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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000432/2023

Hearing Held by CVP on 28 March 2024

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Employment Judge S Neilson

Ms V Maxwell

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**Claimant
Represented by Mr
Paul, PCS Union**

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Commissioners for HMRC

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**Respondent
Represented by
Mr Ashmore,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The judgment of the Employment Tribunal is as follows:-

- (1) the claimant having withdrawn the claim for victimisation (Section 27 of the Equality Act 2010) that claim is dismissed;
 - (2) the respondent's application to strike out the claimants claims of direct discrimination; indirect discrimination and harassment on the grounds of
- 35 time bar is refused;

- (3) the respondent's application under Rule 37 to strike out the claimant's claim of indirect discrimination (being the claim set out at page 8 of Employment Judge Sutherland's Note of 30 January 2024) is refused;
- 5 (4) the respondent's application under Rule 37 to strike out the claimant's claim of indirect discrimination (being the second indirect discrimination claim set out at page 2 of the claimant's Further and Better Particulars of 13 February 2024) is granted and that claim is struck out;
- (5) the respondent's application for a deposit order under Rule 37 in respect of the remaining indirect discrimination claim is refused;
- 10 (6) the claim shall proceed to the final hearing already fixed for 20 to 24 May 2024.

REASONS

Background

1. The claimant brought claims for direct race discrimination; indirect race
15 discrimination; harassment on the grounds of race and victimisation. A final hearing has been fixed in the case for 20 to 24 May 2024. The factual background to the claim and the details of the claim are as set out in the Note from the Preliminary Hearing dated 30 January 2024.
2. At the case management preliminary hearing on 30 January 2024 an open
20 Preliminary Hearing to consider the issue of time bar was fixed. By letter of 13 February 2024 the respondent applied for an order under Rule 37 and Rule 39(1) of the Employment Tribunal Rules for strike out, which failing a deposit order, in respect of the claims of indirect race discrimination and victimisation. An open preliminary hearing was held by CVP to consider both the issue of
25 time bar and the respondent's applications for strike out/a deposit order. The respondent was represented by Mr Ashmore, Solicitor. The claimant was represented by Mr Paul, a trade union official. At the outset of the hearing the respondent requested that the claimant give evidence and be cross examined. This was opposed by the claimant. The Tribunal determined that it

would not be necessary or appropriate for any evidence to be led at the hearing.

3. In response to a request from the Tribunal the claimant provided details of her financial circumstances and ability to pay any deposit in an e mail of 5 April 2024 to the Tribunal.

4. During the course of the hearing the claimant's representative informed the Tribunal that the claim for victimisation under Section 27 of the Equality Act 2010 ("**the EA**") was withdrawn. The Tribunal accordingly dismisses that claim in accordance with Rule 52 of the Employment Tribunal Rules. It is no longer relevant to consider the respondent's application for strike out/deposit order in respect of the victimisation claim.

Law

5. The relevant provisions of Section 123 of the EA provide as follows:-

"(1) ..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.*

...(3) for the purposes of this section-

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

6. The relevant provisions of Rule 37 and 39 of the Employment Tribunal (Constitution & Rules of Procedure) Regs 2013 provide as follows:-

“37(1) At any stage of the proceedings either on its own initiative or on the application of a party a tribunal may strike out all or part of a claim or response on any of the following grounds-

5 (a) *that it is scandalous or vexatious or has no reasonable prospect of success;*

(b) *.....*

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or if requested by the party, at a hearing.

