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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107851/2020 (A)

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Held on 29 November 2021

Employment Judge R Gall

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Ms M Wieteska

**Claimant
In Person**

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HC-One Ltd

**Respondent
Represented by:
Ms L Murray -
Solicitor**

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JUDGMENT FOLLOWING PRELIMINARY HEARING

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1. The Judgment of the Employment Tribunal is that the elements of claim relating to incidents of discrimination said to have taken place prior to 11 July 2020 are time barred. The Tribunal has no jurisdiction to hear them. It is not considered just and equitable to extend time to enable those allegations to be considered.

2. The application for strike out of the claim is refused. Orders are issued as now set out.

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UNLESS ORDER

UNLESS THIS ORDER IS COMPLIED WITH BY THE DATE SPECIFIED, THE CLAIM SHALL BE DISMISSED ON THE DATE OF NON COMPLIANCE WITHOUT FURTHER ORDER.

5 The claimant says that acts of direct discrimination have occurred. Her protected characteristic is that of her nationality, being Polish. She says that she has been treated less favourably because of her Polish nationality.

Within 28 days of the date of this Note and Order, the claimant is to answer the following questions:-

- 10 1. What does the claimant say is the less favourable treatment because of her Polish nationality, the acts of discrimination by the respondents, she experienced in the period after 11 July 2020?
2. Who carried out each of those alleged acts?
3. When after 11 July 2020 did each of those alleged acts take place? (please provide the day and month and the time of day as that is recalled, together with who was there if there were any witnesses)
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4. Does the claimant say that she was treated less favourably than another actual employee of the respondents who was not Polish and who was in the same circumstances as she was?
5. If the answer to question 4 is “yes”,
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 - (a) Who was that employee and what was their nationality?
 - (b) How was the other employee treated by the respondents in the circumstances which are the same as those of the claimant?
 - (c) Why was that treatment more favourable than the treatment the claimant experienced in those circumstances?
 - 25 (d) Why is it that she regards her less favourable treatment as being because of her Polish nationality?

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6. If there was no such actual employee, does the claimant say that had there been an employee in the same circumstances as she was and who was not Polish, the claimant would have been treated less favourably than the other hypothetical employee because the claimant is Polish?
7. If the answer to Question 6 is “yes”, why does the claimant say that?
8. The claimant has specified in her document of 6 March 2021 that she seeks £16,000 for “loss of mental health”.
- (a) Is that the total sum she asks the Tribunal to award if successful?
- 10 (b) If not, what sum does she ask for?
9. How has the claimant arrived at the sum of £16,000 or any other amount she states?
10. Does the claimant rely on any medical information in support of her financial claim? If so a copy of it is to be provided within the 28 days for compliance with this Order.
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IMPORTANT INFORMATION ABOUT ORDERS

- (1) You may make an application under rule 29 for this order to be varied, suspended or set aside. Your application should set out the reason why you say that orders should be varied, suspended or set aside. You must confirm when making the application that you have copied it to the other parties and notified them that they should provide the tribunal with any objections to the application as soon as possible.
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- (2) If this order is not complied with, the tribunal may make an order under rule 76 (2) for expenses or preparation time against the party in default. If the order is not complied with, the tribunal may strike out the whole or part of the claim or response under rule 37.
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REASONS

