



EMPLOYMENT TRIBUNALS

Claimant: Miss Maxine Machin

Respondent: HSBC UK Bank PLC

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 16 August 2022

Before: Employment Judge Barrett

Representation

For the Claimant: Miss Laura Halsall, Counsel

For the Respondent: Mr Hamed Zovidavi, Counsel

JUDGMENT

The judgment of the Tribunal is that: -

1. The Respondent's application to strike out two allegations in the Claimant's claim is refused.

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by telephone. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Introduction

1. The Respondent applied to strike out, or alternatively for a deposit order on, the following two factual allegations:
 - 1.1 That in approximately March 2018, following a period of illness the Claimant was told by Sundeep Thacker there was no role for her to return to and instructed to find a new job herself.

- 1.2 That from November 2019, in her line manager's absence, duties (including board meetings and holding exchange meetings) which were previously shared equally between the Claimant and her colleague were removed from the Claimant following her being registered as disabled.
2. These allegations are framed as direct disability discrimination, discrimination arising from disability and disability-related harassment.
3. The date of the second allegation was provided by the Claimant's counsel at the hearing.

Parties' submissions

4. The Respondent's counsel submitted that these matters were well out of time, there was no link between these allegations and the subsequent allegations in the Claimant's claim, and that they involved different actors. He submitted there was no (alternatively little) reasonable prospect of these allegations forming part of a continuing act of discrimination and no (alternatively little) reasonable prospect of the Tribunal concluding that it was be just and equitable to extend time to include them.
5. The Claimant's counsel disagreed. She submitted that in relation to the first allegation, the Tribunal could not know what factors the Claimant would rely on in support of an argument for a just and equitable extension and therefore could not be sure that the argument would fail. She acknowledged that it was the only allegation against Sundeep Thacker. The November 2019 allegation was submitted to form part of the same factual matrix as other allegations which did form part of the claim and there was a reasonable prospect of establishing that it formed part of a continuing act.

The law

6. Rule 37(1)(a) of the Employment Tribunal Rules provides that the Tribunal may strike out all or part of a claim on the ground that it lacks reasonable prospect of success. In *Mechkarov v Citibank NA* [2016] ICR 1121, Mitting J gave the following guidance:

'(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.'

7. Rule 39(1) of the Employment Tribunal Rules states that where at a preliminary hearing 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 to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Rule 39(2) provides that 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.

8. In *Hemdan v Ishmail* [2017] ICR 486, Simler J explained at §12-15:

‘The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strikeout which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, 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 the defence....

Once a tribunal concludes that a claim or allegation has little reasonable prospect 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. That means that regard should be had, for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved and the case is likely to be allocated a fair share of limited tribunal resources are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.’

9. Section 123(1)(a) Equality Act 2020 (‘EqA’) provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates. Section 123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. Where a claimant pleads that a particular allegation which would otherwise be brought out of time amounts to part of “*conduct extending over a period*” for the purposes of s.123(1)(3)(a) Equality Act 2010, the question is whether “*the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs*”: *Aziz v FDA* [2010] EWCA Civ 304 §36. One relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: *Aziz* §33.
10. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA, where it considers it just and equitable to do so. That is a very broad discretion. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of his rights to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

Conclusions

11. In relation to the March 2018 allegation, I saw the force in Mr Zovidavi's submission that it would be unlikely this matter could form part of a continuing act of discrimination. The Claimant's return to work in March 2018 does not seem, on the face of the pleadings, to form part of the same chain of events in 2019 and 2020 which gave rise to her claim. As Miss Halsall accepted, this is a standalone allegation against Mr Thacker who otherwise is not alleged to be a perpetrator of discrimination in the claim. I concluded it was also unlikely that the Claimant would succeed in an argument that it would be just and equitable to extend time to hear this allegation, given that it concerned events which occurred more than 3 years prior to the presentation of her claim, during which time she had been able to ventilate her concerns by raising a grievance in November 2019.
12. I accepted Miss Halsall's submission that it would not be right to conclude there was no reasonable prospect of the Claimant succeeding at trial. Arguments on 'continuing act' and just and equitable extension are fact-sensitive, and the Tribunal hearing the evidence will be best-placed to determine these matters. Taking into account the principles summarised in *Mechkarov*, the threshold for strike-out was not met.
13. However, I considered that the threshold for making a deposit order was met. There is a proper basis for doubting the likelihood that the Claimant will be able to show that the March 2018 allegation formed part of a continuing act of discrimination: it pre-dates and is factually separate from the chain of events at the heart of her claim and concerns a different alleged perpetrator. There is a proper basis for doubting the likelihood that the Claimant will be able to succeed in the argument that it would otherwise be just and equitable extend time in relation to this allegation: the length of the delay and fact that the Claimant was able to pursue a grievance in the intervening period are relevant factors.
14. I considered whether it would be in accordance with the overriding objective to exercise my discretion to make a deposit order in relation to this allegation. I concluded that it would. Should the Claimant decide not to pay a deposit and pursue this allegation, the scope of the claim would be narrowed, and Mr Thacker and possibly other potential witnesses would not be required to give evidence about things which happened over four years ago.
15. The level of deposit ordered must be such as not to prevent access to justice and will be determined after reasonable enquiries have been made into the Claimant's ability to pay. The Claimant was not in attendance. Therefore, I did not make the deposit order on the day of the hearing but gave case management directions for the Claimant to provide further information and for the Respondent to respond.
16. In relation to the November 2019 allegation, I concluded that the Claimant had a reasonable prospect of establishing this to be part of a continuing act, should she succeed at trial in establishing that other matters which she complains about amounted to disability discrimination. The allegation that duties were removed from the Claimant after she was registered as disabled, falls into the same time period from November 2019 when the Claimant also says a colleague at a lower grade was given more senior duties than the Claimant, and she was excluded at work. These latter matters are accepted by the Respondent to form part of the

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Claimant's claim. The respective thresholds for strike-out or for making a deposit order are not met in relation to this allegation.

**Employment Judge Barrett
Date: 18 August 2022**