



EMPLOYMENT TRIBUNALS

Claimant: Angela Hunter

Respondent: Northern Divers (Engineering) Limited

Heard: in public by CVP **On:** 30 April 2024

Before: Employment Judge Ayre, sitting alone

Appearances

For the claimant: Did not attend the hearing and was not represented

For the respondent: Lynsey Howes, solicitor

JUDGMENT AT PRELIMINARY HEARING

1. The claims for age and sex discrimination are struck out because:
 - a. They are vexatious; and
 - b. They are out of time and there is no reasonable prospect of the claimant successfully showing that it would be just and equitable to extend time for the presentation of those complaints. Accordingly the Tribunal does not have jurisdiction to hear them.
2. The claim for equal pay is struck out because it has no reasonable prospect of success.

REASONS

Background

1. The claimant was employed by the respondent as a payroll clerk, from 2 November 2015 until 5 May 2023. Early conciliation started on 26 October 2023 and ended on 7 December 2023. The claim form was presented on 6 January 2024. On the claim form the claimant ticked the boxes indicating that she is making claims for age and sex discrimination and for 'other payments'. Her claim form appears to include a complaint of equal pay, relying upon a comparator named Jake.

2. The respondent defends the claim. In its response it pleads that:
 - 2.1 The claimant admitted to stealing almost £85,000 from the respondent, and was summarily dismissed for gross misconduct as a result;
 - 2.2 The claimant has failed to particularise her complaints of age and sex discrimination in her claim form;
 - 2.3 The complaints of age and sex discrimination are out of time;
 - 2.4 Jake is not an appropriate comparator for the equal pay claim because he was employed as a trainee diver and subsequently a fully qualified diver, whereas the claimant was employed as a payroll clerk;
 - 2.5 The claimant did not raise any of the issues referred to in the claim form at any time during her employment with the respondent; and
 - 2.6 The claims are without merit and made maliciously and vexatiously.

The hearing

3. Notice of today's hearing was sent to the claimant on 9 February 2024 at the email address provided in the claim form. On 13 March 2024 an amended notice of hearing was sent to the parties, including the claimant. In the amended notice of hearing the parties were informed that:
 - 3.1 The length of the hearing had been extended to 3 hours; and
 - 3.2 At the hearing the Judge would decide whether to strike out all or any part of the claim, and/or whether to order the claimant to pay a deposit as a condition of continuing with all or part of her claim.
4. In advance of the hearing the respondent prepared a Case Management Agenda and draft List of Issues, which Ms Howes told me she had sent to the claimant, without receiving any response.
5. The claimant did not attend today's hearing and was not represented. The hearing was due to start at 10 am, but the start of the hearing was delayed until 10.30 to give the claimant time to dial in. She did not do so. The claimant had not provided a contact telephone number on her claim form, but the respondent was able to provide one for her. A member of Tribunal staff called the telephone number provided four times in an attempt to contact the claimant but was unable to make contact with the claimant.
6. There was no record on the Tribunal file of the claimant having requested a postponement of the hearing, of having contacted the Tribunal or the respondent to indicate that she would not be able to attend today's hearing, or indeed of the claimant having taken any action in relation to the claim since filing her claim form in January.

7. In the circumstances, I decided to proceed with the hearing in the absence of the claimant in accordance with Rule 47 of the Employment Tribunal Rules of Procedure. There was no evidence to suggest or reason to believe that if I were to postpone the hearing the claimant would attend on another date.
8. Ms Howes made submissions on behalf of the respondent. In summary she submitted that:
 - 8.1 The claims are scandalous and vexatious and being made as revenge for the respondent reporting the theft to the police;
 - 8.2 The claims are entirely without merit and have never been raised previously with the respondent;
 - 8.3 Jake was doing an entirely different job to the claimant, which was not of equal value to the claimant's. He worked unsocial hours, away from home, carrying out an important health and safety role, sometimes in a hostile working environment;
 - 8.4 There are material inaccuracies in the claim form; and
 - 8.5 There is no just and equitable reason for extending time, and it would be an abuse of process to allow the claimant to continue with claims with no merit.
9. Having considered the submissions made by Ms Howes, I decided, for the reasons set out in this judgment, that the claims should be struck out. Having delivered that decision orally, Ms Howes made an application for the costs of preparing for and attending today's hearing, in the sum of £1,155.
10. Rule 77 of the Employment Tribunal Rules of Procedure provides that no costs order can be made "*unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application*". Ms Howes therefore agreed to put her application for a costs order in writing and send a copy of the application to the claimant so that she has the opportunity to comment on it.

