EMPLOYMENT TRIBUNALS

Claimant: **Dr Anil Taneja**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre**

On: **11 July 2023**

Before: **Employment Judge Crosfill**

Appearances

For the Claimant: In person
For the Respondent: Mr Orlando Holloway of Counsel instructed by Bevan Brittan

JUDGMENT

1. The Claimant's allegations that he did a protected act for the purposes of Section 27 of the Equality Act 2010 on the following occasions:

    1.1. By bringing a 'Job Planning' grievance in or around December 2017; and

    1.2. Orally during grievance meetings that were held on 15 November 2018 and 20 February 2019;

    have no reasonable prospects of success and are struck out.

2. For the avoidance of doubt no other aspects of the Claimant's amended claims brought under Section 27 of the Equality Act 2010 are affected by this order.

3. The Claimant's claims of direct age discrimination brought under Section 13 of the Equality Act and relating to:

    3.1. The failure to appoint the Claimant to the position of Cardiology Clinical Lead in August 2019; and

    3.2. The failure to appoint the Claimant to the role of Cardiology Clinical Lead in November/December 2021;

have no reasonable prospects of success and are struck out.

REASONS

1. The case was listed for a preliminary hearing in public by Employment Judge Feeny who decided that a preliminary hearing was necessary to determine the following issues:

    1.1 The Claimant's application to amend his claim to rely on the new matters set out in his "Particularised List of the Claimant's Claims" submitted on 21 March 2023;

    1.2 Whether the victimisation complaint should be struck out on the ground that it has no reasonable prospect of success (pursuant to rule 37(1)(a));

    1.3 Whether the Tribunal should order the claimant pay a deposit as a condition of continued advance of victimisation complaint (pursuant to rule 39);

    1.4 Whether the tribunal has jurisdiction to consider the age discrimination complaint pursuant to section 123 of the Equality Act 2010.

2. Employment Judge Feeny made directions in order that the parties could prepare for this hearing. The hearing was listed in public as the issues to be determined included matters which it is necessary were dealt with in public.

3. The Claimant has issued a second claim under the Case Number 3200885/2023. No directions had been made in that claim and I was required to consider whether it should be consolidated with the Claimant's first claim.

4. This judgment and reasons deal only with the issues identified at paragraphs 1.1 and 1.4 above. Further decisions in respect of the other issues are set out in a case management order.

5. The Respondent invites me to strike out the Claimant's claims for victimisation. The basis for the application is that it is said that the two acts said by the Claimant to be 'protected acts' do not qualify for protection under sub-section 27(1) of the Equality Act 2010. In short it is said that there is no allegation made by the Claimant whether express or implied that the Respondent has breached the Equality Act.

6. The Respondent further invites me to strike out the claims of age discrimination on the basis that they have been presented outside the primary statutory time limit and that the time limit should not be extended.

7. The manner in which EJ Feeny expressed the issues to be determined in relation to the age discrimination complaints suggests that I was being invited to determine the issue of whether the claims were in time on a 'once and for all basis'. The direction that the Claimant file a witness statement is consistent with that interpretation of the order. I discussed with the parties the basis of the

Respondent's application. Mr Holloway made it clear that he has applied for and was seeking a hearing as to whether the claims should be struck out pursuant to rule 37 schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I explained the differing approaches to the Claimant as explained in ***Caterham School Ltd v Rose*** (see below). I explained that if I acceded to Mr Holloway's approach he would have the benefit of a slightly more lenient approach in that the Respondent would have to show that there was no reasonable prospect of him persuading the Tribunal that his claims were presented within the statutory time limits. Both parties agreed that I should deal with the application under rule 37 and that I should not determine the issue on a once and for all basis.

Striking out claims – generally

8. The power to strike out a claim under Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances ***Tayside Public* Transport *Co Ltd (t/a Travel Dundee) v Reilly*** **[2012] IRLR 755**, at para 30. In discrimination claims where findings of fact can depend upon whether or not it is appropriate to draw inferences of discrimination from primary facts particular care needs to be taken before striking out a claim ***Anyanwu v South Bank Students' Union*** **[2001] IRLR 305, HL.** The same cautious approach should be applied in a claim brought under S47B ERA 1996 ***North Glamorgan NHS Trust v Ezsias*** **[2007] IRLR 603**.

