EMPLOYMENT TRIBUNALS

Claimant: Ms C Bailey

Respondent: BPP University Limited

Heard at: London Central (remotely by CVP – open hearing)

On: 30 August 2022

Before: Employment Judge Heath

Representation
Claimant: Miss H Platt (Counsel)
Respondent: Mr R Jones (Counsel)

RESERVED JUDGMENT

1. The claimant's claim under Issue 6.2.5 of the Agreed List of Issues annexed to the case management summary of Employment Judge Gordon-Walker of 14 June 2022 (victimisation by being invited to discuss matters with ACAS) is struck out as having no reasonable prospect of success.

2. The remaining claims of the claimant are not struck out.

3. The remaining claims are not made subject to deposit orders.

REASONS

Introduction

1. The claimant presented an ET1 (2207459/2021) on 9 December 2021 ("the first claim") raising complaints relating to sections 15, 20-21, 26 and 27 Equality Act 2010 ("EqA"). She presented an ET1 (2201349/2022) on 23 February 2022 ("the second claim") raising complaints relating to

sections 15, 20-21, 27 EqA and of constructive unfair dismissal and wrongful dismissal.

2. This matter was listed by EJ Gordon-Walker to consider:
    a. The claimant's application to amend the second claim to add to the claim of harassment;
    b. The respondent's application to strike out the claim pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 ("ET Rules")
    c. Case management.

3. I have dealt with all matters relating to the application to amend and case management in a separate case management summary.

The law

4. Rule 37 of the Employment Tribunals Rules of Procedure 2013 ("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;*

5. 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."*

6. 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.

7. 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:

    a. *In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form:* ***Sougrin****.*

    b. *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****.*

    c. *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****.*

    d. *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****.*

    e. *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****.*

    f. *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.***

    g. *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****.*

    h. *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****.*

i. *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****.*

j. *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****.*

k. *(11) 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****.*

l. *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****.*

m. *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***

8. 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.*

9. 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.

Strike out and deposit order

Time point

10. Having regard to the guidance in *E v X*, I observe that:

    a. The respondent is asking me to strike out the claims in the first claim as being out of time, rather than asking me to determine limitation as a preliminary issue.

    b. The claimant did not give evidence, but both parties referred to documentary evidence in the bundle.

c. An agreed List of Issues was annexed to EJ Gordon-Walker's case management summary. I used this as an aid to my determinations, but referred back to the case pleaded in the Grounds of Complaint attached to the ET1 if there was any doubt as to what the issues were.

d. I am viewing the claimant's case at its highest, assuming facts as pleaded by her.

e. I am to consider whether the claimant has established a reasonably arguable basis for her contention that acts are so linked as to be a continuing act of discrimination.

11. It is probably useful to stand back and look at timings fairly broadly before stepping into any detail (taking the claimant's claims at their highest).

a. Essentially, the claimant says that between 23 October 2020 and 19 January 2021, when she went off sick, she was unfavourably treated by the respondent in ways which breached section 15 and were breaches of the duty to make reasonable adjustments.

b. On 19 January 2021 the claimant was off sick. Her fit notes refer to "work stress induced migraines". She did not return to work.

c. From February 2021 the claimant's sick pay was reduced.

d. The claimant was referred to OH and a report of 18 March 2021 suggested she would be fit to return to work if the respondent made the adjustments she said she needed.

e. On 8 April 2021 the claimant discussed the claimant's potential return to work and adjustments which the claimant says were outstanding from an educational psychologist assessment report provided to the respondent in November 2020, and an Access to Work assessment made in December 2020. She says further requests for adjustments were made on 14 and 16 April 2021 and 17 May 2021.

f. On 17 May 2021 she put in a workplace grievance. She was given an outcome on 16 July 2021 which uphold one element of her grievance. She appealed her grievance outcome and an appeal was heard on 9 August 2021. She was given an appeal outcome on 3 September 2021.

g. On 1 October 2021 the claimant contacted ACAS and was provided a certificate on 11 November 2021.