1. This Preliminary Hearing (“PH”) took place by video conference call on 29 November 2021. The claimant, Ms Wieteska participated. Ms Murray participated for the respondents. An interpreter who assisted with translation, Ms Szydłowska, was also present on the video call and translated into Polish for the benefit of Ms Wieteska when the Employment Judge or Ms Murray spoke, and into English for the benefit of the Employment Judge and Ms Murray when the claimant spoke. Ms Wieteska can read and write in English, however spoken English is problematic for her, hence the involvement of the interpreter in this and earlier PHs. The Tribunal is grateful to the interpreter.
2. The PH was held by video conference (CVP) with agreement of the parties and given the pandemic.
3. The PH was set down to determine whether elements of the claim made were presented out of time. Those elements occurred in 2014 in the case of one and 2018 in the case of the other. The claim was presented on 14 December 2020. Notification of the claim had been given to ACAS on 7 October 2020.
4. Those 2 elements were the only ones alleged to have occurred prior to events said to have happened on or after 11 July 2020. It was accepted that a claim in respect anything said to have occurred after 11 July 2020 had been presented in time.
5. Whether either or both of the 2 elements referred to could proceed as part of this claim turned upon whether they were part of conduct extending over a period, linked therefore to events after 11 July 2020. An alternative means by which the 2 elements of claim mentioned could proceed would be if the Tribunal was persuaded to exercise its discretion and to extend time for presentation of those elements of claim on the basis that it was just and equitable for it to do so.
6. Prior to the PH the respondents had submitted a bundle of documents. They had also sent in their submission in relation to time bar. Ms Wieteska confirmed that she had those documents and anticipated that the PH would deal at this PH both with the question of time bar and the application for strike out.

7. Ms Wieteska made submissions, as did Ms Murray, on both time bar and possible strike out. Ms Wieteska gave evidence as to any facts she relied upon to persuade the Tribunal that it was just and equitable to extend time, in the event that the Tribunal found that the 2 elements of claim mentioned above were presented out of time.

8. Having heard from parties in relation to time bar, the PH adjourned. This was to enable me to consider the material before me and to come to a view on the question of time bar and potential extension of time on the basis that so proceeding was just and equitable. After the adjournment I announced my decision, with reasons. The reasons set out in this Judgment confirm those given at the PH.

9. The PH then dealt with the question of strike out. Both parties made submissions. The Tribunal adjourned over an extended lunch and, on resumption announced its decision. The reasons given in this Judgment confirm those given at the PH.

Time Bar

10. The claim relates, in the main, to events in 2020. It was presented on 14 December 2020, a claim having been notified to ACAS on 7 October 2020, as mentioned above.

11. A claim under the Equality Act 2010 (“the 2010 Act”) requires to be brought within 3 months starting from the date of any alleged discrimination. Unless any earlier events formed part of conduct extending over a period, any alleged acts of discrimination prior to 11 July 2020 would be time barred. This is in terms of Section 123 of the 2010 Act.

12. In assessing whether conduct extending over a period has occurred, a Tribunal should consider the gap between events said to be connected, the nature of those events, whether the personnel involved are the same and also whether the event in question which is said to be connected is a single event or is itself something which continued over a period.

13. A claim which is time barred can be permitted to proceed if the Tribunal is persuaded that it is just and equitable that this happens (Section 123 of the 2010 Act). In making any such assessment a Tribunal properly has regard to the extent of the delay in bringing any such matter to the Tribunal, the reason for any such delay, the knowledge of a claimant and whether a claimant has had the benefit of legal advice at any point, prejudice to each party if time is extended enabling the element of claim to proceed or, on the other hand, if time is not extended and any risk to availability or quality of evidence of the events due to passage of time. The general principles of equity and fairness are to be kept in mind. Case law confirms that the exercise by a Tribunal of its discretion is not automatically in favour of time being extended. In case law the comment has been made and approved that exercise of discretion is the exceptional rather than the rule.
14. The first question to be considered was whether the earlier events were linked to those after 11 July 2020 in that they formed part of conduct extending over a period.
15. The earlier events were in 2014, (the PVG registration issue) and 2018, (the issue over a photograph of the claimant being taken).
16. The people involved were different, albeit they were employees of the respondents. Those involved in 2014 were not involved in either the 2018 or 2020 incidents alleged. Those involved in the 2018 incidents were not involved in the 2014 or 2020 incidents alleged.
17. The nature of the incidents were different. Further, each of the earlier events involved distinct events rather than ongoing conduct. There was no policy or ongoing provision of the respondents said to be involved. The gap in time between 2014 and 2018 was significant. The gap between the incident in 2018 and events from July 2020 onwards was also reasonably large. I also took into account the claimant's own comments when she had provided further particulars to the Tribunal. She had said in March 2021 that she did not see the events as being related.

