EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs J E Okeke	v	**Care UK Community Partnerships Limited**

HEARING

Heard at: London South **On: 14 and 15 June 2018**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: **Mr J Gidney of Counsel**
For the Respondent: **Mr D O'Dempsey of Counsel**

JUDGMENT on PRELIMINARY HEARING

1. The claimant's application to amend her claim to add claims of direct and indirect discrimination on the ground of religion or belief and harassment related to religion or belief is permitted. The detail of the allegations is set out on pages 158 and 159 of the bundle. Any issues relating time limits for any aspect of this claim and whether there are continuing acts are reserved to the hearing which hears the merits of the claim including any issue of just and equitable extension of any time limit.

2. The respondent is permitted to answer the amended claim within 28 days hereof.

3. The remaining claims of discrimination set out in the Amended Particulars of Claim [157-166] are not in time and it is not just and equitable to allow the ET1 to be amended by adding them.

4. The remaining claims set out in the Amended Particulars of Claim under the Employment Rights Act ("ERA") are not in time and it was reasonably practicable to raise them within time so the ET1 is not amended by adding them.

5. The existing claim is not struck out as having no reasonable prospect of success.

6. A deposit order is not made in respect of the existing claim.

7. No award of costs is made in respect of the Preliminary Hearing on 8 November 2017 which the claimant did not attend.

8. A case management preliminary hearing should be scheduled in normal course.

REASONS

Preliminary

1. This preliminary hearing was fixed in order to consider the claimant's application to amend her ET1, to consider the respondent's application to strike out or to make a deposit order, to consider the respondent's application for the costs of attending the Preliminary Hearing on 8 November 2018 and to make any case management orders necessary for the hearing [153]. In relation to the latter, due to shortage of time, it was not possible to address further case management.

2. The claimant gave evidence on her own behalf. There was a bundle of documents to which reference will be made where necessary.

Chronology

3. On 21st March 2016, the claimant commenced employment with the respondent as a Registered Nurse.

4. On 27 February 2017, the claimant was suspended from duty for sleeping on duty and not responding to the call bell.

5. On 3 March, the respondent wrote to the claimant about the investigation.

6. On 7 March, the claimant raised a grievance with the respondent by email alleging "bullying, harassment and discrimination during the disciplinary process". The claimant did not particularise any allegations of discrimination or harassment within the grievance email. The respondent attempted to arrange a meeting with the claimant to discuss her grievance on three occasions, 13 April, 21 April and 17 May. She did not attend any of the meetings and claimed she was on annual leave on these dates. Annual leave had not been booked by her on these dates with the respondent.

7. On 18 May 2017, the claimant notified ACAS of a dispute.

8. On 13 July, there was a disciplinary hearing.

9. On 17 July 2017, the claimant presented her claim to the Employment Tribunal, in the Particulars of Claim, she alleged religious discrimination.

10. On 18 July 2017, the claimant was dismissed on for gross misconduct.

11. On 1 September, the claimant submitted a 186 page appeal document to the respondent. The claimant also attached two Appendices to the document. Appendix 1 contained a further 47 pages and Appendix 2 contained 228 questions for the respondent over 33 pages. The claimant sent lengthy emails to the respondent on 21, 26, 27, 28 and 29 September 2017 which tended to repeat points already made.

12. On 12 September 2017, a Notice of Hearing on 8 November was issued [13-14].

13. On 26 October 2017, the claimant emailed the Tribunal and requested a postponement of the preliminary hearing on 8 November "in order to seek medical assistance and generally help for stress, anxiety, extreme pressures and generally for my emotional /physical wellbeing" [29].

14. On 31 October, the claimant was told by the Tribunal that she should provide medical evidence to support her application [32].

15. The claimant contacted her GP surgery on 31 October 2017 as soon as she received the notification from the Tribunal on 31 October 2017. She found that getting an appointment with a GP in time for the deadline of 3 November 2017 was not possible. The surgery told her to call back the next day in the morning, they could not offer her any GP appointments prior to 3 November 2017, but they would do their best to offer her an earliest possible appointment with the Nurse Practitioner and partner in the practice, who could prescribe, assess, diagnose, refer and subsequently provide medical evidence in the same manner a GP. She was offered an appointment on 1 November 2017 in the evening.

