EMPLOYMENT TRIBUNALS

Claimant: Mr P Framjee

Respondents: (1) Crowe UK LLP
(2) Mr N Bostock
(3) Mr P Varley

Heard at: London Central (by Cloud Video Platform) **On:** 25 April 2023

Before: Employment Judge Joffe

Appearances
For the claimant: Mr J Susskind, counsel
For the respondents: Mr J Crozier, counsel

JUDGMENT

1. There is a prima facie case that the matters the claimant complains of constitute conduct extending over a period within the meaning of section 123(3) Equality Act 2010 and therefore have been presented in time. The partnership claims are not struck out.

2. The claimant's claims in respect of his bonus do not have little reasonable prospect of success and are not struck out.

REASONS

Claims and issues

1. This open preliminary hearing was listed by Employment Judge Goodman to consider the respondents' application to strike out a number of the claimant's claims on the basis that they were said to have no reasonable prospects of success, alternatively for deposit orders.

2. At the time of the case management preliminary hearing in front of Employment Judge Goodman on 16 March 2023, the application to strike out was not fully formulated and Employment Judge Goodman made the following orders for this preliminary hearing:

   17. By 23 March 2023 the respondent must send the claimant and the tribunal an application to strike out claims identified by paragraph number of the grounds of claim as amended.
   18. By 6 April 2023 the respondent must send the claimant a paginated bundle of documents they rely on in the preliminary issue.
   19. The claimant has permission to add documents to this bundle relevant to the preliminary issue (to be added at the end of the respondent's documents) by 13 April.
   20. If either party proposes to adduce witness evidence at the preliminary hearing, a written witness statement must be sent to the other party by 18 April 2023.
   21.The respondent must send the tribunal the documents bundle and any witness statements for the preliminary hearing by noon on Friday 20 April, marked in the subject line of the email that it is for hearing on 23 April.

3. I have no doubt that Employment Judge Goodman had in mind the requirements of rule 37(2) of the Employment Tribunals Rules of Procedure 2013 that 'a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing, or, if requested by the party, at a hearing' and that the expectation was that the application would identify not only the claims to be struck out but the basis of the strike out application in respect of each such claim.

4. I mention this background because I was asked to decide a preliminary issue about the ambit of the applications before me.

5. In accordance with Employment Judge Goodman's orders, the respondents made applications by letter dated 22 March 2023. Those applications were clearly described at the outset of the letter:

   2. The Respondents invite the Employment Tribunal to:
   (1) Dismiss the Claimant's claims arising on or before 31 December 2020 on the basis that such claims are outside the ET's jurisdiction (Ground 1); and

   (2) Strike out (or make a deposit order(s)) in relation to the Claimant's claims based on an alleged Remuneration Agreement (Ground 2).

6. The letter then went on to expand upon those grounds. Ground 1 was that the older claims or 'partnership claims' were 'out of time and cannot form part of a continuing act with later acts.'

7. Mr Susskind prepared his skeleton argument based on the grounds as described in the applications. Mr Crozier had added to his skeleton argument a new ground, (1)(b), which was an argument that the 'partnership claims' had no

reasonable prospects of success on the merits, because, putting the matter very broadly, the earlier claims relied on challenges to partnership retirement provisions to which the claimant was subject, which challenges, it was asserted, could not succeed in light of authorities such as Seldon v Clarkson Wright & Jakes [2012] UKSC 16.

8. Mr Susskind objected at the outset to the inclusion of this ground, which he said should have been included in the original written application if it was to be pursued. He said further that its inclusion would have influenced the documents and evidence marshaled by the claimant for the hearing and that the claimant was prejudiced by the way in which it had been raised. Allowing it to be heard would not be in accordance with rule 37(2). Mr Crozier submitted that Employment Judge Goodman's' orders did not require the respondents to do anything more than identify the claims which they sought to strike out and that in any event a paragraph in the letter of application which read 'Accordingly the Partnership Claims identified at [paragraphs of the claim form] should be dismissed or, alternatively, struck out.' was apt to cover a merits challenge. He also submitted that it was not a complex point and Mr Susskind should be able to deal with it, particularly as there had been additional time whilst I undertook preliminary reading.

