Case Number: 3304357/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O Kolawole	v	IBM UK Ltd

PRELIMINARY HEARING

Heard at: Watford **On:** 27 April 2023
Before: Employment Judge R Lewis

Appearances:
For the Claimant: Ms N Mallick, counsel
For the Respondents: Ms J Stone, counsel

RESERVED JUDGMENT

1. The claimant may amend the ET1 claim form by pleading that in the conduct and outcome of her grievance process, including the grievance appeal, the respondent committed acts of direct race discrimination and / or victimisation.

2. The claimant's complaints which relate to events before 22 July 2021 are out of time. It is not just and equitable to extend time, and they are struck out because the tribunal has no jurisdiction to hear them.

REASONS

Background procedure

1. This Judgment and reasons should be read in conjunction with my orders made after the preliminary hearing on 19 January 2023, sent to the parties on 25 January 2023.

2. In that order I set out a timetable to prepare for the present hearing and an agenda.

3. In the interim, the claimant provided additional information, which amended the framework, but that was not relevant to today's task. He had also obtained the benefit of professional advice.

4. At this hearing, I had a bundle of 480 pages, and I record my appreciation of the respondent's solicitors, who undertook the complex task of preparing it. Ms Mallick had prepared a skeleton and a list of issues. Hwe list of issues reduced the claimant's drafting to a concise summary, on less than 3 sides of A4.

5. At the start of the hearing, Ms Mallick confirmed that the claimant withdrew any claim of unfair dismissal, including any claim of constructive unfair dismissal. She confirmed that the withdrawal includes withdrawal of any claim of discrimination in dismissal under Equality Act s.39(2)(c). Those withdrawals are set out in a separate judgment. She confirmed that the claim proceeds as a claim of race discrimination only.

6. This hearing then proceeded broadly in accordance with paragraph 10 of my order of January, opening with the claimant's application to amend; the respondent's reply and its applications for strike out and deposit; and the claimant's reply to the respondent's applications.

7. That work occupied the entire morning. I then suggested to the parties that the five case management points which I had set out at paragraph 11 of the January order could not be dealt with, because they were contingent on this reserved judgment. Ms Mallick confirmed that the application for a Rule 50 order was not pursued.

8. I suggested, and counsel agreed, therefore that the better course was to reserve judgment, and list a telephone case management hearing to consider matters in light of today's outcome. That is the subject of a separate Order.

Factual background

9. I heard no evidence and found no facts. The relevant background chronology can be shortly summarised, and I understand the following to be agreed.

10. The claimant was born in 1977. He joined IBM in 2018.

11. He gave notice of his resignation on 5 July 2021. His last day at work was 23 July 2021. His employment ended on 5 August.

12. On 22 July, and therefore while still an employee he submitted a written grievance, which he later annexed to his ET1.

13. He received the outcome of the grievance on 7 December 2021, and immediately appealed against the outcome.

14. He received the outcome of the grievance appeal on 1st April 2022.

15. The claimant entered into early conciliation (Day A) on 8 April.

16. Day B (date of the ACAS certificate) was 11 April.

17. The claimant presented his ET1 to the tribunal on 11 April.

18. The response was accepted by the tribunal on 30 June.

19. Notice of the first preliminary hearing was sent to the parties on 17 July 2022, listing the hearing which took place on 19 January 2023.

20. On 7 January 2023 the claimant sent the tribunal and respondent an application to amend his claim. The amendment was an assertion that there was a continuing act of discrimination during, and after the end of his employment, and which extended into discrimination in the conduct and outcome of the grievance and appeal. That is a very brief summary of a document which was prolix and unclear.

21. The first preliminary hearing took place on 19 January, and was adjourned part heard to the present hearing.

22. On 15 February 2023 the claimant's solicitors came on record.

Today's hearing

23. I have approached my task by asking the following questions:-

    23.1 What are the factual and legal complaints in the ET1 of 11 April 2022?

    23.2 Does the ET1 include a claim of discrimination and/or victimisation in the conduct and/or outcome of the claimant's grievance?

