claimant:** Mrs L Mankau (counsel)

**For the respondent:** Mr G Powell (counsel)

# JUDGMENT ON STRIKE-OUT / DEPOSIT ORDER APPLICATION

The judgment of the Tribunal is that the Respondent's strike-out and deposit order applications are dismissed.

## REASONS

### **The type of hearing**

1. This has been a remote electronic hearing under Rule 46. The public was invited to observe via a notice on Courtserve.net. No members of the public joined.
2. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

### **The issues**

3. The issues to be determined:
  - (1) Whether the claim should be struck out as standing no reasonable prospect of success under Rule 37(1)(a) because of the jurisdictional requirements of Equality Act 2010 (EA 2010), s 123;
  - (2) Alternatively, whether a deposit order should be made under Rule 39.
4. There was a preliminary issue as to whether privilege has been waived in relation to the legal advice that the Claimant received from his Trade Union. After an adjournment to take instructions, Mrs Mankau agreed on behalf of the Claimant that privilege had been waived in respect of the legal advice referred to in the witness statement at paragraphs 74-78 and further disclosure relating to that issue was provided to the Respondent.

### **The Evidence and Hearing**

5. I read the pages in the bundle to which I was referred and the additional documents which I admitted into evidence. I received a witness statement and heard oral evidence from the Claimant, who was cross-examined by Mr Powell. I gave judgment orally at the hearing and written reasons were requested. What follows is the corrected transcript of the oral judgment.

### **Adjustments**

6. The Claimant needed to stand up occasionally in order to relieve physical discomfort.

### **Factual matrix**

7. The claim in this case was presented on 4 January 2022 following a period of ACAS early conciliation between 25 October 2021 and 5 December 2021. The list of issues in the case was determined at a Case Management Preliminary Hearing before Employment Judge A Richardson on 29 March 2022 and the claims as identified there include claims for direct race discrimination, direct religion or belief discrimination, failure to make reasonable adjustments for disability, discrimination arising from disability and harassment in relation to race and/or religion or belief and victimisation.
8. The Claimant prepared a witness statement for the purposes of this Hearing. Most of it dealt with the issue of his disability or alleged disabilities. That does not form part of this hearing. The part of the statement on which the Claimant has been cross examined and in respect of which he has affirmed the truth starts at paragraph 67 and runs to the end of the document.

9. I am now going to set out the factual matrix that I have taken into account in determining the issues before me. I am not making findings of fact. It is agreed between the parties that as I am exercising jurisdiction to decide whether or not claims that have reasonable prospect of success on a time point, I am not making any findings of fact that would bind a Tribunal were this case to go further forward or indeed in relation to any other matter. With that caveat, the factual matrix that I have taken into account is as follows.
10. The Claimant commenced employment with the Respondent on 1 March 2008 as a Learning and Organisational Development Administrator. The Respondent is an NHS Trust that runs a mental health hospital. The Claimant is an Asian Muslim man. He suffers from various medical conditions including colitis disease, kidney disease and neurological problems and also anxiety and depression.
11. Between 2017 and September 2020 the Claimant was line managed by a lady called Ms Whiskar. On 21 January 2020 the Claimant says he first raised a formal grievance in relation to Ms Whiskar and that no action was taken in relation to that. The Claimant says he submitted a further grievance on 20 February 2020, between March 2020 and September 2020 the Claimant was in America first on unpaid leave and then working from America during the period of the pandemic. He remains in America to date but working remotely during the periods where he has not been on sick leave.
12. In September 2020 the Claimant submitted further grievances against Ms Whiskar and also against her line manager (Mr Fishwick) complaining of bullying, harassment, race and disability discrimination. The Respondent then commenced investigation of that grievance. The Claimant complains that a Ms Lopez met with him on 9 October 2020 concerning his grievance and told him not to raise some of his past complaints of discrimination against Ms Whiskar as part of the grievance process.
13. The Claimant's grievance was then investigated by an external investigator, Ms Blake-Racon. On 9 March 2021 the Claimant commenced long term sick leave and has not returned to work since. On 16 March 2021 the Claimant was informed of the grievance outcome and it was upheld in part in relation to bullying by Ms Whiskar with six out of thirteen allegations being upheld. It was not, however, found that the bullying was by reference to any protected characteristics.
14. The Claimant submitted an appeal within the time limit envisaged in the Respondent's grievance process. He complained in his appeal both about failures to find discrimination and harassment and about failure to investigate allegations as part of the grievance process. By May 2021 no appeal hearing had yet been arranged and the Claimant corresponded with the CEOs of the Respondent and member of Human Resources (HR). In particular, there was correspondence with Mr Mitchell during May 2021 about whether or not the Claimant wished to participate in a restorative justice process. The Claimant's position at that point was that he did not wish to participate in restorative justice but wanted to continue with the grievance appeal process.

