



EMPLOYMENT TRIBUNALS

Claimant: Farah Khan

Respondent: John Lewis Plc

RECORD OF A PRELIMINARY HEARING

Heard at: London Central Employment Tribunal **On:** 6th November 2024
By Cloud Video Platform

Before: Employment Judge Gidney

Appearances

For the Claimant: Not present or represented

For the Respondent: Ms Naomi Webber (Counsel)

JUDGMENT

Upon hearing Counsel for the Respondent

And upon the Claimant not attending, despite calls and emails made by the Employment Tribunal on the morning of the hearing it is the Judgment of the Tribunal that:

- 1. The List of Issues annexed to the Order of Employment Judge Khan dated 12th July 2024 shall not be extended to include new matters by way of amendment, the Claimant having failed to made an application to amend her Claim Forms (2202574/2023) and (2210077/2023) to comply with the information ordered by Employment Judge Khan.**

- 2. The Respondent's application to strike out from the List of Issues annexed to the Order of Employment Judge Khan dated 12th July 2024 the following claims / allegations is granted, namely:**
 - 2.1. The Factual Allegations (1) 1.1 a, b, c, d, e, f, g & h;**

 - 2.2. The job roles at (1) 1.1 i (i), (v), (vi), (xi), (xiv) & (xv);**

 - 2.3. The Factual Allegation (1) 1.1 j, in so far as it relates to Matt, Tyrone, Hale Cottingham and Yolandie Richardson;**

 - 2.4. The Harassment Claims at (3) 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8 & 3.9 (which are all based on the now struck out factual allegations at (1) 1.1 a-h);**

 - 2.5. The unauthorised deduction from wages claim at (8) 8.1.**

REASONS

The Claimant's application to postpone today's hearing

1. This matter was due to start at 10.00am on 6th November 2024. At 8.05am on 6th November 2024 the Claimant emailed the Tribunal in the following terms: '*Unwell - Unable to attend because of medical reasons as already stated*'. The Claimant did not copy the Respondent into that communication. It was not supported by any medical evidence. Despite plainly being aware of the hearing the Claimant did not respond to the Tribunal's two emails asking for medical evidence to support the application and did not answer the Tribunal's two attempts to contact the Claimant by telephone.
2. In the absence of any further application or evidence in support of the application, I refused the Claimant's application to postpone the hearing. The Claimant was aware of the hearing and emailed the Tribunal about it on the morning of the hearing. After sending her email she did not respond to the attempts by the Tribunal to seek medical evidence that morning, made both by email and telephone. The Claimant having made her communication simply ceased to engage with the Tribunal.
3. The Claimant had failed to produce any medical evidence to support her application to postpone the hearing. Medical evidence is required and without it the application was refused. It was made on the morning without notice to the Respondent, who was ready and expecting to proceed.

The Claimant's failure to apply to amend her claims

4. On 9th July 2024 Employment Judge Khan gave the Claimant a further 7 days to clarify any application to amend her Claim. On 19th September 2024 Judge Khan, noting that no further information had been provided by the Claimant, refused any amendment application based on the effect her disabilities had on

her dismissal. In respect of the matters for which the Claimant had provided some further information, the Judge listed the application to amend her Claim to add those matters to be heard today.

5. The Claimant failed to make a further application to amend her Claim to include the additional information that she had provided and failed to attend today to make that application in person.
6. Accordingly, whilst such matters could be referred to as background matters, no application has been made to include them as Claims and they are not so included. The List of Issues for the Tribunal to determine (attached at annex 1 to the Case Management Order of 6th November 2024) does not include them and should now be considered as final. This matter is currently listed in April 2025, some 5 months from now. That time will pass quickly. This matter has been before the Tribunal for Case Management on 5 separate occasions prior to today and has been considered by 3 different Judges, or 4 different Judges, if I am included. It is not in accordance with the overriding objective for the Issues still to be 'open' at this late stage. Accordingly the List of Issues annexed to this Order shall be closed. The parties are to prepare their claims and defence to these issues only.