h. The claimant presented her first claim to the tribunal on 9 December 2021.

i. The claimant was assessed by OH on 14 January 2022. The report noted that the claimant was noted fit to return to work due to unresolved issues in the workplace, specifically outstanding workplace adaptations are recommended in reports referred to above plus a British Dyslexia Association report provided on 4 November 2021.

j. On 11 February 2022, the claimant received a return to work plan, which she says was inadequate in certain respects.

k. The claimant resigned on 14 February 2022 citing loss of all trust and confidence that the adjustments she had been seeking over a year would ever be made.

l. The claimant presented her second claim on 21 March 2022.

12. It is accepted by the respondent that issues 3.1.1 to 3.1.7 (allegations under section 15 relating to events between October 2020 and 15 January 2021 just before the claimant's sick leave) are acts extending over a period. The respondent's case is, essentially, that there were no sustainable acts of discrimination pleaded during the claimant's sickness absence. The section 15 claims in this period, according to the respondent, are unsustainable, and the dates of any failures to make any reasonable adjustments claims predate the sickness absence.

13. Issue 3.1.8 is about the delay to the grievance and appeal. I had some concerns about the "something arising" pleaded at 3.2.8. Miss Platt confirmed that issue 3.2.8 did not encapsulate the something arising. She confirmed that the claimant's case on this issue should be as follows "the respondent treated the claimant unfavourably by delaying the grievance and appeal, this was because of the claimant's need for reasonable adjustments and that stress exacerbated her underlying conditions and prolonged her migraine and sickness absence". It is probably the case that the reference to stress exacerbating the conditions is not relevant at this stage.

14. I am not in a position to make determinations about the respondent's motivation in an application to strike out a discrimination claim (*Eszias*). I am also not in a position to find, as the respondent urges me to, that "any delay was no more than was reasonable". That would involve me engaging in a mini-trial and to examine the respondent's policies and making factual findings about what was or was not reasonable in the circumstances of the case.

15. Mr Jones, in his skeleton, suggests there is no link between Issues 3.1.1 to 3.1.7 and the Issues that follow. I find that the claimant has established a reasonably arguable basis that these complaints are linked to the delay in dealing with adjustments. These earlier issues, on the claimant's case, were of unfavourable treatment because of issues which arose from her disability which required adjustment. The delay in dealing with the appeal,

on the claimant's case, was because of her need for these adjustments. There is a *prima facie* link.

16. The time frame of the appeal-related complaints is 17 May 2021 to 9 September 2021. Mr Jones argues that there was more than a three-month gap between issue 3.1.7 and the appeal.

17. Issue 3.1.9 is that "*the claimant has not been able to return to work because of the respondent's failure to make reasonable adjustments which have either not been implemented in a timely manner or at all*". Mr Jones attacked this on the basis that it duplicates the reasonable adjustments claim and it does not identify any treatment by the respondent.

18. Miss Platt confirmed that the unfavourable treatment is that the respondent's failure to make adjustments *prevented* the claimant from returning to work.

19. I also agree with Miss Platt that there is nothing to stop a claimant making claims in the alternative. Indeed, it is very common. I do not consider that the claimant has no reasonable or little reasonable prospects of success in claiming that a failure to make reasonable adjustments because of her need for reasonable adjustments. A claimant's case is not that there was a flat refusal to make adjustments, but that the adjustments simply were not made. This was a long-standing workplace dispute involving the claimant, her manager, OH and HR. I cannot, on an application to strike out, make findings on disputed issues of motivation.

20. On the claimant's case there were requests to make adjustments on dates in April and May 2021. Again, there is a prima facie linkage with the issues that came before this.

21. Issue 3.1.10 is that pay was reduced from February 2021 because of the sickness absence. I note that the claimant sets out in her Grounds of Complaint that she went on to SSP and then received no pay from 5 August 2021. She also refers to having to arrange a BDA workplace assessment and to this being delayed. Her case is that she was fit to return if the adjustments were made.