16. The nurse practitioner provided a letter which was posted to the Employment Tribunal on 1 November 2017 [33]. The nurse practitioner at the Greyswood Practice stated that the claimant had attended the surgery on 11 July 2017, 14 and 22 August, 20 September 1 October and 1 November complaining of work related stress. She had attended her previous GP surgery with work related stress on 13 March 2017, 12 May and 26 June.

17. The Tribunal confirmed receipt of this letter on 2 November 2017. On 2 November, the respondent wrote to the claimant to confirm the outcome of her grievance which was upheld in part.

18. The claimant telephoned the Tribunal office to find out whether the postponement had been granted. The Employment Judge's response rejecting her postponement request on the ground that her medical evidence was inadequate was emailed to her on 7 November 2017 at 13.45 [34]. The hearing was scheduled for the next day at 10.00am. She telephoned the GP practice and requested a letter from a GP this time. There was no appointment available for any GP to do this on 7 November 2017, but the surgery agreed to work towards an appointment for this around 8.00am the next day. The practice was busy on the morning of 8 November 2017 and the GP provided a letter by 9.45am, hence the medical evidence letter with her written representation was not sent to the Tribunal until 9.59am.

19. By letter dated 8 November, the claimant wrote to the Tribunal seeking an adjournment of the hearing that day [209]. In that letter she makes reference to the police attending her home at 1pm that day in connection with a complaint of domestic violence which meant she had to vacate the family home in the previous two weeks. She says she had contacted a solicitor after she received the ET3 but that was to assess her case and her circumstances were such that she did not provide the necessary information.

20. At the hearing on 8 November, Employment Judge Baron was not inclined to postpone the hearing in the claimant's absence and considered that progress could be made with the management of the claims in the absence of the claimant [36]. She was ordered to provide details of her income for the purposes of the deposit order application [37]. She thereafter provided responses to the questions asked of her in an undated 16-page document. The respondent incurred costs of £1182 in attending the hearing on 8 November 2017 [43].

21. On 8 November, the claimant received an email confirmation of an appointment for the assessment for post-traumatic stress syndrome for 24 November [213].

22. On a subsequent date, possibly 19 December, she provided a 19-page undated document providing further particulars of her claim.

23. On 5 March 2018, the claimant applied to the Tribunal to amend her application [176]. She wished to add claims of direct discrimination because of her age, contrary to sections 5 and 13 of the Equality Act 2010 ("'the EqA"); Harassment related to her age, contrary to sections 5 and 26 of the EqA; Direct discrimination because of her race, contrary to sections 9 and 13 of the EqA; Direct discrimination because of her sex, contrary to sections 11 and 13 of the EqA; Indirect discrimination because of her sex, contrary to sections 11 and 19 of the EqA; Harassment related to her sex, contrary to sections 5 and 26 of the EqA; Victimisation after raising a complaint of discrimination, contrary to section 27 of the EqA; Detriment on the grounds of making a protected disclosure, contrary to section 47B of the ERA; Breach of contract. The claimant sets out factual assertions in support of each new claim. These have been set out in consolidated form at pages 157-165 by her counsel whose assistance to the claimant has been invaluable.

24. She also wishes to add a claim direct and indirect discrimination because of her religion or belief, contrary to sections 10, 13 and 19 of the EqA and harassment related to religion or belief, contrary to sections 10 and 26 of the EqA again with factual assertions provided.

Submissions

25. The Tribunal heard oral submissions from both parties and considered written submissions from the claimant.

Law

Amending the claim

24. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 NIRC. There is a distinction which requires to be drawn between:

(i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, i.e. re-labelling.

(ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim. As Harvey notes at paragraph 312.01 in relation to this type of amendment: *"*So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded.

(iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

25. In essence, **Selkent** said that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, [including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]" before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it." This approach was approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201.

26. There is also Presidential Guidance.

27. In **Galilee v. Commissioner of Police of the Metropolis** [2018] ICR 634, the Employment Appeal Tribunal examined the authorities on the effect of granting an amendment on the time limits for claims.