9. It will generally not be appropriate to strike out a claim where the central facts necessary to prove the case are in dispute. It is not the function of a tribunal such an application to conduct a mini trial. The proper approach is to take the Claimant's case at its highest as it appears from their ET1 unless there are exceptional circumstances ***North Glamorgan NHS Trust v Ezsias***. Such exceptional circumstances could include the fact that the Claimant's case is contradicted by undisputed contemporaneous documents or some other means of demonstrating that *'it is instantly demonstrable that the central facts in the claim are untrue'* ***Tayside***.

10. In ***Balls v Downham Market High School*** **[2011] IRLR 217** Lady Smith reminded tribunals that the test is not whether the claim is likely to fail but whether there are no reasonable prospects of success. That however is not the same thing as there being no prospects of success at all - see ***North Glamorgan NHS Trust v Ezsias*** at para 25 citing ***Ballamoody v Central Nursing Council*** **[2002] IRLR 288**. Another way of putting the test is that the prospects are real as opposed to fanciful see ***North Glamorgan NHS Trust v Ezsias*** para 26.

11. ***QDOS Consulting Ltd and others v Swanson*** **UKEAT/0495/11/RN** provides authority the proposition that orders under rule 37 should be made only in the most obvious and plain cases and not in cases where there is a need for prolonged and extensive study of documents and witness statements. Those propositions may also be found in the authorities above. HHJ Serota QC prior to stating those propositions drew attention to the similar position under the Civil Procedure Rules. He said (at para 45):

[45] It may be instructive to compare the position of striking out under the Employment Tribunal Rules with striking out as provided for in the Civil Procedure Rules. I note that there is a close affinity between striking out under CPR 34.2(a) [sic –there is a typo in the report], which enables the court to strike out the whole or part of a statement of case that discloses no reasonable grounds for bringing or defending a claim overlaps with Pt 24, on summary Judgment. Rule 24(2) entitles a court to give summary Judgment against a Claimant or Defendant on a claim or issue where there is no real prospect of succeeding on the claim or issue, or successfully defending the issue. The notes to CPR 24 in the White Book make this clear:

> *"In order to defeat the application for summary Judgment, it is sufficient for the Respondent to show some prospect; ie some chance of success. That prospect must be real; ie the court will disregard prospects that are false, fanciful or imaginary. The inclusion of the word 'real' means the Respondent has to have a case which is better than merely arguable. The Respondent is not required to show their case will probably succeed at trial; a case may be held to have a real prospect of success even if it is improbable. However, in such a case the court is likely to make a conditional order."*

12. Care needs to be taken when assessing whether a case has no reasonable prospects of success to avoid focussing only on individual factual disputes. A case may have some reasonable prospects when regard is had to the overall picture and all allegations taken together see ***Qureshi v Victoria University of Manchester*** **[2001] ICR 863**

13. The statements of principle derived from the cases referred to above do not in any way fetter the discretion of a tribunal to strike out a case where it is appropriate to do so ***Jaffrey v Department of the Environment, Transport and the Regions*** **[2002] IRLR 688 at para 41**.

14. In ***Chandhok & Anor v Tirkey*** **UKEAT/0190/14/KN** Mr Justice Langstaff made the following comments (with emphasis added):

"20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):

"…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general

position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."

15. ***ED & F Man Liquid Products Ltd v Patel and another*** **[2003] EWCA Civ 472** concerned an application to set aside a default judgment. The Defendant contended that the test was the same as that for summary judgment made under Part 24 of the Civil Procedure Rules. The test to be applied under that rule is whether a claim or defence has "no real prospect of succeeding". There is no material distinction between this test and the test under Rule 37 of the ET procedure rules. The Court of Appeal explain what is meant by the requirement to take a case at its highest. Potter LJ giving the judgment of the Court said, at para 10 (with emphasis added):

"…..where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable.."

The claims of victimisation Section 27 of the Equality Act 2010.

16. In order that Section 27 is engaged the Claimant needs to show that he did a protected act falling within Section 27(2). That subsection reads as follows:

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) *making an allegation (whether or not express) that A or another person has contravened this Act*.