9. I did not agree with Mr Crozier either as to the effect of Employment Judge Goodman's orders or as to the content of the application letter. It was clear from Employment Judge Goodman's orders in totality that the intention was that the parties should be clear as to the nature of the applications so that they could produce any appropriate documentary and witness evidence. I did not agree that the letter included any application in the form of ground (1)(b) and I did not agree that the claimant had had a fair opportunity to respond to the application, which seemed to rely on an assertion that the claimant's circumstances were so factually similar to those in cases such as Seldon that there was no reasonable prospect of a different outcome. In response to such an argument, the claimant might well have assembled documents he wished to rely on as showing the contrary. I say no more about this application, which I declined to hear, save to note that the Supreme Court in Seldon made clear that questions about retirement ages are fact sensitive.

10. In relation to the time issues, I considered, and the parties agreed, that the proper approach was that described by the Court of Appeal in Lyfar v Brighton and Sussex University Hospitals NHS Trust [2006] EWCA Civ 1548 and Aziz v FDA [2020] EWCA Civ 3204: where an issue of time arises at a preliminary hearing, the test is whether the claimant has made out a prima facie case for the incidents being treated collectively as an act continuing over a period.

Claims in the proceedings

11. The claimant is a very senior accountant who specialises in working with non-profit entities. The first respondent is a professional services firm providing audit, tax and advisory services. The claimant was a partner of the first respondent from 2008 to 31 December 2020. He was Global Head of Social Purpose and Non-Profits.

12. Put very briefly, the first respondent's' partnership deed ('LLP Deed') contained retirement provisions which included a normal retirement age of 60. There was provision for a partner to continue to age 65 with the agreement of the Supervisory Board and past that age in exceptional circumstances and with the agreement the Supervisory Board by special resolution supported by 75% of the Senior Equity Partners.

13. The claimant turned 60 in 2015 and his partnership was extended by agreement on several occasions until he turned 65.

14. As a result of extensive negotiations, the claimant entered into a fixed term employment contract with the first respondent which commenced on 31 December 2020 and terminated on 30 September 2022. The contract contained provisions about bonuses which are the subject of dispute between the parties.

15. Discussions to extend that contract did not result in agreement and the claimant's employment terminated on 30 September 2022. The claimant raised a grievance and, separately, a complaint about his bonuses. These complaints were investigated by the first respondent.

16. There is a helpful broad summary of the claims said to arise from these matters at the outset of the claimant's particulars of claim:

The essence of this action is that the First Respondent maintained a discriminatory environment for older employees which made the Claimant, who turned 65 in 2022, vulnerable to adverse and unwanted changes in his working terms and conditions. The Respondents capitalised on that vulnerability. They did so, first, by effectively forcing him to relinquish his partnership. Then they sought to extract the same service from him as a fixed-term employee as he had provided as a partner, but on lower pay (and in any event lower pay than had been agreed). Finally, when the Claimant, a senior and respected figure within the firm, raised concerns about discriminatory and otherwise unlawful activity - both about how he was being treated and the Third Respondent's treatment of female colleagues - the Respondents retaliated by withholding sums that were properly owed to him, and by purporting to rescind an extension to his fixed-term employment contract that had already been agreed. None, or little, of the unlawful treatment would have happened but for the Claimant's age

17. The claims fall into three categories for the purposes of these applications:

- The partnership claims. These are claims about how the claimant ceased to be a partner of the first respondent and are claims of direct and indirect age discrimination;
- The employment claims relating to bonuses. These are claims of direct age discrimination, victimisation, detriment under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ('FTE Regulations'), protected disclosure detriment and unlawful deductions from wages;
- Other claims relating to the claimant's period of employment which are not the subject of strike out applications.

