EMPLOYMENT TRIBUNALS

Claimant: Mr Neil Duke

Respondent: B & M Retail Ltd

Heard at: Manchester (in public) **On:** 4 November 2019
In chambers 11/27 November 2019

Before: Employment Judge Hoey (sitting alone)

Representatives
For the claimant: Mr Gerrard (trade union representative)
For the respondent: Mr Buckle (solicitor)

JUDGMENT

The Tribunal has decided that:

1. The claimant was a disabled person in terms of section 6 of the Equality Act 2010 at the relevant times, for the purposes of his claims.

2. Each of the claims were brought within the statutory limitation period, which failing they were raised within such other period that was just and equitable.

3. It cannot be said that there are no reasonable prospects of success or little reasonable prospects of success in respect of the claims, each of which shall now proceed to a Hearing.

Introduction

1. This case called as a preliminary hearing following a case management preliminary hearing that had been heard on 12 June 2019. The hearing was fixed to determine 3 main issues:

    a. Was the claimant a disabled person in terms of section 6 of the Equality Act 2010 at relevant time?

    b. Were any of the claims lodged outwith the statutory time limit, and if so, should the time limit be extended?

c. Should the claims be struck out for having no reasonable prospects of success which failing should a deposit be ordered if the claims have little reasonable prospects of success.

2. The claimant was represented by his trade union representative and the respondent by a solicitor.

3. I began the hearing by reminding the parties of the overriding objective in terms of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and of the need to work together to ensure matters were dealt with justly and proportionately and the parties were placed on an equal footing.

4. A joint bundle had agreed comprising 166 pages to which an additional 2 pages were added during the hearing.

5. This judgment follows my detailed consideration of the evidence and submissions that were made.

Issues

6. The claimant had raised a claim for direct disability discrimination, indirect disability discrimination and an alleged failure to make reasonable adjustments.

7. Each of the claims appeared to stem from the one incident, namely that on 1 May 2017 the claimant (a retail store manager) asked and then agreed to move stores to work in a smaller store, albeit the claimant relies upon a policy of the respondent which is not limited in time as such (and which continued to be applied).

8. The claimant had complained about the reduced salary (which applied because the store was smaller) by lodging a grievance on 22 July 2017, the outcome of which he appealed and received a decision dated 24 October 2018.

9. His claim form was presented to the Tribunal on 17 January 2019.

Disability status

10. The first issue that arose was whether or not the claimant was a disabled person in terms of section 6 of the Equality Act 2010 at the relevant time. The parties had agreed the claims all stemmed from and related to the move on 1 May 2017 and so this was the relevant time. The claimant's agent had initially suggested he was relying on a continuing act but conceded that this was a discrete matter that had happened on 1 May 2017.

11. However, as can be seen below, the claimant's agent changed his position by the time the hearing proceeded to hear the parties' submissions. The claimant's agent had submissions that had been prepared prior to the hearing which he issued to the respondent and the Tribunal. Those written submissions argued that there was a continuing act and that the claims did not relate only to the

event on 1 May 2017 but up to and including the outcome of the grievance appeal in October 2018. This is due to the claimant relying upon the respondent's application of their policy. The claimant's claims related to the respondent's policy as to how it pays managers, which clearly did apply for the period in question and not simply on one occasion.

12. I shall come to that matter when dealing with the time bar issue but it is a relevant consideration in relation to disability status since when leading evidence, the claimant focused upon the medical position as at 1 May 2017.

13. Nonetheless his evidence was clear in that his medical position remained constant by the outcome of the appeal (in October 2018) and this was not challenged by the respondent. The document that the parties agree be added to the bundle was a medical report dated 25 July 2017 which confirmed the claimant's position had not changed. I also understand (from the claimant's submissions) that the respondent's occupational health expert confirmed the position as set out in this judgment (see page 109 and 110 of the bundle). In other words, the claimant's medical position (as known by the respondent) was not materially different in October 2018 to that pertaining in May 2017.

