Case Number: 2200786/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms N Mukoro		**(1) Independent Workers' Union of Great Britain** **(2) Jason Moyer-Lee** **(3) Catherine Morrissey** **(4) Danny Millum** **(5) Jonathan Katona** **(6) Henry Chango Lopez** **(7) Maritza Calisto Calle**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 12 July 2018**

BEFORE: Employment Judge A M Snelson

On hearing the Claimant in person and Mr J Galbraith-Marten QC, leading counsel, on behalf of the Respondents,
And on reading the written representations of the Claimant delivered on 10 September 2018,

The Tribunal adjudges that:

(1) The complaints of direct racial discrimination identified in paras 1.6 and 1.7 of the record of the preliminary hearing (case management) held by Employment Judge Grewal on 16 March 2018 were presented out of time and the Tribunal has no jurisdiction to consider them.
(2) Accordingly, those complaints are dismissed.

REASONS

Introduction

1. The Claimant, a legally qualified woman in her mid-fifties, describes herself as black west African and claims to be disabled by anxiety, depression and

panic attacks. The Respondents have conceded that she is so disabled. She was employed by the First Respondents ('the union') in the capacity of Legal Department Co-ordinator from 15 July 2015 until 6 November 2016, when she was dismissed.

2. By a claim form presented on 4 April 2017, the Claimant brought complaints of discrimination on grounds of race, disability and sex, a complaint of victimisation, a complaint of disability-related harassment, a claim for wrongful dismissal and a claim for arrears of pay. The above judgment and these reasons are concerned only with the race discrimination claim.

3. At a preliminary hearing (case management) on 13 March 2018, Employment Judge Grewal identified the allegations relied upon the purposes of the race discrimination claim in these terms:

> **1.6 Whether throughout the Claimant's employment Jason Moyer-Lee and various volunteers and officers spoke in Spanish in the Claimant's presence;**
> **1.7 Whether on 20 April 2016 Jason Moyer-Lee ('JML') reported the Claimant to the Legal Department Sub-committee for being aggressive, rude, sullen and a "mouthy black woman". The Claimant's case is that her behaviour did not demonstrate those traits and that JML was applying a racial stereotype to her;**
> **1.8 It is not in dispute that the Respondent dismissed the Claimant.**

Accordingly, it was common ground that the race discrimination claim rested on the two allegations listed at 1.6 and 1.7 and the dismissal.

4. By an application dated 2 May 2018, the Respondents' representatives made applications in respect of the race discrimination claim for orders to strike out the first two as being out of time, alternatively as having no reasonable prospect of success. They further applied for the dismissal-based claim to be made the subject of a deposit order on the basis that it had little reasonable prospect of success.

5. That application came before me on 12 July 2018. The Claimant appeared in person, although she was accompanied by her daughter who provided valuable support. The Respondents were represented by Mr Jason Galbraith-Marten QC, appearing on a *pro bono* basis.

6. Mr Galbraith-Marten produced a helpful note which outlined and developed the main arguments pursued in support of the application. A copy of that note was given to the Claimant in advance of the hearing. The Claimant, having arrived late for the 10.00 a.m. hearing, asked for a short adjournment because she "needed air". Accordingly, I put the hearing back to 11.00.

7. When the matter was called on, I asked the Claimant if she intended to give evidence on the time issue. She said that she did not, and that she was unwell and wanted a postponement. She produced no medical evidence suggesting that she was unfit to attend the Tribunal. I gave no formal ruling on the application but did observe that it was important to make progress with the litigation. The dispute was becoming stale. Moreover, a final

hearing had been set for five days commencing on 20 September. The Claimant then said that she would at least need time to respond to the Respondents' applications. Here, I was more sympathetic. Despite the polite objections of Mr Galbraith-Marten, I decided that it was in keeping with the overriding objective to allow her until 27 July to submit written representations in response to the applications, limited to 3,000 words. As I will shortly explain, the applications were narrow in scope. Mr Galbraith-Marten's note, which included a careful exposition of the law, barely exceeded 2,000 words. I also gave the Respondents the opportunity to reply to the Claimant's submissions, limiting any comments to 1,000 words and setting a deadline of 3 August.

8. Mr Galbraith-Marten then addressed me briefly to reinforce certain points in his note. His submissions contained no surprises: they were wholly in line with what I had read in the original application and his note. By agreement the hearing was then adjourned.