    23.3 In light of the above, should the claimant have permission to amend the ET1 by including a claim of harassment in relation to events up to the end of his employment on 5 August 2021?

    23.4 Should the claimant if necessary, have permission to amend the ET1 by complaining of discrimination and/or victimisation in the conduct and/or outcome of the grievance process between 22 July 2021 and 1 April 2022?

    23.5 Should the case, or any part of it, which emerges from the above be struck out on ground that it has no reasonable prospect of success?

    23.6 Should the case, or any part of it, which emerges from the above be the subject of any deposit order(s)?

The legal framework

24. The legal framework for this hearing was not in dispute. In the January Order, written when the claimant was acting in person, I suggested that the parties might find helpful the guidance of the EAT in Chaudhury v Cerberus, 2022 EAT 172. In considering an application to amend, and submissions to strike out on various grounds, including limitation, at the same hearing, the correct approach is to deal first with the application to amend, so that I can be clear that I understand exactly what it is I am asked to strike out. That approach is not affected by the background to this hearing, which indicates the risk that the amendment, if allowed, would bring into time a claim which on its face is otherwise out of time. When I consider the application to amend, I should bear in mind the nature of the amendment, and whether it is a re-labelling of an existing claim, or the introduction of fresh claims; I should consider the timing and manner of the application; and, perhaps most importantly and most difficult, I must weight up the balance of prejudice or hardship: what prejudice will allowing the amendment cause to the respondent, as against the prejudice caused to the claimant by

refusing it. When I come to limitation, I must consider whether the alleged acts of discrimination are indeed out of time, or if they form a continuing act, and if not whether it is just and equitable to extend time, bearing in mind that time limits are to be observed, and that an extension of time is not to be available as of right, or taken for granted. Finally, the applications for strike out and / or deposit orders must be made properly within the framework of Rules 37 and / or 39, and a claim of discrimination, even if it appears weak, should not be struck out unless there is some specific justification for doing so. At all stages of this process, the tribunal must exercise its discretion in accordance with the over riding objective and the interests of justice.

The ET1

25. My starting point is to consider the ET1. I must approach it with informality and non-legalistically. The claimant is plainly highly educated, as well as capable and experienced in expressing himself in writing. He is no lawyer and is plainly out of his depth in dealing with the tribunal and the technique of a legal claim.

26. In the ET1, the only ticked boxes were for unfair dismissal and race discrimination.

27. At box 8.2 the claimant set out aspects of the grievance procedure and outcome. I note that his complaint was that two named managers had "discriminated, bullied and harassed me whilst they were my managers." He referred to this having taken place in relation to five "covered areas". The five areas were performance review, promotion, training allocation, assignment, and job allocation.

28. At box 9.2, in relation to outcome, he wrote:

> "IBM assigned case handlers that could not address my grievance and/or my desired outcome. I like IBM to allow my initially stated desired outcomes, and to include number 5 of the desired outcome."

29. This referred to a portion of the claimant's grievance of 22 July 2021, which he annexed to the ET1, in which he set out desired outcomes, including compensation "for missed career opportunities and racial bias."

30. At box 15, the claimant wrote again about the grievance process. He wrote: "None of the assigned case handlers.. could address my desired outcomes.." He wrote that one investigator:

> "…mentioned to me during his finding meeting that he did not have access to certain witnesses and evidential documents to allow in-depth review of my grievances. I later appealed and submitted additional evidential documents that IBM had not shared with case handlers that they could use and/or rely on to validate all my grievance claims… I believe IBM had not reviewed the supporting evidential documents before reaching case investigation conclusion that was shared with me on 1 April 2022."

31. Attached to the ET1 was a four-page document headed "Formal complaint: non-inclusive behaviours." It should be read in full; it was the original grievance of 22 July 2022.

