THE EMPLOYMENT TRIBUNALS

Claimant Miss R Olyazadeh

Respondent Newcastle University

Heard at Newcastle upon Tyne Hearing Centre

On 25 October 2023 (In chambers 29 November 2023)

Before Employment Judge Langridge

Representation:

Claimant In person
Respondent Mr Robert Allen, counsel

JUDGMENT

1) The claimant's complaints under case number 2500668/2023 for maternity and pregnancy discrimination are dismissed on withdrawal.

2) The claimant's complaints under case number 2500668/2023 of unfair dismissal and for notice pay are dismissed on withdrawal.

3) The claimant's complaints under both case numbers 2500668/2023 and 2502011/2023 for a redundancy payment are dismissed on withdrawal.

4) The claimant's complaints under case number 2502011/2023 of unfair dismissal and for notice pay were not presented within the applicable time limit. It was reasonably practicable to do so. Those complaints are therefore dismissed.

5) The respondent's application to strike out the claimant's claims under Rule 37 Employment Tribunal Rules of Procedure 2013 is refused.

REASONS

Introduction

1. Today's public preliminary hearing was listed to deal with various issues arising from the two claim forms submitted by the claimant. The first ET1 was brought under case number 2500668/2023 ('the first claim'). It was submitted on 3 April 2023, while the claimant's employment was continuing. The complaints raised in the first claim were for unfair dismissal, notice pay, a statutory redundancy payment; and discrimination on the grounds of sex, pregnancy/maternity and race. The race discrimination claim has previously been dismissed on withdrawal.

2. On 29 August 2023 the claimant submitted another ET1 under case number 2502011/23 ('the second claim'), relying on an effective date of termination of 31 May 2023. This followed a previous preliminary hearing at which the claimant was made aware that her first claim may have been premature. The second claim was limited to complaints of unfair dismissal, notice pay, and for a statutory redundancy payment.

3. During the discussion of the issues at today's hearing the claimant withdrew all her complaints under the first claim, so far as they were brought under the Employment Rights Act 1996 (unfair dismissal, notice pay, and redundancy payment). The claimant also withdrew her claim for a statutory redundancy payment under the second claim, after accepting that there was no redundancy situation. The claimant had previously indicated to the Tribunal that she wished to withdraw her complaints under the Equality Act 2010 in respect of pregnancy and maternity discrimination, and this judgment gave effect to that decision. The remaining discrimination complaints were for direct sex discrimination and victimisation.

4. The issues for the Tribunal to determine at today's hearing were therefore:

    a. Whether the second claim (for unfair dismissal and notice pay) was submitted in time, by reference to the effective date of termination; and

    b. Whether the complaints of direct sex discrimination and victimisation should be struck out under Rule 37 of the Tribunal Rules of Procedure 2013; or whether they should be the subject of deposit orders under Rule 39.

5. If it were determined that the second claim was not brought in time, then the Tribunal would have no jurisdiction to hear those complaints. This was subject to the question whether it was reasonably practicable for the claimant to have brought the second claim in time.

6. The Tribunal heard evidence from the claimant and reviewed a number of contemporaneous documents produced in an agreed bundle. The Tribunal had to make findings of fact so as to decide the correct effective date of termination ('EDT'). The strike out issues had to be determined by reference to the pleaded case and the information presented at this hearing.

A. The second claim – time point

The pleaded case

7. The first claim was submitted on 3 April 2023 when the claimant's employment was still continuing. At a preliminary hearing on 20 June the claimant was ordered to provide Further Information about her claims. By then her employment had ended but there was a dispute between the parties about which of them had brought it to an end. In her Further Information document the claimant continued to challenge that it was her decision to leave, though at today's preliminary hearing she conceded that she had resigned. She said she handed over the two projects she was working on in March 2023, and took annual leave until 17 March. In her LinkedIn profile she said her employment ended in March 2023 because that was when she handed over her projects. She said she was paid until 23 March and stated that the respondent "ended my employment on 18th April". The claimant then received a payment of £321.10 at the end of May, and said that when she checked the HMRC website at the beginning of June she saw that her employment "ended 18th of April".

8. The question of the EDT was discussed at a later preliminary hearing on 24 August, when both parties agreed that the claimant's employment ended on 18 April 2023 (paragraph 31 of Judge Sweeney's Case Summary).

