EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms S Kupeli-Holt	AND	Dorset Healthcare University NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 13 December 2022

EMPLOYMENT JUDGE J Bax

Representation
For the Claimant: Mr P O'Callaghan of Counsel
For the Respondent: Mr C Milsom of Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The claim of constructive dismissal pursuant to the Employment Rights Act 1996 is struck out on the basis that the Claimant has no reasonable prospects of success in establishing it was not reasonably practicable to have presented the claim in time.
2. The application to strike out the allegations of direct discrimination is dismissed.
3. The application for deposit orders in relation to allegations 7 to 12 of the allegations of direct discrimination is dismissed.

4. For the reasons explained below, the Employment Judge considers that the Claimant's allegations in relation to allegations 1 to 6 of her claims of direct discrimination have little reasonable prospect of success.

   The Claimant is ORDERED to pay deposits on the following claims

   The sum of £5 for each of the following allegations:

(1) The claimant was segregated at work from 16/9/16 when she was required to sit with staff from other countries by Angela Turner.

(2) Towards the end of September 2016 the claimant was not provided with a laptop and dictation machine by Angela Turner.

(3) On or around 29th or 30 September 2016 Angela Turner told the claimant that she should look for another job at the end of the training and that the service did not need foreign staff. That conversation took place at Angela's desk when no one else was present.

(4) Fiona Orme told the claimant that her husband was Greek and that they thought Turkish women were bitches. That conversation took place towards the end of September 2016 in a downstairs corridor close to the former main bedroom where the claimant's office was situated. No one else was present.

(5) At a one-to-one appraisal meeting in a supervision room, between the 23rd and 24 October 2018, Angela Turner said to the claimant that she could not be a clinical supervisor and she would not send her to the training.

(6) On 11 September 2018, Bianca Thomas went to the claimant's room and "shouted at [her] said that fucking Asian fuck off to your county, go to fucking hell, why the fuck are you still here"

not later than **14** days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant's claims should be struck out on the grounds that they had no reasonable prospects of success. For the majority of the discrimination claims this was based on the Claimant having no reasonable prospect of success of establishing there was a continuing act or that it was just and equitable to extend time. In relation to the constructive dismissal claim that she had no reasonable prospect of establishing that it was not reasonably practicable to present the claim in time. Alternatively deposit orders were sought on the basis that the claims had little reasonable prospects of success.

2. The Claimant provided a witness statement dealing with the time limit points. It was agreed by counsel for both parties that the statement should be taken as read. The Claimant gave evidence about her means

Background

3. In this case the claimant brings claims of constructive unfair dismissal and direct discrimination on the grounds of race, religion or belief.

4. The Claimant's employment ended on 21 September 2020. She notified ACAS of the dispute on 15 March 2021 and the certificate was issued on the same day. The claim was presented on 19 May 2021.

5. In the claim form the Claimant complained of incidents from 2017 involving racial slurs. She raised an internal complaint in 2019. Between August 2019 and January 2021 a group began to bully her. After her resignation she complained that Mr Goodman contacted her new place of work in Durham and gave the Whittington Health Trust written and verbal private information and gave her a negative reference. She complained about numerous individuals. The staff alleged to be responsible were white English and describes herself as Turkish.

6. On 9 December 2021. Employment Judge Rayner conducted a telephone case management preliminary hearing. The Claimant was ordered to provide a complete list of the allegations she was making. The claim was listed for a preliminary hearing to identify the issues, the Respondent's application to strike out the claim or for a deposit order in the alternative, the Judge had discretion whether to determine time limit issues and whether the Tribunal had jurisdiction. The Claimant was ordered to provide a witness statement dealing with the issue of time limits.

7. The Claimant provided the further information about her claim.

8. The preliminary hearing was postponed and relisted. The Claimant was ordered to provide a witness statement by 10 June 2022 for a second time.