14. The respondent conceded that the claimant had physical impairments at the relevant time, namely sarcoidosis, (an inflammation of the lung), degenerative disk disease and lower back arthritis. The issue was whether or not the impairments satisfied the requirements set out in section 6 of the Equality Act 2010, which was disputed by the respondent.

Time limits

15. At the outset of the hearing, the claimant's agent had suggested the claims were not out of time, but following a discussion as to the nature of the claims, his agent conceded that the claims all stemmed from a one-off act, the transfer to the new role on 1 May 2017. The claimant had lodged 2 grievances, the latter of which resulted in an appeal outcome being issued on 24 October 2018.

16. The claimant's agent at submissions sought to withdraw the concession since the written submissions that he presented argued that there was a continuing act that went beyond 1 May 2017 and continued up to the outcome of the appeal hearing which was issued in October 2018.

17. The respondent's agent argued that this was something about which no advance notice had been given and the case had been presented (and defended) on the basis of the position which had been agreed at the outset of the hearing, namely the claims were time barred and the issue was whether the claims should be allowed to proceed, although late.

18. I asked the parties to make submissions on these issues and reserved my decision.

Strike out and deposit order

19. Finally, the respondent argued that the claims had no reasonable prospects of success and should be struck out, which failing a deposit order should be made, there being little reasonable prospects of success.

Disability Issue – Findings of fact

20. Evidence was led by the claimant himself and from the respondent (a replenishment assistant who worked with the claimant and reported to him). Both witnesses had lodged a witness statement and were cross examined. I am able to make the following findings of fact from the oral evidence that was led and the documents to which I was referred, on the balance of probabilities (by finding what was more likely than not to be the case).

Background

21. The respondent is a retail operation and the clamant was engaged as Store Manager from July 2013. In 2015 he was promoted to a larger store. He asked to move to a smaller store due to his health concerns, which was closer to his home, which was agreed. He moved to the smaller store, on or around 1 May 2017.

22. Since 2007 the claimant has suffered from back pain and was diagnosed with lower back arthritis and suffering from a degenerative disc.

23. In 2016 the claimant was diagnosed with having sarcoidosis which manifests itself by way of a chronic cough.

Medical position

24. The medical information that was presented to the Tribunal included the following facts, which I accept.

25. On 4 March 2016 the claimant had presented with a persistent cough. The letter from the medical physician stated that he had a history of allergic rhinitis and occasionally got flare ups with the cough clearing after some time. His cough had worsened. He complained of a “tearing sensation” down his right side on coughing which was muscular in nature. There was no medical information as to how the impairment manifested itself nor on what would happen if any of the medication was not taken by the claimant.

26. On 15 April 2016 the claimant saw a specialist surgeon who diagnosed chronic cough which was stated to have been presented for around 6 months at that time. The consultant noted that there was remission in between events. Medication was prescribed.

27. On 23 May 2016 the surgeon reports that “his cough is better”.

28. At an examination on 14 July 2016 the doctor noted that the “appearances are highly suggestive of Sarcoidosis”

29. On 23 August 2016 the specialist notes that the claimant has suffered from a cough since 1996 when he was diagnosed with asthma. The cough can last for a number of months or weeks but “he has had a constant cough from last year”.

30. At a review on 26 September 2016 the surgeon states that the claimant has had a “chronic cough on and off”. The surgeon states that “it is extremely troublesome and interfering with his quality of life. In addition, he feels generally “achy” and quite lethargic”. He was prescribed steroids.

31. On 28 October 2016 the consultant noted the diagnoses of chronic cough and sarcoidosis and osteoarthritis (in the heading of the letter). The surgeon noted that the “cough had virtually gone. However, he still feels quite lethargic”. The claimant complained of a dull chest ache which kept him awake (which may be a side effect of medication).

32. On 29 November 2016 the surgeon noted that the cough had returned and the claimant “felt quite lethargic”. Medication was continued (but there was no evidence as to what would happen had the medication not been taken).