22. The respondent says that the reduction in pay was in accordance with its own absence policy. In circumstances where the allegation is that the employee would not be absent if reasonable adjustments were made it appears to me that there may be complicating factors. It also appears that there may be questions as to whether this was a one-off act continuing consequences or whether there were fresh considerations when adjustments issues were raised.

23. Again, the claimant raises a failure to make reasonable adjustments as being a part of this. There is a prima facie link with what went before. It is

not appropriate to strike out this claim or make it the subject of a deposit order.

24. Issue 3.1.11, which appears in the second claim, is that the claimant was prevented from returning to work because adjustments were not made. Again, there is nothing to prevent the claimant from running a section 15 claim in the alternative to a reasonable adjustments claim. The adjustments element provides a link with what went before.

25. Putting this all together, taking the claimant's claim at its highest, she has established on her section 15 claims a prima facie case of an ongoing discriminatory state of affairs through linked alleged acts of discrimination from October 2020 to when she went on sickness absence on 18 January 2021 (Issues 1.3.1 to 1.3.7), through February 2021 (Issue 3.1.10) through April 2021 to her termination (3.1.9) and from May 2021 to September 2021 (1.3.8).

26. The respondent has also raised challenges on time relating to the reasonable adjustment claims, the harassment claims and victimisation claim. There is some complexity in the arguments relating to reasonable adjustments claims, and Mr Jones puts forward a case for the time limit relating to the adjustment claims being from January 2021. Intending no disrespect to his able arguments, I have found on an examination of the section 15 claims that I have sufficient material to find a reasonably arguable case that there was discriminatory conduct extending over a period that would bring the claims throughout this period within the time limit. I therefore have not considered it necessary, or proportionate, to deal with the other claims from a time point perspective. They are all alleged to have taken place within the same timeframe as the section 15 complaints, and the tribunal at the final hearing will consider whether or not they are in time along with the claims I have considered above.

27. If I am wrong on my findings in respect to an act extending over a period, there is also the question of the just and equitable extension. The claimant has provided medical evidence that during her sickness absence she had work stress induced migraines. Also, on her case which I take at its highest, the respondent delayed dealing with her grievance and its appeal. I do not consider that her pleaded contention that it would be just and equitable to extend the time stands no or little reasonable prospects of success having regard to these factors.

<u>Conclusion on time point</u>

28. The application to strike out all for a deposit order in respect of the time point fails. As set out in issue 10 of *E v X* ,the claimant "lives to fight another day, at the full merits hearing" on the question of time.

<u>Other points</u>

29. In considering time, I have already dealt with issues 3.1.8, 3.1.9, 3.1.10 and 3.1.11 which respondent said had no or little reasonable prospects of success. The respondent also seeks to strike out other elements of the claims, or in the alternative seeks deposit order in respect of them.

30. **Issue 3.1.12**: - it is said that this duplicates the constructive dismissal claim and no treatment is identified.

31. When considering a discriminatory constructive unfair dismissal, the way the tribunal approaches it is by considering whether matters relied on as contributing to the repudiatory breach were discriminatory. In the claimant's second claim she asserts that her constructive dismissal was discrimination under section 15. Her constructive dismissal claim includes, as repudiatory breaches, the allegations of discrimination in the first claim and the second claim. These obviously include section 15 claims.

32. There is nothing offensive about running a constructive unfair dismissal claim as simultaneously being an act of discrimination under section 15. The unfavourable treatment was identified as including the acts of discrimination. I do not find that there is no or little reasonable prospect of the claimant succeeding in this complaint.

33. **Issue 4.1.10**:- it is said that this does not identify any PCP, or any adjustment which would avoid the alleged disadvantage. The fact is it does *identify* the PCP, the practice of delay. It may be that the real question is whether this *was* a practice of the respondent. That will be a matter for evidence. It is not fatal for a claimant not to identify a reasonable adjustment *(Project Management Institute v Latif* [2007] IRLR 579). I therefore do not find that there is no or little reasonable prospect of the claimant succeeding in this complaint.