9. When submitting her second claim on 29 August 2023 the claimant relied on a new termination date of 31 May 2023. In the form ET1 she referred to the fact that she had emailed the respondent on 3 March 2023 and had mentioned "my last working day at the university is the 2nd of March and I will use all my holiday till the 17th of March. This was clear communicating through email for ending employment was not acceptable by them." She relied on 31 May as the EDT because that was the date she received her final wages payment. If correct, that date would mean the second claim was brought in time.

Findings of fact

10. The following findings of fact reflect the written and oral evidence presented to the Tribunal, and are intended to be limited to the issue of identifying the EDT.

11. The claimant's employment began on 23 March 2020 and she was issued with Conditions of Service applicable to research associates. These provided that the appointment was a whole time one, terminable after two years' continuous service on three months' notice from either side. The Conditions of Service further stated:

> "The member of staff shall not retain or accept any other employment or appointment which involves substantial calls upon his/her time or energies without the agreement of his/her Head of Unit and the Faculty Pro-Vice-Chancellor where appropriate."

12. From 12 September 2022 the claimant was appointed on an open-ended contract as a research associate working on a water security and sustainability hub project which was due to end on 31 March 2024.

13. In an email dated 11 November 2022 the claimant told her line manager, Professor J Mills that she had found a new job, working remotely. The new employer had agreed to her working part time for both employers. She said she could only focus on the water hub project 40% of her time. She invited Prof Mills to discuss this with colleagues and revert to her. The respondent's position was that the claimant's role required a commitment of at least 80%. Part-time working was not agreed.

14. On 18 November the claimant emailed Prof Mills again, using the subject heading "waterhub handover and leaving". She said she had written a resignation letter as she was expecting to take up her new job on a full time basis. She set out the proposed text of her resignation in the body of her email and discussed the handover arrangements she was putting in place for someone to take over her work. The claimant proposed a termination date of 31 January 2023, which Prof Mills agreed in his reply of the same date. The claimant was unsure about how to proceed, as she hoped to be given new opportunities in similar projects in the future. Prof Mills explained that she could not stay on an open contract with the respondent, though they could consider making her a visiting researcher until the end of the water hub project.

15. On 14 December Prof Mills sent a follow up email asking the claimant to submit a formal resignation letter, receipt of which was essential in order to action her proposed one month's notice and arrange a replacement. The claimant replied to say she was only required to give one week's notice and had done so verbally in November. She said she would provide the letter the following month.

16. The next day, Prof Mills replied with the benefit of advice from People Services on the resignation formalities. He advised the claimant that she was contractually obliged to give 3 months' notice but they would accept her proposed leaving date of 31 January 2023. She was given a link to the online leavers form she needed to complete, but she said she was unable to access it. The following day, People Services sent further guidance on how to proceed, but the claimant did not action this. When asked about this in early January 2023, the claimant said the link was for a fixed term contract whereas hers was open-ended. She questioned why she could not have an ongoing open contract with the university to take advantage of future research opportunities.

17. On 5 January 2023 the claimant exchanged several emails with Mr Usher in People Services. She said: "I am just dropping out from the current project Waterhub we have, for a couple of years due to Covid they had issues with money and we all had to leave at some points." In his reply Mr Usher explained that the link to the leavers form was not specific to any type of contract. Any future employment with the respondent would depend on the claimant applying for a new position. Her current position was tied to a funded project and that funding was due to end on 31 March 2024. The respondent did not have research colleagues who were free to float between projects. Mr Usher explained the need to complete a leavers form to ensure she would be correctly paid, otherwise an underpayment may result. The claimant saw this email as a threat that she would not get paid. She replied to say so, and to question the need to fill out the leavers form at all.

She said: “I will fill out the form when there will be someone to clearly tell me what exactly this open contract means”.

18. As part of this email exchange the claimant told People Services that she was not leaving the project due to redundancy but for other reasons “and one is that they were expecting me to work part time since I was back from maternity and issues we got for funding”. She therefore looked for another job, but rather than leave the university she wanted to apply for funds so as to collaborate with future research, and keep her affiliation as a research associate.

19. On 19 January the claimant met with Ms Hugall from People Services. The claimant told her there was “a funding issue where she was expected to go part time”. The claimant said this was “fine with her” and she had told Prof Mills that her Global Talent Visa would allow part time working. She had been offered a new job to start on 1 February and wanted to do the two roles, but Prof Mills had said the respondent needed someone full time. The claimant told Ms Hugall that she was not resigning and was not going to sign anything to that effect. She alleged that Prof Mills said he “did not want” her. Ms Hugall felt there was some confusion and said she hoped that a conversation with Prof Mills would lead to a better understanding of the situation.