32. Although the ET1 narrative sets out that the claimant presented a grievance, that it was not properly investigated, that witnesses were not interviewed and

documents not considered, and that it therefore could not be addressed fairly, the claimant nowhere expresses a complaint that those matters in the conduct of the grievance and its outcome may have been further unlawful acts. I have understood them to set out the claimant's assertion that he has been unable to obtain redress through the respondent's own procedures, hence his decision to present this claim.

33. I note that in the ET1 and attachment the word "racial" appears six times, and the word "bias" 12 times. The word "harassed" appears once; the words "discrimination" and "victimisation" do not appear at all. I make every allowance in the claimant's favour for his lack of legal training and experience. However, it is striking that in the many usages of the words "racial" and "bias", there is no point at which either of those words is applied to the conduct or outcome of the grievance and grievance appeal.

34. In my judgment, the ET1 raises factual complaints that the claimant suffered discrimination and harassment in the five covered areas quoted above, and no more. The complaints are raised as complaints of direct race discrimination, and potentially as complaints of harassment.

Amendment: events after end of employment

35. I note that the factual basis of the complaint about the grievance process is set out in the ET1, although not clearly or chronologically. In particular, the claimant has referred to the appointment of investigators, the inadequacy of their remit, their failure to consider relevant documents, and their failure to contact relevant witnesses.

36. In light of that, I find that the claimant has, at least, implied his discontent with the conduct and outcome of the grievance, and, perhaps more by luck than judgment, he has also referred to the outcome of the grievance appeal, albeit fleetingly in the last line of box 15.

37. I therefore find that the fundamental facts which are the basis of the application to amend are within the ET1, as presented.

38. I accept Ms Mallick's point that the respondent is not wholly surprised by this, as its ET3 dealt with the grievance process. I also accept that that may have been in preparation for a submission in relation to the Acas Code, rather than in anticipation of this application to amend.

39. I accept that the claimant made his application to amend late, and no doubt in anticipation of the January hearing. I accept that it is likely that the formal step of a written application to amend in January was taken on legal advice, perhaps in response to the contents of the ET3.

40. Although Ms Stone had suggested at the January hearing that the application to amend was made opportunistically, ie with a view to saving a plainly out of time claim, that was not an argument which she pursued today, and which I do not think would have assisted.

41. I then turned to the balance of hardship. I have to weigh up the balance against the claimant of refusing the application to amend with the balance against the respondent of permitting it.

42. I accept that permitting the amendment will add to the burden on the respondent of these proceedings, by extending the timescale of the events in question, requiring more preparation and possibly more witness evidence from the respondent, and that some (but not all) of the detailed points in the amendment may have become incapable of fair trial by lapse of memory.

43. I make that last comment on the understanding that it is likely that grievance investigators kept detailed written records of the investigation, perhaps with the assistance of HR. However, it may well be that in relation to any point of detail (eg why was a particular line of enquiry not pursued) there may not be written record and there may be a lapse of recollection. That is particularly likely in the surrounding circumstances: at the time of the grievance investigation the claimant was an ex-employee who was in respected new employment; the events may not have been as important to the grievance investigator as they were to the claimant; and the claimant's concept of what was relevant to his grievance may, as a matter of legitimate judgment, not have been shared by an investigator.

44. When I turn to the balance of hardship against the claimant, I face the difficulty that while I respect the claimant's strength of feeling, the tribunal must conduct cases objectively, and attaches relatively little weight in case management to strength of feeling. I attach no weight to the fact that the claim now presents as a claim in which the only level of damages is for injury to feeling, as I must approach a discrimination claim as a matter of principle. I note that the claimant might well have submitted that there was a failure to deal with a grievance in support of an application for statutory uplift. It follows that the grievance process was bound to be considered, at least in outline, albeit by application of a different test from that in the 2010 Act.