However, by 1 June 2021 (as the Claimant accepted in oral evidence), he was not well enough to participate in the appeal process and notified the Respondent of that. The Claimant remained too unwell to participate in the grievance appeal until approximately March 2022.

15. On 15 August 2021 the Claimant wrote to Mr Hoskin complaining about feeling excluded and isolated from the team and that this was causing on going stress and anxiety. This included a complaint about his not having been told about the person who had been dealing with his case leaving the Trust until Mr Hoskin's email of 10 August 2021. The Claimant complained in that email also about being required to rewrite and reiterate everything that had been said previously. He stated that he was in no fit state to go through an appeal physically or mentally at that point.
16. I now need to step back and look behind the scenes to what happened in terms of the Claimant preparing his claim and submitting the claim to this Tribunal. In his witness statement the Claimant says he did not bring the claim immediately in relation to treatment by Ms Whiskar because he was intimidated by her. He brought the grievance through the Respondent's internal process instead. From October 2020 he had a Unison Representative, Ms Brandy assigned to his case. In March 2021 the Claimant first asked Ms Brandy about taking legal action but was told at that point to wait for the grievance outcome and nothing was said about time limits.
17. On 14 May 2021 the Claimant wrote to Ms Brandy indicating that he had now decided he would like to get a solicitor involved and put in a claim. He refers in that email to discrimination being 'ongoing'. The Claimant was from this point aware in principle of the right to bring a claim and that there were time limits for doing so. There was correspondence between him and his Unison Representative Ms Brandy and also conversations and discussion about whether Unison would support him. Unison initially told him that they would not support him, but then submitted his case for consideration and advice by their solicitor. In mid October 2021 Unison advised the Claimant that they had taken legal advice from a solicitor and were not prepared to assist (the solicitor's view being that the claim had no legal merit). The Claimant then took action to commence the ACAS process himself without any assistance from his Trade Union. He contacted ACAS on 25 October 2021, the ACAS conciliation period finished on 5 December 2021 and the claim was presented on 4 January 2022.

## **The law**

18. The law that I have to apply is as follows. The provisions as to time limits are set out in Section 123 of the Equality Act 2010 (EA 2010). Section 123 provides as follows:

### **123 Time limits**

(1) Subject to section 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.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
  - (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
  - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section—
  - (a) conduct extending over a period is to be treated as done at the end of the period;
  - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
  - (a) when P does an act inconsistent with doing it, or
  - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

19. Time limits are extended for ACAS Early Conciliation in accordance with s 140B as follows:

**140B Extension of time limits to facilitate conciliation before institution of proceedings**

- (1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).
- . . . .
- (2) In this section—
  - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
  - (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
- (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
- (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
- (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

20. In this case parties are agreed that any alleged act of discrimination occurring before 26 July 2021 is outside the primary three month time limit in Section 123(1)(a). To establish whether a complaint of discrimination has been presented in time, it is necessary to determine the date of the act complained of as it sets the time limit running. In computing the primary time limit, conduct extending over a period is to be treated as done at the end of the period.
21. The Court of Appeal authorities of *Aziz v FDA* [2010] EWCA Civ 304 and *Hendricks* [2002] EWCA Civ 1686, [2003] IRLR 96 make clear (see