18. I appreciated that the claimant says that the conduct overall showed how the respondents treated immigrants, as she put it. I did not see, however, that in law there had been conduct extending over a period to enable the events said to have occurred in 2014 and 2018 to be regarded as having been brought within the relevant time limit when this claim was presented.

Possible extension of time

19. I next considered whether it was just and equitable to extend time enabling the claim in relation to the time barred elements to proceed.

20. The onus is on the party seeking such an extension of time to persuade the Tribunal that its discretion ought to be exercised to grant an extension of time.

21. A Tribunal relevantly considers the elements mentioned above, namely passage of time, prejudice to respective parties, any advice taken, any risk to availability or quality of evidence and equity and fairness. As detailed above, exercise of discretion is the exception rather than the rule. Time limits are present in statute for a reason.

22. In this case the claimant confirmed in evidence that she had the benefit of legal advice from a solicitor in both 2014 and in 2018. She took advice in relation to the events she now sought to reply upon. She also had advice about the events of 2014 from Citizens' Advice Bureau at that time. In her evidence the claimant was unable in my view to explain why it was that she had not pursued any claim of discrimination in relation to the events in 2014 or 2018 and now sought to do that. I certainly heard no information from her upon that point.

23. I realised the significance to the claimant of the events to which she referred and the impact those had had upon her. I also appreciated the impact my decision would have upon her.

24. Nevertheless, I did not see, applying the relevant principles to the facts before me, that it was just and equitable to extend time to enable the claim to proceed in relation to the events of 2014 and 2018. In particular the fact that the

claimant had had legal advice was important in my view, as was the passage of time since the events in question. Those involved in the earlier incidents are no longer with the respondents. Evidence therefore is reduced in quality and indeed availability due to the length of time between these alleged events and the claim being made.

25. Time is therefore not extended. The claim will proceed in respect of events alleged to have occurred after 11 July 2020.

Possible Strike Out

26. The PH then went on to consider possible Strike Out of the claim.

27. Following upon a PH held for case management purposes in February 2021 Orders were issued. Those were issued with a view to specification of the claim being obtained and to try to obtain details of the loss which the claimant sought as an award if successful.

28. The claimant replied with some information. She did not, however, specify a comparator, actual or hypothetical, or explain why it was that she concluded the treatment she complained of had been because of her nationality, as opposed, for example, to there having been decisions made by her employers which she regarded as wrong. The claimant stated in her reply that her claim (insofar as that is now being heard by the Tribunal) should result in an award to her of £16,000 in respect of damage to her mental health.

29. In July of 2021 another PH took place. The Employment Judge then presiding reissued, in effect, the Orders made following the PH in February 2021. He ordered in paragraph 10 that the claimant detail what she sought by way of remedy if the claim succeeded and how much was sought in respect of each complaint, with information as to how that was calculated.

30. There was no reply to the terms of the Order in paragraph 10. Further information was given by the claimant in August 2021. No comparators were detailed.

31. The Tribunal wrote to the claimant on 3 September and 13 October reminding her of the need to comply with the terms of the Order in paragraph 10 of the Note of 19 July. There was no reply to either of these letters.
32. In those circumstances a Strike Out warning letter was issued to the claimant on 22 October 2021. It required an answer/compliance with the Orders by 8 November 2021. There was a reply objecting to strike out. There was no further information on the claim or in respect of compensation.
33. In those circumstances the respondents maintained that strike out should result. Attempts had been made, they said, to have the claim clarified and specified. The claim was approaching being a year old, however the respondents remained unclear as to the case being advanced. It appeared the claimant was not actively pursuing her case, they said.
34. The claimant resisted strike out. She had replied as best she could and believed she had answered all asked of her. She had given a figure for the sum she asked for.
35. I considered the circumstances and reflected upon the respective positions of parties and the principles to be applied in a situation such as this. I adjourned the PH to do this and thereafter resumed the PH to announce the outcome of my deliberations.
36. The claim is one of discrimination. The allegation is that direct discrimination has occurred, that certain events have happened involving less favourable treatment of the claimant because of her nationality.
37. A claim of that type inevitably involves comparison with other employees. Those might be actual employees compared to whom the claimant says she was treated less favourably, attributable to the fact that she is Polish. The claimant has not however been able to name any such employees. She said she is not aware of other employees who were in the same situation as she was and in comparison with whom she was treated less favourably because of her nationality.