17. The Claimant has put his case on the basis that he made complaints which amounted to allegations that there had been contraventions of the Equality Act 2010. There is no suggestion that the Claimant had done any act falling within sub-sections 27(2)(a) or (b). Whilst sub-section 27(2)(c) can be construed very broadly making a complaint about treatment at work would not qualify under that section unless the complaint expressly or implicitly alleged a breach of the Equality Act 2010.

18. The first of the alleged protected acts is said to be the content of a grievance brought by the Claimant about work planning. That grievance was included in a bundle of documents prepared by the Claimant it is 8 pages long.

19. In the Claimant's grievance he sets out his complaints. These concern his job plan and his contention that he is doing a large number of 'COW' (Consultant of the Week) tasks. He also raised the fact that he does more 'PA's (Planned Activities) than he was being paid for.

20. The Claimant makes no reference either to his race or to where he trained. He does not refer to any other protected characteristic either of himself or of his colleagues. There is absolutely nothing within the document that could conceivably be an express or implicit allegation that there had been an infringement of the Equality Act 2010.

21. The Claimant accepts in his witness statement that the grievance itself does not refer to any protected characteristic nor does it mention discrimination (in the legal sense). It is the Claimant's case that his grievance needs to be seen in the context of an e-mail he sent on 25 January 2017 where he raises the issue of Job planning. In that e-mail he refers to the number of COW tasks he does, and the number done by 'all others' and says, *'then that may be discriminatory'*.

22. I have granted the Claimant permission to amend his claim to rely on his e-mail of 25 January 2017 as a protected act in its own right. That leaves me to deal with the Claimant's argument that his job planning grievance sent 10 months later needs to be read together with that e-mail.

23. There is no reference in the grievance to the Claimant's earlier e-mail. It is not incorporated either expressly or implicitly. The grievance refers to a wider number of concerns than the brief e-mail of 25 January 2017.

24. In ***Waters v Commissioner of Police for the Metropolis*** **[1997] ICR 1073** the Court of Appeal placed importance on the need for the recipient of any alleged protected act to be able to recognise that what was being alleged was a breach of the Equality Act.

25. I do not believe that it is remotely arguable that as the Claimant has previously suggested that his allocation of COW tasks may be discriminatory his grievance submitted 10 months later which did not repeat the allegation in any way should be taken as alleging a breach of the Equality Act 2010.

26. I take into account the warnings I have set out above about striking out claims under the Equality Act 2010. I have allowed the Claimant to rely on his e-mail of 25 January 2017 as a protected act in its own right. I do not consider that he has any reasonable prospects of showing that the subsequent correspondence in the form of his grievance amounts to a protected act. I therefore strike out that allegation.

27. The next two protected acts rely upon what the Claimant is alleged to have said in meetings on 15 November 2018 and 20 February 2019.

28. The Claimant had provided me with minutes of the meeting that took place on 15 November 2018. I have read then carefully. The meeting concerned the Claimant's complaints relating to the process and outcome of his appeal against the job planning process. There is no reference at all to race or any other protected characteristic. The Claimant does say that his workload is higher than all colleagues but does not tender any reason why that might be the case.

29. I cannot assume that the minutes of the meeting are complete. However, there are two matters I need to consider when assessing whether the Claimant has any reasonable prospects of showing that he made some express or implied allegation that there had been a breach of the Equality Act 2010. The first is the fact that the Claimant was invited to put in a witness statement in support of his position. He does not suggest in that witness statement that he made any suggestion that a difference in treatment between himself and his colleagues was because of any protected characteristic. In his submissions the Claimant accepted that this was the case and explained this by suggesting that he did not wish to stray into areas of controversy.

30. The second matter which I have regard to is a record in the Case Management Order of EJ Feeney where it is recorded that Mr Dunn of Counsel accepted on the Claimant's behalf that the Claimant could not recall raising any allegation of discrimination during either meeting.

31. I was provided with and have carefully read the meeting notes of the meeting of 20 February 2019. The meeting concerns an outcome following earlier processes. There is no reference whatsoever to any protected characteristic or to discrimination in the technical sense.

32. The Claimant relies upon the same argument as he did previously. He says that as the meetings concerned the issue of Job Planning referred to in his e-mail of 25 January 2017 where he had mentioned discrimination then what he said at all subsequent meetings should be taken as repeating that allegation.