33. On 10 January 2017 the consultant stated that the claimant “feels better in himself but still feels quite fatigued”. His cough “is now supressed” and steroids were to be reduced.

34. On 24 February 2017 the consultant noted that the claimant’s cough “remains at bay” but the claimant is “feeling quite lethargic”. He was prescribed steroids but no information is given as to the effect if these were not taken.

35. On 11 April 2017 the surgeon notes that since stopping steroids the claimant did not have any further cough or chest pains. Fatigue was, however, still present. He does feel that he gets a good night sleep but is “quite fatigued during the day”.

36. The bundle included reports beyond this date but as the focus at the Hearing was on the 1 May 2017, no specific reference was made to the later medical reports.

37. No medical information was presented as to how the impairments the claimant suffered impacted upon his day to day activities (particularly with regard to the claimant’s lower back arthritis/degenerative disc). This was found in the claimant’s impact statement and, to a lesser extent, in his witness statement, to which he referred. His impact statement broke the claimant’s impairments down into two, the degenerative disk/arthritis and sarcoidosis.

Effect of impairment

38. The claimant says that “due to a combination of both conditions I suffer with different levels of lower back pain”. He explained that he gets pain in his buttocks and thigh and “shooting pains up the back on a daily basis”. The statement notes that his pain is worse when kneeling, reaching over, jumping,

sitting, standing, bending, lifting or twisting. He also notes he was prescribed steroids.

39. I find the claimant sought to mask the effects of his disability, which included by attending work and by not showing the effects of his impairments outwardly.

40. The respondent challenged the claimant's evidence on the basis that the evidence they had, from their experience of the claimant on a day to day basis, substantially conflicted with what he was saying. The challenge the respondent had was that they could only provide evidence with regard to what a colleague saw of the claimant during working hours when the individual saw the claimant, which was obviously not at all times during working hours and did not deal with the times when the claimant was not at work (which they were essentially unable to challenge).

41. There was an evidential dispute in terms of the impact the claimant's physical impairments had on a day to day basis. The claimant contends that his condition resulted in him having difficulty twisting, bending, kneeling, reaching over, standing in the same spot, using a step ladder and lifting. He argued that he had delegated tasks to other individuals within the store and was spending only 30% of the time on the shop floor, with the remainder of the time recovering. The respondent's position was that there were no such effects of his impairments.

42. The Tribunal heard evidence from a colleague of the claimant who worked 35 hours a week and who reported directly to the claimant. She saw the claimant and worked with him on a daily basis. She worked with the claimant from 5 March 2016 until the claimant's move away from the store on or around 1 May 2017.

43. She stated that she was never asked to do any of the tasks that the claimant had said he delegated to others. She would have been one of the persons to whom such tasks would be delegated (but there were others).

44. She saw the claimant at work when she was working. Her evidence was that the only issue that she saw affecting the claimant was a cough (for which he took medication) that he had but she was surprised to learn of the impact the claimant maintained his impairments had on a day to day basis since she saw no evidence of it.

45. She was of the view from her experience of the claimant he spent 90% on the shop floor and 10% in the office (and not the 30% on the shop floor and 70% in the office as the claimant suggested) and use stairs and ladders.

46. The claimant's impact statement sets out the consequences of both conditions. The degenerative disc/arthritis is stated to give the claimant lower back pain "at times". It notes that the claimant suffered "with different levels of pain at all times". He had purchased a thermal bed which he said reduced his pain.

47. The statement notes that the condition affects his mobility and if he sits for too long, the pain increases in his back. If he kneels this causes pain. Longer walks cause him to suffer pain. Long car journeys cause pain as does travelling on public transport. He argues that in terms of manual dexterity, the pain he suffers makes him feel fatigued which causes him a lack in concentration. He says that lifting, carrying, bending and picking items up can increase pain in his back and he is unable to concentrate at home and at work when he suffers from pain.

