EMPLOYMENT TRIBUNALS

Claimant: **Mr D Patterson**

Respondent: **Secretary of State for Work and Pensions**

Heard at: **East London Hearing Centre**

On: **25 October 2022**

Before: **Employment Judge Brewer**

Representation

Claimant: Mr A Bertin, Solicitor

Respondent: Ms E Hodgetts, Counsel

JUDGMENT having been sent to the parties on 28 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In these reasons, case number 3202601/2021 is referred to as the first case and case number 2203624/2021 is referred to as the second case.

2. This hearing was listed as an open preliminary hearing to consider the respondent's application for the first and second claims to be struck out either in whole or in part and/or for the claimant to be required to pay deposit as a condition of continuing any of the allegations made in those claims.

3. The respondent was represented by Ms Hodgetts and the claimant by Mr Bertin. The claimant did not attend and did not give any evidence on his behalf.

4. I was provided with a bundle of documents, an agreed agenda for this hearing, a draft list of issues in relation to the third claim and finally a skeleton argument on behalf of the respondent. I am grateful to both representatives for their assistance in this matter.

Applications in relation to the first and second claims

Law

5. The material parts of the Tribunal Rules are as follows:

> ***"Striking out***
>
> ***37.***—*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success…*
>
> ***Deposit orders***
>
> ***39.***—*(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument…"*

6. In the first claim, the claimant brings claims for direct discrimination because of race and disability. He also brings a claim under section 15 Equality Act 2010, a claim for failure to make reasonable adjustments and a claim victimisation. The claimant also brings a claim under section 146 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

7. In the second claim the claimant brings claims for direct race and disability discrimination and a claim under section 15 Equality Act 2010.

8. It is accepted that the allegations in both the first and second claims are out of time and that the claimant did not contact ACAS until the primary time limit had expired and the respondent says that time should not be extended.

9. In relation to the discrimination claims the following are the key principles.

10. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337). Given that the treatment must be less favourable, the claimant should identify an actual or a hypothetical comparator which who's in materially the same circumstances as the claimant.

11. Under section 15 EqA, the claimant must show what the something arising is from disability, what the unfavourable treatment is upon which he relies, and that the unfavourable treatment was because of the something arising.

12. In relation to the claim for failure to make reasonable adjustments the respondent must have applied one or more PCP which must have caused a substantial disadvantage to the claimant in order for the duty to consider reasonable adjustments to be engaged.

13. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

14. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

15. In **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g.race) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.

16. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

17. Finally, turning to the strike out provisions of the Rules, I note that claims of discrimination are rarely struck out where there is a factual dispute between the parties (**Anyanwu v South Bank Student Union** 2001 UKHL 14, and also see **Mechkraov v Citibank NA** 2006 ICR 1121). However, the test is of course whether there is no reasonable prospect of success, even if there are factual disputes.

18. Having said that, I note that I should, when considering strike out, take the claimant's pleaded case at its highest however, I do not lose sight of the fact that in many, indeed almost certainly in most claims of discrimination the Tribunal will need to draw inferences from disputed findings of fact which I am not in a position to, and indeed nor should I, do. Those inference may be critical in many cases.

19. Caution should be exercised if a case has been badly pleaded, for example, by a litigant in person whose first language is not English. Taking the case at its highest may well ignore the possibility that it could have a reasonable prospect of success if properly pleaded. In ***Mbiusa v Cygnet Healthcare Ltd*** UKEAT/0119/18 *(7 March 2019, unreported)* it was held that in view of the lack of clarity as to the claimant's arguments, the proper course of action would be to establish more precisely what the claimant was arguing, if necessary make amendments and then, if still in doubt about chances of success, make a deposit order. At paragraph 21 Judge Eady provided useful guidance about the problem of imprecise pleading, particularly by litigants in person, as follows:

"Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see ***Hassan v Tesco Stores Ltd*** *UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where – as Langstaff J observed in* ***Hassan*** *– the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."*

20. Caution needs to be exercised before striking out a discrimination claim without a hearing where, even though the primary facts may not be in dispute, there is nevertheless a dispute about the inferences to be drawn from them. As Simler J explained in ***Zeb v Xerox (UK) Ltd*** UKEAT/0091/15 *(24 February 2016, unreported), 'the* question of what inferences to draw forms part of the critical core of disputed facts in any discrimination case' (para 21), as do the respondent's explanations for alleged less favourable treatment (para 23); accordingly, employment judges need to be alert to the possible inferences that might be drawn and the lines of enquiry that will need to be pursued at a hearing before striking out such claims.