33. I do not accept the Claimant's arguments for the same reason as I have given above. There was nothing in what the Claimant did say at either meeting that referred to the e-mail, or incorporated the complaint made in the e-mail. To amount to a protected act it is essential that the recipient could recognise that the Claimant was alleging a breach of the Equality Act. I find that the Claimant has no reasonable prospects of establishing that he said or did anything during the two meetings that could amount to a protected act.

34. I shall therefore strike out those two additional protected acts.

Age discrimination

Striking out claims – time limits

35. In ***Caterham School Ltd v Rose (Sex Discrimination – Continuing act)*** **[2019] UKEAT 0149/19** HHJ Aurbach explained the difference in approach of a tribunal dealing with an application to strike out a claim by reference to time limits and a tribunal determining whether a claim was presented in time. He said

*58. First, it i*s always important for there to be clarity, when a Preliminary Hearing is directed, at such a Hearing, and in the Tribunal's decision arising from it, as to whether *the Tribunal is considering (or directing to be considered), in respect of a particular complaint, allegation or argument, whether it should be struck out (and/or made the subject of a deposit order), or a substantive determination of the point.*

59. The differences, in particular, between consideration of a substantive issue, and consideration of a strike out application, at a Preliminary Hearing, are generally well understood, but still worth restating. A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact. 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. But if a strike out application fails, the point is not decided in the Claimant's favour. The Respondent, as well as the Claimant, lives to fight another day, at the Full Hearing, on the time point and/or whatever point it may be.

60. By contrast, 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 of the case.

61. All of that applies equally where the issue is whether there has been conduct extending over a period for the purposes of the section 123 time limit. If the 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. But if it is not struck out on that basis, that time point remains live. If, however, the Tribunal decides at a Preliminary Hearing, that the claim does relate to something that is part of continuing conduct, and so is in time, then the issue has been decided and cannot be revisited.

36. In ***Aziz v First Division Association (FDA)*** **[2010] EWCA Civ 304** The Court of Appeal set out the proper approach when a tribunal is asked to consider striking out a claim on the basis that there is no jurisdiction and where that is resisted by the claimant by suggesting that the event complained of forms part of conduct extending over a period. The Court said:

'34. One issue of considerable practical importance is the extent to which it is appropriate to resolve issues of time bar before a main hearing. Obviously there will be a saving of costs if matters outside the jurisdiction of the ET are disposed of at an early stage. On the other hand a claimant must not be barred from presenting his or her claim on any issue where there is an arguable case.

35. The Court of Appeal considered the correct approach to this matter in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548. In that case the claimant complained of 17 incidents of racial discrimination over a period of many months. The question of time bar was dealt with at a pre-hearing review. The claimant gave oral evidence on that occasion. Having heard the claimant's evidence, the ET allowed five of the claimant's complaints to proceed but dismissed the other 12 complaints as being out of time. The EAT and the Court of Appeal both upheld that decision. Hooper LJ gave the leading judgment, with which Hughes LJ and Thorpe LJ agreed. Hooper LJ stated that the test to be applied at the pre-hearing review was to consider whether the claimant had established a prima facie case. Hooper LJ accepted counsel's submission that the ET must ask itself whether the complaints were capable of being part of an act extending over a period.

36. Another way of formulating the test to be applied at the pre-hearing review is this: the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs: see Ma v Merck Sharpe and Dohme Ltd [2008] EWCA Civ 1426 at paragraph 17.'

Time Limits – Equality Act

37. Section 123 of *the Equality Act 2010 imposes a time limit for the presentation of claims to an employment* tribunal. The material parts say:

'123 Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

38. The leading case on the meaning of the expression 'act extending over a period' used in sub section 123(3) of the Equality Act 2010 is ***Commissioner of Police of the Metropolis v*** *Hendricks* **2003 ICR 530, CA** as confirmed in ***Lyfar v Brighton and Sussex University Hospitals Trust*** **2006 EWCA Civ 1548, CA.** The test is not whether the employer operated a policy practice or regime but to focus on the substance of the complaint and ask whether there was an ongoing situation or continuing state of affairs amounting to an 'act extending over a period as distinct from a succession of isolated or specific acts. Even where there is an act extending over a period it is necessary to show that that continued to a point where a complaint relying upon a single act would have been in time.