28. When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence. Although the allegations in the original claim and in the amendment were not identical, Rimer LJ, giving the only reasoned judgment of the Court, held that 'the thrust of the complaints in both is essentially the same'. The fact that the whistleblowing claim would require an investigation of the various component ingredients of such a case did not mean that 'wholly different evidence' would have to be adduced. **Evershed v. New Star Asset Management Holdings Ltd** [2010] EWCA Civ 870 at para 50.

Time limits and extension
Not reasonably practicable to present claim in time

29. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. The leading authority on the subject is the decision of the Court of Appeal in **Palmer and Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA.

Just and equitable extension

30. The EqA permits the Tribunal to grant an extension of time 'if, in all the circumstances of the case, it considers that it is just and equitable to do so'. They entitle the [employment] tribunal to take into account anything which it judges to be relevant': **Hutchison v. Westward Television Ltd** [1977] ICR 279, EAT. Notwithstanding the breadth of the discretion, it has been held that 'the time limits are exercised strictly in employment cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ).

STRIKING OUT

31. An employment judge has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success.

32. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid.

33. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute

34. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the

exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

35. As whistleblowing cases have much in common with discrimination cases, in that they too are fact-sensitive and involve similar public interest considerations, (see **Ezsias v. North Glamorgan NHS Trust** [2007] ICR 1126 CA.

DEPOSIT ORDERS

36. A deposit order can be made if the specific allegation or argument has little reasonable prospect of success. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit 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 by creating a risk of costs ultimately if the claim fails' (para 10), she stated that the purpose 'is emphatically not to make it difficult to access justice or to effect a strike out through the back door' (para 11).

37. As a deposit order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response as a whole, it is possible for a number of such orders to be made against a claimant or respondent in the same case.

COSTS

38. The grounds for making costs orders fall into two categories: (*a*) a general discretionary ground relating to the bringing or conducting of the proceedings, and (*b*) specific grounds relating to postponements and adjournments, to non-compliance with orders, and witness expenses.

39. In **Jilley v. Birmingham & Solihull Mental Health NHS Trust** UKEAT/0584/06, [2008] All ER (D) 35 (Feb), the EAT held that, although ability to pay would be taken into account by the county court on such an assessment, it is also open to the employment tribunal to take it into account when making the order. It could do so, for example, by ordering that only a specified part of the costs should be payable or by placing a cap on the award. But whether or not it takes ability to pay into account, tribunals should always, according to Judge Richardson in **Jilley**, give reasons for their decision. He stated (at para 44):

> 'If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential.'

DISCUSSION and DECISION

40. In considering this matter, the Tribunal has taken into account the evidence of the claimant and the nature of the amendment, the applicability of time limits and the timing of the application and reminded itself that regard must be had to all the

circumstances, in particular, any injustice or hardship which would result from the amendment or refusal to make it.

41. The original ET1 is specifically targeted at the treatment of the claimant in relation to religion. The claimant said she was assisted by her daughter. She certainly had assistance in completing it by a person with some knowledge of employment law. The narrative narrates “There is no equality impact assessment in the Holiday policy and the impact of such a blanket ban on Christians has not been fully assessed.”

42. The claimant said that she did not capture all that she wanted to say in her Claim Form. She said the reason for this was due to her untreated mental health which required a change in her GP practice in summer 2017 due to the lack of medical support that she was receiving for her mental health. It took a long time to get treatment in place for mental health in 2017 including depression, anxiety, panic attack and work related stress. At times she could not get out of bed, perform the most basic tasks, and she could not function normally. She was too ill to engage properly in the legal process and accessing/securing legal representation. Even though she had been asking for treatment/support for her mental health under the NHS since early 2017, she did not get a treatment plan in place until November 2017. She said that her family in 2017 went through extreme trauma and suffering. Late 2016 and 2017 was a time of crisis for herself and her family, although in 2018 they have now pulled through these challenges including the following:

42.1 Her grandchild being stabbed in eye in February 2017 and facing systematic racism at school. He had to be pulled out of school, this situation endured from February 2017 to September 2017.

42.2 There was a high profile domestic violence conviction for an attack on her daughter in 2017 and the fall out from that throughout 2017, plus the added stress of the event, legal process, case and media coverage in 2017.