<u>The hearing</u>

18. I had an electronic bundle running to 466 pages. This consisted of the pleadings and orders and some contemporaneous documents. Disclosure has not yet taken place. I was provided with helpful skeleton arguments by both counsel, supported by extensive bundles of authorities,

19. I had a witness statement from the claimant running to 33 pages. The witness statement gave more detail about the claimant's career and the background to his claims and fleshed out the information contained in his claim form. The claimant was called to attest to the truth of that statement and was subject to a limited amount of cross examination. He confirmed that he knew that his partnership would end as a function of his age, that he had taken some legal advice in 2022 but not between 2015 and September 2020. He confirmed that he understood that the terms of his employment relationship with the first respondent would not continue indefinitely but said that he was assured that he was continuing as a partner in all but name.

Law

Striking out

20. Under rule 37 of the Employment Tribunals Rules of Procedure 2013, a claim or response may be struck out on various grounds including that it is scandalous and vexatious or has no reasonable prospects of success: rule 37(1)(a).

21. In heavily fact-sensitive cases, such as those involving whistleblowing or discrimination, the circumstances in which strike out is appropriate are likely to be rare: Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108, EAT.

22. The test is not whether the claim is likely to fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test: Balls v Downham Market High School and College [2011] IRLR 217, EAT.

23. It is crucial when considering strike out to take the claimant's case at its highest; where there are core issues of fact which turn to any extent on oral evidence, these should not be decided without an oral hearing. If the claimant's case is conclusively disproved by or totally and inexplicably inconsistent with undisputed contemporaneous documents, it may be struck out: Mechkarov v Citibank NA [2016] ICR 1121.

24. A useful summary was provided by Linden J in Twist DX Limited v Armes [2020] 10 WLUK 604:
The relevant principles relating to the application of this provision for present purposes can be summarised as follows:

a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, *Tayside Public Transport Company Limited v Reilly [2012] IRLR 755 at paragraph 30* .
b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention *"has a realistic as opposed to a fanciful prospect of success"* : see, for example, paragraph 26 of the Judgment of the Court of Appeal in the *Ezsias case (supra)* .
c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of **Ezsias** .
d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, *even on that basis* , it cannot succeed in law.
e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: see, for example, *Campbell v Frisbee [2003] ICR 141* CA.
f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it *"may"* do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see *Soo Kim v Yong [2011] EWHC 1781*.

25. There is a 'high public interest' in the determination of discrimination claims on their particular facts: Anyanwu v South Bank Student Union [2001] UKHL 14.

Deposit orders

26. A tribunal may make a deposit order where a claim has little reasonable prospect of success, pursuant to rule 39 of the Tribunal Rules 2013. 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 if the claim fails. Their purpose is not to make it difficult to access justice or to effect a strike out through the back door. Even where a claim has little reasonable prospect, there is a discretion as to whether to make a deposit order, which must be exercised in accordance with the overriding objective: Hemdan v Ishmail and anor [2017] ICR 486, EAT.

Time limits

27. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other period as the Tribunal considers just and equitable.

28. Under s 123(3), conduct extending over a period is to be treated as done at the end of the period.

29. There is a distinction between conduct extending over a period and an act with continuing consequences. The authorities in this respect were reviewed by Bean LJ in Parr v MSR Partners LLP [2022] EWCA Civ 24:

> *38 Thus the ratio of Kapur is that the critical distinction is between a one-off decision and a continuing act or continuing state of affairs, and that to require employees to work on less favourable terms as to pension than their comparators is as much a continuing act as to require them to work for lower current wages.*
> *39 This is to be contrasted with the decision of this court in Sougrin v Haringey Health Authority [1992] ICR 650. The applicant was a black staff nurse. She complained of being given an E grading in October 1988 while in February 1989 a white nurse who was her chosen comparator was upgraded to F. Her industrial tribunal claim for racial discrimination was not presented until May 1990. It was held by this court that the act complained of was that the respondent authority had refused to upgrade the applicant while upgrading her comparator, not that it operated a policy or rule never to upgrade black nurses. The discriminatory act was a once-for-all event (occurring at the latest on the dismissal of her internal appeal), and the payment of a lower salary to her than that paid to her comparator was therefore not an act extending over a period within the meaning of section 68(7)(b) but the continuing consequence of that event. An argument on behalf of the appellant that the court was bound by Kapur to find in her favour was rejected. Lord Donaldson of Lymington MR said, at p 661:*
> *In the present case it has never been suggested that the local health authority had any such policy [not to pay the same wages to black and white employees]. Its policy was quite clearly to pay the same wages to every employee in the same grade regardless of racial distinctions. The applicant's complaint was quite different, namely, that she had been*

