



EMPLOYMENT TRIBUNALS

Claimant: Mr K Jarco

Respondent: Hovis Ltd

Heard at: Bristol (by Video) **On:** 5 November 2020

Before: Employment Judge Midgley

Representation

Claimant: In person

Interpreter: Ms Teixeira-Vaz

Respondent: Mr Hickford, Solicitor

RESERVED JUDGMENT FOLLOWING A PRELIMINARY HEARING

1. The claimant's claim that he was unfairly dismissed contrary to sections 98 (4) and 103A ERA 1996 have no reasonable prospect of success and are struck out.
2. The claim that the respondent made unlawful deductions from the claimant's wages contrary to section 13 ERA 1996 on the grounds that the respondent incorrectly provided details of his final net pay to HMRC, adversely affecting his entitlement to Universal Credit has no reasonable prospect of success and is struck out.
3. The claim for unlawful deduction of wages in respect of annual leave will proceed to a final hearing.
4. The Claimant's claims that he suffered a detriment contrary to section 47B ERA 1996 has little reasonable prospect of success and the claimant is ordered to pay a deposit to pursue each allegation of detriment. The level of the deposit will be determined once the claimant has provided details of his means in accordance with the tribunal's orders.
5. The claimant's claims that he suffered direct discrimination, victimisation and/or harassment contrary to sections 13, 26 and 27 EQA 2010 have little reasonable prospect of success and the claimant is ordered to pay a deposit to pursue each factual allegation in respect of each legal claim. The level of the deposit will be determined once the

claimant has provided details of his means in accordance with the tribunal's orders.

REASONS

The claim

1. By a claim form presented on 25 October 2019 the claimant brought claims of whistleblowing detriment; victimisation (the protected characteristic being race); direct race and sex discrimination; harassment (the protected characteristics being race and sex) and unlawful deduction from wages.
2. On 30 July 2020 the claimant applied to amend his claims to include allegations that his dismissal, which had occurred on 20 May 2020, was automatically unfair pursuant to section 103A ERA 1996, and unfair contrary to s.(98)4 ERA 1996.

The Issues

3. The hearing was listed to determine whether the claims had been presented within time and, if not, in relation to those brought under the Equality Act 2010, whether it would be just and equitable to extend to permit them to be heard.
4. The respondent's application of 19 June 2020 sought strike out of the claims on the grounds that they were out of time as indicated above. The application made on 21 September 2020 sought strike out of the claims which had been added by way of amendment (namely automatically unfair dismissal, unlawful deduction of wages and unfair dismissal) on the grounds that they had no reasonable prospect of success, alternative lead the respondent sought a deposit order on the grounds that they had little reasonable prospect of success.
5. Accordingly, I had to determine whether the claimant's claims that he had been dismissed because he had blown the whistle (section 103A ERA 1996), that he had been unfairly dismissed (contrary to section 98 (4) ERA 1996) and that the respondent had made unlawful deduction from his wages (contrary to section 13 ERA 1996) had either:
 - 5.1 no reasonable prospect of success (for the purposes of Rule 37);
or
 - 5.2 little reasonable prospect of success (for the purposes of Rule 39).

Procedure, Hearing and Evidence

6. In preparation for the hearing the Claimant had prepared a witness statement addressing the reasons why the claims were presented when they were,

addressing his knowledge of the time limits, and the advice that he had obtained in relation to the presentation of his claims.

7. In addition, I had the benefit of the following documents:
 - 7.1 The Claimant's Scott Schedule of claims, including those he sought to add by way of amendment.
 - 7.2 The respondent's written applications for strike out on deposit dated 19 June 2020 and 21 September 2020.
 - 7.3 The tribunal file and the documents contained within it which had been sent by the claimant in support of his claims, bound in plastic sleeves.
8. The claimant gave evidence by affirmation and answered questions from Mr Pickford for the respondent and from me. I had brief oral submissions from each of the parties. We adjourned over lunch so that the claimant could produce those closing arguments with the assistance of the interpreter, and the interpreter kindly read them out in English after the lunch break.
9. Given that any extempore judgement would need to be interpreted to the claimant, and the pressures of the remaining time, the parties agree that it was appropriate for me to reserve judgement and send the written Judgment to the parties.

The Background Facts

The history of the allegations, proceedings and relevant events

10. The claimant was employed by the respondent from 9 January 2006 until his dismissal on 20 May 2020. He was initially employed as a Tray Wash Operative.
11. In March 2016 the Claimant's ex-partner sought to relocate abroad on a permanent basis with the daughter of that relationship. The claimant and his ex-partner were in dispute about that matter and, in consequence, the claimant escalated complaints to the police on 8 August 2016. On 11 September his partner left the country with his daughter. The claimant made a further report to the police on 30 September 2016.
12. In the interim on 25 May 2016, the claimant submitted a grievance to the respondent complaining that his line manager Mr Goziewski made racist comments to other staff members and generally acted inappropriately. That was a protected act. The claimant alleges that Mr Kevin McCarthy told him, on that day, that he was a grass and Polish troublemaker could not be trusted and changed the claimant's job. The claimant alleges that that was a detriment because of his protected act.

