EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Dr P Sanchez Roa** | v | **Hammersmith Medicines Research** |

# OPEN PRELIMINARY HEARING

**Heard at:** **Watford** **On: 5 February 2020**

**Before: Employment Judge Alliott – Sitting alone**

**Appearances:**
**For the Claimant:** **In person**
**For the Respondents:** **Dr M Boyce (Medical Director)**

# JUDGMENT

1. The claimant's claims of age discrimination have no reasonable prospect of success and are struck out pursuant to Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

# REASONS

1. The claimant was employed by the respondent as a Screening Physician on 1 October 2018. She resigned on 23 November 2018 giving one week's notice. The effective date of termination of her employment was therefore 30 November 2018.

2. By a claim brought on 22 May 2019, following a period of early conciliation from 27 February to 14 March 2019, the claimant brought claims for age discrimination and other payments, namely overtime pay and sick pay she alleges were outstanding at the date of the termination of her employment.

**Time**

3. By my calculation, the 3-month period for the claimant to bring her claims would have expired on 29 February 2019. The Acas notification was 27 February 2019 and the date of the certificate is 14 March 2019. Therefore, the claimant had until one month after Day B, 14 March 2019, to bring her claims.

4. The primary limitation period would therefore have expired on 14 April 2019. The claimant's claim was presented on 22 May 2019 and by my calculation she is 38 days late.

5. Therefore, in order to proceed with her age discrimination claim, the claimant will need to establish that it is just and equitable to extend time for her to bring that claim. I recite this by way of background. I stress that I have made no decision one way or another as to the prospects of establishing that as I have not heard representations in relation to it.

**The procedural steps taken in this claim**

6. Notice of a closed preliminary hearing for today was given to the parties on 12 June 2019.

7. No doubt in response to the contents of the respondent's response form, Employment Judge Lewis directed, on 15 August 2019, the following:

> "No later than 12 October 2019, the claimant is to send to the tribunal and to the respondent a list of all the events which she asks the tribunal to decide were matters of age discrimination. The list must be typed, in numbered paragraphs, and the events should be listed in date order.
>
> In relation to each event in this list, the claimant must give all the following information:
>
> 1. A summary of happened
> 2. When and where it happened
> 3. Who was responsible for the event
> 4. Who else was present
> 5. The basis upon which the claimant complains that the event was an act of age discrimination
> 6. Who the claimant compares herself with in complaining that she has been treated less favourably on the grounds of age."

8. On 11 October 2019, the claimant sent a 11-page document in response to that order.

9. On 4 November 2019, the respondent wrote to the tribunal complaining that the claimant had not linked any particular remark or action to discrimination on the grounds of age and that the document did not explain how she was treated less favourably than other younger new starters.

10. Employment Judge Lewis directed, on 4 January 2020, as follows: -

> "The preliminary hearing on 5 February 2020 will be heard in public and may consider any application by the respondent for strike out/deposit order(s)."

11. Thus it is that Dr Boyce, on behalf of the respondent, has made before me an application for a strike out order and/or a deposit order in relation to the claimant's age discrimination claims.

## The law

12. I have a discretion to strike out all or part of the claim on the basis that it has no reasonable prospect of success – Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

13. I have taken fully in to account that the appellate courts have repeatedly stressed that in discrimination claims that are invariably fact sensitive, it is only in the clearest cases that a strike out order will be appropriate.

14. In particular, from paragraph 11.123 of the IDS Employment Law handbook on Practice and Procedure, I take in to account as follows:

> "Special considerations arise if a tribunal is asked to strike out a claim of discrimination on the grounds that it has no reasonable prospect of success.
>
> In Anyanwu and another v Southbank Students Union and another [2001] ICR 391, HL, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. With this guidance in mind, the Court of Appeal in Community Law Clinic Solicitors v Methuen [2012] EWCA Civ 571 CA, held that an employee's claim for age discrimination should not be struck out because the case required further examination of the facts so as to properly consider whether age discrimination could be inferred."

15. I have also taken in to account that even if the grounds for striking out the proceedings have been made, a tribunal should consider alternatives to striking out, for example, the ordering of further particulars.

16. Lastly, I have made due allowance to the fact that the claimant is not legally represented. In that context, whilst it is obviously not for myself to make out the claimant's claim, I have spent just short of one hour in discussion with her in an endeavour to establish how it is that she puts her age discrimination claims.