20. Ms Hugall followed this up by meeting Prof Mills on 23 January. He denied telling the claimant that he did not want her. He understood that she wanted to go part time and he had put arrangements in place for her to reduce to 80%. The claimant had asked to remain at 100% as she wanted to apply for a Global Talent Visa. He agreed to that request, and she remained full time. Prof Mills said the claimant had told him her prospective new employer was pushing for her to work 100%, but her preference was to work part time for both employers. Prof Mills said they could not agree to this arrangement, at which point there was a discussion about 100% working for the new employer and notice periods. That is how the subject of the claimant’s possible resignation arose.

21. A meeting then took place on 26 January between the claimant, Prof Mills and Ms Hugall, to discuss the question of the claimant's resignation. The claimant was reminded of the Conditions of Service provision that external work had to be approved by management. The claimant said she knew she was not wanted because she had previously been asked to go part time and now that she wanted to work part time she was being told it could not be accommodated. Ms Hugall’s record of the meeting stated: “I asked whether you were asked to go part time and you said no. You then said that colleagues in a research meeting had told you that ‘the hub’ no longer wanted a decision platform, which is what you were working on and is why you know that you are not wanted.”

22. At this same meeting Prof Mills told the claimant that the part time cover that had been arranged with a colleague was intended to cover key elements of her role only, pending recruitment of a full time replacement. This could not be actioned until the claimant submitted her formal resignation, but she made it clear she was not prepared to do that. She invited the respondent to dismiss her. The respondent said it had no grounds to do so, and said it would continue to honour the contract. It remained willing to agree a reduction to 80% FTE.

23. On 27 January Prof Mills emailed the claimant's colleague who was due to take over aspects of the claimant's work, saying that since the handover meeting the situation had changed and the claimant was no longer resigning from her post. The email was copied to the claimant.

24. Ms Hugall's letter recording the meeting was sent to the claimant on 30 January. On 31 January she sent her detailed notes in reply, which led to an invitation to meet again. The claimant agreed to this, but pointed out that she was involved in a stressful family court case in February. Ms Hugall agreed to await that before fixing the meeting. In the same exchange of emails the claimant expressed her upset at the way she had been treated at the 26 January meeting. She said she was going to leave the project because she was "tired of all things happened to me at work since I got pregnant or even before when Covid was blamed for it".

25. In her response to the record of the 26 January meeting the claimant added commentary on some of the points raised. She denied that she had ever intended to resign, but wished simply to switch to a part time contract. She again invited the respondent to dismiss her, by reference to the prohibition on taking a second job without permission.

26. The next step the claimant took was to initiate early conciliation with Acas on 14 February, in respect of the first claim.

27. On 22 February the claimant emailed Ms Hugall in the context of a possible meeting to discuss her ongoing role. She refused to share information about her second job, and asked the respondent to give her a decision. She ended by saying, "I do not wish to work for the university any more" and asked for advice on how to do that.

28. The last day when the claimant carried out any substantive work was 2 March 2023. She told colleagues it was her last day as she was leaving the university. The same day, the respondent offered her the opportunity to raise a grievance, but the claimant was not interested in pursuing this. She wanted the respondent to offer a settlement agreement and was prepared to sign her resignation if that was offered by the end of her 10 days' holiday on 17 March. In a further email exchange on 8 March the claimant repeated that she did not wish to work for the university any more.

29. On 30 March Acas informed the respondent that the claimant intended to submit her resignation, and Ms Hugall emailed the claimant asking her to forward it to People Services. The claimant did not do so. On 13 April she chose to return all university property to the respondent.

30. The next exchange of emails has an important bearing on the case. Several messages were sent on 18 April, beginning with an email from Ms Hugall at 12:08. This notified the claimant that her recent unpaid leave would end on 24 April when she was expected to return to work. The claimant was invited to an informal meeting with Prof Dawson that day. Ms Hugall asked the claimant to advise if she was not intending to return to work, in light of the recent return of property. The

claimant opened her reply sent at 12:44 by saying, “I believe you are kidding me no?”. She went on to make allegations about being forced to resign and being denied part time working. She said, “I am not going to work any more and I believe I made it clear my last working meeting was 2nd March”. She said, “There is no role to return”, and asked Ms Hugall not to communicate with her further.