9. Unfortunately, my directions were not complied with. The result was that I was not in a position to issue my decision in the week commencing 13 August, as I had envisaged. Eventually, after some difficulty, it was possible to set up a telephone hearing attended by the Claimant's daughter and Mr Galbraith-Marten, which took place on 7 September. By that stage it had become common ground that, owing to the Claimant's failure to comply with the directions for the preparation of evidence, the final hearing could not proceed. In the circumstances, Mr Galbraith-Marten asked me to retain one of the allocated days to hear an application on behalf of the Respondents for a striking-out order, any application by the Claimant and, subject to those, deal with further case management. Ms Mukoro (junior), while of course not accepting that any striking-out order would be appropriate, agreed that Mr Galbraith-Marten's proposal would facilitate a resolution of all outstanding procedural issues. Accordingly, I vacated the final hearing but listed a preliminary hearing in public for what had been day five of the allocation (26 September) and gave short directions. I also granted a final extension of time for the delivery of the written representations first permitted on 12 July, to 10 September.

10. At 23:38 hrs on 10 September, 22 minutes before the last deadline, the Claimant delivered her written representations.

The legal principles

11. By the Equality Act 2010, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. "Conduct extending over a period" is to be treated as done at the end of the period (s123(3)(a)). The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson-v-Bexley Community Centre* [2003] IRLR 434 CA).

12. By the Employment Tribunals Rules of Procedure 2013 ('the Rules'), r37(1)(a), the Tribunal has power to strike out claims or parts of claims on the ground that they have no reasonable prospect of success.

13. It is well-established that striking-out orders are exceptional in discrimination cases. The Tribunals must exercise great care and caution when faced with an application for such an order (see *Anyanwu-v-South Bank Students Union* [2001] 1 WLR 683 HL). That said, in an appropriate case a striking-out order should be made and failure by the Tribunal to do so may be held to amount to an error of law (see *ABN Amro Management Services Ltd-v-Hogben* UKEAT/0266/09, 20 November 2009 (Underhill P)).

14. By r39(1) the Tribunal has power to make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of being permitted to persist with an argument or allegation judge to have "little reasonable prospect of success".

The arguments

15. In respect of the claim recorded in EJ Grewal's document, para 1.6, Mr Galbraith-Marten pointed out that the Claimant's last day at work was 10 June 2016, the ACAS conciliation period was 25 July to 10 August 2016 and (as already noted) the claim form was not presented until 4 April 2017. For the purposes of the 2010 Act, s123(3)(a), there could be no question of the material conduct "extending over a period" ending later than 10 June 2016. The claim was hopelessly out of time and no sustainable reason for extending time had been shown.

16. As to the second allegedly detrimental act (EJ Grewal's document, para 1.7), Mr Galbraith-Marten submitted that the conduct complained of could only be seen as a 'one-off' event. Time ran from 29 April (not 20 April) 2016 and the claim was therefore about eight months out of time. Again, no ground had been shown for substituting a more generous time limit than the statutory three months.

17. Mr Galbraith-Marten further submitted that both detriment claims were patently without merit and that that was a factor which argued against the exercise of the 'just and equitable' discretion, alternatively in favour of their being struck out as having no reasonable prospect of success.

18. In her written representations, the Claimant stresses that she was and is a vulnerable person and that she was not able to do justice to her case at the preliminary hearing. She briefly addresses the merits of the racial discrimination claims, contending that they are not weak but only suffer from the disadvantage of being poorly presented. No representations are offered on the jurisdictional challenge based on time.

Conclusions and outcome

19. I am satisfied that Mr Galbraith-Marten's submissions on the time issues are

correct. It is plain that he is right about the dates from which time runs for the purposes of the detriment claims. There is no room for a tenable 'conduct extending over a period' argument. The Claimant declined to give evidence to explain the delay in commencing proceedings and her written representations are silent on the time point. She is (I am told) legally qualified and must be taken to have been aware of her legal rights or, at the very least, put on inquiry as to those rights. She has signally failed to show that her poor health prevented her from taking appropriate, or any, steps to safeguard her interests. No ground for exercising the 'just and equitable' discretion in her favour is made out. It follows that both detriment claims must be dismissed for want of jurisdiction.

20. I also agree with Mr Galbraith-Marten about the merits of the detriment claims. Had they survived the jurisdictional challenge, both would have been very strong candidates for striking-out or, at the very least, deposit orders.

21. The deposit order application in respect of the dismissal claim is dealt with in an accompanying document.

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EMPLOYMENT JUDGE SNELSON
19 Sep. 18

Judgment entered in the Register and copies sent to the parties on ….19 Sep. 18

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