9. On 18 August 2022, the preliminary hearing was heard by Employment Judge Dawson. The Claimant was represented by a solicitor, Mr Yildrim. It was confirmed that the allegations were based on the Claimant's ethnicity of being Turkish, Jewish and Muslim. It was clarified that the allegations started in 2016, when she was segregated, and culminated in being given unfavourable references. It was identified that the Claimant made 29 allegations, however a large number were withdrawn. It was accepted that it was necessary for the Claimant to apply to amend her

claim. The application was determined and the issues were identified. It was confirmed that she was only bringing claims of direct discrimination under the Equality Act 2010. The constructive dismissal claim was based on the alleged acts of discrimination.

10. When determining the application to amend, Employment Judge Dawson considered whether the allegations could be said to amount to a continuing act, on the basis that it was relevant to that. Whilst acknowledging that there were significant gaps in the dates, he could not say there was no reasonable prospect of the Claimant establishing that the Respondent was responsible for a continuing state of affairs which allowed discrimination to occur. It was acknowledged that there might be an argument that there was little reasonable prospect of success. He said, in terms of determining whether there was a continuing act, it was a case in which it was necessary to hear all of the evidence before the Tribunal could decide whether or not a continuing act existed.

11. The discrimination alleged is as follows, as taken from list of issues attached to the case management summary dated 18 August 2022:

    3.2.1 The claimant was segregated at work from 16/9/16 when she was required to sit with staff from other countries by Angela Turner.

    3.2.2 Towards the end of September 2016 the claimant was not provided with a laptop and dictation machine by Angela Turner.

    3.2.3 On or around 29th or 30 September 2016 Angela Turner told the claimant that she should look for another job at the end of the training and that the service did not need foreign staff. That conversation took place at Angela's desk when no one else was present.

    3.2.4 Fiona Orme told the claimant that her husband was Greek and that they thought Turkish women were bitches. That conversation took place towards the end of September 2016 in a downstairs corridor close to the former main bedroom where the claimant's office was situated. No one else was present.

    3.2.5 At a one-to-one appraisal meeting in a supervision room, between the 23rd and 24 October 2018, Angela Turner said to the claimant that she could not be a clinical supervisor and she would not send her to the training.

    3.2.6 On 11 September 2018, Bianca Thomas went to the claimant’s room and “shouted at [her] said that fucking Asian fuck off to your county, go to fucking hell, why the fuck are you still here”

    3.2.7 At an online staff meeting on 21 April 2020, Bianca Thomas and Chris Anderton verbally attacked the claimant saying that they did not want to hear her foreign voice any more.

3.2.8 At the same meeting James Goodman removed one of the claimant's duties and gave it to Erin Robertson.

3.2.9 On 22 April 2020, James Goodman emailed the claimant saying she was disturbing staff at the meeting and they were complaining about her.

3.2.10 In an appraisal taking place in a café next claimant's workplace in March 2020, James Goodman said "he knows that I was not wanted in the service because of my background. He said the reputation in IAPT services are very important and that everyone knows each other throughout the country. He said that if you do not have good reputation you cannot work in this field especially people like you coming from Turkey. He said he had to go along majority."

3.2.11 James Goodman sent the claimant's sickness records from 2011 to both Durham and London services

3.2.12 in February 2021 James Goodman called Whittington Health NHS Trust managers and give them a negative reference about the claimant and, in particular, about her personality and character.

12. The Claimant also raised a grievances on 25 August 2019 and 26 February 2020. The First Grievance was dismissed on 6 March 2020, which the Claimant appealed and a hearing took place, but it was not possible to conclude it in the time available. The reconvened hearing took place in September 2020 and it was upheld in one respect regarding incorrectly recording one absence. The second grievance was heard on 27 April and 15 May 2020. The second grievance was not upheld. At the appeal on 29 October 2020 the Claimant was partly successful.

13. The Claimant resigned and her employment ended on 21 September 2020. It was common ground that to bring the claim of constructive dismissal in time that the Claimant needed to have notified ACAS and presented her claim by 20 December 2020.

14. An amended response had not been provided at the date of the hearing.

15. It was common ground that I was not bound by the decision of Employment Judge Dawson on the amendment application when considering the strike out and deposit application.

The applications

16. I have considered the written and oral submissions of the Respondent and the oral submissions on behalf of the Claimant. I considered the Claimant's witness statement on time and the documents I was referred to in the bundle by the parties. I have not heard any oral evidence, and I

do not make findings of fact as such, but my conclusions based on my consideration of the above are as follows.