*Hendricks* at [48] and *Aziz* at [36]) that where the question of time limits arises at a preliminary hearing and there is a question as to whether or not there is 'conduct extending over a period' for the purposes of s 123(3)(a), the Tribunal must be satisfied that the Claimant has a *prima facie* case that the various complaints are so linked as to amount to a continuing act or 'ongoing state of affairs'.

22. There is also specific provision in the Equality Act about failures to act, a failure to do something is to be treated as occurring where the person in question presided on it: see s 123(3) and (4) above.
23. In *South West Ambulance Services NHS Foundation Trust v King* [2020] IRLR 168 Chowdhury P (as he then was) observed that an act that is found at a final hearing not to be an act of discrimination cannot form part of the continuing act for the purposes of the provisions of time limits: see [32] to [33] of that case. For that reason it is not normally possible at a Preliminary Hearing to make any final determinations to whether or not something is a continuing act because in order to make any final determination the Tribunal would have to make a final determination on the merits of the claims.
24. In deciding whether or not there is an arguable case as to continuing act at this stage, in addition to the general guidance in *Hendricks* and *Aziz*, I have had regard to the following principles. First, the fact that different individuals may have been involved in the various acts of which complaint is made is irrelevant and not a conclusive factor as to whether there is a continuing act: see *Aziz* at [33]. Secondly, the continuing act can comprise acts which fall under different headings of discrimination such as victimisation and direct discrimination: see *Robinson v Royal Surrey County Hospital NHS Foundation Trust* (UKEAT/0311/14/MC) at [65]. Of course, it is necessary that the factual matters relied on do indeed form a continuing state of affairs. *Robinson* is only authority for the principle that the mere fact the legal label for the discrimination changes during the period is not itself sufficient to break what would otherwise be a continuing act.
25. Applying the above principles, if the Claimant has established a *prima facie* or arguable case that there was a continuing act leading up to something that happens within the primary three-month limitation period, then I should of course allow this claim to proceed to a full hearing. If, however, he does not have an arguable case on continuing act, I have to consider whether or not he has an arguable case that it will be just and equitable to extend time in relation to anything that happened before that primary three month limitation period, in this case prior to 26 July 2021. Again, I am not making a substantive determination as to whether or not it would be just and equitable to extend time because since I cannot in this case make a substantive determination as to whether or not there is a continuing act, nor can I make a substantive determination as to whether or not it would be just and equitable to extend time. The merits of the claims will likely be relevant to the just and equitable question and final determination of whether or not an extension should be granted (if it is needed) must also await the Final Hearing (if I do not strike the claim out).

26. I bear in mind that the burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time: *Robinson v Bexley Community Centre* [2003] IRLR 434. I have to consider the length of and reasons for the delay and weigh up the relative prejudice to both parties of extending or refusing to extend time: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194. The fact that an internal appeal is ongoing is not ordinary sufficient on itself for time to be extended but it is one factor to be taken into account: *Apelogun-Gabriels v Lambeth* [2002] ICR 713 at [16].
27. Unlike in an unfair dismissal claim where incorrect legal advice about time limit may lead to a conclusion that the Claimant's claim lies against his legal advisors rather than the Respondent (the *Dedman* principle), in discrimination cases the fact that a Claimant has been wrongly advised by a solicitor or Trade Union official may be a factor pointing in favour of a just and equitable extension. See the authorities referred to at IDS Employment Law Handbook, Volume 5, Chapter 5, paragraph 5.127.
28. Since I am exercising a strike out jurisdiction in a discrimination claim I must apply a cautious approach in the light of the guidance of the House of Lords in *Anyanwu* [2001] ICR 391 because of the difficulty of establishing direct evidence of discrimination.
29. In relation to Deposit Orders all the same principles apply, save that I am of course applying the less onerous threshold of considering whether or not the claim stands little reasonable prospect of success rather than no reasonable prospect of success.