45. Like all balancing exercises, this one is difficult, because it is not an equal balance of equally competing factors. It seems to me that the balance however favours the claimant's right to test the factual points indicated in the ET1, and therefore to test the reasons why the respondent dealt with the grievance as it did, and reached the conclusions which it did. Therefore the amendment is allowed.

46. The precise extent of the amendment is a matter on which it may be helpful to invite submissions through a list of issues at the next case management hearing. In principle the amendment which is allowed is that the existing factual matters in the ET1 (and no other) relating to the conduct and outcome of the claimant's grievance, including the grievance appeal, may proceed as claims of direct discrimination and/or victimisation.

Limitation

47. I now turn to limitation, in light of the above chronology.

48. The limitation point has been troubling. On its original presentation, the claim appeared to be related to events during the claimant's management at the respondent, and therefore significantly out of time. The claimant has agreed that he had access to legal advice during the primary limitation period, and in a document called "Second witness statement" for today, he wrote that he understood that it would be better to wait until the conclusion of his grievances

before presenting the present ET1. It will be noted that the ET1 was presented 10 days after the failure of the grievance appeal.

49. The effect of the amendment is that the matters complained of do not end with the termination of the claimant's employment, or with his last day at work in July 2021, but run to the final date of 1 April 2022.

50. Ms Stone had a number of submissions. I disagree with her submission that the ET1 does not cover the grievance appeal. As I have commented, I accept the reference to the grievance appeal as embraced by the permission to amend, even if, as I have said above, that is a more a matter of luck for the claimant than anything else.

51. There was discussion on whether there was continuing act, ie a continuing state of affairs whereby the claimant was discriminated against by operational line management while in the position of being line managed, and then discriminated against (and victimised) by other managers tasked with investigating his grievance and appeal, such that it could be said that there was a continuing state of discriminatory affairs embracing the claimant's allegations from 2019 to April 2022.

52. The difficulty with that line of dispute is that the tribunal may feel compelled to conduct a full fact find as the basis for resolving that point; and it may be reluctant to abridge that fact find at a preliminary hearing on submission.

53. It seems to me however a matter of common sense that the claimant's departure from his employment with IBM breaks the continuity of any continuing act and opens a wholly different sequence. In the first sequence, while still an employee of IBM, the claimant complained that line management of his team persistently marginalised and excluded him. He has referred to two line managers, and a sequence of managerial events with which both were tasked. I do not have to make any decision about whether there was continuing act from 2019 up to the end of the claimant's employment; I need only find that I can see the strength and logic of the claimant's argument that that sequence constitutes a single continuing act.

54. However, it seems to me to stand to reason, as a matter of common sense, that when the claimant left the employment of IBM, and when his engagement with IBM became limited to that of an aggrieved former employee pursuing a grievance, which was under investigation by individuals appointed from outside his line management chain, that represents a break in continuity, and the start of a new sequence. I make no finding on whether the grievance procedure from July 2021 to April 2022 was a single continuing act, although logic would point in favour of it being so.

55. In my judgment, the claimant's complaints about his operational line management, not including the conduct of the grievance and grievance appeal, form a sequence of events which ended with the claimant's last day at work in July 2021, and are not extended by the presentation and conduct of the grievance procedure. Ms Mallick's submission to that effect was, with respect, no more than bare assertion, and fell into the error of pre-supposing a shared discriminatory 'culture' at work, when that is exactly what is to be proved.

56. It follows that in my judgment the claimant presented his claim significantly outside the primary time limit for presenting a claim in relation to operational events up to the end of his employment. I must therefore go on to consider whether it is just and equitable to extend time to permit him to do so. I note that he had access to legal advice, but that either the legal advice was wrong about limitation, or, if it were correctly given, he disregarded it and chose to await the outcome of his grievance before presenting a claim. Ms Mallick submitted that justice showed that the respondent had admitted distinctions in treatment; eg that the claimant was not in the first tranche of his team to be submitted for SANS training, although he was offered the training in a second tranche. I am not persuaded that that point, which is a speculation on the reasons to be shown by the respondent, is sufficient to persuade me that it is just and equitable to extend time.