13. The claimant alleges that thereafter between 2017 and 2019 Miss Barclay and Mr Croft regularly called him a “Polish troublemaker.”
14. On 23 August 2017, the Polish district court made an order for the claimant’s daughter to be returned to England. The claimant alleges that he was subjected to a detriment on the grounds of having made protected disclosures on his return from Poland, having collected his daughter, when the respondent failed to honour a promise made by Joe Schofield, an HR adviser, that the claimant would be permitted to work weekdays only on his return.
15. In addition, the claimant says that he suffered a further detriment on grounds of having made a protected disclosure because on 29 August 2017 Mrs Ottley sent an email to the managers in the region stating of the claimant (in relation to the return to work process):

“he plays the system well. I want to take him out of the process when he returns so will require as much information as possible so please ensure a thorough return to work is completed along with Q&A of why he was unable to drive back (he was okay to drive there).”
16. Furthermore, the claimant complains that Mrs Ottley directly discriminated against him on 29 August by requesting additional evidence regarding his time off work in relation to the period where he was seeking to recover his daughter. The claimant alleges that discriminatory conduct continued, forming part of a discriminatory policy that was applied again between the 13th and 18th February 2019, when he was required to provide evidence of his mother’s surgery, following a request for time off in consequence of it, and on 2 March 2019, when he required a day’s emergency leave for a family emergency.
17. On the 7 February 2018, the claimant’s partner’s appeal against that order was rejected by the Regional Court. In March 2018, the claimant’s partner returned to the UK, and a Port Alert was issued to prevent her returning to Poland with their daughter. On 5 March 2018, HHJ Marston granted a residence order in favour of the claimant, precluding his daughter from being removed from the jurisdiction for any purpose whatsoever.
18. The claimant argues that the emotional and physical toll of the family Court proceedings meant that he had “no other choice but to try to wait out the hard times at work” as he was mentally exhausted, and had incurred significant expense in the family Court proceedings. He did not believe he could risk his job by pursuing claims, at a time when he had just secured residence of his child.
19. Nevertheless the claimant continued to report issues at work to his employer, but he says that he suffered from increasing stress and anxiety, eventually developing depression with the result that he describes himself as feeling paralysed and unable to determine what he should do.
20. In the period November 2018 until January 2019 the claimant says that Mrs Ottley, Mr Croft and Mr Morgan directly discriminated against Polish employees and men by removing coverings from the windows of the

buildings and Portakabins where the Polish employees and male employees change their clothing, and by Mrs Ottley entering the portacabin unannounced. He complains that latter treatment amounted to harassment and the grounds of his sex.

21. In the period December 2018 until April 2019 the claimant alleges that he was subjected to a series of detriments by his first line manager, Mr S Croft at work, including unreasonable criticism, being overloaded with work and being excluded from the port cabin where employees were permitted to change and keep their belongings. On 2 March 2019, he alleges that Mr Croft harassed him on the grounds of his race by calling him a “dickhead” when the claimant requested time off for a family emergency.
22. On 27 March 2019, the claimant raised a Data Subject Access Request in accordance with the GDPR. Eventually, he began a period of sickness absence on 8 April 2019 from which he did not return prior to his dismissal. On the same day, the claimant submitted a request by letter to Mrs Ottley to change his role from working on the Tray Wash to the Trays and Banks area. He stated that he did not feel safe in the Tray Wash role, citing “several health and safety issues” and his treatment by management.
23. In approximately May or June 2019 the claimant alleges that Mrs Ottley, Mr Croft and Miss Thomas subjected him to a detriment on the grounds he made protected disclosures by frustrating his request to change role from the tray wash to the trays and banks area.
24. The respondent avers that on 20 May 2019, the claimant met with Mrs Ottley to discuss an occupational health report and his proposed change of workplace. During the discussion, Mrs Ottley discussed the claimant’s concerns with him, identified that a previous occupational health report had suggested that working on the trays and banks position would exacerbate claimant’s existing back injury and offered refresher training in relation to the manner in which baskets should be removed in the Tray wash position. The claimant stated he just wanted to change position and felt overloaded. The claimant explained that his treatment by management related to an occasion where he required emergency leave, but the first line manager had recorded his absence as unauthorised.
25. Thereafter the respondent argues that despite repeated requests from Mrs Ottley to meet with the claimant, the claimant failed to attend any further meetings to discuss his continued absence in the period May to August 2019.
26. On 27 June 2019 the claimant received a response to the DSAR, which included an email dated 29 August 2017 from his manager Mrs Otterly referring to the claimant stating “I want to take him out of the process when he returns to work so will require as much information as possible so please ensure a thorough return to work is completed”. The claimant perceives that that is an email demonstrating a conspiracy to dismiss him.
27. Also amongst the documents disclosed to the claimant as part of the DSAR was an email dated 3 May 2019 from Mr Brian Cavanagh relating to a proposed response to the claimant’s DSAR, and requesting whether “there

