



EMPLOYMENT TRIBUNALS

Claimant: Mrs T Wills

Respondent: The Salvation Army Trustee Company

Heard on: 29 July 2022 and Reserved to 15 September 2022

Before: Employment Judge Hindmarch

Appearances

For the claimant: Mr Wills (Husband)

For the respondent: Mr Gidney – Counsel

JUDGMENT

The Claimant's claims are struck out pursuant to Rule 37 of the Employment Tribunal Rules of Procedures.

REASONS

1. This claim came before me for an Open Preliminary Hearing on 29 July 2022. The purpose of the hearing was to consider the Respondent's application for a strike out or deposit order. The Claimant was represented by her husband and the Respondent was represented by Counsel, Mr Gidney. I had a bundle of documents running to 231 pages, a written Application from Mr Gidney, and a statement from the Claimant. Further documents were produced by the Claimant during the hearing to which I return below. There was insufficient time for me to deliberate and give a decision, so I reserved my decision to 15 September 2022.
2. By an ET1 filed on 7 March 2021, following a period of ACAS early conciliation from 18 January 2021 to 25 February 2021, the Claimant brought claims of ordinary and automatic unfair dismissal, disability discrimination and victimisation. Given the date the claim form was presented, and having regard to the period of ACAS early conciliation, the earliest date that any alleged act could be in time is 19 October 2020.
3. The response was filed on 20 April 2021 and on 11 August 2021 the Respondent made a Request for Further and Better Particulars. On 13 August 2021 Employment Judge Wedderspoon directed that the Claimant be ready to

provide these Particulars at the forthcoming Case Management Preliminary Hearing on 19 August 2021 (page 37 of the bundle).

4. A Case Management Preliminary Hearing took place on 19 August 2021 before Employment Judge Perry. A copy of his record of the Hearing is at pages 38-52 of the bundle. Under the heading 'The Issues' he recorded, "I sought to clarify the various complaints that were pursued by the Claimant. Despite Employment Judge Wedderspoon having directed that the Claimant be ready at this hearing to provide the information detailing the basis for her claim she found it difficult to do so such that I could understand the basis for her complaints." Employment Judge Perry went on to order the Claimant to provide a list of potential issues with shaded areas directing the Claimant to provide further information. He ordered a further Case Management Hearing be listed to further clarify the issues. He also ordered that the Claimant provide a disability impact statement.
5. On 13 September 2021, the Claimant submitted written Further and Better Particulars, page 55-60 of the bundle.
6. On 8 October 2021, the Respondent made an application to strike out the claim on the basis it had no reasonable prospects of success, pages 62-64 of the bundle.
7. On 14 January 2022, there was a further Preliminary Hearing before Employment Judge Algazy QC. The Record of the hearing is at pages 163-168. He made an Unless Order requiring the Claimant to provide the details of her claim as previously ordered by Employment Judge Perry. He expressed sympathy for the Respondent's position (as regards its strike out application) but stated "I was minded to give the Claimant one final opportunity to properly plead her case by imposing an appropriate Unless Order." He urged the Claimant to seek legal advice.
8. The Claimant then submitted a document entitled "Claimant Response" in which she sought to further explain her claims.
9. Thus, before this hearing the Claimant had been offered several attempts to particularise her claim. These were in her ET1, in replying to the Respondent's Request for Further and Better Particulars, by Employment Judge Wedderspoon in advance of the Case Management Hearing on 19 August 2021, at the Case Management Hearing on 19 August 2021, after that hearing and in response to Employment Judge Perry's order, at the further Case Management Hearing before Employment Judge Algazy QC on 14 January 2022 and in response to his Unless Order.
10. The Respondent contended before me that I should now strike out the claim on the ground it had no reasonable prospect of success given a) many of the claims were out of time and b) even taking the claims out their highest they were too vague (despite a number of attempts to frame them) and/or were missing essential statutory elements.