42.3 It was a drain on her and her family’s resources financially, mentally and physically (constantly having to flee home)

42.4 Her oldest grandchild was put on a vigilante anti-jihad watch list and suffered threats from racist groups from June 2017, whilst she was also worried anonymity would be exposed in the press. This happened suddenly in June 2017 and at the same time as she was putting forward her legal claim at the ET, which meant that she had to follow through a different legal process. Having to deal with a strenuous high profile legal process with risk of threats from summer 2017 to January 2018.The gravity of my grandchild’s high profile legal process, the intensity of the associated risk and the suddenness of the situation completed diverted her away from her own legal process at the ET and securing legal assistance/lawyer to take these claims forward in June/July 2017

42.5 She also had to support my grandchildren through their mother’s terminal illness diagnosis, deterioration and death in October 2017.

43 The claimant did not produce any supporting evidence of the misfortune of which she spoke. It is highly emotive material but even where there might have been some evidential support for example an internet search for a press report of the conviction for domestic abuse, it was not made available to the Tribunal. The medical evidence did not refer to the family circumstances [215]. and in the absence of such

support, her evidence was not accepted. This evidence stands in stark contrast to the evidence the claimant gave in relation to the case management preliminary hearing which was detailed supported by written material and credible.

44 The Tribunal considers that the amendment to add claims of direct and indirect discrimination on the grounds of religion and belief and harassment relating to religion or belief can be permitted to be made to the claim as they are foreshadowed in the ET1. Whilst the claim reads principally as one of indirect discrimination, the claimant refers to being "bullied when I asked for time off for Christmas 2017, she also refers to the intensification of the bullying and harassment. The Tribunal makes no determination in relation to time limits except to say that parties were agreed that any claim of discrimination on the ground of religion on or after 19 February is in time for the claim lodged in her ET1.

45 Otherwise, considering the nature of the amendment, the amendment proposed sets out a whole raft of new facts and legal cases which amounts to a wholesale late re-writing of the claim. The factual material which is sought to be added starts with the commencement of employment and runs through the period of employment. Any factual enquiry would be of a substantial nature and the Tribunal is left asking if these matters were so important, why were they not included in the ET1. On 7 March and 1 September, the claimant sent the respondent a grievance and a lengthy document with complaints. The Tribunal does not accept that the claimant was unable to include relevant material in her ET1 had she wished to do so.

46 The complaints are made substantially out of time and the claimant' evidence as to why this was, was not accepted.

47 In addressing the timing and manner of the application, the Tribunal noted from the chronology the substantial period of time before the application was made to the Tribunal. It was not until counsel for the claimant became involved that the amendment was put into a comprehensible form.

48 The Tribunal considered that it was reasonably practicable for the claimant to include the new material based on the ERA at the time of the ET1and in any event, the time within which the claim was made was unreasonably long.

49 The Tribunal considers that it is not just and equitable to extend the time for lodging the new discrimination material other than that referred to in paragraph 43.

50 In balancing relative injustice, the Tribunal concluded that the amendment would cause hardship to the respondent in that it has to incur the expense of a much more extensive hearing. The Tribunal also took into account the fact that the claimant was representing herself for a substantial period of time. Overall, the Tribunal determined not to permit the extended amendment.

51 The respondent has made an application for its costs incurred by their attendance at the Case Management Hearing on 8 November 2017. The claimant made an application on 26 October 2017 for postponement for a) health reasons b) due to domestic violence and incidents/risks that were associated and ongoing at the

time, which quickly escalated out of control days in the 2 weeks running up to 8 November 2017 endangering the life and wellbeing of all those affected. This was a sad situation and was out of her control.

52 The Tribunal considers that none of the respondent's costs were wasted by her non-attendance, as the hearing proceeded in her absence. The Tribunal finds that the claimant would have contributed little on nothing to the case management discussion and that she made substantial efforts to obtain an adjournment.

53 No costs order is made as relates to the hearing on 8 November.

54 The motions for strike out and deposit order are unnecessary save as directed against the original case as amended. These orders are not made in respect of that original case as amended as there are issues of fact to be determined at a hearing. An assessment of prospects of success could not be made.

55 A case management preliminary hearing should be scheduled in normal course.

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Employment Judge Truscott QC

Date 31 July 2018