is any specific wording that we have to narrow down such requests". Again, the claimant perceives that that is evidence of Mr Cavanagh's having taken part in a conspiracy to dismiss him.

28. The claimant states that when he read that email he concluded that he had no other choice but to defend himself by bringing a claim in the tribunal. He believed that the last act was the email of Mr Cavanagh which was sent to him on 20 May 2019, addressing the reasons for the delay in complying with his DSAR, and therefore approached ACAS within three months less a day from that act. The claimant therefore approached ACAS on 18 August 2019; he does not explain why he left his approach until the very of the period.
29. On 4 July 2019, the respondent argues that Ms Otterly contacted the claimant requesting an absence review meeting, identifying the failure of the claimant to engage with previous requests for such meeting. She offered to send him questions about his health for him to respond to in writing if he was too ill to attend.
30. The claimant did not respond to the letter but on 9 July 2019 raised a grievance, in which he complained that he had been subject to "all forms of discrimination and racism" from his managers at work, which he suggests occurred in the period March and April [2017] which led him to conclude that he should make a DSAR. The letter requested that Miss Otley should not contact the claimant any further and made reference to the possibility that he would bring a claim in the employment Tribunal if appropriate action was not taken.
31. Since July 2019, the respondent has tried to arrange for a grievance meeting at which the claimant could expand upon the details of his complaints. Despite responding to those requests for the first time on 10 December 2019, the claimant has never attended a grievance meeting or indicated his willingness to do so.
32. In July 2019, the claimant's ex-partner sought an Occupation Order in respect of the family home. That application was dismissed on 15 July 2019. In August 2019, due to the claimant falling into arrears on his mortgage payments, an application for repossession of the property was made, but suspended by the Judge on terms that the claimant should commence repaying the balance of mortgage payments.
33. In the period between 16 August 2019 and 11 February 2020 the claimant says that he sought help from his union, the BFWU. Similarly, in the period 23 August 2019 till 18 October 2019 claimant says that he sought advice from Miss Michelle Cowley of the CLA. Likewise, on 16 August 2019 the claimant approached Watkin solicitors, but could not afford the fees. The claimant notified ACAS of a dispute with his employer that day. A certificate was issued on 30 September 2019
34. Between 18 September and 2 December 2019, the claimant approached the Bristol Law Centre for advice. Between 3 October and 21 October 2019, the claimant sought advice from the University of Bristol Law Centre.

35. The claimant then presented the claim on 25 October 2019, having drafted it himself. On 30 December 2019, in accordance with the tribunal's order, the claimant provided Further and Better Particulars of those claims.
36. In January 2020, the respondent received a request for a reference from Acorn Recruiting in respect of an application which had made to drive for Acorn Logistics. That request identified that the claimant has undertaking employed work as a driver for the company.
37. On 20th February 2020, the claimant was requested to attend a meeting to discuss the fact that he was working for another company well signed off as unfit from the respondent. The claimant did not respond that letter or attend the meeting; that scenario was repeated in respect of a further request on 26 February.
38. On 8 April 2020, the claimant attended a preliminary hearing before Employment Judge Bax, during which reference was made to the letter of 26 February (with the claimant had produced at the hearing).
39. In consequence the claimant was requested to attend a disciplinary hearing to discuss allegations of gross misconduct in relation to failing to comply with a reasonable managerial instruction to attend an absence meeting, failing to maintain suitable contact during a period of sickness absence, and being absent without leave.
40. In compliance with an order of Employment Judge Bax of 8 April 2020, the claimant provided a Scott schedule setting out his claims. EJ Bax listed further preliminary hearing for two hours to identify the claims from the Scott schedule. That hearing was listed for the 30 July 2020.
41. The claimant did not attend the scheduled disciplinary hearing, nor a further rescheduled hearing on 20 May 2020, nor did the claimant send any written representations as had been suggested in the letter of 5 May. In consequence the claimant was dismissed in his absence by Mr Hughes on 20 May 2020 on the grounds that the claimant had committed gross misconduct identified in the allegations.
42. On 27 May 2020 the claimant indicated his intention to appeal against his dismissal; he did so by letter dated 1 June 2020, arguing that he had unilaterally decided not to attend any meetings with the employees based at the Avonmouth site.
43. On 19 June 2020, the respondent applied for the telephone case management hearing to be converted to a preliminary hearing to consider its application for the claims to be struck out, alternatively for the claimant to be ordered to pay a deposit in order to pursue them, on the grounds they had little reasonable prospect of success.
44. On 29 July 2020, the claimant indicated that he had been dismissed on 20 May 2020 and, at the preliminary hearing before Employment Judge Cadney on 30 July 2020 confirmed that he wished to pursue further claims arising out of his dismissal.