11. Rule 37 (1) (a) Schedule 1 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 gives me the power to strike out a claims or claims where there are no reasonable prospects of success. A strike out is the ultimate sanction. For an application to be successful the claim or claims must be bound to fail.
12. Rule 37 (1) (a) provides “At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim...on the following grounds
 - (a) that it is scandalous, vexatious or has no reasonable prospects of success.”
13. The threshold required is high. In North Glamorgan NHS Trust v Ezsias (2007) IRLR 603, the Court of Appeal held where facts are in dispute, a Tribunal should rarely strike out a claim without the evidence being tested at final hearing.
14. Where there is a time bar to jurisdiction, or where there is no more than an assertion of a difference in treatment and a difference of a protected characteristic, strike out may be appropriate Chandhok v Tirkey (2015) IRLR 195, EAT. Tribunals must take care with litigants in person. This does not mean a Tribunal cannot strike out a claim by an unrepresented party, however the Tribunal needs to ensure it understands the case put forward by a Claimant before doing so.
15. Deposit orders are dealt with by Rule 39.
 - “(1) Where... the Tribunal considers that any specific allegation or argument in a claim...has little reasonable prospects of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance the case. (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.”
16. I now turn to the facts of the case as evidenced by the pleadings, and taking the Claimant’s case at it’s highest. The Claimant brings a disability discrimination claim relying on a number of conditions namely severe nerve compression of the lower back (accepted as a disability by the Respondent) and anxiety and depression, fibromyalgia, tinnitus, glaucoma and gall bladder (these not being accepted as a disability by the Respondent).
17. The following chronology is relevant. I have taken this from the Respondent’s written Application provided by Mr Gidney and have listed each allegation made against each item in the chronology. I have set out the nature of the claim and Mr Gidney’s points as to time limits and any other point made in relation to the strike out application.
 - a. The Claimant commenced employment with the Respondent on 5 May 2005 in the role of Night Care Assistant.

- b. In November 2012, the Claimant alleges that she provided the Respondent with a copy of an MRI scan regarding her back and the Respondent failed to carry out any risk assessments or consider any adjustments. This is put as a failure to make reasonable adjustments claim under s20-21 Equality Act 2010. The Respondent says this allegation is 7 years and 11 months out of time, it is not referred to in the ET1, no provision, criteria or practice is identified, and no disadvantage is identified.
- c. In 2014 the Claimant had a 6-week sickness absence due to a meniscus tear in her knee. On returning to work she alleges there was no return-to-work interview, or a phased return offered. Again, she puts this as a failure to make reasonable adjustments claim. The Respondent says this allegation is 6 years out of time, it is not referred to in her ET1 and is not related to the Claimant's disabilities relied on.
- d. In 2014, the Claimant had two further periods of absence due to stress, anxiety and depression. She alleges the Respondent did not conduct a return-to-work interview or offer a phased return to work. Again, this is put as a failure to make reasonable adjustments. The Respondent says this is 6 years out of time, is not referred to in the ET1 and is not related to the Claimant's disabilities relied on.
- e. In 2015, the Claimant had a further period of 6 weeks sickness absence due to a meniscus tear in her knee. On this occasion there was a return-to-work interview and the Claimant returned to work on light duties, but she alleges that the Respondent did not conduct a risk assessment or consider any other (unspecified) adjustments. Again, this is put as a failure to make reasonable adjustments. The Respondent says this is 5 years out of time, it is not referred to in the ET1 and is not related to the Claimant's disabilities relied on.
- f. In the summer of 2015, the Claimant moved to the role of Night Shift Carer. The Claimant puts this as a failure to make reasonable adjustments. The Respondent says this allegation is 5 years and 5 months out of time, it is not referred to in the ET1 and does not disclose any cause of action.
- g. On 6 December, the Claimant was given a 'caution' by the Respondent as regards high levels of absence. The Respondent says this allegation is 4 years and 10 months out of time. It says the allegation does not appear in the ET1. The allegation is put as a s15 Equality Act 2010 claim.
- h. On 15 November 2016, the Claimant alleges she made a protected interest disclosure to the Respondent concerning a medication error/incontinence need/that there had been an attack by a resident. This is pleaded as a protected disclosure. The Respondent says it does not disclose information, does not appear to be in the public interest and

does not identify which of the categories within s43B Employment Rights Act 1996 are in play.