10 *(3) Where a response is struck out the effects will be as if no response had been presented as set out in Rule 21 above.”*

“39(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

(2) The tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

20 *(3) The Tribunal's reasons for making the deposit order should be provided with the order and the paying party must be notified about the potential consequences of the order.*

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out.
25 *Where a response is struck out the consequences shall be as if no response had been presented, as set out in Rule 21.”*

Decision – Time Bar

7. In relation to time bar the ACAS Early Conciliation Certificate was issued on 19 June 2023, with notification to ACAS taking place on 3 June 2023. The claimants ET1 was lodged on 29 August 2023 and accordingly any claims that arose prior to 14 May 2023 fell outside of the statutory time limit for bringing proceedings as set out in Section 123 of the EA unless the conduct complained of extended over a period and the end of that period was after 14 May 2023 or it would be just and equitable to extend the period.
8. The respondent submitted that this was not a course of conduct claim or to the extent that it was that the course of conduct concluded prior to 14 May 2023. The respondent also submitted that it would not be just and equitable to extend time.
9. The claimant's position was that there was a course of conduct flowing from July 2022 through to the final decision on the claimant's appeal issued on 30 May 2023.
10. The claims and timelines of the claims that are put forward by the claimant are set out within Judge Sutherland's Note of the preliminary Hearing of 30 January 2024 as further expanded by the claimant in her Further and Better Particulars lodged on 13 February 2024. The relevant claims are claims of direct discrimination; indirect discrimination and harassment.
11. In considering whether or not there is a course of conduct the Tribunal has had regard to the decision in *Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*, where the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. In *Pugh -v- National Assembly for Wales UKEAT0251/06* the EAT held that a tribunal should consider the allegations "in the round", and ask whether, on the facts, the employer was responsible for an ongoing state of affairs where the claimant was treated less favourably.

12. At this preliminary stage where an argument is put forward by the claimant that there is a continuing course of conduct it is for the claimant to show a prima facie case. If there is an arguable case for a continuing act, that claim (or part of a claim) should be allowed to proceed, although the burden will be on the claimant to prove that.
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13. Turning to the allegations themselves. The claimant asserts that she was unfavourably treated on the grounds of her race (Abkhazian/Armenian) (direct discrimination under Section 13 of the EA) and that the acts or omissions that amount to less favourable treatment also amounted to unwanted conduct such as to found a claim for harassment (Section 26 of the EA). The claimant further asserts that she has a claim of indirect discrimination (section 19 of the EA).
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14. The respondent's position was that the alleged acts/omissions/unwanted conduct ran from the 4th July 2022 through to 29 August 2022. They accept that these are all connected events. However, the respondent maintains that the disciplinary process and appeal process that the claimant was subjected to in the period from September 2022 through to 30 May 2023 are entirely separate. With regard to the indirect discrimination claim the position of the respondent was that the event giving rise to the indirect discrimination claim arose in August 2022 and that whilst the claimant was now alleging a further event giving rise to indirect discrimination – that occurred in January 2024.
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15. For the claimant Mr Paul submitted that there was a continuing act running from July 2022 through to the end of the disciplinary process on 30 May 2024. The claimant's position was that the direct discrimination, harassment and indirect discrimination claims all arose out of the same course of conduct. In particular the position of the claimant as regards the disciplinary process instigated against her was that it arose out of the discriminatory conduct of Mr Robson against her – and accordingly should be seen as part of an ongoing act.
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16. In the view of the Tribunal it is the characterisation of the disciplinary process that the claimant was subjected to that is key in determining whether or not on a prima facie basis it can be said that there is a course of conduct extending beyond 14 May 2023. It is accordingly important to examine how that process relates to the alleged acts/omissions/unwanted conduct leading up to the process.
17. The claimant alleges that she was subjected to a number of acts/omissions/unwanted conduct in the period from 4 July through to the end of August 2022. She alleges that the primary instigator of these events was her then line manager Mr Robson. These allegations include allegations that she was required by Mr Robson to go through probation again (having previously been employed by HMRC); being questioned in a disturbing and unnecessary manner by Mr Robson regarding her ethnicity, family background and divorce; and during a Teams meeting Mr Robson making inappropriate comments around her chosen avatar. One of her allegations relates to her treatment by Mr Robson at a meeting on 18 August 2022 where she alleges she was mocked for asking questions about how the head of duty allocations were determined. The respondent's acknowledge in their ET3 that it is Mr Robson who instigates the disciplinary process against the claimant (see paragraphs 7, 8, 9 and 10) in respect of comments allegedly made by her at the meeting on 18 August 2022. Mr Robson holds a meeting with her on 30 August 2022 to discuss his concerns about her breach of various policies based upon her alleged comments at the meeting on 18 August 2022. Mr Robson then notified the claimant on 1 September 2022 that her conduct would be investigated under the respondent's disciplinary process (known as the Upholding our Standards process). One of the allegations made by the claimant is that Mr Robson makes a false allegation of misconduct on the grounds of her race. The matter is then passed to Bill Hadley to investigate with Laurence Murphy appointed as a decision maker. Mr Hadley concludes there is a case to answer and the matter proceeds to a disciplinary hearing which is held on 19 January 2023. The misconduct allegations are upheld and the claimant is notified on 27 February 2023 of a first written warning to be on