45. Employment Judge Cadney declined to hear the strike out application on the grounds that (a) the claims in question may be linked to the dismissal, which may bring them within time; (B) the claimant has not prepared a witness statement addressing the issue of why the claim was submitted when it was and it would be unfair to require the claimant to do so without proper preparation or notification at the preliminary hearing; and (C) the claimant would be disadvantaged if he were to endeavour to respond to an application to strike out without the benefit of an interpreter.
46. Employment Judge Cadney therefore directed that the claimant should identify any amended claim by 7 September 2020 and, by the same date, serve a witness statement addressing the relevant issues for the purposes of section 123 (1) Equality Act 2010. He permitted the respondent to serve an amended response addressing any new claims by 21 September 2020, identifying any grounds for strike out or deposit in respect of the new claims by the same date.
47. On 24 September 2020, the claimant's appeal against his dismissal was rejected.

The claimant's evidence at the preliminary hearing

48. In answering questions from Mr Hackford for the respondent and from myself, the claimant stated that:
 - 48.1 he had always known that discrimination was unlawful,
 - 48.2 he was aware of the existence of employment tribunals from approximately March 2019 (and that a tribunal is the court within which claims of discrimination should be pursued),
 - 48.3 he knew that some form of time-limit would apply to his exercise of his rights in the tribunal,
 - 48.4 he did not seek legal advice as to those time limits before 16 August 2020. Later, he conceded that he knew of the three month time limit in approximately June 2019, given that in his statement he indicated that he had approached ACAS within three months less a day of what he perceived to be the last act of discrimination/detriment, namely the email from Mr Cavanagh on 20 May 2020.
 - 48.5 He had been a member of a trade union throughout his employment with the respondent, and the trade union provided legal advice and support to its members.
 - 48.6 He accepted that he had not made any reference directly to that email as an act of discrimination, detriment or harassment within the amended Scott schedule which he served on 7 September 2020.
 - 48.7 He accepted that he had access to the Internet but said he did not think to research what the time limits were in relation to his potential claims using that resource.

49. The claimant's primary argument, therefore, was that his claims were within time, as they were all linked to the final act of discrimination, which he alleged was Mr Cavanagh's email of the 20 May 2020.

The Law

Strike Out

50. The power to strike out a case is contained in Rule 37 ET(CRP)R 2013 ("The Rules") which provides insofar as is relevant:

(1) At any stage of the proceedings, either of its own initiative or on the grounds of a party, a Tribunal may strike out all or part of the claim response in any of the following grounds –

(a) that it is scandalous or vexatious or has no reasonable prospect of success

51. The ground pursued here was that the claim had no reasonable prospect of success.

52. In conducting the assessment of the merits of the claim for the purposes of an application under Rule 37 the Tribunal must take the claimant's case at its highest; that means that the Tribunal must assume that the claimant will establish the matters alleged in the claim form or any document containing an amendment or clarification of it, which the Tribunal has permitted to be treated as part of the claim.

53. As the then President of the EAT Mr Justice Langstaff observed in Romanowksa v Aspirations Care Ltd [2014] 6 WLUK 763

"Sometimes it may be obvious that, taking the facts at their highest in favour of the claimant, as they would have to be if no evidence were to be heard, the claim simply could not succeed on the legal basis on which it has been put forward. Where, however, there is a dispute of fact, then unless there are good reasons, indeed powerful ones, for supposing that the claimant's view of the facts is simply unsustainable, it is difficult to see how justice can be done between the parties without hearing the evidence in order to resolve the conflict of fact which has arisen."

54. Thus in Ezias v North Glamorgan NHS Trust [2007] EWCA Civ 330 the Court of Appeal upheld the decision of the Employment Appeal Tribunal (Elias J) that the claim of the claimant could not properly have been struck out because there was a central dispute of fact.

55. In the course of his Judgment, with which Moore-Bick and Ward LJ agreed, Maurice Kay LJ accepted that there might be cases which embraced disputed facts which nevertheless might justify the striking out of those cases on the basis that they had no reasonable prospect of success (see paragraph 27), but he went on to say that what was important was the particular nature and scope of the factual dispute in question. He went on to observe at paragraph 29:

“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.”

