



EMPLOYMENT TRIBUNALS

Claimant: Mr A Parmar

Respondent: John Lewis Plc

Heard at: London South

On: 4 May 2023

Before: Employment Judge Heath

Representation

Claimant: In person

Respondent: Ms G Holden (Counsel)

JUDGMENT

1. The claimant's complaint of unfair dismissal is dismissed.
2. The claimant's claims of disability discrimination are not struck out either on the basis of time limits or on their merits.
3. The claimant's claims of race discrimination are not struck out either on the basis of time limits or on their merit.

CASE MANAGEMENT ORDERS

1. The application to amend the claim to bring a complaint of automatic unfair dismissal for health and safety reasons is refused.
2. No deposit order is made in respect of the claimant's disability discrimination claims either on the basis of time limits or on their merits.
3. No deposit order is made in respect of the claimant's race discrimination claims either on the basis of time limits or on their merits.

REASONS

Introduction

1. An Open Preliminary Hearing (“OPH”) was listed by EJ Fredericks at a Case Management Preliminary Hearing (“CMPH”) held on 2 November 2022. The purpose of the OPH was to consider:
 - a. Whether the claimant’s claims, particularly in relation to things done prior to three months before bringing his claim, are brought in time and whether the Tribunal has jurisdiction to hear them;
 - b. Whether any of the claimant’s claims should be struck out because they have no real prospects of success; and/or
 - c. Whether any of the claimant’s claims should be made subject to a deposit order as a continuation of their continuation; and
 - d. To conduct any case management as may be necessary in anticipation of the hearing of any surviving claims at the Final Hearing.
2. At the CMPH the claimant was not certain that he would proceed with a disability discrimination claim. However, if he were to proceed with one, the OPH would decide whether he was a disabled person having regards to the statutory definition. I have dealt with this matter in a separate judgment.

Claims and issues

3. The claimant was employed by the respondent between 3 May 2021 and 21 May 2021. He claims that he was constructively dismissed by the respondent on this latter date, but began working for them as an agency worker. He further claims that he applied for further employed roles with the respondent, but was unsuccessful in his applications.
4. EJ Fredericks set out the issues which the tribunal was to decide following discussion with the parties at the CMPH. The claims set out under the heading “The Issues” were:
 - a. **Time limits** - whether the claims were brought in time, if not whether there was conduct extending over a period and the claim was made at the end of that period, and if not whether it is just and equitable to extend time.
 - b. **Unfair dismissal** - this was expressed to be a constructive dismissal based on the breach of the implied term of trust and confidence. The claimant’s length of service was set out as an issue. It was also set out that the claimant may be for automatic unfair dismissal based on the respondent having “no regard for his health and safety”.

- c. **Direct race discrimination** - three allegations of less favourable treatment were asserted by the claimant. During his employment, not permitting him to changes shift times despite having knowledge of his disability. After his employment terminated, suspending him following tachograph infringements. Finally, not recruiting him for employed positions between July and October 2021.
5. At the hearing before EJ Fredericks, the claimant was unsure whether he wished to bring a disability discrimination claim. He was given time in which to indicate whether he was pursuing such claim. He subsequently did give such an indication. However, probably because of the claimant's position at the Case Management Preliminary Hearing, no reference to a disability discrimination claim was made in the list of issues.
6. Early in the OPH, it was therefore necessary for the tribunal to establish what the issues in any disability discrimination claim were. Following discussion with the parties, and scrutiny of the ET1 the following claims were identified:
 - a. **Breach of the duty to make reasonable adjustments** during the claimant's employment between 3 and 21 May 2021. The allegation appears to be (section 8.2 ET1 at page 8 OPH bundle) that a PCP was applied requiring the claimant to begin work between 8 pm and 12am. This placed him at a substantial disadvantage due to the lack of sleep he experienced because of his mental health issues. A reasonable adjustment would have been to allow him to start work earlier in the band.
 - b. **Discrimination arising from disability** while the claimant was an agency worker. On 2 August 2021 the claimant alleges (ET1 continuation sheet at page 14 OPH bundle) he was treated unfavourably by being suspended. He alleges the suspension was for infringements which arose from his disability.