refused an F regrading for racially discriminatory reasons.

30. I also bear in mind the classic formulation in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530:

On the evidential material before it, the tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working environment does not necessarily rule out the possibility of continuing discrimination against her, for which the commissioner may be held legally responsible. Miss Hendricks has not resigned nor has she been dismissed from the service. She remains a serving officer entitled to the protection of Part II of the discrimination Acts. Her complaints are not confined to less favourable treatment of her in the working environment from which she was absent after March 1999. They extend to less favourable treatment of Miss Hendricks in the contact made with her by those in the service (and also in the lack of contact made with her) in the course of her continuing relationship with the Metropolitan Police Service: she is still a serving officer, despite her physical absence from the workplace. She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

…

The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the appeal tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaint that the commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

[Per Mummery LJ at paras 48 and 52]

31. In Edinburgh City Council v Kaur [2013] CSIH 32, a school teacher alleging seven categories of act over a period over five years against multiple members of staff were linked by a glass ceiling on career progression for ethnic minorities and a bullying and hostile working environment had done sufficient to establish a prima facie case that there was a continuing act.

32. In E v X, L and Z (UKEAT/0079/20/RN), Ellenbogen J reviewed earlier authorities on strike out of claims which assert a continuing act but are said by the respondent to be time-barred and summarised the principles as follows:

50. With the qualification to which I have referred at paragraph 47 above, from the above authorities the following principles may be derived:

1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: Sougrin;

2) It is appropriate to consider the way in which a claimant puts his or her 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;

3) 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;

4) 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;

5) 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;

6) 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;

7) 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;

8) In an appropriate case, a strike-out application in respect of some part of a claim can been 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 (as qualified at paragraph 47 above);

9) 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 [v Royal Surry County Hospital

NHS Foundation Trust and others UKEAT/0311/14/MC] and paragraph 47 above;

10) 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;

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;

12) 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;

13) 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 make 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 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.

Just and equitable extension

33. The onus is on a claimant to convince the Tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA.

34. The discretion to extend time is a wide one. In British Coal Corporation v Keeble and ors 1997 IRLR 336, the EAT confirmed that it is relevant to look at factors in section 33 of the Limitation Act 1980, which requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued

has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. In Southwark London Borough Council v Afolabi 2003 ICR 800, the Court of Appeal confirmed that, while the checklist in section 33 provides a useful guide for tribunals, it need not be adhered to slavishly.

35. The length of and reasons for the delay and whether the delay has cased prejudice to the respondent are almost always relevant factors: ABM University v Morgan [2018] ICR 1194.

36. Prejudice may take two different forms:
    a. The prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence;
    b. The forensic prejudice which the respondent may suffer if the limitation period is extended by many months or years, caused by such things as fading memories, loss of documents, and losing touch with witnesses.

    The latter type of prejudice may be decisive against an application to extend time but its absence is not decisive in favour of an extension.

    Miller v Ministry of Justice UKEAT/0003/15

Structure of the Equality Act 2010

37. Part 2 of the Equality Act 2010 contains key concepts; in Chapter 1 the protected characteristics are defined and in Chapter 2 the types of prohibited conduct are set out. Further parts of the Equality Act then apply those concepts to different relationships in which the proscribed conduct is rendered unlawful. Part 5 of the Equality Act 2010 defines the types of work relationships and circumstances in which that conduct is unlawful. These relationships include, amongst others, employment relationships, partnership relationships, relationships involving contract workers and so forth.