56. In approaching the test, the Tribunal must consider whether, on careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. It is a high test. The test is not whether the claim is likely to fail, or whether it is possible that the claim will fail (see Balls v Downham Market High School & College [2011] IRLR 217 EAT).

57. As a general principle, discrimination cases should not be struck out except in the clearest circumstances. In Anyanwu v South Bank Students' Union [2001] IRLR 305 HL, Lord Steyn stated at para 24:

“For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plain cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest”.

58. Nonetheless Anyanwu confirms that in a case where the core of facts is undisputed, or in a “plain and obvious case”, the Tribunal may properly strike out a claim. Thus, Anyanwu is not of itself to be taken as a fetter on the Tribunal’s discretion. In Jaffrey v Department of the Environment, Transport and the Regions [2002] IRLR 688 EAT Mr Recorder Langstaff QC as he then was stated:

“Although the power to strike out a claim is one which should be exercised sparingly, and although full regard must be had to the words of Lord Steyn in Anyanwu v South Bank Students' Union [2001] UKHL 14 at paragraph 24, that there is a high public interest which should bias a Tribunal in favour of a claim being examined on the merits or demerits of its particular facts, if a Tribunal reached a tenable view that the case cannot succeed, then it had a discretion to strike out a claim ...”

59. That view was endorsed in ABN AMRO Management Services Ltd v Hogben UKEAT/0266/09/DM at [7] where it was held that if a claim appears to be hopeless, and there is no concrete basis for supposing that cross-examination would improve prospects, then it is not legitimate to allow the claim to proceed in the hope that something may materialize at trial.

Deposit Orders

60. The power to order a party to pay a deposit in order to pursue a claim or part of a claim is given to the Tribunal by Rule 39(1) as part of its general case management powers. Rule 39 provides in so far as is relevant:

- (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.
- (2) The Tribunal shall 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.
- (3) The Tribunal’s reasons for making deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
- (4) If the paying party fails to pay the deposit by the date specified the specific allegation/argument to which the deposit order relates should be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in Rule 21.
- (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation argument against the paying party for substantially the reasons given in the deposit order:
 - (a) the paying party should be treated as having acted unreasonably in pursuing that specific allegation argument for the purposes of Rule 76, unless the contrary is shown; and
 - (b) the deposit should be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),otherwise the deposit shall be refunded.

61. A power to order a deposit, just as with the power to strike out a claim is often exercised by way of summary Judgment without hearing evidence. To hear evidence would likely defeat the purpose of using the power to save the time, expense and resources of the parties and that of the Tribunal in dealing with a claim which, on any reasonable view, objectively has little prospect of succeeding.

62. That is not an exercise in blind faith, rather the Tribunal is entitled to have regard to the likelihood of a party being able to establish the facts essential to his case, and in so doing in exceptional cases reach a provisional view as to the credibility of the assertions being put, but it must have a proper basis for doubting the likelihood of the party’s ability to establish those essential matters (see Van Rensburg v Royal Borough of Kensington-Upon-Thames [2007] All ER (D) 187, also a decision of Elias J when sitting as president of the EAT at para 26 and 27). The EAT considered wording of Rule 20 as it then was, which provided that:

“if a chairman considers that the contentions put forward by any party in relation to a matter required to be determined by a tribunal have little prospect of success”

63. Mr Justice Langstaff concluded that the wording “in relation to a matter to be determined by a tribunal” permitted the tribunal to have regard to matters of credibility and not merely matters of law. However in reaching that decision he relied upon the decision of the Court of Appeal in Ezias and noted that such cases will be “very exceptional”, repeating the example given in Ezias of the facts asserted by the claimant being entirely inconsistent with undisputed contemporaneous documents (see paras 24 and 25).
64. That approach was considered and refined in Sharma v New College Nottingham EAT 0287/11, in which the Employment Appeal Tribunal referred to the House of Lords’ decision in Anyanwu, where Lord Hope said that ‘discrimination issues... should, as a general rule, be decided only after hearing the evidence’ and held that it would be illogical to require an Employment Judge to take different approach depending on whether they were considering striking out or making an order for a deposit as either order was, on any view, a serious, and potentially fatal, course of action.
65. In Sharma the EAT found that a Tribunal had erred in concluding that the claimant’s race discrimination claims had little reasonable prospect of success solely on the basis that the contemporaneous documentation was inconsistent with a claimant’s account. On the facts of that case, there were underlying factual disputes. The claimant was asserting that, behind the documentation, there was verbal harassment, verbal threats and aggressive bullying behaviour towards him that constituted acts which, in the absence of an acceptable explanation, the tribunal could conclude were on the ground of his race.
66. Similarly, in Javed v Blackpool Teaching Hospitals NHS Foundation Trust EAT 0135/17 Mrs Justice Elisabeth Laing stated:

‘An undisputed document could, I have no doubt, provide evidence wholly inconsistent with, or contradicting, a primary factual allegation made by a claimant.... It is considerably less easy to see, however, how a document could contradict the inference which the claimant seeks to persuade an employment tribunal to draw when he makes an allegation of race discrimination.’