Procedure

7. I was provided with 80 page bundle, further documents relating to driver infringements, further documents relating to applications for permanent roles and a skeleton argument from Ms Holden.
8. The claimant gave evidence and was questioned by myself and by Ms Holden. His evidence was largely concerned with the issue of disability, but he was asked questions relating to time limits.
9. After evidence had been heard and just before submissions, the claimant made an application to amend his claim to assert he had been automatically unfairly dismissed for health and safety reasons. I took the claimant through the factors normally considered by tribunals when considering applications to amend, and Ms Holden resisted the application.
10. In relation to his application to amend, the claimant alleged that he had been forced to resign because his manager refused to adjust his work times. The claimant said that he brought to his employer's attention that he believed he was at risk of falling asleep at the wheel when he was driving.

He was told that there were no changes that could be made to his work times, and so he gave his notice. He said that he was making the application to amend now because he researched last night and found that he needed more than two years' service to claim unfair dismissal. He said that he did not pick up on this issue at the last hearing because he was overwhelmed by the hearing itself.

11. The parties gave closing submissions. The hearing did not conclude until after 3:30 pm and so I reserved my decision.

The law

Time limits EA

12. Section 123 EA provides:

(1) 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.

...

(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.

13. The key question in determining whether there was conduct extending over a period is whether there was an ongoing situation or continuing state of affairs which amounted to discrimination (*Hendricks v Metropolitan Police Commissioner* [2002] IRLR 96). The claimant bears the burden of proving, by direct evidence or inference, that numerous alleged incidents of discrimination are linked to each other so as to amount to a continuing discriminatory state of affairs.

14. As to extending time, the Court of Appeal in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050 observed that the wording of section 120(1)(b) "*such other period as the employment tribunal thinks just and equitable*" gives the Tribunal a wide discretion in considering whether to extend time. Leggatt LJ said that "*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reason for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claims while matters were fresh).*"

15. Tribunals are encouraged to "*assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular... 'The length of, and the reasons for, the*

delay' ” (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 22).

16. In *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] UKEAT 132 the EAT held that the potential merits of a claim, which was not so weak as to be struck out under Rule 37, are not irrelevant when it comes to deciding whether it is just and equitable to extend time. If these the merits are weighed in the balance against the claimant the assessment of the merits “*must have been properly reached by reference to identifiable factors that are apparent at the preliminary hearing, and taken proper account, particularly where the claim is one of discrimination, of the fact that the tribunal does not have all the evidence before it, and is not conducting the trial*”.
17. Reviewing the authorities, the learned editors of *Harvey’s* set out a non-exhaustive list of factors that may prove helpful in assessing individual case:
 - a. the presence or absence of any prejudice to the respondent if the claim is allowed to proceed
 - b. the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;
 - c. the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;
 - d. the conduct of the claimant over the same period
 - e. the length of time by which the application is out of time;
 - f. the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of the claim;
 - g. the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

Time limits and preliminary hearings

18. In the case of *E v X and others* UKEAT/0079/20 the EAT reviewed previous authorities and identified a number of key principles to be applied when time points are being considered at a preliminary hearing. I set them out in full:
 - h. *In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: **Sougrin**.*
 - i. *It is appropriate to consider the way in which a claimant puts their case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: **Robinson**.*
 - j. *Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of*

issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: **Sridhar**.