39. If any claim has been presented after the ordinary time limit imposed by sub-section 123(1)(a) of the Equality Act 2010 (a period within 3 months extended by the provisions governing extensions of time for early conciliation) then the tribunal cannot entertain the complaint unless it is just and equitable to do so. The following propositions have emerged from the case law:

39.1 The *discretion* to be exercised¶ under subsection 123(2)(b) is broad – see ***Chief Constable of Lincolnshire Police v. Caston*** **[2010] IRLR 327** where Sedley LJ commented:

'There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing employment tribunal proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer'

39.2 ***Robertson v Bexley Community Centre t/a Leisure Link*** **[2003] IRLR 434,** CA reminds a tribunal that whilst the discretion to extend time is wide the burden is on the Claimant to show why time should be extended and as such an extension is the exception and not the rule.

39.3 In deciding whether or not to extend time a tribunal might have regard to the statutory factors set out in the Section 33 of the Limitation Act 1980 see ***British Coal Corporation v Keeble and ors*** **[1997] IRLR 336, EAT** although caution needs to be applied to avoid those factors being

approached in a mechanistic manner or treating them as exhaustive ***Adedeji v University Hospitals Birmingham NHS Foundation*** **[2021] EWCA Civ 23** per Underhill LJ at paragraph 37.

39.4 Whether there is a good reason for the delay or indeed any reason is not determinative but is a material factor ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** **2018 ICR 1194, CA**.

39.5 It will be an error of law for the Tribunal not to consider the relative prejudice to each party ***Pathan v South London Islamic Centre*** **EAT 0312/13**

39.6 In ***Miller v Ministry of Justice*** **[2016] UKEAT 0004/15** Mrs Justice Laing identified that:

'There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.'

39.7 If the question of whether to exercise the statutory discretion is being considered at a preliminary hearing rather than a final hearing then the apparent merits of the claim may be taken into account in assessing whether to exercise the discretion. In ***Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132****, emphasising the caution that would be needed in order to take this into account it was said;*

'The tribunal is therefore not necessarily always obliged, when considering just and equitable extension of time, to abjure any consideration of the merits at all, and effectively to place the onus on the respondent, if time is extended, thereafter to apply for strike-out or deposit orders if it so wishes. It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.'

Discussion and Conclusions

40. The Claimant contacted ACAS for the purposes of early conciliation on 15 May 2022, received an early conciliation certificate on 25 June 2022, and presented his claim to the employment Tribunal on 18 July 2022. It follows from that the Tribunal would have no jurisdiction to hear any complaint about an event prior to 16 February 2022 unless the Claimant was able to show that the act or omission formed part of an act extending over a period and is taken as ending after that date OR that it was just and equitable for there to be an extension of time.

41. In the present claim the Claimant has set out two acts/omissions which he says amount to direct discrimination because of age. These are:

    41.1 The failure to appoint the Claimant to the position of Cardiology Clinical Lead in August 2019; and

    41.2 The failure to appoint the Claimant to the role of Cardiology Clinical Lead in November/December 2021

42. In support of his claims of age discrimination the Claimant suggests that he was told that the post of Clinical Lead was reserved for a younger consultant looking to build up managerial experience. In his response to a request for further information the Claimant says that it was Dr Ceri Davis that told him this. It appears to have predated the 2019 appointment. Assuming that the Claimant is correct that would not necessarily be unlawful – age discrimination being the only type of direct discrimination that might be justified. Here I must take the Claimant's case at the highest and assume that his account of what he was told is correct. I must also disregard the possibility that the Respondent will establish any justification defence.

43. The Claimant needs to show that he has at least some prospects of success either that these acts for part of conduct extending over a period (together with some act that is within time) or that it would be just and equitable to extend time. I shall deal with each of those points in turn.

44. The Claimant has brought some discrimination claims within the present proceedings which are, if established, in time. Those are claims of direct and indirect discrimination and harassment. All those claims rely on race as the relevant protected characteristic. One claim of victimisation is also brought within time.