67. The tribunal in that case had concluded that the claimant had not made an allegation of race discrimination at the time he initially raised a grievance because the documentary evidence (the grievance itself) was totally inconsistent with an allegation of race discrimination. Laing J observed that this was to confuse the content of an allegation with its merits. The tribunal had no sound basis for concluding that the claim had no or little reasonable prospect of success and the EAT accordingly quashed the deposit order.

Time Limits

68. S.123(1) EQA 2010 contains the primary time limit for claims brought pursuant to the Equality Act. It provides as follows: -

(1) proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three 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.

(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.

69. While employment tribunals have a wide discretion to allow an extension of time under the 'just and equitable' test in S.123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EQA, 'there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.' The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.
70. These comments were endorsed in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."
71. Before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was (Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan).
72. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an

extension of time should be just and equitable - Pathan v South London Islamic Centre EAT 0312/13.

73. In exercising its discretion to allow out-of-time claims to proceed, a tribunal may also have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT at para 8). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular:
- (a) the length of and reasons for the delay;
 - (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
 - (c) the extent to which the party sued had co-operated with any requests for information;
 - (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
 - (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action
74. Although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220 at para 33, per Peter Gibson LJ).
75. In Department of Constitutional Affairs v Jones 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice. Nevertheless, there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh) (see Afolabi above) .
76. It is always necessary for tribunals, when exercising their discretion, to identify the cause of the claimant's failure to bring the claim in time (Accurist Watches Ltd v Wadher UKEAT/0102/09, [2009] All ER (D) 189 (Apr)), but a tribunal will err if it focuses solely on whether the claimant ought to have submitted his or her claim in time, rather than weighing up the relative prejudice that extending time would cause to the respondent on

the one hand and to the claimant on the other: (see Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.)

77. Where a claimant asserts that he is ignorant of the right to bring a complaint the Tribunal must assess whether it was reasonable for him to have been ignorant, and to have remained so, throughout the period of the primary time limit (see Perth and Kinross Council v Townsley EATS 0010/10.)
78. There is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the employer's grievance procedure before embarking on legal proceedings. The general principle is that a delay caused by a claimant awaiting completion of an internal procedure *may* justify the extension of the time limit but it is only one factor to be considered in any particular case (see *Robinson v Post Office 2000 IRLR 804, EAT*, affirmed in Apelogun-Gabriels v Lambeth London Borough Council and anor [2002] ICR 713, CA.)

Conclusions

79. I set out the respondent's grounds for its application to strike out and its arguments in terms of jurisdiction and my conclusion on each applying the law above to the facts as I have found them above, below.

No reasonable or little reasonable prospect of success (rule 37 and rule 39)

Automatically unfair dismissal (section 103A ERA 1996)

80. The claimant relies upon his emails to the Information Commissioner's Office ("ICO") between 17 January and 14 July 2020 as protected disclosures which he argues were the reason the principal reason for his dismissal on 20 May 2020.
81. As a matter of logic, only those disclosures predating his dismissal can have been causative of that action.
82. In any event, the respondent's argument is that correspondence with the ICO relating to the Claimant's DSAR was conducted by its High Wycombe office and there is nothing to suggest that the staff in the Avonmouth office, in particular Mr Hughes, was aware of that correspondence at all, let alone of its detail at the time that he made the decision to dismiss.
83. The claimant did not advance any positive argument to establish that Mr Hughes did have or could reasonably be inferred to have knowledge of the content of the protected disclosure or even of its existence.
84. Conversely, the respondent argues that the reason for the dismissal relied upon by Mr Hughes had been admitted by the claimant, in particular there was no dispute that the claimant had failed to attend or respond to requests to attend meetings to discuss his health, that he had failed to attend requests to attend a disciplinary hearing and, crucially, that he had worked

for Acorn Recruitment, and that Acorn Recruitment had sent a request for a reference in January 2020 to the respondent, and at that time the claimant was working for Acorn recruitment while simultaneously being signed off as unfit for work with the respondent. Therefore, the respondent argues, there is an overwhelming evidential case to demonstrate that the reason for dismissal had nothing whatsoever to do with a protected disclosure but related solely to admitted misconduct.