## The facts

17. I have been told by the respondent and it is not challenged by the claimant, that the respondent employs 270 people in a range of ages from their 20s to Dr Boyce who is 80. I was informed that 39 employees are over the age of 60.

18. The claimant's date of birth is 8 November 1959 and consequently, in 2018, she was 59 years old.

19. It is common ground that all employees of the respondent are required to register their attendance and departure from work using two forms of technology. The first is using a finger scanner and the second is using a fob. The primary purpose of the finger scanner was to record the times of attendance at work by the employees for the purposes of calculating pay and overtime payments. The fob was used for security purposes and also to record who was in the building in the event of, for example, a fire. In the event that the finger scanner, for whatever reason, did not record an employee's attendance at work, then the fob could be used as a secondary system to check attendance.

20. All employees were required to be registered on the systems to use those two forms of technology.

21. It is common ground that the claimant and the respondent both wanted the claimant to be successfully enrolled upon and use both systems thereafter.

22. The claimant told me that initially, her enrollment upon the systems was successful and she could use them for about 10 days.

23. However, for whatever reason, the claimant experienced significant difficulties in being able to use both systems thereafter.

24. I do not consider that establishing why the claimant was unable to use the systems is a matter of disputed fact that will assist her case. The claimant has stressed that she has worked with a huge amount of very complex technology in her career, was used to similar biometric registries both in the UK and abroad and that she did not have any physical limitations with her fingers. The claimant's complaints, in effect, relate to the fact that she was unable to enroll upon the systems and feels that she was treated less than optimally by the respondent in the respondent's attempts to get her to enroll.

25. The respondent does not know why the claimant could not enroll on the systems and points to the fact that all of its other employees have successfully managed to enroll.

26. I do not consider that an examination of the facts as to how the claimant was treated whilst trying to get her to enroll will be relevant to her claim for age discrimination. For the purposes of this application I have assumed that her allegations of how she was treated will be made out at a hearing.

27. That having been said, I have endeavoured at some length to understand how the claimant puts her case. During the course of discussion with the claimant we have considered both direct and indirect discrimination.

28. A central issue in the claimant's allegations is that she feels that there was a perception that she was less competent using technology because of her age. In my judgment, there is no reasonable prospect of her successfully establishing this as a proposition. In my judgment, competence with technology is not age specific. People have varying abilities with technology both in their 20s and in their 60s.

29. In order to succeed in her direct discrimination claim the claimant will have to demonstrate that the respondent treated her less favourably than it would have treated others on the grounds of her age.

30. It is inconceivable that the respondent deliberately caused the claimant difficulties in enrolling on the system. The difficulties in enrolling were either down to the claimant's lack of capability or some sort of malfunctioning of the software in the technologies being applied.

31. The comparators the claimant would seek to rely upon were other new starters in their late 20s or early 30s. In order to succeed on her direct discrimination claim the claimant would have to show that a new starter, in their late 20s or 30s, having trouble enrolling on the systems, would have been treated more favourably than herself. In my judgment the claimant stands no prospects of so doing.

32. As regards indirect discrimination, the provision, criterion or practice relied upon would be the requirement to enroll on the two systems. In order to succeed on this claim the claimant would have to show that the requirement to enroll on the system puts, or would put, a person with whom the claimant shared the characteristic, at a particular disadvantage when compared with persons with whom the claimant did not share the characteristic. Further, she would have to show that it actually put the claimant at that disadvantage.

33. In my judgment, the claimant has no prospects of successfully demonstrating that the requirement to enroll on the two systems put her at a particular disadvantage compared with those in their late 20s and 30s.

34. Accordingly, in my judgment, this is a case where it is clear and obvious that the claimant has no reasonable prospect of success and, accordingly, I strike out her age discrimination claims.

**Application for privacy**

35. At the conclusion of this hearing the claimant made an application for privacy, in particular, that her identity should be restricted from being place on the website.

36. The basis of this application was that the claimant did not want her identity to be available to the public.

37. Taking in to account the principle of open justice, in my judgment, it would not be necessary in the interests of justice or in order to protect the claimant's convention rights to anonymise the judgment dismissing her claims for age discrimination. Accordingly, I refused the application.

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**Employment Judge Alliott**

Date: 27 February 20

Sent to the parties on:

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For the Tribunal:

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