Claimant's witness statement

17. The Claimant gave notice on 22 July 2020 and worked her contractual notice period until the termination of her employment in September 2020.

18. At paragraph 5 she referred to persistent discrimination which started in 2016 and concluded when she had brought her claim.

19. Between September 2020 and March 2021 the Claimant worked for Tees, Esk and Wear Valley NHS Foundation Trust.

20. On 25 January 2021, the Claimant had a telephone call with Ms Ellard and asked about her sick leave for the past four years and told her Mr Goodman had made negative statements about her. She then sent a text message to Mr Goodman asking why he disclosed her sickness records back to 2011.

21. On 28 January 2021, the Claimant was informed that Whittington had withdrawn its offer of employment.

22. On 15 February 2021, the Claimant received a response from the Respondent.

23. In March 2021 she became aware of the content of the reference.

24. The Claimant said that for several months she would not leave the house, eat or contact anyone and had depression and anxiety [paragraph 13]

25. She says on 2 December 2020 she was suffering from depression and anxiety.

26. She was only able to present the claim with help from friends

27. She was not considering bringing a claim until she was subjected to bullying again by the provision of the reference.

The Respondent's submissions

28. The Respondent submitted that the claims should be struck out or deposit orders made in the alternative.

29. The constructive dismissal claim should have been presented by 17 December 2020 it was therefore 5 months out of time. No basis had been

put forward as to why it was not reasonably practicable to present that claim in time.

30. The Respondent submitted that the witness statement made little reference to the specifics as to why there was a continuing act, so that the matters before 2021 were in time.

31. Further it was submitted that the claimant accepted that the allegations were time barred.

32. The allegations fell into 4 distinct groups:

    (1) Three allegations against Ms Turner in 2016 and one against Ms Orme in September 2016. There was then a gap of 2 years.
    (2) Allegations against Ms Thomas and Ms Turner in September and October 2018. Following which there was no incident for 19 months.
    (3) The allegations in March/April 2020.
    (4) The post termination allegations.

33. The allegations were verbal and therefore memories would fade and some were seven years old and this was prejudicial to the Respondent and went to whether it is just and equitable to extend time.

34. For the constructive dismissal claim the last incident relied upon was 6 months before resignation.

35. I was reminded that if there was a deposit order it must not be a strike out by the back door in terms of the level of deposit.

36. In relation to the 2021 allegations a deposit order was sought. It was said that there was an error with the medical records and that the claimant was not advancing a case which showed less favourable treatment in respect of the reference

<u>The Claimant's submissions</u>

37. In relation to the constructive dismissal claim, it was accepted that a basis had not been put forward in respect that it was not reasonably practicable to present the claim in time. It was conceded that the application to strike out the claim under the Employment Rights act 1996 could not be opposed.

38. In terms of the discrimination claims, it was submitted that the starting point was that if conduct extending over a period is found then the claims will not be out of time. There had been a difference in the orders in relation to the provision of a witness statement. In Judge Rayner's order dated 16

December 2021 there was specific reference to including information about a continuing act. In the order dated 12 May 2022 the statement only specifically referred to the reasons for not filing the application in time. it was submitted that a lay person would consider it was not necessary to refer to a continuing act, following the second order.

39. She had referred to matters in 2016 in her witness statement.

40. The gaps in time were explained by a period of sickness absence between September 2017 and June 2018. There was therefore less opportunity for discrimination to occur and this was sufficient to demonstrate the discriminatory state of affairs.

41. In relation to the gap between 2018 and 2020, it was pointed out that the Claimant had made other allegations in 2019, which were withdrawn. Further she had further sick leave in that period.

42. This was a factual situation and could only be determined at the final hearing after hearing all of the evidence.

Reply by the Respondent

43. Mr Milsom referred me to South Western Ambulance v King EAT/0056/19 and that where acts were not proven as victimisation they could not be used as acts of conduct extending over a period.