85. Those arguments in my judgement are strong, compelling and comprehensive. I bear in mind that complaints of whistleblowing detriment and dismissal are akin in their nature to complaints of discrimination, and therefore extreme caution should be taken before striking any such claim out on the basis that it has no reasonable prospect of success. However, as was made clear in it Anyanwu (para 39), strike out may be appropriate even in cases of discrimination.
86. On the facts of this case, in my judgement this is such a case because the claimant has no reasonable prospect of establishing any causal connection between his emails to the ICO and the decision to dismiss him. I bear in mind in reaching that conclusion that the claimant might argue, were he legally represented, that he could elicit such a link through cross-examination, but the case of ABN AMRO Management Services Ltd v Hogben (see in particular paragraphs 13 to 15) makes it clear that where I am persuaded that the case has no reasonable prospect of success, and there is no basis for supposing that cross-examination could advance the claimant's case, then the appropriate course is to strike it out.
87. I can see no evidential basis whatsoever to suppose that cross-examination could advance the claimant's case as he has not identified any factual basis on which Mr Hughes was aware of the protected disclosure. I am therefore satisfied that the claim under section 103A ERA 1996 has no reasonable prospect of success and should be struck out.

Unfair dismissal (section 98 (4) ERA 1996)

88. The respondent repeats its arguments in relation to the claimant's claims that his dismissal was substantively unfair and contrary to section 98 four ERA 1996. In addition, it argues that the claimant has not pleaded or identified any basis on which he argues his dismissal was procedurally unfair.
89. The test that the tribunal must apply in relation to this claim is whether dismissal for the alleged acts of misconduct fell within a band of reasonable responses open to a reasonable employer. It is clearly well within the band of reasonable responses to dismiss an employee who consistently fails to respond to letters or to comply with reasonable managerial instructions to attend meetings, and who remains absent from work on the grounds of sickness while simultaneously working for another employer.
90. As indicated above, the claimant does not significantly challenge any of those primary facts, rather arguing that the decision to dismiss was part of a continuing campaign against him. For the reasons that I have given in relation to the section 103A claim above, I am satisfied that there is no

reasonable prospect of the claimant establishing such a connection. In consequence in my judgement the claimant has no reasonable prospect of establishing that he was unfairly dismissed and I therefore strike out the unfair dismissal claim.

Unlawful deduction of wages

91. The claimant advances two distinct claims as unlawful deduction of wages:
 - 91.1 a claim for four days holiday pay in the period July to August 2019.
 - 91.2 A claim that the respondent incorrectly provided details of his final net pay to HMRC, adversely affecting his entitlement to Universal Credit.
92. Addressing the first claim, any deduction, in the sense in section 13 ERA 1996 would have occurred in the September pay slip in the sense the claimant would have been paid less than he was properly due (using the words of the statute). Accordingly, any claim in respect of that deduction had to be presented to the tribunal by December 2019. The claimant issued his claim on 25 October 2019 and that claim is within time and will therefore proceed to hearing.
93. However, the allegation that the respondent incorrectly identified the claimant's final net pay in his final payslip or P60 is not an allegation which can be pursued under section 13 ERA 1996, because the claimant is not alleging that there was any deduction from his wages all that he was paid less than he was properly due, rather he is arguing that the figure given to a third party was inaccurate.
94. Accordingly, I am satisfied that that that second claim for unlawful deduction of wages has no reasonable prospect of success and it is struck out.

Jurisdiction

Victimisation.

95. The claimant's case that is as a consequence of doing a protected act, namely raising a grievance on 26 May 2019, he suffered detrimental treatment on 26 May 2016 and between the 2017 and 2019 when various remarks were made to him by Miss Ottley and Mr Croft.
96. The allegations against Miss Ottley and Mr Croft are largely (if not entirely) unspecified in relation to the times when they are said to have occurred, in any event the last occasion on which they can have been made to the claimant was 7 April 2019, being his last day at work. Accordingly, any claim in respect of those matters had to be presented by 6 July 2019 unless they formed part of a course of conduct extending over a period for the purposes of section 123 EQA 2010.
97. The respondent argues that the claimant has not alleged in the Scott Schedule that his dismissal was an act of direct discrimination, harassment or victimisation and therefore that the claimant cannot seek to rely on his

dismissal as conduct which could be linked to form conduct extending over a period. I reject that argument. The claimant is a litigant in person whose first language is Polish. He has some familiarity with the legal process and courts due to his cases in the Family Court. Familiarity is not the same as knowledge, specialism or even understanding. His ET1 included an allegation that he believed that he would be dismissed as part of a 'campaign' would culminate in his dismissal. I am satisfied, therefore, that the fact that the schedule does not expressly identify that the claimant's dismissal was part of a continuing course of conduct of discrimination does not preclude me from considering that possibility for the purposes of exercising my discretion under section 123 EQA 2010.