## Decision

30. I have considered the Claimant's claim as falling in three parts.
31. First, the claims of discrimination in relation to the treatment of the Claimant by Ms Whiskar, and I group with that the allegations made against Mr Fishwick. It is accepted by the Claimant that those allegations concluded in or around September 2020 and were therefore not 'ongoing' as at 26 July 2021.
32. The second category concerns the grievance appeal process. As at the critical date of 26 July 2021 the appeal had not been heard and nor had the Respondent decided not to hear the appeal. The position was that from 1 June 2021 the Claimant was too unwell to participate in the appeal and that situation persisted until March 2022 which was well after he put in this claim. In those circumstances, it seems to me that the complaint there was ongoing discrimination as of 26 July 2021 in relation to a failure to hold a grievance appeal meeting stands no reasonable prospect of success because what is needed to establish a continuing act is an ongoing unlawful state of affairs. However, from the point at which the Claimant was unable to participate in

the grievance appeal because of his own ill health, there was nothing unlawful in the Respondent not arranging an appeal.

33. The third aspect of the claim relates to the matters essentially captured in the Claimant's email of 15 August 2021, i.e. his complaints about being excluded and isolated from the team and having to rewrite and reiterate matters that he felt he had dealt with previously. That includes the complaint from the Claimant that the failure to tell him until 10 August 2021 that the person dealing with his complaint had left the trust was a further example of the exclusion and isolation. The other examples which he had referred to and set out in his email to his Trade Union representative in May 2021 included examples of alleged exclusion and isolation occurring after April 2021. Although there will clearly be scope for argument as to whether the matters about which the Claimant complains under this third heading amount truly to an ongoing state of affairs rather than isolated treatment by different individuals, at this stage, taking the Claimant's claim at its highest, it seems to me that there is a reasonable prospect of the Claimant establishing that if any of these matters amounted to discrimination, they were part of a continuing state of affairs and the 15 August 2021 email shows that this state of affairs was ongoing as at the crucial date of 26 July 2021.
34. It follows that that third aspect of the claim is at least arguably in time.
35. I next consider whether it is arguable that there is some link between that third part of the claim and the other two parts that might be sufficient to create a continuing act between all three elements, notwithstanding the involvement of different people in the three parts. In that regard I take into account that as part of the grievance process the Claimant raised allegations of failure to investigate properly the prior bullying allegedly by Ms Whiskar. I accept that element of it, the 'turning a blind eye point' if I can put it like that, potentially provides a link as between the allegations against Ms Whiskar and the handling of the grievance itself, albeit that that particular argument is in my judgment a weak one.
36. As to the complaints about handling of the grievance and appeal process, those are in my judgement at least similar in kind to the complaints that are made about exclusion and isolation which I have found to be arguably continuing as at the relevant date of 26 July 2021. This is in particular because the Claimant argues that the grievance and appeal processes should have proceeded more quickly because of his medical needs. This argument is similar to what he says went wrong in failing to support him and excluding him from the team. There are therefore arguments to provide links between each of the three parts of the Claimant's claim as I have identified them to be, albeit that the arguments in favour of linking those three things are much weaker than the argument in relation to the third part of the claim itself constituting a continuing act. Nonetheless, I am satisfied that it cannot be said that the Claimant stands 'no reasonable prospect' of establishing a continuing act in relation to all elements of his claim. I would, however, find that there was 'little' prospect of establishing a continuing act between the first/second and third parts of the claim.