The Law

11. Rule 37 of the Rules provides that:

"(1) 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;*
- (b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious; ..."*

12. Strike out is a draconian sanction and not one that should be applied lightly. Tribunals should be particularly cautious about exercising their power to strike out badly pleaded claims brought by litigants in person who are not familiar with articulating complex arguments in written form on the ground that they have no reasonable prospect of success (***Mbuisa v Cygnet Healthcare Ltd EAT 0119/18***).
13. The Employment Appeal Tribunal, in ***Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108*** commented that whilst in some cases strike out may save time, expense and anxiety, in cases that are fact sensitive the circumstances in which a claim is likely to be struck out are rare.
14. In ***Cox v Adecco and ors [2021] ICR 1307*** the Employment Appeal Tribunal gave guidance to Tribunals dealing with strike-out applications against litigants in person. It held that when considering strike out of claims brought against litigants in person, the claimant's case should be taken at its highest and the Tribunal must consider, in reasonable detail, what the claims and issues are.
15. In ***Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391*** the House of Lords stressed the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and can only be determined after evidence has been heard.
16. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination 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.*
17. By virtue of section 140B of the Equality Act 2010, ACAS early conciliation will normally extend time, but not in cases where the early conciliation itself starts more than three months after the last act of alleged discrimination.
18. Tribunals have a discretion as to whether to extend time (***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434*** and ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640***) but exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time.
19. When deciding whether to exercise its discretion to extend time, the Tribunal can take into account anything that it considers relevant. Factors that may (but will not always – see ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23***) be relevant include:
 - 19.1 The length of and reasons for the delay in presenting the claim;
 - 19.2 The extent to which the cogency of the evidence is likely to be affected by the delay;

- 19.3 The extent to which the respondent cooperated with any requests for information;
 - 19.4 How quickly the claimant acted when she knew of the facts giving rise to the claim; and
 - 19.5 The steps taken by the claimant to obtain professional advice once she knew of the possibility of taking action.
20. The Tribunal may consider the merits of the case (*Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 1342*), the prejudice that would be suffered by either party if the application for an extension of time were to succeed or fail, and the practical consequences of allowing or refusing an extension of time.

Conclusions

21. I reached the following conclusions having considered the claim form and response form, the submissions of the respondent, and the legal principles summarised above.
22. I have reminded myself that caution should be exercised before striking out discrimination claims, which are normally fact sensitive, and that the claimant's case must be taken at its highest. That said, this case is one in which in my view the threshold for strike out is met.
23. The claimant has taken no steps whatsoever to progress her claim since issuing proceedings. She has had the opportunity to adduce evidence and to make representations as to why her claims should not be struck out but has failed to do so.
24. The respondent set out clearly its position in its response to the claim. On 13 March the Tribunal wrote to the parties, including the claimant, putting them on notice of the issues that would be considered today, including the question of strike out.
25. Despite being warned that the question of strike out would be considered today, the claimant has not attended, or sent in any evidence or representations. Her non-attendance at the hearing is entirely without explanation. She has made no contact with the Tribunal or with the respondent's representative since submitting her claim.
26. The respondent has attended today and made submissions which are uncontested by the claimant and which I accept.
27. I am satisfied, having reviewed the claim form and response form, and listened to the submissions of Ms Howes, that the complaints of age and sex discrimination are vexatious. I accept Ms Howes' submissions that they were not raised during the course of employment, and that they have been raised, belatedly, in response to the respondent reporting the claimant to the police.

28. I also find that the discrimination complaints are out of time, and that there is no reasonable prospect of the claimant establishing that it would be just and equitable to extend time. The claimant's employment terminated on 5 May 2023, so time for starting early conciliation expired on 4 August 2023. She did not start early conciliation until 26 October and did not present her claim until 6 January 2024.
29. Her discrimination claims are therefore more than five months out of time, taking account of the fact that there is no early conciliation extension, because she started early conciliation more than three months after the termination of her employment.
30. The claimant has provided no explanation or reasons for the delay in presenting her claim, despite having the opportunity to do so. Time limits exist for an important reason of public policy and the Tribunal does not have jurisdiction to hear claims that are out of time. Given the significant delay in this case and the lack of explanation for that delay, there is in my view no reasonable prospect of the claimant establishing that it would be just and equitable to extend time.
31. For the above reasons the discrimination claims are struck out.
32. The equal pay claim appears to have been made in time but has in my view no reasonable prospects of success. Whilst I accept that equal pay claims are fact sensitive, and that it is rare for a Tribunal to find that they have no reasonable prospect of success, this is such a claim. The respondent has provided what appears to be a robust defence to the claim setting out significant differences between the role carried out by the claimant and the role of her comparator. That defence, and the submissions made by Ms Howes today, have not been challenged by the claimant.
33. The claim for equal pay is therefore struck out on the ground that it has no reasonable prospect of success.

Employment Judge Ayre
30 April 2024

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>