45. The first matter I should address is whether claims of differing types of discrimination can amount to conduct extending over a period. The question of whether a continuing act can comprise acts which fall under different "headings" of discrimination was considered in ***Robinson v Royal Surrey County Hospital NHS Foundation Trust*** **UKEAT/0311/14/MC** *where at paragraph 65 HHJ Eady (as she was) said (with my emphasis added):*

    'When considering whether a Claimant has made out a prima facie case that that of which she complains amounts to conduct extending over a period, however, I can allow that it might be appropriate to consider that conduct as comprised of acts that, taken individually, fall under different headings. Such an assessment will inevitably be fact- and case-specific, but if the Claimant was, for example, complaining that putting her on particular shifts was a continuing act of direct discrimination and then, as the other side of that particular coin, that failing to put her on different shifts was a failure to make reasonable adjustments, I cannot see why she would not be entitled to say that those matters should be considered together as constituting conduct extending over a period.'

46. I consider that where, as in ***Robinson***, the protected characteristic is common to the various complaints that would make it easier to establish that two different

claims formed part of conduct extending over a period, but it would not be determinative. In contrast, complaints relying on different protected characteristics might be harder to link together. Harder perhaps, but I do not say impossible. Conduct by a person with antipathy to a man with a disability informed by a view of 'manliness' might be unlawful because of one or the other protected characteristic or both. However the claim might be put it would be possible to show a reasonably arguable case that there is a sufficient link between any acts complained of.

47. It would not be possible to link acts complained of under the Equality Act 2010 with other acts under other legislation even if they were unlawful. The conduct extending over a period must comprise conduct that is unlawful discrimination not merely unlawful or indeed merely immoral or unfair.

48. What I take from ***Robinson*** is the importance of the quote that I have emphasised above '*Such an assessment will inevitably be fact- and case-specific'*. The fact that there are differing causes of action may be a factor, but it will not be determinative. The issue remains the question of whether the Claimant can show '*a reasonably* arguable *basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs'.*

49. I find that the Claimant has failed to show a '*reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs'* between the acts of discrimination that rely on age and those that rely on race. This is particularly so where the Claimant does not suggest that race in a direct sense was a cause of poor treatment but says that his colleagues treat him poorly because of where he trained. I do not see any argument based upon concepts of intersectionality that might benefit the Claimant.

50. In his witness statement the Claimant refers to the fact that he has brought a further claim. The Claimant made a further application for the role of Cardiology Clinical Lead in February 2023. He was interviewed but did not get the job. He was informed of that on 6 February 2023. The person who wrote to the Claimant and who interviewed him was Andrew Archibold.

51. The Claimant relied on this additional failure to appoint him as being evidence of conduct extending over a period that post dated his claim. I need to deal with this alternative means of bringing the earlier claims into time.

52. It emerges from the documents I was provided with that the Claimant says that the August 2019 appointment was made without interviewing the successful candidate. The 2021 appointment arose when the first appointee took maternity leave. The 2023 appointment was advertised, and the Claimant was interviewed. The person appointed in 2023 was the same person who had covered the original appointee's maternity leave.

53. The Claimant has not suggested that the decision maker in 2023 was the same person who took the earlier decisions. He makes a bold assertion that the Respondent does not appoint people of his age to the role of Clinical Lead. In his later claim he says that the decision not to appoint him was also an act of race discrimination.

54. I have reached the conclusion that the Claimant has not presented any *reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs* between the 2021 recruitment exercise and that which took place in 2023. The Claimant has not established an arguable case that the decision makers were the same. There is a gap of 15 months between the last two acts. The nature of the final recruitment exercise appears to have been very different to the earlier exercises (on the Claimant's account).

55. The Claimant simply asserts that there is a policy of not appointing persons over 50 to these roles. He has not pleaded a factual basis for that. The fact that he was not appointed on three occasions is insufficient to establish even an arguable basis for suggesting that there was such a policy. I am of the view that the failure to appoint the Claimant to a role on three specific occasions is an allegation of three specific acts of discrimination and not an allegation of an act extending over a period – see ***Owusu v London Fire and Civil Defence Authority*** **[1995] IRLR 574, EAT**

56. It follows that I am satisfied that, even if I were to take account of the most recent failure to appoint the Claimant I am not satisfied that there is any arguable basis for saying that that demonstrates conduct extending over a period sufficient to bring the earlier claims within the statutory time limits.