48. He says that "without pain killers I would feel increased pain, be unable to concentrate, [suffer a] temperament change, low mood, be sore, have fatigue and be anxious". This was based on the claimant's belief rather than upon any medical basis or upon any evidence of the claimant having experience of not taking the medication.

49. With regard to sarcoidosis, which manifested from a persistent cough, which started in late 2015, his statement states that steroids had helped but "not this time". He says persistent coughing impacts on his day to day activities putting him at significant risk of long term multiple side effects of taking steroids.

50. His statement says that sarcoidosis causes him to have "significant weakness" which means he finds it "much harder to carry out normal day to day tasks" which include communicating with others, working stock quickly and driving. He says it also affects his mobility as he has to walk at a slower pace due to the loss of energy from consistent coughing and he is unsteady with movement. He says he has difficulty going up and down stairs due to tiredness and weakness in his body. A side effect, he says, is back pain which stops him lifting items. He says he gets fatigued easily and has disturbed sleep.

51. He says that without medication he would be house bound, and unable to communicate, have mood swings and deep depression, which appears to based on the claimant's belief rather than upon any actual experience of medical information. There was no evidence of the claimant having experience of the effect of not taking medication.

52. The parties agreed that there was no medical evidence to support the claimant's assertions (as to the impact of his impairment) and the Tribunal required to make a finding of the impact of the claimant's impairments on the balance of probabilities. There was clearly a stark conflict between the evidence presented by both parties.

53. While the parties suggested I had to choose whose evidence is to be preferred, I do not consider that such an approach is determinative of the issue of disability given the scope of the evidence from the respondent which was limited to what that witness saw. The respondent did not challenge large parts of the claimant's evidence, which was not surprising given the respondent would not know how the impairment impacted upon the claimant outwith times those who worked with him saw him, but I require to make findings based upon the evidence I heard.

54. I accept that there are some inconsistencies in the claimant's evidence and his answers in cross examination were in some parts confusing but that did not result in his evidence being incredible. On the whole, I found the claimant to be a credible and reliable witness. His assessment that he had revised his activities to spend 30% on the shop floor (rather than the 90% suggested by the respondent's witness) was a guess by the claimant. I find on the balance of probabilities the claimant did restrict his shop floor activities and that he did delegate to others. It is impossible to say to what extent he reduced his direct shop floor activities (and instead supervised others who carried out his instructions) but I find that the claimant's impairments had caused him to materially restrict his working on the shop floor carrying out lifting, ladder and stock work.

55. The respondent's witness was not present with the claimant at all times during the day and not at all outwith her working hours. She is also not able to comment upon the extent to which the claimant sought to mask the effect of his impairments.

56. Having considered the evidence carefully, I accept the claimant's evidence that the content of his impact statement referred to the impact his impairments had not just at the time of writing but in 2016 and 2017. I find on the balance of probabilities that the claimant did suffer pain on a daily basis and that he was lethargic and lacking in energy in a material way. That impacted upon his ability to drive and to concentrate. I also find that the impairments had the following effects upon the claimant:

    a. He suffered from lower back pain on a daily basis, which involved shooting pains in his back which affected his ability to walk, sit and drive
    b. The claimant struggled to concentrate as a result of the pain and fatigue he encountered stemming from his impairments and his energy levels were considerably reduced. This affected his ability to have a conversation and communicate with others.
    c. His impairments made it more difficult for him to lift everyday objects and to walk up ladders

57. The foregoing effects would occur on a daily basis and lasted for 12 months by 30 April 2017 (and it would have been so had the matter been considered at that time).

58. His chronic cough also made it more difficult for the claimant to communicate with others. His persistent cough makes him unsteady on his feet and results in him having to walk at a slower pace. The persistent cough also exacerbates the claimant's back pain which results in the claimant encountering difficulty in lifting and moving everyday objects. This also restricted the claimant's ability to drive.

59. Even although the claimant's cough would disappear on occasion, he still suffered fatigue and a lack of energy as a result of his condition which affected his ability to communicate with others and carry out normal day to day activities since he would be tired, more so than others. These issues were likely to recur

as at April 2017 even although they did not occur on a daily basis. They were fluctuating.