21. The EAT gave further guidance on the tribunal's duties in relation to strike-out applications against litigants in person in **Cox v Adecco and ors** EAT 0339/19. There the EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are: 'Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is'. Thus, there has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order. In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person 'may become like a rabbit in the headlights' and fail to explain the case he or she has set out in writing. In some cases, a proper analysis of the pleadings, and of any core documents in which the claimant seeks to identify the claim, may show that there really is no claim and therefore no issues to be identified. More often, however, a careful reading of the documents will show that there is a claim, even if it might require amendment. The EAT went on to note that respondents, particularly if legally represented, should, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, aid the tribunal in identifying the documents in which the claim is set out, even if it may not be explicitly pleaded in a

manner that would be expected of a lawyer. Finally, if the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

22. However, in **Ahir v British Airways plc** 2017 EWCA Civ 1392, CA, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored.

23. In **Kaur v Leeds Teaching Hospitals NHS Trust** 2019 ICR 1, CA, Lord Justice Underhill reiterated the sentiment he had previously expressed in **Ahir** when concluding that an employment judge had correctly struck out a constructive dismissal claim based on a final straw incident on the basis that it had no reasonable prospect of success. His Lordship observed: 'Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed. There were in this case no relevant issues of primary fact. Had the matter proceeded to a full hearing the job of the tribunal would not have been to decide the rights and wrongs of the [final straw] incident of 22 April, and it would not have heard evidence directly about that question. The issue would have been whether the disciplinary processes were conducted seriously unfairly so as to constitute, or contribute to, a repudiatory breach of the Appellant's contract of employment. The evidence relevant to that question in substance consisted only of the documentary record. It is true that if there were any real grounds for asserting actual bad faith on the part of the decision-makers that could not have been resolved without oral evidence; but that was not the pleaded case, and the employment judge was entitled to conclude that there was no arguable basis for it.'

24. In relation to the time limit issue in discrimination cases, I note the following.

25. The three-month time limit for bringing a discrimination claim is not absolute: employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so — S.123(1)(b) EqA.

26. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA,

> **'***there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'*

27. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable — **Pathan v South London Islamic Centre** EAT 0312/13 (discussed below).

28. The Court of Appeal in the **Robertson** case also stressed that the EAT should be very reluctant to overturn the exercise of an employment tribunal's discretion in deciding what is 'just and equitable'. In order to succeed, it would have to be shown that the tribunal took into account facts that it ought not to have done or took an approach to the issue that was very obviously wrong, or that the decision was so unreasonable that no tribunal properly directing itself could have reached it.

29. This approach was confirmed by the Court of Appeal in **Chief Constable of Lincolnshire Police v Caston** 2010 IRLR 327, CA. There, a police officer presented a claim of disability discrimination outside the three-month time limit. The employment tribunal decided it was just and equitable to extend the time limit, taking into consideration the claimant's mental ill health, which had led her to mislead her solicitors as to the date of the 'trigger point' for the purpose of calculating the time limit. However, in the course of his judgment, the employment judge quoted with approval a comment from a textbook that tribunals and appellate courts had adopted 'a liberal approach' to extension of time. The employer challenged the decision to extend time on the basis that this comment showed that the tribunal had committed an error of law and taken the wrong approach. Both the EAT and the Court of Appeal refused to overturn the tribunal's decision. Looked at objectively, there was ample material on which the tribunal could exercise the discretion, and whether the chairman thought he was being 'liberal' or not in his interpretation was irrelevant.

30. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in **S.33 of the Limitation Act 1980** (as modified by the EAT in **British Coal Corporation v Keeble and ors** 1997 IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular,

    a. the length of, and reasons for, the delay;

    b. the extent to which the cogency of the evidence is likely to be affected by the delay;

    c. the extent to which the party sued has cooperated with any requests for information;

    d. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and

    e. the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

31. In **Department of Constitutional Affairs v Jones** 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. However, while a tribunal is not required to go through every factor in the list referred to in Keeble, a tribunal will err if a significant factor is left out of account — **London Borough of Southwark v Afolabi** 2003 ICR 800, CA.

32. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.

33. The test under TULRCA is whether it was reasonably practicable to bring the claim in time and if not, whether the extra time taken was reasonable (section 147 TULRCA). This is the same as the test in relation to unfair dismissal which is what most of the case law in this area refers to.

34. S.111(2)(b) ERA (and its equivalents in other applicable legislation – here section 147 TULRCA) should be given a 'liberal construction in favour of the employee' (**Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA).

35. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. '*That imposes a duty upon him to show precisely why it was that he did not present his complaint'* (**Porter v Bandridge Ltd** 1978 ICR 943, CA). Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable (**Sterling v United Learning Trust** EAT 0439/14).

36. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable' (see below).

37. In **Palmer and anor v Southend-on-Sea Borough Council** 1984 ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in **Asda Stores Ltd v Kauser** EAT 0165/07 explained it in the following words:

> *'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.*

38. As well as the above cases, I have had regard to other cases cited by Ms Hodgetts in her skeleton.

39. It seems sensible to deal with the question of jurisdiction first, that is to say whether to extend time before moving on to consider whether any allegation has little or no reasonable prospects of success.

Just and equitable extension

40. I note that there is no right to an extension of time, it is up to the claimant to make the case for the extension and a Tribunal cannot hear an out of time claim unless the claimant convinces it that it is just and equitable to extend time.

41. As I noted above, the claimant did not give evidence at this hearing, and I have therefore to rely on the submissions of Mr Bertin. His submissions focused on the questions of little or no reasonable prospects of success, and he said nothing at all about why it would be just and equitable to extend time. He also made no submissions on the question of the balance of injustice. I am left in the perhaps unenviable position of seeing whether there is anything in the bundle of documents I have been provided with which explains the claimant's position on his delay and why he says it would be just and equitable to extend time.

42. I note that the first claim was presented by the claimant with no assistance, and he was at that stage a litigant in person. By the time of the second claim, according to Mr Bertin, the claimant had received help from counsel through direct access. By the time of the claimant's third claim, which is not otherwise relevant to these issues, the claimant had engaged the services of Taylor Rose MW, which I understand is a firm of solicitors. At that stage it was known that time limits were an issue because they are dealt with in detail in the respondent's response to the second claim.

43. Despite that, and despite the fact that the Tribunal was invited in the third claim to treat the first two claims as if they are also pleaded in the third claim, there is no pleading in the third claim in relation to time limits and there is no reference to why, if the claims are out of time, it would be just and equitable to extend time.

44. Given those facts, as I understand the law, there is no basis upon which I can extend time *absent* any evidence or information from the claimant as to why I should, and for that reason the discrimination claims under case numbers 3202601/2021 and 2203624/2021 are struck out as the tribunal has no jurisdiction to hear them.

Reasonably practicable extension

45. As I have noted above, the onus of proving that presentation in time was not reasonably practicable rests on the claimant and that imposes a duty

upon him to show precisely why it was that he did not present his complaint in time.

46. Again, there were no submissions on this point. There is and was no suggestion of any impediment which prevented the claimant from presenting his claim in time and I consider that I am bound to conclude that he was able to bring his claim in

time and that therefore time should not be extended in relation to the claim under section 146 TULRCA.

47. For those reasons the claim under section 146 TULRCA is struck out.

No or little reasonable prospects of success

48. Given the possibility of a challenge to the above decisions and given that I have heard submissions from both representatives, I should set out my thoughts on the question of a strike out or a deposit order being made under the Tribunal's rules in relation to no or little reasonable prospects of success had I extended time.

Disability claims

49. Without wishing to rehearse the entire case file, the position which was set out by the respondent can be summarised as follows:

    a. the claimant was on special leave during the pandemic because he said that a heart condition put him at risk,

    b. following an investigation, it was established that during the special leave period the claimant was working as a driver for Uber,

    c. this led to a disciplinary process,

    d. the claimant failed to attend the disciplinary hearing notwithstanding that it was re-arranged a number of times,

    e. the claimant was dismissed and failed to appeal.

50. At this stage of the proceedings the respondent does not admit that the claimant meets the definition of disabled in section 6 Equality Act 2010.

51. The claimant's discrimination claims revolve around the disciplinary procedure, the investigation and the dismissal. There are other issues raised which includes not providing the claimant with the laptop for a period of time, asking him inappropriate questions, delay, failing to keep in touch.

52. The claim for failure to make reasonable adjustments is essentially around both home working and again the disciplinary investigation.

53. The allegations in relation to victimisation are about being removed from his front of house role, not being offered mediation, the respondent failing to keep in touch as well as the claimant's alleged breach of the special leave policy which led to the disciplinary investigation and ultimately the dismissal.

54. Despite the first and second claims being issued in 2021 and despite the claimant being ordered to provide detailed further particulars, there are a number of aspects of these claims which remain very poorly pleaded, not to say completely obscure.