34. **4.1.14 to 4.1.19**: - respondent says these are not PCPs of the respondent, but "necessary incidents" of her position as a lecturer. It is suggested that the claimant is "attempting to broaden the duty at s20(3) EqA to impose a requirement for an employer to take steps to avoid any disadvantage that a disabled person may suffer, which goes beyond the intention of Parliament".

35. A requirement to read, absorb and recall information, for example, or to use memory and concentration seems clearly to be a necessary requirement of a role such as a lecturer. At first blush these requirements do seem fairly broad. The real enquiry, however, is the extent to which she was required to do these things and what if any steps it is reasonable for the respondent to take to address any disadvantage experienced by the claimant. This is a matter for the final hearing. I do not consider that these complaints have no or little reasonable prospects of success.

36. **4.3.14, 4.3.16 to 4.3.19**: - it is said that the claimant is duplicating, as an auxiliary aids claim, a previous PCP claim. The respondent also asserts that it agreed to provide these auxiliary aids but that they would be

provided on a return to work which never came. There is nothing inherently abusive about running a PCP and auxiliary aids claim in the alternative. Whether there was an agreement to provide the auxiliary aids is not the requirement of section 20(5) EqA. It is to "take such steps as it is reasonable to have to take to provide the auxiliary aid" (emphasis added). Whether such steps were taken will be a matter for evidence for the final hearing. I do not consider that these complaints have no or little reasonable prospects of success.

37. **4.3.15, 4.3.17 and 4.3.19**: - the respondent suggests that the adjustment of "workplace coaching" is not something that would address the disadvantages alleged, and it would not be reasonable to ask the claimant to attend such coaching before her return to work. I find myself singularly ill-equipped to make any sort of decision about whether a proposed adjustment would address a disadvantage and when it was reasonable or not to offer it. It is entirely shorn of any evidential context in an application to strike out. I do not consider that these complaints have no or little reasonable prospects of success.

38. **4.6.1 to 4.6.3**: the respondent says that these auxiliary aids were in fact provided. There is a dispute of evidence, I understand, on this point. Certainly in respect of the headset and the printer, which makes it unsuitable for determination under Rule 37 or 39. I am uncertain what the position is with Dragon software. I am not prepared to strike it out or order a deposit. However, in respect of the Dragon software, I would suggest the claimant deletes it from the agreed List of Issues if it has indeed been provided. If there is no agreement, it is a matter which the tribunal will decide at the final hearing.

39. **6.2.2 to 6.2.3**: the respondent says the return to work was planned in both of these issues, that the failure to make reasonable adjustments duplicates another claim, and that in fact numerous adjustments were agreed. Mr Jones's skeleton referred to 92 pages of documentation in support of this. As set out earlier, there is nothing abusive about claims being run in the alternative. An application to strike out or to consider making a deposit order is a summary assessment. The sheer volume of documentation I was invited to consider tends to suggest that determination of these particular issues is something for the final hearing. The fact that the claimant disputes that the return to work plan was adequate reinforces this.

40. **6.2.5**: the allegation is that it is a result of a protected act, pleaded as "on 1 October 2021 by contacting ACAS for early conciliation", the claimant was subjected to a detriment in that she was invited to discuss reasonable adjustments by an ACAS conciliator and share personal details with ACAS rather than at a meeting with the respondent.

41. I find that there is no reasonable prospect of the claimant being able to show that, effectively, engaging in the statutory early conciliation process

at the behest of an ACAS conciliator was a detriment that the respondent subjected her to. This claim will be struck out.

42. **6.2.6**: this issue is alleging that the constructive dismissal was a detriment because of a protected act. The constructive dismissal pleading identifies discrimination set out in the first claim and in the second claim as the repudiatory breaches relied on. These include allegations of acts of victimisation, which would constitute a detriment for the purposes of a constructive dismissal. I do not consider that this complaint has no or little reasonable prospects of success.

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Employment Judge **Heath**

31 August 2022_____

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

01/09/2022

FOR EMPLOYMENT TRIBUNALS