60. The foregoing effects in relation to the impairments did not materially change and the position remained as above at 24 October 2018.

Medication and other effects

61. The claimant did take medication but this was sporadic and the medication changed, as did the dosage and type. His evidence was not clear in relation to the specifics and the medical information did not provide any assistance in determining what the effect upon the claimant would have been had he not taken the relevant medication. There was no medical evidence that set out what would have happened had the claimant not taken the medication which he took on occasion. The effects as set out above were the effects with medication and it is highly likely that had the claimant not taken the relevant medication the effects would have been worse.

62. There was also no evidence from the claimant that set out what actually happened had the claimant not taken his medication. He believed that he would not have been able to function had he not taken his medication but there was no evidence that this had in fact happened. The claimant was clear that his medication did assist him, albeit no specific evidence was produced as to the ways in which it did so and the above findings are made on the basis of the claimant's position with the benefit of medication.

63. I also note that the claimant had purchased, at considerable costs to himself, a specialist bed to support him. There was no evidence before the Tribunal as to what would have happened had the claimant not had the benefit of that support (other than what the claimant thought might happen if he did not use it).

The law - disability

64. Section 6 of the Equality Act 2010 states that:

    a. "A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities…

    b. A reference to a disabled person is a reference to a person who has a disability.

    c. In relation to the protected characteristic of disability –

        i. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
        ii. A reference to persons who share a protected characteristic is a reference to persons who have the same disability

65. Paragraph 5 of Schedule 1 to the Act states:

    a. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:

        i. measures are being taken to correct it, and

        ii. but for that, it would be likely to have that effect.

    b. 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

66. Paragraph 12 of Schedule 1 of the Act provides that when determining whether a person is disabled, the Tribunal "must take account of such guidance as it thinks is relevant." The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability" (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to section 6(5).

67. In **Goodwin v Patent Office** 1999 ICR 302, Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the (then) Disability Discrimination Act 1995. Morison J held that the following four questions should be answered (which apply as much today for the Equality Act 2010 as it did then), in order:

    a. Did the claimant have a mental or physical impairment? (the 'impairment condition');

    b. Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');

    c. Was the adverse condition substantial? (the 'substantial condition');

    d. And was the adverse condition long term? (the 'long-term condition').

68. That case also contains a reminder that a purposive approach should be taken of the legislation in this area and that Tribunals should bear in mind that even although a claimant can carry out a task with difficulty, the relevant effects can still be present. Persons with disabilities often downplay the effects of their impairments. Tribunals should also ensure they do not lose sight of the overall picture in making their assessment.

Submissions on disability

69. The claimant had provided written submissions and argued that the evidence showed the physical impairments had a substantial adverse and long term effect upon his ability to carry out normal day to day activities.

70. The respondent accepted that there were physical impairments but denied they had an adverse effect upon day to day activities. It was argued that his colleague was able to comment on what the claimant could do. The claimant had attended work without issue.

71. At most the respondent argued the claimant suffered from fatigue which did not have the requisite effects.

72. The respondent argued that the medication was irrelevant since it was taken sporadically and the claimant managed to attend work without any issues. The respondent argued the definition had not been made out.

Discussion and reasons on disability

73. I shall take each of the issues within the legal definition in turn,

    a. Did the claimant have a mental or physical impairment? (the 'impairment condition');

74. It is not in dispute that the claimant suffered from a physical impairment.

    b. Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');

75. It was not essentially in dispute that the claimant's impairment did impact upon his ability to carry out day to day activities to the extent that the respondent accepted the claimant had suffered fatigue and a cough and some pain (which would impact upon day to day activities). In any event I find that the impairments did affect the claimant's ability to carry out day to day activities. They restricted his ability to drive and to concentrate and to lift and walk. These were all day to day activities. The key issue for the respondent was whether or not the impact upon the claimant's ability to carry out day to day activities was substantial and/or was it minor or trivial.

    c. Was the adverse condition substantial? (the 'substantial condition') and did it last for 12 months or more;

76. They key issue in this case was whether the impact was substantial, which means more than minor or trivial. In other words, does the limitation go beyond the normal differences in ability among people and had it lasted for 12 months or more. The Tribunal needs to assess the evidence carefully. The respondent's challenge was not that the claimant had impairments but that the effects of the claimant's impairments as alleged by the claimant were not present (ie not substantial or long term).