Submissions

38. I had helpful skeletons supported by detailed oral submissions from the parties.

Jurisdictional arguments: the partnership claims

39. On the issue of whether there was a continuing course of conduct, Mr Crozier had three limbs to his submissions.

a) The partnership matters did not continue beyond December 2020. Taken on their own they did not continue thereafter;

40. After the partnership arrangement ended, the claimant was no longer subject to the PCPs relied on or the LLP deed. The end of the partnership may have had continuing consequences but was a one-off act.

b) The statutory construction argument;

41. Mr Crozier argued that for matters to form part of a continuing course of document, there had to be identity of: protected characteristics, type of prohibited conduct and the relationship which rendered that conduct unlawful. In this case the employment claims were brought under section 39 of the Equality Act 2010 and the partnership claims under section 45. There could be no continuing course of conduct which spanned that change in relationship.

42. In the face of authorities which suggested, albeit obiter, that there is no issue in considering as a course of conduct discrimination which falls under different heads – such as direct discrimination and harassment - Mr Crozier submitted that there is a statutory basis for making the type of prohibited conduct an exception to his general principle in section 25 Equality Act 2010 which is entitled 'References to particular strands of discrimination'. This in essence sets out what types of conduct may constitute discrimination in relation to each protected characteristic. I observe that on its face, the purpose of this section seems to go no further than to make clear the meaning of terms such as 'age discrimination' where they appear elsewhere in the Act.

c) Argument on the facts;

43. Mr Crozier in any event submitted that other factors pointed away from there being a continuing course of conduct spanning the two periods and relationships. There was a substantial gap in time between the final event of the partnership claims (31 December 2020) and the first of the employment claims, which is the award of a bonus on what the claimant says was a discriminatory basis in July 2022.

44. Mr Crozier also submitted that the Partnership claims were not about the decisions of individual decision-makers and in particular the third and fourth respondents, but about the application of the LLP Deed.

45. Mr Susskind said that Mr Crozier's statutory construction argument was unsupported by authority and there was no basis for it in the Equality Act 2010. On the contrary, section 123 concerns time limits for 'a complaint within section 120'. Section 120(1) provides that the tribunal has jurisdiction 'to determine a

complaint relating to (a) a contravention of Part 5 (work)'. The section makes no distinction between the subcategories of work within Part 5. There is therefore no statutory basis for distinguishing between the different sections in Part 5 when considering whether there is conduct extending over a period for the purposes of section 123(3)(a).

46. The effect of Mr Crozier's arguments would be, for example, that a sustained campaign of racial harassment could not be treated as conduct extending over a period if, at some point during the period, the person harassed was promoted from employee to partner.

47. The argument is inconsistent with authorities such as Robinson and E v X, which hold, at least obiter, that the type of discrimination is immaterial (eg there can be a continuing act spanning acts of harassment and acts of victimisation).

48. So far as Mr Crozier's arguments on the facts were concerned, the Tribunal is only concerned at this stage with whether there is a prima facie case of a continuing act, looking in the round at the claimant's pleaded allegations at their highest and assuming that each allegation is proved. The continuing act could, looking at the language of the authorities, be a discriminatory or detrimental state of affairs, accumulation of events, climate of abuse or a series of similar acts.

49. The claimant's claim was expressly about a climate, culture, ongoing situation of state of affairs in which he and other older people were systematically disadvantaged because of their age. He asserts that there is a career ceiling for older employees and that no partner has ever been allowed to extend their term beyond the age of 65. He says that he was told by the second respondent that the first respondent did not want to set a precedent for a partner continuing past age 65 and that there were forceful efforts to persuade him not to seek to extend his partnership. He asserted that the Age 65 Rule in the LLP Deed formed part of a the discriminatory environment and was supplemented by a range of PCPs which he relies on as being indirectly discriminatory. The further acts of discrimination which occurred when the claimant became an employee were attributable to the same discriminatory environment of which the Age 65 Rule and the PCPs formed a part. These assertions were more than merely arguable.