44. He reiterated that this application was not about motivation, but whether the Claimant had sufficient prospects of success to persuade the Tribunal that the claims were a part of a continuing act and/or whether it was just and equitable to extend time.

Means to pay a deposit order

45. I accepted the Claimant's evidence that, although she has a reasonable monthly income, her essential outgoings spend all of her income. I accepted that she was of limited means and is looking after both of her parents. She essentially has a hand to mouth existence.

The law

46. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules". Rule 37(1) provides that:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a) that it is scandalous or vexatious or has no reasonable prospect of success;

47. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule 39(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.

Direct Discrimination claims

48. I reminded myself of the tests to establish direct discrimination. In *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):
"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

49. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment 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 act of discrimination". The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

50. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

51. In every case the tribunal has to determine the reason why the Claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the

claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

Time limits

52. Section 111(2) of the Employment Rights Act 1996 provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

53. Section 120 of the Equality Act 2010 (“EqA”) confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

Unfair dismissal claims

54. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall’s Meat Co v Khan [1978] IRLR 499, Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances [1974] 1 All ER 520) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT).

55. In Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of

the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit…"

56. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".

Discrimination claims

57. It is generally regarded that there are 3 types of claim that fall to be analysed through the prism of s. 123;

    a. Claims involving one off acts of discrimination, in which, even if there have been continuing effects, time starts to run at the date of the act itself;
    b. Claims involving a discriminatory rule or policy which cause certain decisions to be made from time to time. In such a case, there is generally a sufficient link between the decisions to enable them to be joined as a course of conduct (e.g. Barclays Bank-v-Kapur [1991] IRLR 136);
    c. A series of discriminatory acts. It is not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In Hendricks-v-Metropolitan Police Commissioner [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person

(Aziz-v-FDA [2010] EWCA Civ 304 and CLFIS (UK) Ltd-v-Reynolds [2015] IRLR 562 (CA)).

58. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - Pathan v South London Islamic Centre EAT 0312/13.

59. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, 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. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET 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 the 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 sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”

60. In exercising its discretion, tribunals may have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case and in particular ,
    a. the length of and the reasons for the delay.
    b. the extent to which the cogency of the evidence is likely to be affected by the delay.

c. the extent to which the party sued has cooperated with any requests for information
d. the promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
e. the steps taken by the claimant to obtain appropriate professional advice.

61. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular the length of and reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

Strike out

62. Under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, a tribunal can strike a claim out if it appears to have no reasonable prospect of success. It is a two stage process; even if the test under the rules is met, a judge also has to be satisfied that their discretion ought to be exercised in favour of applying such a sanction. Striking out a claim is a draconian step and numerous cases have reiterated the need to reserve such a step for the most clear and exceptional of cases (for example, Mbuisa-v-Cygnet Healthcare Ltd UKEAT/0119/18).

63. The importance of not striking out discrimination cases save in only the clearest situations has been reinforced in a number of cases, particularly Anyanwu-v-South Bank Students Union [2001] UKHL 14 and, more recently, in Balls-v-Downham Market School [2011] IRLR, Lady Justice Smith made it clear that “no” in rule 37 means “no”. It is a high test.

64. In Ezsias-v-North Glamorgan NHS Trust [2007] EWCA Civ 330 the Court of Appeal stated that it would only be in exceptional cases that a claim might be struck out on this ground where there was a dispute between the parties on the central facts.

65. In Cox v Adecco & Others UKEAT/0339/10/AT, HHJ Taylor after a review of the authorities summarised the general propositions for a strike out application at paragraph 28 as:

(1) No-one gains by truly hopeless cases being pursued to a hearing;
(2) …

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
(4) The Claimant's case must ordinarily be taken at its highest;
(5) It is necessary to consider, in reasonable detail, what the claims and issues are.

66. The Claimant also referred me to Jatto v Godloves Solicitors UKEAT/0330/07, Jiad v Byford [2003] IRLR 232, Mechkarov v Citibank NA [2016] ICR 1121, which made the same points.