38. It was confusing, in my view, that, despite that position on the part of the claimant, she also maintained that other employees were treated differently to her and that she was singled out due to being Polish. She said that had she not been Polish she would have been treated differently and better.
- 5 39. In my view it is difficult, if not impossible, to reconcile those 2 positions – that of not being able to give information about any situations or circumstances in which other employees who are not Polish were treated better than the claimant and yet asserting that as the claimant is Polish she was, in the same or similar circumstances, treated less favourably compared to other employees.
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40. There is the possibility of there being a hypothetical comparator if no actual one exists. A claimant can say “if there was an employee in the same circumstances as me, but who was not Polish, then, because I am Polish I would be treated less favourably than that other employee”. A claimant has to be able to explain why they believe this to be so, in relation, in this case, to the events founded upon, being those after 11 July 2020.
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41. Orders were issued in February 2021 by the Tribunal. Some material was received in response. The Orders were, in effect, repeated in July of this year. The July Orders spelt out specific requirements in relation to the schedule of loss. There has however been no reply since the July Orders with any further information or supporting documentation in relation to the figure proposed by way of compensation in the event of success. It might be, for example, that medical reports could be produced.
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42. It is therefore my conclusion that the Orders as issued have not been met by the replies received from the claimant. That led to the Strike Out warning.
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43. It is not my view, however, that the case is not being actively pursued by the claimant. It seems to me, without hopefully appearing condescending, that the claimant has been struggling to grasp the concept of unfairness of treatment as she sees it and the requirements of the 2010 Act for discriminatory conduct to have taken place, as well as the requirements of the principles of fair notice.
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44. These are difficult concepts. I keep in mind the claimant's limited or non-existent ability to converse in English. As she has previously confirmed, however, she is able to read and write in English, as indeed evidenced by her replies to the Orders and her communications with the Tribunal.

5 45. Although therefore the Orders have not been met and there has been a Strike Out warning letter issued, I am conscious of all the circumstances. Those include the fact that this is a discrimination claim. Strike out is a draconian, severe step to take. It brings the claim to an end. A Tribunal requires to consider, prior to adopting striking out as the sanction applied, whether there
10 is an alternative step available as a lesser sanction.

46. I was not prepared to strike out the claim in the present circumstances. I am of the view, however, that more specific information is required in order to understand the claim of discrimination being made.

15 47. I therefore confirmed on 29 November at conclusion of the PH and confirm once more that Unless Orders are issued. I explained the importance of Ms Wieteska considering her position very carefully so that she replied to the Orders with the details asked for. I suggested she might wish to take advice. I confirmed that if no reply was received to the Orders, or if the Orders were not substantially met by any reply, then her claim would come to an end
20 without further procedure. That is the meaning of the term "Unless".

48. The questions set out in the Order are designed to obtain information as to any actual comparator, failing which information as to the hypothetical comparator replied upon. It is important that Ms Wieteska explains why it is that she thinks the less favourable treatment of which she complains is
25 because of the fact she is Polish. The schedule of loss with any supporting documentation must also be submitted. A lengthier period than might normally be given is provided, with a view to ensuring that any relevant information is received.

30 49. I understood that the respondents might well not see this step as ideal. It does however seek to have the details of the claim pinned down in order that the case can proceed to a hearing if the reply answers the terms of the Order. In

that situation a relatively brief telephone case management PH might be involved to confirm witnesses, fix dates of hearing and agree a method of ensuring documents for the hearing were available for the hearing.

50. I was satisfied that Ms Wieteska understood the Order made and what is now
5 required of her.

51. The PH closed having dealt with these matters.

Employment Judge: Robert Gall
Date of Judgment: 02 December 2021
10 Entered in register: 06 December 2021
and copied to parties