- k. *It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated; or (2) substantively to determine the limitation issue: **Caterham**.*
- l. *When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: **Lyfar**.*
- m. *An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: **Aziz; Sridhar**.*
- n. *The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: **Aziz**.*
- o. *In an appropriate case, a strike-out application in respect of some part of a claim can be approached assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required – the matter will be decided on the claimant's pleading: **Caterham**.*
- p. *A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: **Robinson**.*
- q. *If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the*

claimant lives to fight another day, at the full merits hearing:

Caterham.

r. *Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out:*
Caterham.

s. *Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing:* **Caterham.**

t. *If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may be no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue:*

Caterham

Strike out and deposits

19. Rule 37 of the ET Rules 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 or response on any of the following grounds—

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

20. In *Mechkarov v Citibank NA* [2016] ICR 1121 the EAT summarised the principles that emerge from the authorities in dealing with applications for strike out of discrimination claims:

"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

21. The guidance in *Mechkarov* followed from a line of authorities including *Anyanwu v South Bank Students' Union* [2001] IRLR 305 and *Eszias v North Glamorgan NHS Trust* [2007] IRLR 603. *Chandok v Tirkey* [2015] ICR 527 shows that there is not a "blanket ban on strikeout application succeeding in discrimination claims". They may be struck out in appropriate circumstances, such as a time-barred jurisdiction where no evidence is advanced that it would be just and equitable to extend time, or where the claim is no more than an assertion of the difference in treatment and a differencing protected characteristic. *Eszias* also made clear that a dispute of fact also covers disputes over reasons why events occurred, including why a decision-maker acted as they did, even when there is no dispute as to what the decision maker did.

22. In *Ahir v British Airways plc* [2017] EWCA 1392 the Court of Appeal held that tribunal's should "*not be deterred from striking out claims, discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger in reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context*".

23. Rule 39 ET Rules provides: -

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect 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 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.

24. In the case of *Hemdam v Ishmail* [2017] IRLR 228 the Court of Appeal gave guidance to tribunals on the approach to deposit orders. The guidance included:-

- a. The test for ordering a deposit is different to that for striking out under Rule 37(1)(a).
- b. The purpose of the order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and creating a risk of cost. It is not to make access to justice difficult or to effect a strike out through the back door.
- c. When determining whether to make a deposit order a tribunal is given a broad discretion, is not restricted to considering purely legal questions, and is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and reach a provisional view as to the credibility of the assertions being put forward.
- d. Before making a deposit order there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence.
- e. A mini trial on the facts is not appropriate.

Amendment

25. *Selkent Bus Co Ltd v Moore* [1996] ICR 836 sets out a non-exhaustive number of factors to be borne in mind by a tribunal considering an application to amend. These include the nature of the amendment, the applicability of time limits and the timing and manner of the application. *Selkent* makes clear that “the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment”. *Vaughan v Modality Partnership* UKEAT/0417/20 urges a focus on the real practical consequences of allowing or refusing an amendment.

The relevant facts

26. I have set out the facts I have found relating to the claimant’s disability status in a separate judgment. I will not repeat those facts here, but will add and underline a couple of points.
27. The claimant experienced severe depression and anxiety in March 2021. He received a course of counselling which helped in improving his mental state over the course of the next few months.
28. The claimant was directly employed by the respondent between 3 May 2021 and 21 May 2021 when he “parted on good terms” with the respondent. He then signed up with an agency who placed him with the respondent.
29. The claimant currently works for an agency earning around £600-700 per week. His wife earns around £1000 per month. He has two grown up children who are not dependant, but do not contribute to the family’s income. His outgoings are £330 pcm on energy, £50 pcm on water, £140 pcm on house and car insurance, £360 pcm on car finance, £250 pcm on

council tax, £500 pcm on shopping, mobile phones and fuel. The family has savings of £22,000 and his wife has savings of £15,000. Ms Holden calculated a monthly income for the family of £3800 with outgoings of £1630.

Conclusions

Amendment

30. I do not allow the application to amend to include a claim under section 100 Employment Rights Act 1996.
- a. The claimant has not been able to set out the circumstances in which he says section 100 applied. He did not know whether there was a health and safety representative or committee at his former place of work (though he imagined there was one), and there was a degree of speculation as to how he might fit within the section. While it was not easy to see how extensive his amendment might be, it certainly would take matters beyond the current trust and confidence related constructive dismissal claim he was bringing.
 - b. The claimant was alerted to the possibility of amending his claim that the CMPH on 2 November 2022, but did nothing about it until halfway through the OPH. While I accept he may have been overwhelmed during the hearing, he was sent the case management summary on 10 January 2023, and he took no steps to make an application to amend.
 - c. I find that he would have no reasonable prospect of showing that an amended claim was in time.
 - d. The only reason given for such a late application appears to be that the claimant find out very late stage that he did not have ordinary unfair dismissal claim.
 - e. Refusing the application to amend obviously deprives the claimant of the chance of running a claim. But balanced against this is the prejudice the respondent faces in defending a claim which in all likelihood the claimant will not be able to establish is in time.