her record for 12 months. The claimant appealed that decision and an appeal hearing was held before a Ms Woodhouse on 17 May 2023. The final decision on the appeal (to uphold the first written warning but reduce the period to 6 months) was issued to the claimant on 30 May 2023. On the face of both the pleadings submitted by the claimant and the respondent it would appear that the claimant and Mr Robson gave different versions of events as part of the disciplinary process. The claimant maintains (see page 1 of her Further and Better Particulars submitted on 13 February 2024 under the heading “Page 8, line 5, point 20”) that there are facts from which it can be alleged that Hadley, Murphy and Woodhouse failed to investigate or take action because of her race. On her behalf Mr Paul maintained that the whole disciplinary process was commenced in bad faith because of the discrimination.

18. At this stage in the process the Tribunal just needs to be satisfied that there is a prima facie case that there is a course of conduct that includes the disciplinary process. Given the allegations that are made, and the pleadings from both parties, the Tribunal is satisfied, looking at it in the round, that there is a prima facie case that there is an ongoing state of affairs that includes the disciplinary process. On a full examination of the evidence at a final hearing that may or may not turn out to be the case but at this stage the Tribunal is satisfied that there is sufficient apparent connectivity in the events to say that there is a course of conduct that runs up to 30 May 2023. The application to strike out on time bar is accordingly refused.

19. The Tribunal did consider whether it might be appropriate to treat the indirect discrimination claim separately but concluded that as it appears to be linked with the same ongoing events that there are good grounds for treating all remaining claims as part of the same course of conduct.

20. As the Tribunal has found that the claims are part of a course of conduct that ends after 14 May 2023 it is not necessary to consider any extension of time on a just and equitable basis.

30 **Decision – Rule 37/Rule 39**

21. The application by the respondent in relation to strike out/a deposit order relates only to the indirect discrimination claim now that the victimisation claim has been withdrawn.
22. The claimant alleges two claims of indirect discrimination. The first claim is that, per Section 19 of the EA, the respondent applied a “provision, criterion or practice” (“**PCP**”) that workers previous names are not changed on the respondents internal data systems; that the date of application of the PCP was 4 to 27 July 2022 ; that the group disadvantage was that divorced women in her racial group are in physical danger from their former partners family because of their clan based social conservatism; and that the individual disadvantage was that the claimants name was not changed – putting her at risk.
23. The second claim was put forward by the claimant in her Further and Better Particulars (page 2) on 13 February 2024. In that she stated that the PCP was “Respondent has, as recently as the 24 January 2024, provided to a third party, the payments company Edenred UK, the claimants former name.” She asserts that this was “Discovered on 24 January 2024”. She further asserts that the group disadvantage is the same as the first claim but she adds in addition “C is a first generation immigrant, this closeness to the original ethnic area exacerbates the danger. Failure to safeguard personal information as a data controller and as an employer, especially endangering individuals from ethnic minority groups”. She asserts that the individual disadvantage is the same as for the first claim.
24. The respondent submitted that the claims should be struck out on the ground of no reasonable prospect of success (Rule 37(1)(a)). There was no evidential basis to support the claims. The respondent disputes that there are PCP’s as asserted by the claimant. There was no element of repetition to the PCP’s. The respondent further submitted that if there were PCP’s as asserted then they only applied to the claimant – so are not valid. Further there is no group disadvantage – it only relates to the claimant.