31. Ms Hugall replied at 17:00 on 18 April inviting the claimant to reconsider, and reminding her of the option of raising a formal grievance. She said:

> “If we do not hear any further from you by this Friday 21 April 2023, we will accept your email below [sent at 12:44] as confirmation of your resignation with effect from today's date.”

32. This email was sent to the claimant at both her work and personal email addressed, and the claimant did receive it. She did not respond.

33. Having heard nothing in reply to this email, the respondent processed the claimant as a leaver on 25 April, and wrote to her on that date to say so. The letter stated that the employment ended with effect from 18 April, and that accrued annual leave would be paid no later than 31 May. The sum of £331.89 was paid on that date. The respondent processed the claimant's P45 on 23 May and this – as well as pay records – showed the termination date as being 18 April. The claimant returned to the UK on 28 May and saw the P45 then.

34. The claimant initiated early conciliation with Acas in respect of the second claim on 28 August 2023 and the certificate was issued on 29 August 2023.

Conclusions

35. I am satisfied that the claimant's employment ended on 18 April 2023. The effective date of termination is a question of law, taking into account the facts as found above.

36. It is clear that the claimant’s original intention was to negotiate a reduction in her contractual hours from 100% to around 40%, for the purpose of enabling her to combine two part time jobs once her new role began on 1 February. The respondent maintained that the claimant's role had to be carried out with a commitment of at least 80% of a full time position. It had not approved the holding of a second job, as required by the claimant's Conditions of Service.

37. In this context, the claimant contemplated resigning so that she could take up her new role on a full time basis. She had an intention to resign throughout the discussions which followed after notifying her line manager of the new job in November 2022, but she did not give effect to that intention at that time. In response to the respondent's numerous prompts, the claimant chose not to complete the formal records to treat her as a leaver. She did not formally give notice but indicated (incorrectly) that she was only obliged to give one week’s notice. Under her contract she was obliged to give three months’ notice. The respondent was nevertheless willing to agree a shorter period of one month. The respondent required the claimant to complete the leavers records online, but she

never did so. Her reason was that she wanted the respondent to agree to maintain a contractual relationship with her, in effect without pay or duties in the first place, in the hope that she could be considered for future research projects as and when they arose in the future. The respondent made clear this was not something it could do, nor a form of contractual arrangement which it operated. As the claimant did not proceed to complete the leavers paperwork, her intention to resign remained only that, and the employment was not brought to an end as initially expected.

38. The claimant communicated her change of mind to the respondent at the meeting with Ms Hugall on 19 January 2023. From this point the respondent sought to discuss the claimant's future role with her, and the 26 January meeting was part of that. However, numerous other grievances arose at that meeting and these remained unresolved. By 22 February the claimant had decided to leave her employment and communicated this to the respondent. From 2 March she did no more work other than to attend a handover meeting with a colleague. She then absented herself on holiday, and the respondent agreed to a period of unpaid leave.

39. By this time the claimant's ongoing employment status was still ambiguous. She still had an intention to resign but again took no formal steps to give effect to that intention. Ms Hugall therefore brought matters to a head in her emails of 18 April. The key communication is this:

> "If we do not hear any further from you by this Friday 21 April 2023, we will accept your email below [sent at 12:44] as confirmation of your resignation with effect from today's date."

40. By not replying to that email, the claimant effectively communicated to the respondent confirmation of her resignation, effective 18 April 2023. This was communicated by her conduct in not replying to the explicit language in the email, and it was also in keeping with her conduct prior to that date. In her email of 22 February email the claimant had stated, "I do not wish to work for the university any more". On 2 March she carried out her last substantive work and announced her departure to colleagues. She then took a unilateral decision to return all the respondent's property and stopped attending work.

41. The contemporaneous paperwork showed that the respondent treated 18 April 2023 as the EDT when it calculated the claimant's final pay and submitted the P45 to HMRC. The fact that the P45 was processed on 23 May, and the accrued holiday pay was paid on 31 May, do not determine the EDT. They are simply the administrative consequences of an employment contract being brought to an end.

42. As the claimant's effective date of termination was 18 April 2023, the primary time limit under the Employment Rights Act 1996 for bringing a claim for unfair dismissal or for notice pay was 17 July 2023. By that date, the claimant should have contacted Acas to initiate early conciliation, but she did not do so until 28 August 2023, more than one month later. She took this step after being alerted at the preliminary hearing on 24 August of the fact that her first claim had been brought prematurely, before her employment ended.