57. It follows that I need to consider whether the Claimant has any reasonable prospects of persuading the Tribunal that it would be just and equitable to extend time. The Claimant deals with this in his witness statement. He says that he relied on his BMA representative who told him that he could not bring a claim until he had exhausted internal grievance procedures. For the present purposes I need to assume that the Claimant was told that. The pursuit of an internal process will not automatically mean that an extension of time should be given. It is a factor that I need to take into account see ***Wells Cathedral School Ltd v Souter*** **EA-2020-000801**

58. In assessing whether it is appropriate to grant an extension of time the Claimant is to be judged not on what he knew but on what he ought to have known. The Claimant has instructed Counsel to represent him in the past and there is no reason that he could not have sought advice from a lawyer at an early stage. Even if I am wrong about that there is sufficient information on the internet to tell the Claimant that the existence of internal procedures does not suspend the ordinary time limits. The Claimant is intelligent and not without resources. Whilst it is not determinative I conclude that the Claimant ought to have known that pursuing an internal process would not suspend the time limit for bringing a claim..

59. The Claimant goes on in his witness statement to refer to the prejudice to him of not extending the time limit. He says that he has confidence in his case and will have no right to a remedy unless time was extended. I accept that this is a matter that a tribunal is bound to have regard. The Claimant cannot assume that the fact that he has brought a further claim will be another route to a remedy. In any event it seems that the Claimant requires an extension of time for that claim as well.

60. I am entitled to have regard to the merits of the proposed claims. They are neither obviously strong nor obviously weak. I regard them as a neutral factor.

61. I need to have regard to the prejudice to the Respondent. The delay is in the order of 3 months from the second act complained of. I would not place much weight on the suggestion that there is much forensic prejudice in recalling the reasons for that later appointment. What is of more concern is that granting an extension of time even for just that later act means that the decision process surrounding the earlier appointment will be relevant evidence. The Tribunal will be invited by the Claimant to infer that what he was told in 2019 holds good for the appointment in 2021. That is analogous to the prejudice identified in ***Secretary of State for Justice v Johnson*** **2022 EAT 1**.

62. I have identified that the test I am applying is whether the Claimant has no reasonable prospects of persuading a tribunal to extend time. The position before any future tribunal would be the same as it is before me. If I were to decide that on the material before me it is not just and equitable to extend time then there is no reason to believe that a future tribunal would decide differently.

63. I deal with the two allegations separately. In respect of the 2019 appointment unless that formed part of conduct extending over a period with the 2021 appointment the Claimant would be seeking an extension of time of approximately 3 years. For the same reasons as I have expressed above I am not satisfied that the Claimant has established an arguable basis for linking the 2019 and 2021 appointments as conduct extending over a period. Considering that claim in isolation I am satisfied that the Claimant has no reasonable prospects of persuading a tribunal to extend time. There is no good reason for the delay. The delay is lengthy and where the Respondent is required to answer to discrimination claims arising out of decisions in 2019 there is a real risk of forensic prejudice. The difficulty in discrimination claims is that the putative discriminator need not only recall what they have done but why they have acted as they did.

64. Taking the 2019 claim in isolation, whilst I am alive to the prejudice to the Claimant, I am satisfied that the Claimant has no reasonable prospects of persuading a tribunal that it is just and equitable to extend time.

65. Taking a different approach and assuming that the Claimant might show a link between the 2019 and 2021 appointment processes I need to consider whether he might be given an extension of time to bring the last of those two processes into time. I have regard to the fact that the length of the delay is shorter. The risk of forensic prejudice in relation to the events of 2021 is less. However, as I have indicated, opening the door to the 2021 allegation will require the Respondent to adduce evidence of the decisions in 2019 even if only for evidential purposes. There is a real risk of prejudice which is a significant factor to be taken into account along with the other matters mentioned above.

66. I have concluded that the Claimant has no reasonable prospects of success in persuading the tribunal to grant an extension of time either only for the 2021 appointment of treating that event as part of conduct over a period with the earlier 2019 appointment.

67. It follows that the complaints of direct discrimination relying upon age as a protected characteristic should be struck out.

Employment Judge Crosfill
Dated: 28 November 2023