The Respondent's application to strike out part of the Claimant's Claims

7. By applications dated 7th June, 23 July and 3 October 2024 the Respondent has applied to strike out a number (but not all) of the Claimant's claims. The essential basis for the application is that the matters identified are significantly out of time (circa 2 years out of time) and they are not continuing acts of discrimination. The Respondent asserts that even taking into account the caution that Tribunal's must exercise when considering striking out discrimination claims, it remains the case that the Claimant has no reasonable prospect of time being extended in all of the circumstances of this case.

8. In determining the Respondent's application I heard evidence from Laura Fitzpatrick, a senior paralegal in the Respondent's in-house legal department. She set out the chronology and also the steps taken to identify people named by the Claimant. She provided a witness statement and gave evidence under oath. Her evidence was not challenged as the Claimant did not attend the hearing.
9. The chronology reveals the following:
 - 9.1. The Claimant commenced employment with the Respondent on 4th August 2018 at its St Pancras Store as a Selling Assistant.
 - 9.2. The Claimant was furloughed from March / April 2020;
 - 9.3. From September 2020 the Claimant was redeployed to the Hamilton Call Centre, albeit she was working from home;
 - 9.4. The Claimant commenced a period of sick leave from 7th March 2022 and did not return to work for the Respondent prior to her dismissal;
 - 9.5. The Claimant was dismissed on 6th April 2023.
 - 9.6. The Claimant notified ACAS of a dispute with the Respondent on 6 January 2023 and received her ACAS Early Conciliation certificate on 17 February 2023. Other certificates were also obtained, although only this one is relevant for time purposes.
 - 9.7. The Claimant presented her 1st Claim on 14 March 2023.
 - 9.8. The latest date for any discrimination allegation to be in time is therefore **7 October 2022**, being three months less a day from the notification of a dispute to ACAS on 6th January 2023. The Claimant's 2nd Claim relates solely to her dismissal and no time issues arise in respect of that claim.
10. The relevant statutory provisions in determining the Respondent's applications are as follows:

Rule 37(1) ET Rules 2013

"... a Tribunal may strike out all or part of a claim... on any of the following grounds (a) that it ... has no reasonable prospects of success, and (e)

that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim ... (or the part to be struck out)."

S123 EqA 2010:

(1) Subject to 140B proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable ...

(3) For the purposes of this section (a) conduct extending over a period is to be treated as done at the end of the period..."

11. The following legal principles guide Tribunals in the correct approach to such applications, as follows:
 - 11.1. The relevant test is whether the Claimant can establish on a reasonably arguable basis that the various complaints are sufficiently linked to be continuing acts or to constitute an ongoing state of affairs [Aziz v FDA [2010] EWCA Civ 304, para 34-36].
 - 11.2. The Tribunal should look at the substance of the complaints in question to determine whether they can be said to be part of one continuing act by the employer [Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA].
 - 11.3. There is a distinction between continuing acts and acts with continuing consequences. A one-off decision which is not part of a regime, rule, practice or principle of an employer will not be regarded as a continuing act, even if the consequences of that decision are ongoing [Barclays Bank plc v Kapur and ors [1991] ICR 208, HL].
 - 11.4. Acts relied on by a Claimant as part of a course of conduct must be established on the facts and be found to be discriminatory in order to be part of a continuing act [South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168, para 36].
 - 11.5. The relevant test for striking out Claims is whether the Claimant has no reasonable or little reasonable prospects of successfully persuading the ET to extend time.