57. My decision is that all claims relating to the claimant's management before termination of his employment are out of time, not part of a continuing act, and that as it is not just and equitable to extend time, they are struck out.

58. I need, in light of my judgment on limitation, make no decision on any application to amend in relation to the events before 22 July 2021. If required to do so, I would have allowed the claimant to plead his existing claim, without any fresh factual matters, as a claim of harassment in the alternative to direct discrimination.

Rule 37 and Rule 39 applications

59. It follows that at the final stage, I turn to Ms Stone's applications under rule 37 or rule 39 (strike out or deposit orders), limited to the case which I have permitted to proceed, ie that in the conduct and / or outcome of the grievance and / or the grievance appeal, the respondent directly discriminated against the claimant on grounds of race, and / or victimised him because of the protected act of his grievance of 22 July 2021.

60. Consideration of these applications is complex. I have found it useful to consider them both together. Assessment of whether a case has no reasonable prospect of success rather than little reasonable prospect is not clear-cut. Ms Mallick reminded me of the substantial body of authority and policy against strike out of a discrimination claim save in the most exceptional, even 'fanciful,' of cases. Ms Stone countered with the proposition that there was nothing written or pleaded upon which the claimant could invite the tribunal to draw an inference of discrimination, and that he had fallen into the error of relying on a protected characteristic and a detriment without identifying the essential link between them in a chain of causation.

61. Claimants often complain to the tribunal that a grievance hearing was not fairly conducted, or that the conduct and / or outcome were acts of discrimination and / or victimisation. Those complaints are, in general, very difficult indeed for a claimant to sustain. There are common reasons why that is the case, and they include the following, which are not exhaustive or in order of priority. All my observations below apply only to cases where the alleged discrimination took place in the conduct or outcome of a grievance.

(a) The task of the tribunal is to analyse the relevant events objectively. At the liability stage, the claimant's strength of feeling, no matter how passionate and sincere, is not a consideration.

(b) It is not the task of the tribunal to act as a forum for a further appeal on the merits of the grievance. The tribunal is not empowered or qualified to decide the grievance. Its task is to decide whether the grievance process was tainted by a consideration rendered unlawful by the Equality Act, not whether it agrees with the process or outcome.

(c) In a claim of direct discrimination, it is rare for there to be an actual comparator of another race who meets the s.23 'like with like' test. The claimant must then rely on a hypothetical comparator who, apart from the protected characteristic, is in exactly the position as he was. That is difficult to construct and prove in many cases. It becomes more difficult, the greater the number of material variables. By the time the claimant's grievance came to be looked into, there were many material variables.

(d) In a claim of victimisation, the claimant must construct the argument that the grievance would have been dealt with differently if he had not done the protected act: that argument is also difficult to construct and prove, because it requires the claimant in logic to argue that his grievance would have been dealt with differently if it were a grievance which did not include a complaint about race or discrimination.

(e) Investigation of a grievance is an exercise of judgment and discretion by the investigator. Any exercise of discretion, by definition, includes a range of possibilities, many of which may be legitimate. There is rarely a single right answer to a managerial question. The claimant's difficulty is to demonstrate that an exercise of discretion has been tainted by an improper consideration.

(f) The selection of documentary evidence and witnesses to be interviewed falls into the previous sub-paragraph. Claimants often complain that an investigator has failed to follow a relevant line of inquiry. But that argument pre-supposes that the claimant's understanding of what is relevant is objectively reliable. That is not necessarily the case. Claimants often are aggrieved that the investigator has not analysed the grievance in painstaking detail; but a grievance investigator may legitimately take the view that a broad brush overview is the suitable approach .

(g) That point is one aspect of another common difficulty for a claimant: the grievance process is conducted in response to the grievance presented at the time by the claimant. That may not be the same as the case put to the tribunal, perhaps years later, possibly through a representative. The tribunal, as we are often told, has the luxury of hindsight; the grievance process may not.