77. The Guidance in this area notes that the time taken by a person with an impairment to carry out the activities should be considered and contrasted with those who do not have an impairment. It is also possible to look at the way in which the person with the impairment carries out the activity. It is also important to consider whether the effect on more than one activity, when taken together,

could result in an overall substantial adverse effect. The effects of the impairments taken together should be assessed.

78. Section 212(1) of the Equality Act 2010 and paragraph B1 of the Guidance notes that the effect is substantial if it is more than minor or trivial. Paragraphs B2 to B5 note that the time taken to do an activity and the way it is done is relevant and it is the cumulative effect of the impairments which should be considered.

79. The Tribunal must also focus on what the claimant cannot do or can do with difficulty (comparing how others would carry out the activity absent any impairment).

80. I have found that the claimant's impairments impacted upon his day to day activities. In my view, having assessed the evidence carefully the claimant's ability to carry out day to day activities was substantially and adversely affected, which went beyond the normal differences that may exist among people. The claimant suffered pain on a daily basis, with his impairments impacting upon his ability to walk, drive and concentrate. He suffered lethargy which impacted upon his ability to concentrate and communicate with others. It was difficult for him to lift everyday objects and to walk up ladders. These effects would occur on a daily basis and lasted for 12 months by 30 April 2017. It was not suggested that the position improved by October 2018. These are day to day activities and the effect upon the claimant was clearly more than minor or trivial – it was substantial and long term, assessing the matter at the relevant time with the knowledge the parties had.

81. His chronic cough also made it more difficult for the clamant to communicate with others. His persistent cough made him unsteady on his feet and resulted in him having to walk at a slower pace. The persistent cough exacerbated the claimant's back pain which resulted in the claimant encountering difficulty in lifting and moving everyday objects. He experienced shooting pain regularly. This also restricted the claimant's ability to drive. These are day to day activities which were substantially affected at the relevant time.

82. Even although the claimant's cough would disappear on occasion, he still suffered fatigue and a lack of energy as a result of his condition which affected his ability to communicate with others and carry out normal day to day activities since he would be tired, more so than others who did not suffer from that impairment. These issues were likely to recur as at April 2017 even although they did not occur on a daily basis. They were fluctuating.

83. Paragraph 2(2) to Schedule 1 of the Equality Act 2010 notes that even if an impairment ceases to have a substantial adverse effect upon a person's ability to carry out normal day to day activities, it is to be treated as having such an effect if it is likely to recur. This is the position in relation to the effects of the chronic cough the claimant suffered, since it would disappear but return. I am satisfied, however, that the effects of his other impairments satisfied the definition of disability even if the chronic cough were to be excluded, at the time in question from the information that was then known.

84. Taking the effects of the impairments together, it is clear that the claimant had physical impairments which had a substantial, adverse and long term effect upon his ability to carry out normal day to day activities for the period April 2017 until October 2018.

85. I accept the claimant attended work for the duration of the period in question and the respondent's witness may not have witnessed the effects upon the claimant but there was no reason to doubt the impact of the impairments the claimant experienced on a day to day basis, which could have occurred when the colleague was not with the claimant or outwith working hours. The claimant sought to downplay or mask the effect his impairments had when at work but from the evidence presented to the Tribunal in relation to the effect his impairment had upon his day to day activities and from the information known at the time, the constituent elements of the statutory definition were satisfied.