- 11.6. The burden of persuading the ET to exercise its discretion to extend time would be on the Claimant [Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327, at [26]).
- 11.7. It is the exception rather than the rule [Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA].
- 11.8. The strike out power should only be exercised in rare circumstances [Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 775 at para 30];
- 11.9. Cases should not, as a general principle, be struck out on this ground when the central facts are in dispute [North Glamorgan NHS Trust v Ezsias [2007] IRLR 603];
- 11.10. The correct approach for a tribunal to adopt is to take the claimant's case at its highest, as it is set out in the claim, unless contradicted by plainly inconsistent documents [Ukegheson v London Borough of Haringey [2015] ICR 1285, EAT at para 21];
- 11.11. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances [Anyanwu v South Bank Students' Union [2001] IRLR 305, HL];
- 11.12. The above guidance is not to be taken as amounting to a fetter on the tribunals' discretion [Jaffrey v Department of the Environment, Transport and the Regions [2002] IRLR 688 at para 41, EAT];
- 11.13. Whilst striking out discrimination claims will be rare, where there is a time bar to jurisdiction, or where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, strike out may well be appropriate [Chandhok v Tirkey [2015] IRLR 195, EAT, paras 19 & 20].
- 11.14. The Tribunal would have to assess all the factors in the case which it considers relevant to whether it is just and equitable to extend time, including the length of, and reasons for, the delay, the balance of prejudice between the parties and the merits of the claim [Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132].
- 11.15. There are two types of prejudice a respondent may suffer if the limitation period is extended: (i) the prejudice of having to respond to a

claim that would otherwise be out of time, and (ii) forensic prejudice as a result of, e.g. memories fading and witnesses leaving employment [Miller v Ministry of Justice EAT 0003/15].

12. It is important to note that the strike out application does not relate to the whole of the Claimant's case. This matter will proceed to trial on its claims that have a reasonable prospect of success. Applying the above-mentioned legal principles to the facts in this case, my Judgment on the Respondent's application is as follows:
 - 12.1. **Allegations (a)-(d):** These occurred prior to the Claimant's furlough when she was working at St Pancras. They are two and a half years out of time. There is nothing to link them to later allegations which maybe in time. The Claimant was working at a different site and under different managers to the later allegations. There is no reasonable prospect that these incidents are part of a continuing act and/or that it would be just and equitable to extend time by the necessary period.
 - 12.2. **Allegations (e)-(g):** These occurred in 2020, following the move to the Hamilton Call. There is nothing to link them to later allegations which maybe in time. There is no reasonable prospect that these incidents are part of a continuing act and/or that it would be just and equitable to extend time by the necessary two year period.
 - 12.3. **Allegation (h):** The Claimant accepts she was redeployed to the Hamilton Call Centre in September 2020. This is a one-off act in 2020 not linked to any other allegation. It is over two years out of time and there is no reasonable prospect that it would be just and equitable to extend time by the necessary period.
 - 12.4. **Harassment claims:** These relate to allegations (a), (b), (c), (d), (f) and (g). There is no suggestion that these link in any way to later allegations that may be in time. As such, these claims are between two and four years out of time on their own account. There is no explanation for any

delay and the Respondent will be prejudiced by the deterioration of witness memory over that time.

- 12.5. **Allegation (a) ('Matt')**: This allegation is dated 2018 and is therefore around 4 years out of time. The Claimant has been unable to identify who this individual is and as such has no reasonable prospect of establishing a prima facie case of discrimination. The Respondent is put to significant prejudice as it has been unable to identify who the allegation is against and the only individual that might qualify left the Respondent's employment in 2020. It would not be possible to have a fair hearing.
- 12.6. **Allegations (b) & (c) (Hale Cottingham)**: These allegations are dated from early 2019-March 2020, and are therefore between two and a half and three and a quarter years out of time. The Claimant never raised a complaint against Hale Cottingham (of this nature or at all) at the time or at any point throughout her employment, nor has Ms Cottingham sought advice in relation to the Claimant. As such, the Respondent would be put to significant prejudice in obtaining relevant evidence to defend such a claim.
- 12.7. **Allegation (d) (Alex Turner)**: This allegation is dated between December 2019-March 2020, and is therefore around two and a half and two and a quarter years out of time. The Claimant never raised a complaint against Alex Turner (of this nature or at all) at the time or at any point throughout her employment, nor has Ms Turner sought advice in relation to the Claimant. As such, the Respondent would be put to significant prejudice in obtaining relevant evidence to defend such a claim.
- 12.8. **Allegation (e) (Ellie and Katey)**: This allegation of age discrimination is dated September 2020 and is therefore around two years out of time. The Claimant did not raise a complaint at the time and has not given a reason for the delay. Furthermore, despite extensive searches the

Respondent is also unable to identify these individuals and therefore their ages at the relevant time. It would not therefore be possible to have a fair hearing.