(h) The task of the grievance investigator and decider is to follow the appropriate grievance procedure, and the ACAS Code, and to reach an honest decision (ie one in which they sincerely believe), untainted by any

consideration of a protected characteristic or a protected act. The claimant has no right to the outcome which he desires, or to have a grievance or any part of it upheld. Where the outcome is that the grievance hearer finds that the claimant has legitimate grounds of complaint, but not a well founded complaint of discrimination, the only question for the tribunal is whether or not that analysis was tainted, not whether the tribunal agrees with it.

(i) It is difficult for a claimant to demonstrate to the tribunal that a grievance outcome was tainted, rather than just unfavourable. The reasons are in part that the grievance process has largely been a matter of discretion and judgment, and that as a result there are many questions or possibilities faced by the respondent to which there is more than one legitimate answer.

62. These are general points. In any one case, some or all of them may arise. As I have not heard evidence, I am not in a position to say definitively which arise in this case, although points (e) and (f) have particularly troubled me in this case.

63. When I approach the Rule 37 application, I recognise that there is in the claimant's case an element of Micawberism: he hopes that something may turn up in disclosure or evidence. That is not the correct approach to tribunal litigation. I recognise that the balance of authority is firmly against strike out of a discrimination claim. This case faces all the difficulties which I have set out above. In my opinion, the claimant is unlikely to win; but I cannot say that he has no prospect of success, or apply to it the word 'fanciful,' or anything like it, and therefore I decline to strike out.

64. However rule 39 says that a deposit may be ordered if it appears to the tribunal that (emphasis added) *"any specific argument or allegation"* has little reasonable prospect of success. In my judgment, the claimant is advancing a type of case which he will find very difficult to win. I consider further that that general observation is applicable to this case; I have not read or heard anything which indicates that the claimant will be able to escape the problems which are general to this type of case. I accept that the wording of rule 39 is sufficiently flexible for me to find that each of the two over-arching points in the case is a specific allegation (ie that the claimant was directly discriminated against in the grievance investigation and outcome, and that the claimant was victimised in the same respects).

65. I consider that I am entitled, in my deliberation, to rely on judgement based on experience. For the general reasons set out above, and because the claimant has put forward little by way of supporting submission on the merits (save to say that not all 'relevant' [in his eyes] documents or witnesses were considered), I am of the view that this case has overall little reasonable prospect of success, and that it is in the interests of justice that a deposit be ordered.

66. At paragraph 3.3 of the January order I mentioned the claimant's right to put forward evidence on his ability to pay. He had not done so. When I asked about ability to pay, Ms Mallick said that the claimant had, that very day, been given notice of redundancy. I do not know when that will take effect, what redundancy pay will be made to the claimant, if any, or what his employment prospects are. The claimant said that as a result of his redundancy, any deposit of any amount

would be beyond him and would act as an absolute barrier to justice. That being so, the only information I have had about the claimant's means has been that between 2018 at least, and until May 2023, the claimant was paid a six-figure salary.

67. The claimant's submission was, in effect, that I should order no deposit whatsoever because of undocumented assumptions made by a claimant who has just received distressing news. That cannot be right in principle. I have considered whether to break up the variables in the continuing case, and to order more than one deposit. That seems to me unrealistic: the claimant's case is, in one sense, a single continuum, which says that he was treated unfairly, and discriminated against, throughout the process from 22 July 2021 to 1st April 2022. In these circumstances, I have ordered payment of a single deposit, of £250.00, applicable to the entirety of the case which proceeds after this Judgment.

68. I record that I have at this hearing told the claimant that his financial exposure is not capped at the deposit amount, and that I have explained to him the meaning and effect of Rule 39(5) and therefore the consequent exposure to a costs application.

_____

Employment Judge R Lewis

15/5/2023

Sent to the parties on:17/5/2023

For the Tribunal:

N Gotecha