55. It is unclear which purported disabilities are relied upon in relation to particular strands of discrimination. In the claim for failure to make reasonable adjustments there is no reference to any substantial disadvantage suffered by the claimant. It is unclear which disabilities the claimant says resulted in which detriments.

56. The claimant also has a credibility difficulty. During his submissions Mr Bertin confirmed that the claimant now only pursues as disabilities dyscalculia and anxiety. Furthermore, he said expressly that the claimant has never stated that he was suffering from a heart condition and therefore required special leave.

That was a surprising submission given that in the first claim, in his grounds of complaint, at paragraph 17 the claimant says expressly that

> "*he returned to work on 17 March 2020 and informed the DWP of his heart condition…".*

57. Given that the claimant drafted this, or it was drafted on his instructions, his rowing back on that point would give rise to a credibility difficulty. This is significant because the claimant takes issue with some of the matters raised by the respondent in their responses to his various claims and although I accept that by definition that means that at the heart of the case there is a certain amount of factual dispute, I consider that the credibility issue makes it more likely that the claimant will have difficulty succeeding in that dispute.

58. The other difficulty which the claimant faces, it seems to me, is that his claim reads as though what happened to him was because of both race and disability and if that is not what he intended to plead then it remains unclear to me, having read the claims in detail, which claims relate to disability and which claims relate to race.

59. In relation to the question of disability, it is noted that although there are a number of references in the claimant's medical records to anxiety it is noteworthy that there is no consistent pattern other than when there is a reference to anxiety it is always as a reaction to issues at work. There was one reference in 2015 to anxiety, there are two references in 2016 and three in 2017. There is then a gap of two years before three references to anxiety in 2020 and two in 2021. The claimant will in my view have some difficulty explaining how these periods of short-term anxiety are no more than an adverse reaction to unresolved work issues and therefore are unlikely to amount to a disability.

60. There is no reference in the medical records provided by the claimant to dyscalculia. Mr Bertin made the point that given this is not a medical condition, there would be no reason for there to be a reference to it in the GP record. However, given that the claimant says he has the condition, presumably there is somewhere a diagnosis of it in a report of some sort, for example from an educational psychologist or other therapist, which could

have been disclosed by the claimant had he had such a diagnosis, but there has been no such disclosure. I cannot say that no such document exists but at this stage I have to look at the claimant's claim at its highest which is currently that in relation to dyscalculia he merely asserts that he has that impairment *absent* any evidence of it.

61. Having taken the pleadings and these submissions into account my view is that there is little reasonable prospect of the claimant showing that he has the disabilities of dyscalculia and/or anxiety.

62. Furthermore, even if the claimant does show that he was disabled at the relevant times, I consider that he has no reasonable prospect of succeeding in the direct disability discrimination claims in the first and second claims. I would therefore have struck those out.

63. In relation to the claims under section 15 Equality Act 2010, I would strike those out given that the claimant has entirely failed to plead something arising which he says was the reason for the unfavourable treatment and therefore these claims cannot succeed and therefore have no reasonable prospects of success.

64. Finally, in relation to the claim for failure to make reasonable adjustments the claimant has entirely failed to plead any substantial disadvantage and again for that reason those claims have no reasonable prospect of success.

Race claims

65. In relation to the claims for direct race discrimination, these deal with the commencement of the investigation, failing to provide the claimant with a laptop for a period, inappropriate questions, delay and failure to keep in touch. These are the same allegations as set out above in relation to direct disability discrimination but as with those claims, the claimant makes no suggestion as to the connection between his race and the subject matters of his complaints.

66. Given that the respondent received an allegation about breach of the special leave procedure it is difficult to see how the claimant could sustain an argument that the reason for the treatment of commencing the investigation was race and I consider that that allegation has no reasonable prospects of success.

67. In relation to the remaining direct race discrimination claims, it is conceivable that the claimant may be able to evidence a connection between his treatment and his race and although I think it unlikely, I cannot say that such claims have no reasonable prospect of success. I would therefore, if I was not going to strike those claims out in any event, have ordered the claimant to pay deposit of £100.00 per allegation which would be a total of £400.00.

68. In relation to victimisation there are five allegations of victimisation in the first claim and seven in the second claim although five of those are identical to the allegations in the first claim.

69. I share the same concerns over the claimant's ability to make the case in relation to victimisation as I have set out about the claims above, but this falls short of concluding that such claims have no reasonable prospects of success. For the same reasons as set out above, including credibility, I consider that they have little reasonable prospects of success and would have imposed a deposit of £100.00 per allegation in relation to the victimisation allegations which would be a total of £700.00.

Employment Judge Brewer
Dated: 1 November 2022