Unfair dismissal

31. There is a fundamental problem with any ordinary unfair dismissal claim. I have not allowed an amendment to bring an automatic unfair dismissal claim, and so the claimant must show that he had two years' service in order to bring ordinary unfair dismissal claim. All evidence points to the fact that he did not have this requisite service. Indeed, his attempt to apply to amend his claim demonstrates an acknowledgement that he did not have such service. The claimant has no reasonable prospects of succeeding in an unfair dismissal claim, and this claim struck out.

Disability discrimination

32. The claimant's first claim (breach of the duty to make reasonable adjustments) related to his period of employment which ended on 21 May 2021. His second claim related to his suspension on 2 August 2021. He notified ACAS on 27 September 2000, receiving a certificate on 7

November 2021, and he brought his claim on 5 December 2021. He notified ACAS almost a month out of time. I note, from the evidence, that the claimant's mental health had improved during this period, but he appears to have been experiencing anxiety and paranoia during this period.

33. The second claim appears to be in time. With respect to the first claim, the claimant did not approach ACAS until a month after the time limit expired. In respect of the first claim, I note the claimant accepted a number of times in evidence that he had parted on good terms.
34. I do not propose making findings of fact to determine whether the claims were in time, whether they form part of a continuing act and whether it is just and equitable to extend time. No witness statements were ordered for the hearing before me, and while I did hear some evidence, it was not sufficiently detailed for me to feel safe in making findings. This task is much better conducted by a tribunal hearing the whole evidence in its appropriate context. I also bear in mind the theme in the authorities which points towards discrimination claims being heard rather than struck out other than in fairly exceptional circumstances.
35. Ms Holden makes powerful arguments suggesting that there is no continuing act when the claimant moves from employment to (in all probability) contract work. However, I am not in a position properly to determine whether there is no or little reasonable prospect of the claimant establishing a continuing act, or of persuading a tribunal that it was just and equitable to extend time in respect of the first disability discrimination claim.
36. In terms of the merits of the first claim, while it might be said that leaving on good terms is inconsistent with having been discriminated against I do not consider that the threshold either for strike out or a deposit order has been met. Evidence needs to be heard on this point.
37. In respect of the second claim, which is in time, the respondent submits that it will be difficult for the claimant to prove the reason why he was suspended arose out of his disability, when he offers other reasons such as race. The authorities on discrimination have made clear how difficult it is for claimant to prove the reason why an employer acted as it did. The proof will depend on what inferences it is reasonable to draw having heard the evidence of relevant matters. The reason why an employer acted as it did is a factual dispute, and as such a tribunal would rarely consider it appropriate to strike out claim. I also do not consider it appropriate to order a deposit, which may amount to a back door strikeout.

Race discrimination

38. The claimant claims that decisions about his shift times (while in employment) and suspending him in early August 2021 were also acts of race discrimination as well as different forms of disability discrimination. Arguments in relation to time are identical, and I do not strike out the claimant's claims for time limit issues or subject them to a deposit.

39. Equally, the reason why the respondent did not alter the claimant's shift times and why they suspended him on 2 August 2021 are matters about which evidence must be considered.
40. The merits of the claimant's direct race discrimination claim in respect of not being recruited must similarly be adjudicated upon after hearing evidence. While the respondent asserts that cogent reasons were advanced for the claimant not being offered a role, I heard no evidence myself on the point.
41. I do not strike out any of the race claims, and I do not make them subject to a deposit.

Employment Judge **Heath**

9 May 2023