50. The number of successive detriments the claimant was complaining about made it clear that he was not complaining of 'unconnected or isolated acts' but 'an ongoing situation or continuing state of affairs'. Mr Susskind made a number of subsidiary points in support of that assertion, including pointing to evidence from the documents available showing a linkage between earlier and later acts of discrimination, the facts that the complaints were all related to the actions of two individuals , the second and third respondents, and the fact that the asserted reason for the treatment remained the same throughout.

51. Mr Susskind also argued that disclosure was likely to play an important role in these proceedings and a preliminary decision would prejudice the claimant. There was a high public interest in the case being determined on its facts; the LLP Deed predated the 2010 Act and the decision in Seldon and required scrutiny.

52. Alternatively, it would be just and equitable to extend time for the claims. The claimant had a sound reason why he did not bring his claims earlier. When he was removed from the partnership, he was promised that the change would have no material or other impact on him. It was only when the first respondent reneged on those promises in 2022 that the extent of the harm became clear. There was no evidence adduced by the respondents of any forensic prejudice from the extension of time or that a fair trial was not possible. Such a submission would in any event be unrealistic. The events went back only to 2020 and in a professional services firm like the first respondent there would be a significant documentary record.

Ground 2: Bonus claims relating to the alleged Remuneration Agreement were bound to fail.

53. The bonus claims derive from the negotiations between the claimant and the respondents as to the bonuses he would be entitled to when he ceased to be a partner and became an employee of the first respondent. The claimant's case, in brief, is that in order to persuade the claimant to change his status, the second respondent made various representations to the claimant about how he would be treated exactly as he had been as a partner; the only change would be one of status. The claimant and the second respondent made the Remuneration Agreement, which was to the effect that if the claimant became an employee, his remuneration would remain unchanged and commensurate with the other two 36-point partners in the not-for-profit team.

54. That term was not included in the fixed-term contract which the claimant subsequently entered into, which said:
(g) Discretionary bonus - to be based upon the achievement of agreed and written business objectives approved by the Chief Executive. This discretionary bonus will be capped at £95k per annum or pro rata and paid in line with all other annual employee bonuses.
(h) Exceptional and discretionary performance award - to be awarded and approved at the sole discretion of the Chief Executive. Will be considered only if agreed performance objectives are met and the profitability of the firm exceeds the distributable profit for that achieved by the firm in FY 2019/20.

55. The claimant's case is that this term was drafted in this way to enable the second respondent to exercise his discretion to compensate the claimant in line with the Remuneration Agreement. His claims arise out of the failure by the

respondents to exercise the discretion in line with the Remuneration Agreement.

56. The respondents' arguments as to why these claims lacked any reasonable prospect of success were:
    a. The claimant will not be able to establish that the Remuneration Agreement was entered into, given the correspondence trail and the fact that Mr Baker and Mr Adshead of the first respondent investigated the claimant's grievance and rejected the allegation that there was a side agreement. The assertion that there was a side agreement is inconsistent with the negotiation history, which is largely documented;
    b. The fixed-term contract contained a clause that 'This Contract …supersedes and replaces any previous agreement (whether written or oral)…" The existence of an entire agreement clause meant that no collateral agreement had any contractual effect.

57. Mr Susskind submitted that the respondents were seeking summary determination of a fundamental factual dispute between the parties. It was not a contractual claim but a discrimination claim about the respondents' breach of promises made to the claimant.

58. Ms Susskind pointed to the very significant factual disputes between the parties as to what occurred in the course of the negotiations, as revealed by the pleadings. These factual disputes were unsuitable to be determined at preliminary stage.

59. It was wrong for the respondents to suggest that the claimant's case on the Remuneration Agreement was inherently improbable. The claimant's position made commercial sense. The claimant had been prepared to leave the first respondent and had other options. It made no sense that he would agree to stay and do the same work as before for much less remuneration than he had previously received or that his younger colleagues were receiving.