Deposit Orders

67. Where a tribunal considers that any specific allegation, argument or claim has little reasonable prospect of success it may make a deposit order (rule 39). If there is a serious conflict on the facts disclosed on the face of the claim and response forms, it may be difficult to judge what the prospects of success truly are (Sharma-v-New College Nottingham [2011] UKEAT/0287/11/LA). Nevertheless the tribunal can take into account the likely credibility of the facts asserted and the likelihood that they might be established at a hearing (Spring-v-First Capital East Ltd [2011] UKEAT/0567/11/LA).

68. There must be a proper basis for doubting the ability to establish the claim. Van Rensburg v Royal Borough of Kingston-Upon-Thames UKEAT/009607.

69. In Sharma v New College Nottingham [2011] UKEAT/0287/11 When deciding whether a Claimant had proved facts from which a Tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of unlawful discrimination, it was important to bear in mind that it was unusual to find direct evidence of discrimination. In deciding whether a claimant had proved such facts, the tribunal would usually consider what inferences it was proper to draw from the primary facts, and had to assume that there was no adequate explanation for those facts, Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] EWCA Civ 142, [2005] 3 All E.R. 812, [2005] 2 WLUK 455 applied. Given that approach, the issue in the instant case was to what extent it was within the powers of the tribunal at the pre-hearing review, without hearing any oral evidence or coming to any determination on what might be disputed facts, to strike out a claim as having no reasonable prospect of success or to make a deposit order. The EAT referred to the House of Lords' decision in Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL, where Lord Hope said that 'discrimination issues… should, as a general rule, be decided only after hearing the evidence'. It held that it would be illogical to require an employment judge

to take different approaches depending on whether he or she was considering striking out or making an order for a deposit as either order was, on any view, a serious, and potentially fatal, course of action. Accordingly, it upheld the claimant's appeal and quashed the deposit order.

70. I was referred to Hemdan v Ishmail [2017] IRLR 228 and was assisted by paragraphs 12, 13 and 15. The test is less rigorous than the test for a strike out, but "nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or defence. "The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial on the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise… If there is a core factual conflict it should be properly resolved at a full merits hearing where evidence is heard and tested." "Once a tribunal concludes that a claim or allegation has little reasonable prospects of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case.

71. I bore in mind the fact that, in the context of a discrimination case, it is not sufficient for a claimant to demonstrate that there was a difference in treatment and suggest that that alone could have been because of his protected characteristic.

72. Under rule 39(2)When considering an application for a deposit order it is also necessary to make reasonable enquiries into the paying party's ability to pay the deposit and to have regard to such information when deciding the amount of the deposit.

Conclusions

Application in relation to constructive dismissal

73. The Claimant has not advanced any case in her witness statement or in oral submissions that it was not reasonably practicable for her to have presented the claim under the ERA with the time limits. In fact her witness statement said that she was not even considering bringing such a claim until the incidents in 2021. This was evidence suggesting it was reasonably practicable. There was no suggestion it was not reasonably feasible for her to present the claim in time. Counsel for the Claimant said

that he could not oppose the application to strike out this part of the claim, which was a sensible concession.

74. The Claimant had no reasonable prospects of success in establishing it was not reasonably practicable to present the claim of constructive dismissal within the time limits. Accordingly, this claim was struck out.

Application in relation to the discrimination time

75. The Respondent made the application for strike out and deposit on the basis that the last two allegations were not time barred. I have considered the application on that basis, however if the Respondent is incorrect in its calculation consideration might be needed as to whether it is just and equitable to extend time for the last two allegations.

76. When considering the application I was mindful that it would be unusual if there was direct evidence of discrimination or a smoking gun. It was essential to take the Claimant's case at its highest. I also recognised that cases should not be struck out when the central facts were in dispute and that striking out should be reserved for the clearest cases and that it is a high test.

77. In terms of whether there was a concession in the Claimant's witness statement that there was not a continuing act, there was a disunity between the two orders and it was suggested the Claimant might have misunderstood what was required. I took her case at its highest and I did not interpret it as conceding that there was not conduct extending over a period, when she drafted the witness statement.