43. The claimant did not identify any reason why it was not reasonably practicable for her claim for unfair dismissal and notice pay to have been brought in time. It was in fact reasonably practicable to have done so. The claimant was considering bringing claims against the respondent from the early part of 2023, and contacted Acas on 14 February. She was in a position to know or find out from around that then, what time limits applied to the claims she wished to bring. Although the claimant acted promptly after the 24 August preliminary hearing, there was no explanation for not acting before then.

44. Accordingly, the claimant's second claim was brought outside the time limit under section 111 Employment Rights Act 1996 and the Tribunal has no jurisdiction to hear the complaints of unfair dismissal and for notice pay.

B. The first claim – strike out

45. The strike out application relates only to the surviving complaints under the Equality Act 2010 ('the Act'). These are complaints of direct sex discrimination under section 13 and victimisation contrary to section 27. Both claims were brought in time as part of the first claim.

46. At previous preliminary hearings there were questions about the nature and scope of the discrimination allegations. Previous complaints of race, pregnancy and maternity discrimination had already been withdrawn by the claimant. At this hearing I invited the claimant to specify clearly what act or acts of direct sex discrimination she complains of; what protected act she says she carried out; and what detrimental treatment she alleges she was subjected to as a result. The issue to be determined was whether those complaints should be struck out under Rule 37(1)(a) for having no reasonable prospects of success, or alternatively whether deposit orders should be made under Rule 39 because the complaints have little reasonable prospect of success.

The pleaded case

47. The claims for sex discrimination and victimisation were identified in the first claim as being based on the following facts:

    a. Being told by the respondent to go part time in July 2022 after her maternity leave, because she had an infant at home, when extending others' contracts to 100%.

    b. Submitting a "formal discrimination" form in September 2021 after returning from maternity leave, and being "blamed for it". This related to an incident about someone else using her desk on the first day back from maternity leave.

    c. Giving a part-time contract to a male colleague in October 2022.

    d. Forcing her to work full time in February 2023 when she requested a 40% contract.

48. The effect of the claimant's withdrawals is such that only the fourth of these issues survives as a cause of action in its own right. The other allegations may have evidential value in support of that claim, but do not amount to distinct claims.

49. At the first preliminary hearing on 20 June 2023, the claimant was ordered to provide Further Information about her claims. In summary, she made the following allegations:

50. Direct sex discrimination – The act complained of is the handling of the meeting on 26 January 2023 by Prof Mills and Ms Hugall, to discuss the claimant's possible resignation. She alleges that the respondent refused her the option to work part time and told her to work full time or resign. The individuals who decided first that the claimant should work part time, then later denied her that opportunity, were alleged to be:

    a. Prof J Mills (line manager)
    b. Prof R Dawson (Principal Investigator on the water hub project)
    c. Dr C Walsh (Project Lead)
    d. Ms C Grundy (Project Manager)

51. The claimant stated in her Further Information that the discussion about part time working started at around the beginning of March 2022, “considering they have funding issues”. In July 2022 she did not want to work part time unless and until she obtained another job. She said the respondent's decision about “not wanting me part time when they found out I will have another job too”, was mid November 2022, though the main discussion was on 26 January 2023. This was the date of the last act of discrimination.

52. The claimant's belief that this treatment was related to sex was based on her being a mother and a single parent. She stated: “They wanted me part time, and I thought it was because of funding issue till they mentioned it is because I had a son at home and claiming this was my request due to child arrangement, apparently new mothers prefer to work part time, and they wanted me to want that.” The claimant said she made it clear that that was not her wish, and she could not afford to live on part time earnings and so would need to find a second job. She stated [*emphasis added*]:

> “They denied me working part time because they knew I will still be working full time considering I have second job too and for them it was unacceptable due to my child arrangement. They clearly think I can only work part time for them with no other part time jobs. *Nothing else can explain why they wanted me part time before but not when I found a second job*.”

53. When clarifying this allegation at today’s preliminary hearing, the claimant said the respondent had previously asked her for over a year to work part time, because they believed she could not manage to work full time as a mother. When she later requested part time working, the respondent would not agree to this. She accepted that there were funding issues behind the previous request to work part time, but said the respondent only asked her and not the men in the team.

54. Victimisation – In her Further Information the claimant states that her line manager requested a resignation letter on 18 November 2022. This arose because the respondent was not happy that she had said she was dropping out from one project. The claimant wanted to continue working as a researcher and look for funding. She informed her line manager and Dr Walsh that "I will not be working and fixing any issues regarding to that project after I leave (data platform 15 December 2022)."

55. The claimant describes the treatment she says she received. This included alleged threats of being paid less if she did not give her resignation letter on 5 January 2023; and being excluded from a group researcher meeting on 20 January 2023 by Dr Walsh, who had already informed everyone that the claimant was leaving. She alleges that at the 26 January meeting her line manager shouted at her that it was not her business to know why another person could take over her role part time, but she could not work part time herself. The claimant also relies on an email from her line manager on 27 January 2023 informing the new person that she was not in fact resigning from her post, which she describes as "humiliation". She felt she had been forced to attend informal meetings in spite of having a family court appointment in February 2023. The claimant informed the respondent she could not attend any further informal meetings, only formal ones, and her request to be accompanied by a friend was denied. She was then required to attend a meeting on 17 February by Prof Dawson, at a time of day she could not manage due to dropping her son at nursery. She says the respondent requested that she disclose details of her other employment, which she refused to do.

56. The Further Information refers to the claimant being treated differently after informing Ms Hugall about Acas, by email. She does not, however, give any details. She does not identify a protected act which would bring her complaint within the scope of section 27 of the Act. She refers to the incident in September 2021 when she returned to work from maternity leave and found someone else working at her desk, but does not link this to her later treatment relating to the resignation issue.

Preliminary hearing 24 August 2023

57. At the follow up preliminary hearing on 24 August Judge Sweeney set out his understanding of the claimant's claims based on the further information provided by her. Relevant extracts are set out below.

58. Sex discrimination – This is based on the decision in November 2022 to deny the claimant part time working, the reasons for which she did not know until 26 January 2023. The claimant had been asked to go part time after her return from maternity leave in September 2021. It was only when she obtained another job outside the university that she requested part time working, but by then the respondent was insisting she work full time.

59. The claimant raised the subject of the respondent holding a discriminatory belief about working mothers, which had first been mentioned in her Further Information. She linked the respondent's preference for her to work part time with this state of

mind. She alleged that the respondent's managers did not like the fact that as a mother she would be working full time between her two jobs.

60. Judge Sweeney noted that the claimant's argument was an unusual one and referred to the legal authority of Madarassy v Nomura International which says that a claimant must prove facts from which a Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. He felt that the point was suitable to be considered for a deposit order, on the grounds that it may not have more than a little prospect of success.

61. Victimisation – Judge Sweeney directed the claimant to the need to identify a protected act as a condition of pursuing a victimisation claim. She was unable to identify any such act – and indeed had not done so at the previous preliminary hearing. He noted that the complaint in September 2021 was not the protected act which had led to the alleged detriments. He therefore added this claim to the agenda for the public preliminary hearing.

Other relevant information

62. At today's hearing I explored these issues with the claimant again. In answer to repeated questions about what act(s) of discrimination she was relying on, the claimant repeated her position about the respondent's refusal to allow her to work part time, which she said was "because I had another job". When asked what this had to do with sex discrimination, the claimant said it was because she is a mother with caring responsibilities. She related this back to the respondent wanting her to work part time after her return from maternity leave in September 2021. She alleged that this was because the respondent believed she could not manage her full time work and motherhood; yet when she requested part time working at the end of 2022, it was not allowed.

63. The claimant again acknowledged there were funding issues on the previous occasion, but reiterated that only she and not her male colleagues in the team were asked to reduce to part time working.

64. When asked to explain why the 26 January meeting was an act of discrimination, the claimant referred to the dispute about her proposed resignation. The respondent told her she was resigning because her request for part time working was not agreed, but she replied that this was not the case and she was "resigning because they wanted me to leave because I am a working mother".

65. The claimant relies in support of this contention on the discriminatory belief she says was held by the four individuals named above. When asked to explain this, she said Prof Mills and Dr Walsh had knowledge of her work. They were "constantly judging me and said my output was less than full time". I pressed the claimant to identify on what basis she makes this allegation, emphasising that a mere statement to this effect is not enough without some evidence to support it. She said that these four individuals had made the decision she could not work part time. The claimant then modified the allegation to exclude Prof Dawson and Ms Grundy. She relies only on Prof Mills and Dr Walsh holding this belief. Her reason is that they were both involved in her research. They said they needed someone

full time in the role but then gave it to someone part time. Prof Mills was assuming she wanted to work part time because of her childcare responsibilities.

66. That summarises the claimant's argument on sex discrimination. When we discussed her victimisation complaint, I asked the claimant to identify a protected act. She referred to an email dated 31 January 2023 in which she told Prof Mills and Ms Hugall that she would be getting a representative and taking advice. In fact, that email was sent only to Ms Hugall. In it the claimant referred back to previous complaints such as the incident in September 2021. She made a general assertion that she was "going to leave the project because I was tired of all things happened to me at work since I got pregnant or even before when Covid was blamed for it". She added that she would be collecting emails and documents to give to her representative and would not be attending further meetings until she had legal advice.

67. Related to the above is the detailed reply (attached to the above email) in which the claimant took issue with the Ms Hugall's record of the 26 January meeting and reiterated her various grievances. This document included references to the respondent's alleged mindset which doubted that the claimant could manage a full time job and motherhood. The claimant stated: "I felt that they think because I have an infant and I'm fully responsible for his, they do not think I can manage and I should go working less." "They do not believe I can manage a baby and a full time job." The only other specific reference to discrimination referred back to the incident in September 2021.

68. When asked to clarify what detrimental treatment she had experienced as a result of this email, the claimant referred again to the September 2021 incident, and the fact that Prof Mills had told colleagues she no longer wanted to resign. The only incident post-dating the 31 January email was that Prof Mills required her to provide a Fit Note in February 2023 whereas previously he had not needed one. He also wanted to hold a researcher meeting after that. The claimant conceded that these were facts not previously part of her pleaded case.

69. In reaching my decision I reviewed the emails and other documents provided in the agreed bundle, including the respondent's contemporaneous record of the meeting on 26 January 2023. Ms Hugall's letter of 30 January noted the claimant's unhappiness at being denied part time working in order to take up her second job, and said Prof Mills had explained at the meeting that part time working had previously been raised in the context of cuts to funding, to mitigate against possible redundancies. In the event, that funding was maintained and the claimant's contract had been extended. In her letter Ms Hugall recorded that she:

> "[…] asked whether you were asked to go part time and you said no. You then said that colleagues in a research meeting had told you that 'the hub' no longer wanted a decision platform, which is what you were working on and is why you know that you are not wanted."

70. In her detailed reply to this letter, on 31 January, the claimant conceded that she had replied 'No' to Ms Hugall's question and explained: "I said no because like this story, I was told I wanted to go part time. Like now you mentioned I no longer

intended to resign." On the subject of Prof Mills saying she was not wanted, the claimant denied mentioning this at the meeting. She said it was others in the hub who did not want her there, and gave reasons relating to the work on the data management platform. She said the meeting had ended because Prof Mills raised his voice when saying it was none of her business if they hire someone else part time.

Conclusions

71. The authorities on striking out claims urge caution before taking such a serious step, especially in discrimination cases where it is likely that allegations may need to be aired fully at a final hearing. The law recognises that discrimination can be difficult to prove, though claimants do have the burden of proving facts which, if proved, could lead a Tribunal to draw the inference that discrimination has occurred. If such facts are established through the claimant's evidence, then the burden of proof passes to the respondent to explain why the alleged treatment occurred. This is the test under Madarassy to which Judge Sweeney referred in his case management orders of 24 August.

72. In the case of Blockbuster Entertainment Ltd v James [2006] IRLR 630 the Court of Appeal held that a tribunal should not be too quick to consider striking out for any non-compliance with its order, which is a Draconian power and not to be exercised too readily. The question is one of proportionality. The court held that a tribunal should make a structured examination in order to see whether there is "a less drastic means" of achieving the aim, short of an order striking out the claims.

73. In reaching today's decision I was mindful of the importance of not conducting a mini trial on issues of fact, and considered the guidance in other key authorities on striking out, especially in the case of discrimination claims. I considered N Glamorgan NHS Trust v Ezsias [2007] IRLR 603 and Mechkarov v Citibank 2016 ICR 1121, as well as some more general principles set out in Cox v Adecco UKEAT/0339/19/AT. I also took into account the overriding objective, which requires fairness between the parties and a proportionate approach to the claims.

74. The respondent referred to the Court of Appeal decision in Ahir v British Airways 2017 EWCA Civ 1392 which dealt with a successful application to strike out a victimisation claim. The court held that:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established […] It remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be "little reasonable prospect of success" […]
>
> Where there is on the face of it a straightforward and well documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so."