60. The evidence showed that there was no other change to the claimant's role. He kept the same title ad was charged out to clients at the same rate. He had the same minimum hours requirement as partner and the same health care provision, insurance cover and pension arrangements. He was held out as partner to clients.

61. Disclosure would be crucial to this issue.

Conclusions

<u>The time issue: partnership claims</u>

62. I rejected Mr Crozier's argument that in order for there to be a continuing course of conduct within the meaning of section 123, the type of work relationship which existed between a claimant and a respondent must remain the same throughout the time period covered by the individual acts or omissions said to make up that course of conduct, I could see no basis in the statute for that interpretation and I agreed with Mr Susskind's construction that section 123 (3) simply seems to require the complaints to fall within Part 5. It is hard to see why parliament would have intended that a claimant who underwent a change of status such as the change from employee to partner should be timed out of earlier claims unless he or she could persuade a Tribunal to extend time. I could not see what possible policy objective such a provision would achieve. The authorities of Robinson and X and the approach in respect of different types of prohibited conduct seemed to me to apply with even more force where the conduct is the same and it is only the nature of the relationship which has changed.

63. I construe section 25 as having a limited function in disambiguating references to strands of discrimination which occur elsewhere in the Act rather than performing the function Mr Crozier sought to impose on it of defining what kinds of discrimination can be considered as conduct extending over a period. Had parliament intended there to be a relationship with the construction of section 123(3), no doubt that would have been made clear in the section.

64. Having rejected that argument and considered the contents of the claim form, taking the allegations at their highest and assuming each is proved, I was entirely satisfied that there was a prima facie case of conduct continuing throughout the period complained of. What the claimant alleges is that all of the matters he complains about are part of a culture or ongoing state of affairs where decisions were taken and actions performed to his detriment at least in part because of his age. On the facts asserted by the claimant, the Age 65 Rule and the alleged PCPs gave the respondents the tools to strip him of his partner status and once he was stripped of that status it was possible to subject him to further detriments. The role played by the claimant's age and whether these matters are truly connected by a discriminatory culture is a fact sensitive question for trial. It is relevant in considering whether there is a prima facie case that the same personnel were involved throughout the period, which is not an excessive one.

65. Whilst Mr Crozier may well be correct that the removal of the claimant from his partnership, taken by itself, is a one off act with continuing consequences rather than itself being conduct extending over a period, that does not prevent it potentially being part of a conduct extending over a period when taken with the other matters of which the claimant complains.

66. Given my finding that there is a prima facie case of a continuing act, I did not have to go on and consider whether it was just and equitable to extend time.

67. For the reasons set out, I also did not consider that the claimant had little reasonable prospect of establishing that there was a continuing act so as to make a deposit order appropriate.

The bonus issues

68. The facts asserted by the claimant as to the existence and content of the Remuneration Agreement are not inherently improbable nor are they totally and inexplicably inconsistent with undisputed contemporaneous documents. Much will turn on the content of oral discussions occurring alongside the documents, the contents of which discussions are in dispute. There was nothing in the documents I was taken to which seemed to me to establish that the claimant's version could not be correct or even was improbable. There were aspects of the documents, such as references to 'Status change only – otherwise continue as is' in the various iterations of 'concept notes' about the claimant's continued relationship with the first respondent which were capable of supporting the claimant's account.. The clamant asserted that there were many further documents surrounding these negotiations that in any event had not yet been disclosed, which underlined the unsuitability of this issue for summary determination.

69. Whatever the contractual status of the Remuneration Agreement, if the claimant establishes that it existed, he may still bring a claim that the respondents' refusal to act in accordance with the Agreement was discriminatory.

70. These matters are highly fact sensitive. Not only can I not say, taking the claimant's allegations at their highest, that they have no reasonable prospect of success, nor can I say that they have little reasonable prospect of success.

71. For those reasons I do not strike out these claims nor do I make a deposit order.

Employment Judge Joffe
22/05/2023

Sent to the parties on:
22/05/2023

For the Tribunal Office: