EMPLOYMENT TRIBUNALS

Claimant: Mr Dragan Malic

Respondent: (1) JP Morgan Chase Bank N.A London Branch
(2) Keith Enfield
(3) Denis Mikhailov
(4) Pavlos Lazaridis

Heard at: East London Hearing Centre (by CVP)

On: 11 January 2022

Before: Employment Judge Jones

Representation

Claimant: in person
Respondent: Ms S Belgrove (Counsel) with Ms Galloway (solicitor)

JUDGMENT

The claimant's complaints of direct sexual orientation discrimination and harassment against the second, third and fourth respondent are dismissed because they were issued outside of the statutory time limits and it is not just and equitable that time should be extended to allow them to be considered.

The complaints of direct sexual orientation discrimination and harassment against the first respondent which relate to the period 2016 – 2018 were issued outside of the statutory time limits and it is not just and equitable to extend time to allow them to be considered

The complaints against the second, third and fourth respondents are struck out and they are removed as respondents from these proceedings.

The claimant did not bring a complaint of victimisation in his ET1 claim form. The claimant's complaint of victimisation is misconceived. The claimant's application to amend his claim to add a complaint of victimisation is refused.

The claimant's complaint of direct discrimination against the first respondent related to the outcome of his grievance appeal will proceed.

It is the Tribunal's judgment that it is appropriate to make a deposit order in respect of that complaint and a separate judgment is enclosed.

The Tribunal made case management orders to prepare for the final hearing on 13, 14, 15 and 16 September 2022 and those are set out below.

This judgment and reasons were given to the parties in open court on 11 January 2022. These reasons are provided because the claimant requested them.

REASONS

This was a hearing to determine the respondent's applications. The Tribunal heard from the claimant in evidence in relation to the application to strike out his claim because of unreasonable conduct. The Tribunal had submissions from the claimant and from the first respondent on behalf of all four respondents.

The Tribunal considered 2 applications from the respondents.

First application – Time point

The first application was in three parts. The first part relates to the second respondent, Mr Enfield. The respondent applied for the complaint against Mr Enfield to be struck out on the basis that it is out of time. Also, as the claimant failed to set out any basis for his belief that Mr Enfield discriminated against him on the basis of perceived sexual orientation, the respondent submitted that the complaint had no reasonable prospects of success.

It is agreed that Mr Enfield had not worked with the claimant or managed him. The only reference to him in the claimant's ET1 grounds of claim was that he had been aware of the situation and '*had not acted with adequate actions on its prevention'.* That reference related to incidents that the claimant alleges took place between 2016 – 2018, which would be four years before the claim was issued on 21 December 2020.

Mr Enfield provided a sworn witness statement for today's hearing in which he denies knowing anything about the matters that the claimant has included in his claim. This will be his evidence at a final hearing. The claimant was unable to describe any evidence he would rely on to prove that Mr Enfield did know of any conduct by the other named individual respondents. He submitted that as Mr Enfield spoke to the person who conducted the grievance, that was further involvement. He also referred to a decision to make him redundant, which he was not sure had been made by Mr Enfield and which is not a complaint that forms part of this case. Counsel submitted that the claimant's case against Mr Enfield was devoid of merit.

As this is a complaint of omission, time starts to run from the earliest time that Mr Enfield could have acted to stop or prevent the discrimination; which in this allegation would have been 2016. The claimant has not given any reason today why he did not issue these proceedings until four years later.

Secondly, the respondents sought an order striking out the complaints against all three of the named individual respondents and removing them from these proceedings because the allegations against them relate to the period 2016 – 2018 and were not issued until 21 December 2020, which means that they are out of time.

At the preliminary hearing before REJ Taylor on 28 June 2021, the claimant had an opportunity to provide details of the allegations he relies on to prove discrimination. Those are set out in detail in the minutes of that hearing. The allegations against the individual named respondents set out in that document, which correspond with the claimant's grounds of complaint, are indeed all dated between 2016 – 2018.

Thirdly, the respondents applied for the allegations relating to the period 2016 – 2018 against the first respondent to be struck out because they are out of time. It was the first respondent's position that these allegations did not form part of a continuing act against any of the respondents.

The respondents submitted that it was not just and equitable for the Tribunal to apply its discretion to extend time to allow it to consider any of the allegations against any of the respondents. The claimant referred to being off sick and that he was 'in a state of disability' and that the respondent's occupational health service kept him on an incorrect diagnosis.

Second application – scandalous and unreasonable conduct

The second application was that the entire claim should be struck out on the basis of the claimant's scandalous and unreasonable conduct in this litigation in relation to the email and the attachments that he sent to the Tribunal on 14 November 2021.

The respondent submitted that the claimant tampered with documents sent to him by the respondent as part of his subject access request and then sent a false document to the Tribunal with the purpose of putting the respondent in a negative light, to discredit it and assist his case. The documents were in the bundle for today's hearing.

One of the pages in the documents attached to the claimant's email to the Tribunal on 14 November 2021 contained a poem or verse which began with the words '*Here's to the crazy ones'*. The claimant drew the Tribunal's attention to the document and asked the Tribunal to conclude that the respondent had inserted this into it and stated that this was *'not reasonable and is intended to damage my case in further Tribunal proceedings'*.

The respondent produced a sworn witness statement from Aniket Pradhan, an employee in the respondent's legal discovery management team. Following the claimant's complaint to the Tribunal about the verse being in the results of the subject access request, Mr Pradhan conducted an investigation to see whether the email sent to the claimant on 9 November 2021, did contain the set of verses which began with the words '*here's to the crazy ones'*. Mr Pradhan provides details of the searches he undertook and the basis for his conclusion that the documents sent to the claimant did not contain those verses. Copies of the

original document sent to the claimant were in the bundle for today's hearing and they do not include those verses.

The respondent submitted that it would not be possible for a fair trial to be conducted after the claimant's behavior because the Tribunal would not be able to trust any documents that the claimant produces after this. It was submitted that the claim should be struck out in its entirety on the basis of the claimant's vexatious and unreasonable conduct.

The Tribunal took sworn evidence from the claimant on this issue. He denied tampering with the document. He stated that he stood by what he said in his email of 14 November and that was the document that the respondent sent to him. He denied manipulating the document. He stated that he had complained to the information commissioner's office about the document.

After due consideration of both parties' submissions and on the claimant's evidence in relation to the second application, the Tribunal made the following decision.

Strikeout on the basis of unreasonable conduct

In considering the respondent's application I looked at the law relevant to the exercise of the Tribunal's power to strike out proceedings. Has been held that there are two cardinal conditions for the exercise of the power to strike out claim, namely, that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible (see *Blockbuster Entertainment Ltd v James* [2006] EWCA Civ 684). Where these conditions are fulfilled, it is necessary for a tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question. The power to strike out being described in that case as 'a Draconian power not to be readily exercised'.

I have also considered the four principles set out in the case of *Bolch v Chipman* [2004] IRLR 140. In that case, the EAT stated that there must firstly be a conclusion by the tribunal that a party had behaved scandalously, unreasonably or vexatiously and that the proceedings had been conducted by his behalf in such a manner. In this case, the claimant is a litigant in person which means that the way in which he conducts the litigation has a direct effect on his case. He cannot disassociate himself from the actions of his representative.

The evidence I heard this morning leads me to the conclusion that, whether deliberately or inadvertently, the claimant inserted a verse or poem into documents disclosed to him by the respondent as result of his subject access request. He then sent the tampered document to the tribunal, drew the tribunal's attention to the insertion and asked the tribunal to draw conclusions about the respondent based on the wording of the verse/poem. It is highly likely that he hoped that the respondent would be sanctioned by the tribunal for having inserted a poem/verse that refers to people with mental health difficulties in this way.

This was unreasonable conduct by the claimant.

Secondly, even if such conduct is found to exist, the tribunal must reach a conclusion as to whether a fair trial is still possible. Thirdly, even if a fair trial is

not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. For example, it may be possible to impose a lesser sanction than one which leads to a party being debarred from the case in its entirety. Fourthly, even if the tribunal decides to make a striking out order, it must consider the consequences of that order.

I consider that at the claimant has been conducted his proceedings on his behalf December 2020. I was not referred to any other aspect of his conduct of litigation which could be described as unreasonable or scandalous and so I conclude that this is a serious and isolated incident.

I then had to consider whether a fair trial is still possible, given the seriousness of this incident. It is my judgment that as this is an isolated incident, a fair trial is still possible. I then had to consider what sanction is appropriate and proportionate to impose on the claimant to reflect tribunal's disapproval of his actions.

It is this Tribunal's judgment that the claimant has behaved unreasonably by inserting this poem into the documents, by sending it to the tribunal with the hope that it would result in a negative outcome for the respondent and by denying it in this hearing. It is also my judgment that a fair trial is still possible and the respondent's application to strike out the claim is denied. However, it is this Tribunal's decision that if this claim continues and there is any dispute between the parties on the contents or authenticity of any documents; the tribunal will rely on the respondent's position in relation to the document/s as the claimant cannot be relied on for any assistance in that regard.

The note on tribunal file and in these reasons for the benefit of any tribunal who deals with the matter in the future.

The Tribunal then considered the respondent's other applications

The case against the second, third and fourth respondents

It is this Tribunal's judgment that the claimant was unable to explain the basis of his allegations against Mr Enfield. In his claim form and in the minutes of the previous preliminary hearing, the complaint against him is described one of omission – in paragraph 2.2 of the ET1 the claimant states that Mr Enfield *'knew of the situation but did not take any action to stop it'* and at paragraph 2.3.3 that *'he took no action to stop the explicit images being shared by colleagues'*. This morning I asked the claimant what evidence he would rely on to prove these allegations. He did not refer to any evidence or anything that he would refer to or rely on, in order to prove facts from which an inference could be drawn. Mr Enfield categorically denies having any knowledge about any of the matters alleged in this claim.

The allegations against Mr Enfield date back to 2016 as – if that was when the alleged treatment began and he was aware of it, his failure to do anything about it would date from 2016.

It is this Tribunal's judgment that the complaint against Mr Enfield in particular is out of time and has no reasonable prospects of success.

Later in these reasons, I will consider whether it is just and equitable to extend time.

In relation to the other two named individual respondent's – it is this Tribunal's judgment that they are also out of time. The allegations against Mr Mikhailov and Mr Lazaridis date back to the period 2016 – 2018. The claimant went off sick in May 2018 and never returned to work. His interactions with these individuals would have therefore ceased in 2018.

He alleged today that these individuals were involved in the grievance process and were therefore continuing to discriminate against him. He also alleged that as his sick leave was brought about by the respondent's treatment, that should somehow make the allegations in time.

I considered whether there was a continuing act here. It is this Tribunal's judgment that the grievance process and its outcome are not part of the claimant's case. They were not referred to him the claimant's ET1 form and were not listed in the list of issues that came out of REJ Taylor's hearing on 28 June 2021. There is a complaint about the grievance appeal, the outcome of which was sent to the claimant on 6 October 2020. However, the individual who conducted that grievance appeal, Nick Charlwood was unconnected to the claimant and the respondents. The evidence is that he did not speak to Mr Mikhailov or Mr Lazaridis as part of his review of the grievance outcome. He conducted a paper review of the grievance process and outcome, following a meeting with the claimant and HR. He also spoke to Ms Pollard who made the original decision on the grievance.

It is my judgment that the complaint about the outcome of the grievance appeal is separate from the allegations against the named respondents. It is separate in time as it took place over two years after the claimant went off sick and after the last allegations against the named respondents and separate in terms of process as it is not connected to the work of the team that the claimant belonged to or their alleged actions.

It is therefore my judgment that there is no continuing act in relation to the complaints against Mr Mikhailov and Mr Lazaridis or even Mr Enfield and the final historical allegation against the named respondents took place in or around 2017/2018. The allegations of direct sexual orientation discrimination and of harassment against the named respondents related to allegations dated from October 2016 – 2017/18 are out of time.

Later in these reasons, I will consider whether to use my discretion to extend time on a just and equitable basis.

In relation to the complaints against the first respondent, the claimant would need to prove facts to which the tribunal can infer that the allegations from 2016 – 2018 occurred and that the form part of a continuing act with the grievance appeal, the outcome of which the claimant was notified on 6 October 2020, which the claimant alleges is the last act of discrimination.

Having heard claimant today and looked at the documents that he sent to the tribunal prior to today's hearing, it is this Tribunal's judgment that there are no real prospects of the claimant being able to establish that, if the alleged incidents occurred, they add up to more than isolated and unconnected incidents of less favourable treatment by different people over a long period of time. There was nothing that the claimant referred to today that would show a connection between allegations dated between 2016 and 2018 and Mr Charlwood's grievance appeal

process and decision. He was unable to point to anything in our discussion about it.

The claimant referred to two things today - a decision in 2018 to make his post redundant and - the information he has recently seen from the subject access request process around the diagnosis and his treatment by OH (also in 2018/19) but in relation to both of those things I judge that they are not part of this claim and also that even if they were, they are unlikely to bridge the gap between 2018 and 2020, when the claim was issued.

The complaints against the first respondent are therefore also out of time.

Just and equitable extension

I considered whether it is just and equitable to extend time to allow these allegations to be considered.

I firstly noted that the claimant has not put forward any explanation or evidence which could persuade the Tribunal that it should use its discretion to extend time. When asked about this earlier, the claimant referred to being disabled after a period. It is likely that this is a reference to the 12 month period of time by which a person's disability status is assessed. The claimant had been off sick for most of the 2 year period between his last allegation and these proceedings being issued.

During that time the claimant pursued his grievance and appeal. He submitted that he had made applications for employment during that period. It was his case today that he had been misdiagnosed by the respondent's internal OH department and may not have been as sick as he was advised. Even after giving him an opportunity to address the point, the claimant failed to put forward any explanation or evidence around why he did not issue the tribunal proceedings until December 2020.

The respondent referred to the case of *Outokumpu Stainless Steel Ltd v Law* [UKEAT/0199/07] in which it was said that - *'where a claimant does not put evidence before a Tribunal in support of his application [that is, for an extension of time]' explaining his delay and saying why an extension should be granted, how can the Tribunal be convinced that it is just and equitable to extend time?';* and *Ramathakrishnan v Pizza Express (Restaurants) Ltd* [2016] ICR 283 in which it was said that *'if the claimant advances no case to support an extension of time, plainly, he is not entitled to one'.*

I considered the prejudice to both sides. A refusal to extend time would mean that the claimant's complaints would fall away, apart from the allegation surrounding the appeal against the grievance outcome, which I will return to. To grant an extension of time would mean that the respondent would be faced with allegations related to historic matters which it would have difficulty defending. By the time this matter got to a final hearing, the allegations from 2016 would be seven years old, which is likely to affect the quality of the evidence. I am told that most of the recruitment documentation cannot be found. The first respondent has already done a search to try to locate documents in relation to the four job applications that the claimant refers to but can only find documentation in relation to one. Witnesses are unlikely to be able to recall specific details of incidents and conversations 5 or 6 years earlier. It would be impossible to retrieve CCTV

evidence and some documentation from 6 years earlier. I conclude that the respondent would suffer real prejudice if I extended time to allow the historic allegations to proceed against any of the respondents.

As I stated earlier, time limits are to be maintained in the employment tribunal. The discretion to extend time is just that; a discretion. The claimant does not have a right to an extension of time. He has to persuade the Tribunal that it is appropriate in this case to use its discretion to extend time. The claimant has failed to do so. There is considerable gap between the alleged incidents and the issue of proceedings and no satisfactory explanation for the delay in issuing proceedings.

In those circumstances, the Tribunal will not use its discretion to extend time to allow the claimant to pursue these allegations against the respondents.

In this Tribunal's judgment, the allegations against the second, third and fourth respondents are out of time and are dismissed.

The allegations against the 1st respondent that relate to the period 2016 – 2018 are out of time and are dismissed.

I went on to consider the remaining allegation which is that concerning the grievance appeal.

This was not one of the allegations detailed in the minutes of REJ Taylor's preliminary hearing held on 28 June 2021.

In the grounds of complaint, the claimant, in his conclusion, referred to the respondent's action in dismissing his appeal as being the last act before he issued proceedings. In the conclusion, he referred to an '*incomplete investigation process'.*

The claimant did not refer to any evidence that he would rely on to prove facts from which an employment tribunal could conclude that Mr Charlwood came to the decision on the grievance appeal because of any perception that he had about the claimant's sexual orientation. Mr Charlwood had no prior involvement in the history of this matter. He worked in a different department from the individuals involved in the historic allegations (2016 – 2018) and had never heard of the claimant nor any of the individuals mentioned in the claimant's grievance before been allocated to hear the appeal. The claimant did not dispute these facts as set out in the sworn witness statement provided by Werda Gill of HR to this Tribunal setting out those facts.

In this therefore Tribunal's judgment, that this complaint has little reasonable prospects of success. It is appropriate to make a deposit order before the claimant can continue with it.

I took sworn evidence from the claimant on his means before I made the decision on the size of the deposit. The claimant remains unemployed but is supported by relatives abroad. The claimant does not own his own home. He has considerable savings. He could not tell us the amount but confirmed that it was in the thousands. He does not own a car. The claimant earned £55,000pa when he was employed by the respondent.

In my judgment, it was appropriate to make an order that the claimant pay a deposit as a condition of continuing to pursue the complaint about the outcome of the grievance appeal. The claimant confirmed that his complaint about the grievance appeal was as follows: -

> *That Mr Charlwood made the decision not to uphold my grievance because of my sexual orientation or the respondent's perception of my sexual orientation which he knew because it was mentioned in the grievance and in the grievance process.*

The claimant is ordered to pay a deposit of £200 to continue with that complaint and a deposit order which confirms that and explains the reasons for it, is attached.

Victimisation complaint

We discussed whether claimant has an existing complaint of victimisation as part of this claim.

In the preliminary hearing on 28 June 2021, the claimant discussed with REJ Taylor whether he had an existing victimisation complaint as part of this case. Although he had made a victimisation complaint in the ET1, he was unable at that hearing to identify a protected act. At that hearing he confirmed that he had not made any allegation or statement to the respondent alleging that he was treated less favourably because of his actual or perceived sexual orientation. At that hearing, REJ Taylor explained to him that if he had not done a protected act the complaint of victimisation could not succeed. The claimant was given some time to identify the protected act he relied on.

The claimant wrote to the tribunal on 10 July to say that he intended to pursue a complaint of unlawful victimisation and that he relied on a grievance report he sent to the respondent in December 2018. In today's hearing we looked at the detail of the claimant's grievance, which was at page 346 of today's hearing bundle. In trying to identify a protected act, the claimant referred to a meeting with Mr Mikhailov in November 2016 he told him that he had '*noticed a change in professional treatment'* from him. The claimant also referred to two meetings he had with Mr Sargent of the respondent's HR, during one of which he was advised to raise a grievance. He did not refer to less favourable treatment or discrimination or anything similar, in the meetings with Mr Mikhailov or with Mr Sargent.

I conclude that the claimant did not in any of these documents or conversations or emails, make any allegation or statement that he was being treated less favourably because of his actual or perceived sexual orientation. The position is as the claimant is noted as saying in paragraph 13 of the minutes of REJ Taylor's hearing; that he had not made any allegation or statement to the respondent alleging that he was treated less favourably because of his actual or perceived sexual orientation.

In those circumstances, it is this tribunal's judgment that the claimant did not do a protected act and that there is no pleaded victimisation complaint on the facts alleged in the ET1. The conversations he relies on with Mr Mikhailov and Mr Sargent are not capable of being protected acts.

The complaint of victimisation is misconceived and is struck out.

The tribunal made case management orders to assist the parties in preparing for the hearing in September 2022. Those are set out in a separate document which is attached.

About these orders

1. These orders were made and explained to the parties at this preliminary hearing. They must be complied with even if this written record of the hearing arrives after the date given in an order for doing something.

2. If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules.

3. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

Writing to the Tribunal

4. Whenever they write to the Tribunal, the claimant and the respondent must copy their correspondence to each other.

Useful information

5. All judgments and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

6. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: *https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/*

7. The Employment Tribunals Rules of Procedure are here: *https://www.gov.uk/government/publications/employment-tribunal-procedure-rules*

8. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*

9. Employment Tribunals (England and Wales) Presidential Guidance on remote and in-person hearings is here:

   https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf

Employment Judge **JONES**

20 January 2022