86. In making this assessment I have considered the evidence the parties led carefully together with the productions and the statutory wording and Guidance. I have concluded that the effect of the claimant's impairments, even with the benefit of medication was that the claimant's ability to carry out normal day to day activities was impeded in a more than minor or trivial way. That had lasted for over 12 months on 1 May 2017 (and 24 October 2018).

87. In the circumstances I have concluded therefore that the claimant was a disabled person in terms of section 6 of the Equality Act 2010 at the relevant time, namely from April 2017. As the effects did not lessen, and there was no suggestion his impairments had changed, I conclude that the claimant was a disabled person as at April 2017 and up to the outcome of his appeal in October 2018.

Time bar – Findings of facts

88. The claimant gave evidence in relation to time bar and I am able to make the following findings of fact on the balance of probabilities (which are facts for the purpose of this preliminary issue only).

Policy and pay

89. The claimant moved to the smaller store on 1 May 2017 at which point he suffered a cut in the level of his pay. This was because the respondent operated a policy that pay was based upon the size of the store in which the manager worked, which was a continuing policy.

Complaints

90. On 3 August 2017 the claimant lodged a grievance alleging that he had suffered discrimination at work (which did not specifically deal with the pay point).

91. On 26 April 2018 the claimant claimed he was being treated unfairly in relation to pay. He had discovered that colleagues had received a pay increase and he

had not. It was at this point the claimant discovered his 2 comparators (on whom he relies for his direct discrimination complaint) did, in his view, get a pay rise when they moved to a smaller store (which he realised resulted in him, potentially, being subject to direct disability discrimination when he moved stores).

92. On 22 July 2018 the claimant raised a formal grievance complaining about discriminatory treatment. A meeting was held on 7 September 2018 which dismissed his grievance.

93. The claimant appealed against the dismissal of his grievance and was told on 24 October 2018 that his appeal was dismissed.

94. His appeal outcome letter did offer him an increase in salary (which was not backdated).

Claimant's knowledge and position re time limits

95. In April 2017 and in April 2018 the claimant was not aware of the time limit rules pertaining to Employment Tribunal claims, although the claimant understood that he required to go through an internal process before a claim could be lodged. He therefore lodged a grievance and appeal.

96. The claimant had the benefit of trade union advice and support from April 2018. He was not sure when he learned of the 3 month time limit but he thinks it was when he contacted ACAS in late 2018 when he read about the time limits. I find, on the balance of probabilities, that the claimant learned of time limits by the end of 2018, on or around 9 December 2018.

Proceedings

97. The claimant went to ACAS on 9 December 2018. An early conciliation certificate was issued on 7 January 2019.

98. The claimant lodged his claim on 17 January 2019.

Time limits – law

99. Section 123 of the Equality Act 2010 states:

> i. [Subject to [sections 140A and 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—

1. conduct extending over a period is to be treated as done at the end of the period;
2. failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

1. when P does an act inconsistent with doing it, or
2. if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

100. In the case of **Hendricks v Metropolitan Police Commissioners** [2003] IRLR 96 the Court of Appeal on the question of what amounted to a continuing act, cautioned Tribunals against looking too literally for a policy, rule, practice, scheme or regime, but rather to look for incidents which are linked to each other and which are evidence of a "continuing discriminatory state of affairs". Where a continuing discriminatory act exists within the employment relationship, time does not begin to run as long as the discriminatory policy remains in force and the employee remains in the employment of the discriminator.

101. The court emphasised that the focus should be on the substance of the claimant's allegations. In that case the allegation was that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the police force were treated less favourably. The question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

102. The focus is on the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

103. The court in **Robinson v Surrey** 2015 UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time.

104. In **Barclays v Kapur** 1991 ICR 208 the then House of Lords held that a discriminatory practice can extend over a period. The key issue is to distinguish between a continuing act and an act with continuing consequences. The Court held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time

105. In the case of a disability discrimination claim, where the act complained of consists of a failure to make reasonable adjustments, the calculation of the relevant date for limitation purposes is date involves carrying out an investigation into the period during which the respondent might reasonably have been expected to make the adjustments in question and deciding on the date when that period ended, as that will be the date which will be treated as the beginning of the limitation period.