- i. In January 2017, the Claimant alleges she made a further protected interest disclosure to the Respondent regarding the ignoring of holiday requests. This is pleaded as a protected disclosure. The Respondent says it does not disclose information, does not appear to be in the public interest and does not identify which of the categories within s43B Employment Rights Act 1996 are in play.
- j. In January 2017, the Respondent commenced its capability procedure.
- k. In March 2017, the Claimant injured her back and was diagnosed with nerve compression and took 3 days sickness absence. She alleges she returned to work without any assessment by the Respondent and that no adjustments were made. This is put as a failure to make reasonable adjustments claim. The Respondent says it is out of time by 3 years and 7 months and that no provision, criterion or practice or disadvantage have been identified.
- l. In April 2017, the Claimant alleges she made a further protected interest disclosure to the Respondent regarding staff being victimised and bullied.
- m. As a result of the above, on 3 April 2017 the Claimant alleges she was overlooked for training, had management complaints about her performance and HR were not interested in looking into her protected interest disclosure. The Respondent says this allegation is 3 years and 5 months out of time and is not referred to in the ET1. It is put as an allegation of direct disability discrimination under s13 Equality Act 2010 and the Respondent contends that on the Claimant's own case the reason for the treatment was not because of her disability (but rather because of her protected disclosure) and no comparator (s) has been identified.
- n. On 3 May 2017, the Claimant alleges her team leader said, 'that by making (the Claimant) go (on infection control training) with all of the management with whom (the Claimant) was having issues that (the Claimant) would not decide to attend, and that the management could then use the situation to eventually sack (the Claimant) as (the Claimant) was good at her job and knew too much'. This allegation is being put as one of harassment related to disability under s26 Equality Act 2010. The Respondent's position is that this allegation is out of time by 3 years and 5 months, it is not made in the ET1 and does not appear to be related in any way to the Claimant's disability.
- o. In May 2017, the Claimant asserts a further protected disclosure namely telling a colleague she (the Claimant) was being victimised and was asked to raise a grievance. It is unclear what information is said to have been disclosed, whether the disclosure can be said to be in the public

interest and which of the categories within s43B Employment Rights Act 1996 are in play.

- p. On 12 May 2017, the Claimant raised a grievance. The Respondent's position is that this allegation is 3 years and 5 months out of time, it is not referred to in the ET1. It appears to be an alleged claim of harassment related to disability but does not seem to be related in any way to the Claimant's disabilities.
- q. In June 2017, the Claimant asserts she told the Respondent of her health issues, and she had another 3 days sickness absence.
- r. On 4 October 2017, the Claimant alleges a colleague encouraged the making of false allegations against her. This is put as an act of victimisation under s27 Equality Act 2010. The Respondent says this allegation is 3 years out of time and there is no protected act related to disability.
- s. In August 2017, the Respondent informed the Claimant that she required a risk assessment.
- t. In September 2017, the Claimant asserts she attended a meeting to discuss staff using restraints and being attacked. She asserts this was a further protected disclosure. The Respondent says no information was disclosed, the disclosure was not in the public interest and that the Claimant does not identify which of the colleagues within s43B Employment Rights Act 1996 are engaged.
- u. In October 2017, the Claimant asserts she informed the Respondent that her risk assessment had not been addressed and about ongoing issues with night staff.
- v. On 4 October 2017, the Claimant attended a supervision meeting.
- w. On 5 October 2017, there was a management meeting.
- x. On 6 October 2017, the Claimant asserts a colleague was demoted. She says this is a further protected disclosure. The Respondent says the allegation does not involve any disclosure by the Claimant.
- y. On 27 October 2017, the Respondent obtained an occupational health report on the Claimant. From this date the Respondent accepts it has knowledge of the Claimant's back condition and that this amounts to a disability for the purposes of the Equality Act 2010 definition.
- z. On an unknown date another member of staff raised a protected interest disclosure regarding the falsification of training records and the Respondent conducted an investigation in November 2017.

- aa. On 13 November 2017, the Claimant alleges her shift pattern was changed for the following week without notice or consultation. The Respondent's position is that this allegation is 2 years and 11 months out of time and whilst it is said to be an act of harassment related to disability it does not appear in fact to be related in any way to the Claimant's disability. This is also pleaded as a detriment for making a protected disclosure. The Respondent repeats the out of time point but also says it is unclear to which disclosure this is said to be linked and asserts the Claimant in fact offers a different reason for her treatment (harassment).
- bb. On 30 November 2017, the Claimant says she showed a colleague a photo of an agency staff member asleep on duty. She says this is a further protected disclosure. The Respondent says no information was disclosed, any disclosure was not in the public interest and it is unclear which of the categories within s47B Employment Rights Act is engaged.
- cc. On 5 December 2017, staff raised concerns that a procedure to turn residents over every 2 hours was a form of abuse. The Claimant asserts that requiring her to turn patients in this way is indirect discrimination under s19 Equality Act 2010. The Respondent says this allegation is 2 years and 11 months out of time and that the Claimant has failed to identify a relevant provision, criterion, or practice. The Claimant also puts this allegation as a victimisation claim under s27 Equality Act 2010. The Respondent says again that it is out of time and there is no protected act relating to disability.
- dd. On 12 December 2017, the Claimant asserts that she was warned that a failure to turn patients may result in disciplinary action. The Claimant puts this allegation as a complaint of victimisation under s27 Equality Act 2010. The Respondent says it is 2 years and 10 months out of time and there is no protected act related to disability.
- ee. On 12 December 2017, the Claimant asserts that she reported to the Respondent that an agency worker had been caught asleep on duty. She puts this as a victimisation claim under s27 Equality Act 2010. The Respondent asserts this is 2 years and 10 months out of date, there does not appear to be any protected act related to disability and it is not an act of detriment.
- ff. On 14 December 2017, the Claimant makes an allegation that she asked for video/photographic evidence of agency staff asleep. This is put as an allegation of victimisation. The Respondent says it is out of time by 2 years and 10 months and there is no protected act related to disability and no act of detriment.
- gg. In December 2017, the Respondent asked the Claimant for any evidence she had of any agency worker sleeping on duty.
- hh. On 17 December 2017, a staff member made an allegation against the Claimant and another Care Assistant of bullying and harassment, and

the Claimant was moved to a day shift and informed that a disciplinary investigation would take place. The Claimant commenced sickness absence which lasted until she was dismissed on 31 December 2020. The Claimant asserts that being given a letter containing the allegations and moved onto the day shift are acts of victimisation. The Respondent says these are 2 years and 10 months out of time and there is no protected act relating to disability. The Claimant asserts not all witnesses were interviewed in the investigation and that the Respondent's failure to interview everyone is a detriment for making a protected disclosure, as is the change of her shifts. The Respondent says this allegation is 2 years and 10 months out of date and that it is unclear which disclosure this is linked to.

- ii. On 12 January 2018, the Claimant alleges the Respondent sent out an investigation questionnaire to all night staff asking questions about the Claimant. She puts this as a victimisation claim under s27 Equality Act. The Respondent says this is one year and 9 months out of time and that there is no protected act related to disability.
- jj. On 19 January 2018, the Claimant says she sent a letter to the Respondent and asserts that this is a further protected disclosure. The Respondent says it did not disclose information, was not in the public interest and it is unclear which of the categories within s47B Employment Rights Act it is relied upon'.
- kk. On 19 January 2018, the Claimant raised a grievance (that the disciplinary process was victimisation). The grievance was dismissed by the Respondent.
- ll. On 19 April 2018, the Claimant was registered disabled by reason of Fibromyalgia.
- mm. In May 2018, the Respondent determined that the Claimant should face a disciplinary hearing and obtained another occupational health report. The Claimant asserts the Respondent's failure to refer her to occupational health from the onset of her sickness absence of 17 December 2017 until 17 May 2018 and the Respondent not arranging a sickness review meeting after receipt of this occupational health report are acts of discrimination arising from disability under s15 Equality Act 2010. The Respondent says these allegations are 2 years and 5 months out of time, are not in the ET1 and that the 'something arising' to link the treatment to the disability is missing.
- nn. The disciplinary hearing was arranged and postponed on 9 occasions between June 2016 and March 2019. A further occupational health report was obtained in February 2019.
- oo. The Claimant raised a further grievance in October 2018 which was dismissed.

- pp. The disciplinary hearing took place on 26 March 2019. Allegations against the Claimant were upheld, and a written warning was imposed. The Claimant says the written warning was a detriment for making a protected disclosure. The Respondent says this allegation is more than a year out of time, it is unclear to which disclosure it relates and that the Claimant offers an alternative explanation for the treatment.
- qq. In October 2019, a further occupational health report was obtained and in January 2020, the Respondent sought the Claimant's consent to contact her back specialist.
- rr. On 20 January 2020, the Claimant raised a further grievance regarding sickness absence management. The grievance was dismissed.
- ss. On 3 August 2020, the Respondent obtained a further occupational health report. The report stated the Claimant remained unfit for work, no adjustments could be made to facilitate her return, and that the Claimant was likely to remain off work for the foreseeable future.
- tt. On 8 September 2020, the Respondent conducted an absence support meeting with the Claimant. The Claimant agreed with the occupational health assessment.
- uu. On 8 October 2020, the Respondent conducted a formal capability meeting with the Claimant.
- vv. On 15 October 2020, the Respondent sent the Claimant a letter of dismissal confirming a termination date of 31 October 2020.
- ww. The Claimant appealed the decision to dismiss on 28 October 2020. Her appeal was rejected on 25 November 2020.
18. The Claimant gave evidence at this hearing. She confirmed she had taken legal advice from a solicitor in January 2018 and that she had had assistance from a trade union representative from early 2018 until September/October 2020. She accepted she had researched online about how to bring a claim and that she was aware of time limits.
19. On the morning of the hearing the Claimant had submitted some additional documents comprising email communications with her trade union representative.
20. On 10 June 2019, the Claimant had emailed her trade union representative stating "This has gone on for far too long now... You have until Wednesday to submit constructive dismissal and show the proof of submission, or I will go through ACAS as I have already contacted them today'. The trade union representative replied on the same date 'I would strongly advise you not to trigger ACAS conciliation until you receive the legal assessment from UNISON as triggering ACAS without UNISON approval will invalidate support for you'.

21. Later that day the Claimant emailed her trade union representative stating “My three months will be up on July the 1st as I previously stated” to which the trade union representative responded, suggesting they meet in July and “Even if it’s late ...the ET will consider it”. The Claimant accepted in her evidence that these were discussions about filing her claim in July 2019 but that the claim was not filed. She said that she had put her faith in her trade union representative and had expected them to act on her behalf.
22. In his Application Mr Gidney had compiled a list of the Claimant’s various claims and his view on whether they were out of time and if so, his calculation of how far out of time each claim was. He took the Claimant to this in cross-examination, and she did not dispute his position.
23. Mr Gidney also took the Claimant to his list of her claims on other issues. He asked her to identify a protected act for the purposes of her victimisation claim. She was unable to do so.
24. As regards the dismissal (which the Respondent agrees is in time), Mr Gidney asked the Claimant to agree that the Respondent had obtained a number of occupational health reports, that by the dismissal the Claimant had been absent from work on sick leave for 33 months, that the medical professionals and the Claimant as at October 2020 were all agreed no adjustments could be made, there was no opportunity for re-deployment and there was no expected return to work date. The Claimant agreed with all of this.
25. The Claimant gave evidence as to her means.
26. I had a written Application from Mr Gidney. I also heard oral submissions from him. He asserted that the Claimant had had a number of opportunities to particularise her claim. He referred to Employment Judge Algazy QC in essence giving the Claimant a last chance (by way of the Unless Order).
27. Mr Gidney referred me to a passage that Employment Judge Algazy QC had quoted in his case management summary “Whilst Tribunals have an important role at Case Management Hearings to assist unrepresented parties to identify their case from the factual account provided, a point in time must be reached when it is appropriate to step back from that process and move on to consider whether the stated claims have a reasonable prospect of success”. In Mr Gidney’s submission that time was now reached.
28. It was the Respondent’s position that the only claim in time was the unfair dismissal one. This was pleaded as an ordinary unfair dismissal and was not said to be an act of discrimination or a protected disclosure dismissal. Mr Gidney asserted that the agreed facts showed no reasonable prospects of success.
29. Of the discrimination/detriment claims the majority of these occurred before the onset of sick leave in 2017/2018. It would be unreasonable to expect witnesses to recall the facts of the allegations which will date back many years by the time this case gets to trial. Mr Gidney asserted there were no continuing acts in play

and that the Claimant had put forward no good reason for delay nor any reason why time would be extended on a just and equitable basis.

30. I then heard submissions from Mr Wills. He argued that it was in 2017 when a new management team came in, that it became clear the Claimant was no longer wanted and detriments and harassment began. The Claimant realised when she went on sick leave in 2017 that she had been forced out. She contacted a solicitor but could not afford to engage them so instead contacted UNISON and put all of her trust in the union. She lost confidence in the union in 2019.
31. Mr Wills did not address the 'legal' points regarding the time points or the particularisation of the claims in his submission. I invited him to do so if he wished. He declined to do so.

CONCLUSIONS

32. Turning firstly to the in-time claim, that of ordinary unfair dismissal, I do find this has no reasonable prospect of success. Taking the Claimant's case at its highest (and noting her agreement when questioned about this by Mr Gidney) as at dismissal she had been absent from work for 33 months with no prospect of any return date. The Respondent had obtained a number of medical records, it had sought the Claimant's opinion and it was agreed there was no adjustments that could be made to facilitate a return to work nor were there any opportunities for re-deployment to a role the Claimant was capable of undertaking.
33. The Claimant, after many attempts to frame her case, is claiming ordinary unfair dismissal only. Capability is a potentially fair reason for dismissal. With this background the Respondent is bound to persuade a Tribunal the dismissal was fair.
34. Turning to the other claims, they are plainly out of time. The Claimant went on sick leave on 17 December 2017 and did not return to work thereafter. The last allegation she makes (that is unconnected to the dismissal) dates back to March 2019 when she says the written warning given to her is an act of detriment for making a protected disclosure. That is many months, more than a year, out of time. The Claimant says she was aware of time limits, and we know she emailed her trade union representative in June 2019 referring to a time limit of 1 July 2019. Despite this knowledge, she did not go to ACAS until 18 January 2021, after she had been dismissed and had unsuccessfully appealed the decision to dismiss. It seems from her correspondence with her trade union representative, that on 10 June 2019 she had in mind a claim of constructive unfair dismissal and that she was aware of the need to register with ACAS, but this was not done. Despite her evidence that she had her trade union representative advising her until September/October 2020 no good reason has been offered for the delay. Further no continuing act argument has been put forward. Mr Wills told me in his submissions that the issues began in 2017. This does not explain why allegations are made dating back to 2012. Memories do

fade over time, this being one of the reasons for strict time limits, and there is a real difficulty for Respondents facing such dated claims.

35. In my view the detriment and discrimination claims have no reasonable prospects of success given the time limit issues.
36. There is the further issue as to the inadequate pleading of the claim. As already noted the Claimant has had some (limited) legal advice and some trade union advice. She has been given a number of opportunities to frame her claim including Employment Judges and the Respondent's solicitor making specific requests/orders for information which were framed so as to assist even a litigant in person with the various issues and legal tests involved. The Claimant despite this assistance has failed to explain what protected act she relies on for her victimisation claims, she has failed to say why the disclosures she relies on are protected and qualifying. Indeed, from the chronology set out above, many of the alleged protected disclosures cannot be relied on as they simply do not involve the Claimant disclosing anything. Moving on there then becomes a difficulty with the detriments said to have been caused by the disclosures. The Claimant has failed to identify any links. On the issue of the disability discrimination claim the Claimant fails repeatedly to point to the statutory elements of her claims. Even taking the Claimant's case at its highest, it has no merit. I am of the view the claims have no reasonable prospect of success and for that reason I have decided to strike them out.

Employment Judge Hindmarch

28 September 2022

Sent to the parties on:

...4th October 2022....

For the Tribunal Office:

...Eamonn Murphy..