- 12.9. **Allegation (f):** This allegation of age discrimination is dated 2020 and is therefore around 2 years out of time. The Claimant did not raise a complaint at the time and has not given a reason for the delay.
- 12.10. **Allegation (g):** These allegations of race/religious discrimination are dated Oct-Dec 2020 and are therefore around two years out of time. The Claimant did not raise a complaint at the time and has not given a reason for the delay. The Claimant has been unable confirm who Kelly is and thus has no reasonable prospect of establishing a prima facie case of discrimination.
- 12.11. **Allegation (h):** This allegation is dated Sept 2020 and is therefore around 2 years out of time. The Claimant did not raise a complaint at the time and has not given a reason for the delay. The Claimant was offered and accepted this role as an alternative to redundancy, upon the closure of the St Pancras branch (and one of 798 employees to be redeployed at the time).
- 12.12. **Harassment:** The conclusions reached in relation to allegations (a), (b), (c), (d), (f) and (g) above are repeated.
- 12.13. **Allegation (i) (interviews):** The Claimant lists 15 jobs she says she applied for. However, the evidence (provided both by the Claimant and Respondent [395 & 417] indicates that the Claimant only applied for nine roles such that claims based on the remaining roles have no reasonable prospect of success. There is no record of the Claimant applying for the roles at **allegations (i)(i) and (vi)**. As such, the claims relating to these allegations have no reasonable prospect of success.

The roles listed at **allegations (i)(iv), (xi), (xiv) and (xv)** are all duplicates of others on the list.

12.14. **Allegation (j)**: The Claimant brings claims of direct race and age discrimination in relation to not being provided access to courses from November/December 2021, having made this request to a number of colleagues:

12.14.1. **'Matt'**: The Respondent cannot identify this individual, despite having conducted extensive searches. As such, it is not possible properly to defend the claim. The only individual with this name identified left the Respondent's employment in September 2020. As such, there are no prospects of establishing an act of discrimination in Nov/Dec 2021.

12.14.2. **'Tyrone'**: The Claimant has been unable to identify who this individual is and as such has no reasonable prospect of establishing a prima facie case of discrimination. The Respondent has conducted a thorough search and has identified two individuals: Tyrone Thompson-Dixon left the Respondent's employment in September 2020 [425]. As such, there are no prospects of establishing an act of discrimination from Nov/Dec 2021. Tyrone Lovell was employed by the Respondent for six days in early November 2021 as a 'Customer Delivery Resolution Partner'. There are no reasonable prospects of establishing an act of discrimination from Nov/Dec 2021, and (ii) this claim would be almost a year out of time. There would be significant prejudice to the Respondent in defending this claim.

12.14.3. **Hale Cottingham**: Ms Cottingham worked alongside the Claimant until September 2020 before being redeployed to Head Office. She was not working with the Claimant from Nov/Dec 2021. As such, any allegation of discrimination in

relation to the Claimant's training at this time has no reasonable prospect of success.

12.14.4. **Yolandie Richardson:** Ms Richardson worked alongside the Claimant until September 2020 and was then redeployed. As such, there is no reason why the Claimant would be in contact with Ms Richardson about training in Nov/Dec 2021. Furthermore, the Respondent hold no direct emails between the Claimant and Ms Richardson.

12.15. **Claim 8 (Christmas bonus):** The Respondent does not pay a Christmas bonus. Its non-contractual discretionary bonus is paid in March each year (if at all). On 30 September 2022, the Respondent announced it would pay all employees a £500 one-off cost of living support payment on 21 December 2022. This was paid to the Claimant.

13. I am satisfied that the allegations that were not the subject of concerns raised at the time, and that were presented two years after the event, in some cases in respect of individuals that cannot be identified or traced, have no reasonable prospect of success. It is appropriate case management to stop them at this stage and to allow the parties to focus on the Claimant's remaining claims.

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Employment Judge Gidney

Judgment dated 6th November 2024
Full Reasons dated 30th December 2024

Sent to the Parties on:
3 January 2025
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