25. The claimant submitted that there is a clear group disadvantage – it applies to all formerly married women from Armenia/Abkhazia where honour killing and violence against formerly married women is a problem. This is related to these areas in the Caucasus being patriarchal and tribal societies.
- 5 26. In considering strike out the Tribunal is conscious of the two stage test – that one of the grounds under Rule 37 must be established and secondly that the Tribunal must then exercise a discretion (*HM Prison Service -v- Dolby 2003 IRLR 694*). The Tribunal was also conscious that in discrimination claims the Tribunal should be slow to strike out a claim unless evidence has been heard
- 10 (*Anyanwu -v- South Bank Students Union 2001 IRLR 305*).
27. In respect of the first claim the Tribunal does not consider that it would be appropriate to strike out because there is allegedly no evidence to support the PCP. The case must be judged on what the claimant offers to prove. The claimant is offering to establish that there is a PCP that the respondents did
- 15 not change names on their internal database. The respondent submitted that there would need to be an element of repetition to support such a PCP. That may be so but will in any event be a matter for evidence at the hearing. It is not possible to say at this preliminary stage that she will not be able to establish that.
- 20 28. With regard to group disadvantage the Tribunal considers that there is a stateable case. Again it will require evidence to support it – but at this preliminary stage it cannot be said that there is no prospect of success.
29. Accordingly, the Tribunal does not consider that it can be said at this stage that the first indirect discrimination claim is bound to fail. Evidence will be
- 25 required but, in principle, the claim as set out is a stateable claim. The application to strike out the first claim of indirect discrimination is accordingly refused as it cannot be said there is no reasonable prospect of success.
30. With regard to the second claim put forward by the claimant in her Further and Better Particulars the Tribunal does consider that insofar as that is a

freestanding claim it is extremely difficult to see how that has any reasonable prospect of success. The PCP that is put forward is an event that is particular to the claimant. The Tribunal does not see how that could be a PCP within the terms of Section 19 of the EA (see *Ishola -v- Transport for London 2020 IRLR 368*). The claimant is not offering to establish that this was a practice – she is simply referring to something that was particular to her. The Tribunal is satisfied that this element of the claim has no reasonable prospect of success. In terms of exercising discretion the Tribunal is satisfied that it is appropriate to strike out this element of the claim. It will save time and cost by disposing of this aspect of the claim now. The claimant already has an indirect discrimination claim that is proceeding. The Tribunal does consider that the point made by the claimant about disclosure to a third party, if that occurred, might be more appropriately seen as an example of disadvantage that flows from the first claim. In these circumstances the Tribunal does consider it appropriate to strike out this aspect of the claim now.

31. In relation to the application under Rule 39 the Tribunal is not prepared to order a deposit at this stage. The test under Rule 39(1) is that the Tribunal needs to be satisfied that there is little prospect of success and thereafter that it would, exercising a discretion, be appropriate to order a deposit as a condition of continuing with that particular claim. Whilst that is a different test from that under Rule 37 the approach referred to above in *Anyanwu* (paragraph 26) concerning discrimination claims is also applicable to applications for a deposit order. The indirect discrimination claim is a stateable claim and whilst it will require evidence to substantiate the claim the Tribunal is not satisfied that at this stage it can be said that it has little prospect of success.

Employment Judge Neilson
Employment Judge
23.04.2024

Date sent to Parties:-
23/04/2024