78. Whether there is a continuing act is a fact based exercise. The allegations did appear to fall within 4 distinct groups. The Respondent fairly drew my attention to the 2 year and 19 month gaps between the first and second groups of allegations and the second and third groups of allegations. The Claimant's explanation as to the first gap was that she was absent on sick leave for a significant period of time, however this did not cover the whole period. Her explanation for the second gap was that other discriminatory things occurred, on which she no longer relied, and although I accepted that because they had been withdrawn they could not be considered as continuing acts, they were still relevant to the question of whether it was just and equitable to extend time. The Claimant also submitted that she was absent on sick leave for part of the second period.

79. I took into account that the groups of allegations appeared to show some limited crossover between the people involved. However, it was relevant that it was not alleged that same people were involved throughout the period between 2016 and 2021.

80. The primary difficulty for the Claimant is that there were significant gaps between the groups of incidents and her sickness absences were much shorter than the gaps. The factual dispute is not that significant in that she was absent. She relies upon 12 incidents and there is limited cross-over of alleged perpetrators between the groups of incidents. These matters suggest that the Claimant has some prospects of success in establishing that there was conduct extending over a period, however those prospects are weak. I was not satisfied that it was clear the Claimant would not succeed in establishing conduct extended over a period. Taking into account the guidance about the caution required when considering discrimination cases and taking the claimant's case at its highest I was not satisfied that she had no reasonable prospects of success in establishing that there was a continuing state of affairs which allowed discrimination to occur and that there was conduct extending over a period. The strike out application on the basis of time limits was refused.

81. However the Claimant's case, that she was absent on sick leave, only covers part of the gaps between the groups of allegations. Taking into account the limited number of allegations and that the overlap of people involved also appears limited and that the absences do not account for the whole of the gaps I concluded that the Claimant had little reasonable prospects of success in establishing that that the there was a continuing act between the first and second groups of allegations and those later allegations in groups three and four.

82. Further in respect of those allegations, much of what is alleged is verbal. Memories do fade and to the extent that if there was not a continuing act I considered that the Claimant had little reasonable prospects of success in establishing that it was just and equitable to extend time for the allegations between allegations 1 and 6 in the list of issues and the effect on the memories of the Respondent's witnesses and that the allegations were many years old at the date of presentation was relevant.

83. The situation in relation to allegations 7 to 12 was different. Mr Goodman was involved in all but one of the allegations. The gap in time was much shorter and during that time the Claimant was undergoing a grievance process, which could be relevant as to whether discriminatory incidents would have occurred at that time. I was satisfied that the Claimant had reasonable prospects of success in establishing that there was conduct extending over a period for allegations 7 to 12 and/or that it would be just and equitable to extend time. The Respondent's application for a strike out or deposit order for these allegations, on the time basis, was refused.

84. In relation to the Respondent's application for a deposit order for allegations 11 and 12 on the basis of their prospects of success. Mr

Goodman was involved in the last allegations of discrimination before the Claimant's resignation. Allegation 10 makes specific reference to the Claimant's nationality and this could be significant in the determining whether there was a racial motivation for the sending of the medical records and the reference provided. It is unlikely that there will be direct evidence of discrimination and I was satisfied that the Claimant had more than little reasonable prosects of success in these allegations.

85. I concluded that the threshold for a deposit order for allegation 1 to 6 had been met.

86. Firstly it was concluded that there was little reasonable prospects of success that allegations 1 to 4 formed part of conduct extending over period, which included the subsequent allegations, in particular allegations 11 and 12. Further there was little reasonable prospects of success in establishing it was just and equitable to extend time.

87. I reached the same conclusion in relation to allegations 5 and 6.

88. Taking into account the Claimant's limited means I considered that it was appropriate to make a deposit for each of allegations 1 to 6. The Claimant is effectively having a hand to mouth existence at present. The appropriate amount is £5 per allegation.

Employment Judge J Bax
Date: 13 December 2022

Judgment sent to Parties: 14 December 2022

FOR THE TRIBUNAL OFFICE

NOTE ACCOMPANYING DEPOSIT ORDER
Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3033. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

To: HMCTS Finance Centre

Temple Quay House
Hawk D – F
4th Floor
The Square
Temple Quay
Redcliffe
Bristol
BS1 6DG

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order