98. The only acts said to have occurred after the claimant left work were:
- 98.1 Mrs Ottley's failure to permit the claimant to change roles, which is said to have occurred in May 2019, and in light of the chronology of facts above can have occurred no later than 20 May 2019;
 - 98.2 The claimant's dismissal by Mr Hughes on 20 May 2020; and
 - 98.3 Ms Thomas and Miss Anna Rogers unfair investigation in respect of the claimant's DSAR which is said to have occurred on 3 September 2020.
99. It is conceivable that there was a link between Mrs Ottley's decision in May 2019 and the earlier alleged acts of discrimination. The question of whether there is any link between the earlier acts and the dismissal or the matters detailed at paragraph 98.3 above is ultimately one that must be determined when evidence on the point can be heard and evaluated at the final hearing. However, given the significant time delay between Ms Ottley's conduct and the claimant's dismissal, and the unlikelihood of the claimant's establishing that his dismissal was part of any campaign (for the reasons given above) I am satisfied that the claimant has little reasonable prospect of establishing that the allegations formed conduct extending over a period. The claims of victimisation would therefore be out of time and the tribunal would not have jurisdiction to hear them.
100. I am therefore satisfied that the claimant's claims of victimisation have little reasonable prospect of success and direct that he should pay a deposit in respect of each of his allegations of victimisation in order to continue to pursue them. The precise value of the deposit will be set once I have had evidence from the claimant as to his means. Directions of the claimant to file a statement and documents relating to his means will be sent under separate cover.

Whistleblowing detriment

101. Insofar as the claimant's complaints of suffering a detriment because he had made protected disclosures is concerned, necessarily the last date on which any act can have occurred, unless linked to his dismissal was the 20 May 2019, in relation to the claimant's request to change roles. Accordingly, any claim would have had to been presented by 19 August 2019. Given that the claimant approached ACAS on 16 August 2019, he

would benefit from the extension of six weeks. The claim would therefore be in time.

102. However, given that on the face of allegation the complaint that Mrs Ottley subjected the claimant to a detriment in the manner in which she progressed his application to change roles appears to have little merit, given (a) the respondent's positive case that the reason initially given was the effect of the lifting element of the role on the claimant's pre-existing vulnerability (a bad back) and (b) given the claimant's admitted failure to engage with Mrs Ottley after 20 May to discuss the issue, I am satisfied that the claimant has little reasonable prospect of establishing that the last act was detriment because he had made a protected disclosure.
103. I am satisfied therefore that the claimant should be ordered to pay a deposit on the grounds that his claim for detriment under section 47B ERA 1996 has little reasonable prospect of success.

Harassment and direct discrimination

104. The claimant complains as follows:

104.1 he suffered harassment:

104.1.1 between November 2018 and January 2019 as a consequence of the actions of Mrs Ottley and Mr Croft in removing coverings to windows at the Portakabin,

104.1.2 on 2 March 2019 when Mr Croft called him a Polish troublemaker and made other similar remarks.

104.2 He suffered direct discrimination:

104.2.1 on 29 August 2017 and between the 13th and 18th February and 2 March 2019 when Mrs Ottley and Mr Croft requested him to provide additional evidence relating to the time off he had requested for emergencies related to his family.

105. Consequently, unless those acts were linked to and formed part of the course of conduct including the allegations of detriment on the grounds of having made a protected disclosure, the last date on which a claim relating to them could have been presented would be 1 June 2019. The claims would therefore be out of time.
106. The claimant would therefore only be able to demonstrate that the claim was presented in time if he could establish a link between those acts and either (a) the allegations of detriment, or (b) the dismissal and the conduct of Ms Thomas and Ms Rogers relating to his DSAR. For the reasons given above, regard the claimant as having little reasonable prospect of establishing the last act of detriment, and separately for the reasons that I have already given in relation to the complaints concerning his dismissal, I consider that the claimant has little reasonable prospect of establishing such a link and therefore will order a deposit to pursue the claims of direct discrimination and harassment.

107. In my judgement therefore, the claims of harassment and direct discrimination have little reasonable prospect of success and the claimant is ordered to pay a deposit to continue to pursue them.
108. If the claims were to be found out of time, which is of course a matter of fact to be determined by the tribunal hearing the case at final hearing, in my view it would not be just inequitable to extend time as the claimant knew that there was a time limit, but his ignorance as to the time limit was not of itself reasonable because he took no steps to investigate it until 16 August 2019. The claimant was more than capable of taking the necessary steps, given that during the intervening period he had elected to use his time to pursue his DSAR and secure alternative employment with another employer.

Employment Judge Midgley

Dated: 17 November 2020

Judgment and Reasons sent to parties: 25 November 2020

FOR THE TRIBUNAL OFFICE