75. I accept that a Tribunal should not be quick to strike out discrimination claims, which generally need to be decided on their merits based on evidence at a final hearing. In this case, the claimant has put forward the proposition that her request for part time working was denied in early 2023, and she treats this as direct sex discrimination because two of her managers allegedly held a discriminatory mindset about working mothers. There is, however, an inherent contradiction in the claimant's argument, because that mindset supports the notion that mothers are better working part time so as to accommodate their caring responsibilities. That was the claimant's interpretation of the reason she and not male colleagues was asked to reduce to part time working in 2021/2022. By the time the claimant requested to work part time a year later, her purpose was to take up a second job outside the university.

76. In order for the claimant to succeed in her direct discrimination claim, she would have to produce evidence supporting her contention that the respondent refused her part time working request by reference to this discriminatory mindset. Yet if that evidence were established, the mindset would support the opposite argument. If the claimant is right about the beliefs held by Prof Mills and Dr Walsh, that would suggest they would be happy to allow her to reduce her working hours.

77. It is therefore difficult to see on what basis the claimant could present a cogent argument supporting the direct discrimination allegation. I note also that there are apparently innocent explanations for the part time versus full time working arguments. The claimant herself conceded that in 2021 there were funding issues which had a bearing on the request that she work part time. It is also not in dispute that the claimant's reasons for wanting to do that in early 2023 were to take up another job. They had nothing to do with motherhood or childcare. Again, there is an apparently innocent explanation for the respondent's stance on this occasion. Under the claimant's Conditions of Service she was not permitted to take a second job without the respondent's permission. She did not have that. The respondent took the view that the claimant's role required a commitment of at least 80%. It says that some but not all of the claimant's duties were to be covered by a colleague in the department, but if the claimant had formally resigned, it would have been recruiting a full time replacement for her.

78. The claimant can see no other explanation for the respondent denying her part time working request when she obtained a second job. However, it does not follow that the explanation must be connected to sex discrimination. The claimant bears the burden of proving facts which could permit a Tribunal to conclude that the decision was tainted by discrimination.

79. Turning to the victimisation claim, this too is extremely weak. The protected act the claimant relies on is her email dated 31 January 2023 and accompanying notes. This date is significant because it post-dates more or less all of the treatment about which the claimant complains. The only detriments which follow the making of a protected act are the requirements to produce a Fit Note, and being asked to attend a researcher meeting. These are new facts which have not previously been pleaded. The claimant has not applied to amend her claim to include these allegations.

80. The above issues weigh in favour of both claims being struck out. However, as flimsy as the claimant's contentions appear to be, I am not willing to take this step without giving the claimant an opportunity to present her arguments more fully and more coherently at a final hearing. Those arguments must be supported with evidence, which may arise indirectly from other events at work. I note, for example, that there is an issue about male colleagues not being asked to reduce their working hours in 2021. While that is not a cause of action in its own right, it might be supporting evidence of a certain approach being adopted towards the claimant. Likewise, the claimant's letter of 31 January 2023 refers to her being "tired of all things happened to me at work since I got pregnant". Evidence of past issues relating to pregnancy or maternity may need to be aired at a final hearing of the issues, if the claimant is to have any hope of persuading the Tribunal that her allegations are well-founded.

81. Taking account of the legal authorities, I accept that a Tribunal should not be too quick to strike out a claim involving allegations of discrimination, unless the circumstances make it clear that such a step should be taken. Discrimination can be difficult to prove and claimants should not be deprived too readily of the chance to present their evidence. The test under Rule 37(1)(a) is whether the claim has "no" reasonable prospect of success. This is a high bar and on balance, I am not satisfied that it has been quite reached in this case. There is, however, no doubt in my mind that the discrimination and victimisation complaints have "little" reasonable prospect of success, and accordingly a deposit order is being made as a condition of proceeding with those claims.

82. I would reiterate to the claimant the importance of seeking legal advice on the issues raised in this judgment and the related deposit order. Her claims have now been reduced to two issues:

    a. Whether the respondent's refusal to allow her to work part time in January 2023 in order to take up a second job was an act of sex discrimination, and if so, what evidence is there to support that?

    b. Whether the claimant was subjected to any detriment <u>after</u> making a protected act through the content of her email of 31 January 2023.

83. Finally, given the concession made at this preliminary hearing, I note that the allegations of a discriminatory mindset are not pursued in the case of Prof Dawson or Ms Grundy, neither of whom needs be called as witnesses to refute that allegation (though they may be called to give evidence on the issues generally). This is subject to any decision by the Tribunal hearing this claim.

SE Langridge
Employment Judge Langridge

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 14 December 2023

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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