37. I now turn to whether or not there is an arguable case or reasonable prospect of a just and equitable extension being granted in relation to any parts of the claim that are not in time or at least not arguably in time. I assume for present purposes that what I identified as the first and second parts of the claim are out of time so that the question is whether or not there is an arguable case for a just and equitable extension.
38. In my judgment, there is an arguable case for a just and equitable extension in respect of all parts of this claim. There are four linked elements to my conclusion in that regard.
39. First, the grievance appeal process is ongoing even to date and began at least on the Claimant's case before the alleged discrimination by Ms Whiskar had even ceased. That provides an overarching narrative as to why the claim was not brought in earlier. Although the fact there is a grievance and appeal process ongoing does not excuse putting in a claim in time, it is a relevant factor they may provide a basis for a just and equitable extension in an appropriate case, in particular where that occurs in a combination with other factors as it does here.
40. Second, there is little prejudice to the Respondent from extending time. The Respondent argues that because many of these incidents about which the Claimant now seeks to complain date back a long way that would prejudice the Respondent because of the difficulties with witness recall and evidence. In my judgment, however, in this case the prejudice is minimal. The argument is really undermined by the fact that the grievance appeal process is still ongoing because the Respondent is itself still dealing with an appeal against a grievance in relation to conduct by Ms Whiskar. If the Respondent can still deal with it, so it seems to me can the Tribunal. At any rate there is minimal prejudice to the Respondent because the Respondent has had the opportunity to investigate the allegations about Ms Whiskar very much closer to the time at which the events happened. Although memories do fade, memories will have been to a large extent captured in the course of that grievance process.
41. Third, there is the issue of the advice that the Claimant has received from his Trade Union. Since September 2020 the Claimant has had a Trade Union Representative working with him. Even if, as he said at paragraph 77 of his statement, he was aware of time limits from May 2021, that is itself an awareness that came very late in the process. Even from that point onwards it is apparent from the correspondence and from the Claimant's own evidence that he was still very much 'in the hands of' (and reasonably relying on) his Trade Union. He was in correspondence with them about discrimination that he believed to be ongoing and he was from May 2021 until October 2021 waiting to hear from them as to whether or not they would support his claim. In those circumstances, although it is possible that the Tribunal at a final hearing will take a different view, I am satisfied that it was arguably reasonable for the Claimant to place his trust in the Trade Union and await their advice before taking steps to act on his own. As it was, once it was clear

that they were not going to support him, he acted swiftly to put his claim into the Tribunal.

42. Fourth, the Claimant has not been well. There is ample medical evidence in the bundle to show that he is a person who has been struggling with his health considerably over the period in question. It is arguable that the Claimant is not to be held to the same standards of reasonable conduct with regard to his claim as is someone who is not suffering such ill health. In other words, the Claimant's ill health arguably makes it more reasonable for him to have relied on his Trade Union.
43. Putting all four elements together, it seems to me that the Claimant has a reasonably arguable case that if any part of his claim is outwith the primary time limit, there should be a just and equitable extension to allow him to bring it.
44. It follows that I refuse to strike out the claim under Rule 37(1)(a) as standing no reasonable prospect of success on the time point.
45. I have also considered the less onerous threshold for making a Deposit Order of 'little prospect of success'. However, even in relation to that jurisdiction, I should normally take the Claimant's claim at its highest. No points have been made in the course of this hearing about the underlying merits of the Claimant's claims and, indeed, the fact that the Respondent itself accepts there was bullying of the Claimant by Ms Whiskar provides some support for the merits of his case. In any event, assuming for present purposes that the Claimant's discrimination claims are meritorious, for the reasons I have already set out in relation to considering whether or not the time points stands no reasonable prospect of success, I am also satisfied that if the discrimination claims are meritorious, this is a claim that is unlikely to fail on time grounds. Although there are weaknesses in the claim (in particular as to whether there is a continuing act between the first two parts of the claim and the third part), there is more than little prospect of a just and equitable extension being granted for any out of time elements. I therefore decline to make a Deposit Order.

---

Employment Judge Stout

8 June 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

09/06/2022.

FOR THE TRIBUNAL OFFICE