106. It was held in **Abertawe v Morgan** [2018] IRLR 1050, that the duty to comply with the relevant requirement begins as soon as the employer is able to take the requisite steps to avoid the relevant disadvantage to the claimant

107. In **Matuszowicz v Kingston** [2009] IRLR 288, the Court of Appeal held that a failure to make reasonable adjustments is an omission, not an act, and that omission may be either deliberate or inadvertent, that is, it may be due to lack of diligence, competence or any reason other than conscious refusal. This means that if an employer has not done an act inconsistent with making a reasonable adjustment, there must be an enquiry by the Tribunal as to when he might reasonably have been expected to make the necessary reasonable adjustments.

108. The Employment Appeal Tribunal suggested in **Secretary of State v Jamil** UKEAT/97/13 that where the employer keeps the matter under review, the action may be regarded as a continuing act (albeit **Matuszowicz, supra** was not cited).

109. The Court of Appeal in **Morgan, supra** held that, in ascertaining the correct start date in a reasonable adjustment case, the period in which the employer might reasonably have been expected to comply with its duty 'ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time'.

110. If there is a continuing act of discrimination, the Tribunal requires to determine when the continuing act came to an end in order to calculate the limitation date. This was considered in **Fairlead Maritime Ltd v Parsoya** EAT 0275/15 where, the Employment Appeal Tribunal upheld a Tribunal's decision that the employer's policy of paying a reduced salary to employees whose 'employability' was in issue — effectively, those for whom immigration issues might arise due to their visa status — continued to place the claimant at a disadvantage beyond the time when his visa status was resolved in February 2013 and even after the respondent had raised his salary to the correct rate in June 2013.

111. The continuing state of affairs was identified as the respondent's continued failure to make good the shortfall in his pay to reflect amounts he would have earned had he been paid at the correct rate from the start of his employment, despite having promised that it would do so once his visa status was resolved. The Employment Appeal Tribunal considered that the respondent had thereby continued the discrimination and had done so because of the claimant's earlier failure to meet its employability requirement. This state of affairs had continued until the end of the claimant's employment.

112. Thus whether or not a claim is in time will require a careful consideration of the type of claim that is being pursued.

Extending the time limit

113. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

114. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** [2004] IRLR 685 that a Tribunal should have regard to the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** [1997] IRLR 336 which is as follows:

i. The Tribunal should have regard to the prejudice to each party.
ii. The Tribunal should have regard to all the circumstances of the case which would include:
    1. Length and reason for any delay
    2. The extent to which cogency of evidence is likely to be affected
    3. The cooperation of the Respondent in the provision of information requested
    4. The promptness with which the Claimant acted once he knew of facts giving rise to the cause of action
    5. Steps taken by the Claimant to obtain advice once he knew of the possibility of taking action.

115. In **Abertawe, supra** the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1), but that it was often useful to do so. The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account.

116. In the case of **Robertson v Bexley Community Services** [2003] IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

117. That has to be tempered with the comments of the Court of Appeal **in Chief Constable of Lincolnshire v Caston** [2010] IRLR 327 where it was observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

118. It has been held that where delay is attributable to incorrect legal advice, such a failure should not be generally used to penalise a claimant even if there is a stateable claim against the legal adviser (which has been extended to union adviser – **Wright** 2009 All ER (D) 179).

119. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether or not it is just and equitable.

Time bar submissions

120. The claimant's primary submission (from his written submissions) was that his claims form a continuing act and his claim was lodged within 3 months from the "last act in the chain", namely the appeal outcome on 24 October 2018.

121. The claimant argues that the substance of his complaints are the same throughout and as such should be considered a continuing act extending over a period. The contention is that the pay banding was a practice that continued to apply and the time limit runs from the date the last act was completed, namely 24 October 2018.

122. In relation to the reasonable adjustments claim, it is argued that the time limit for pursuing the claim arises from the date the respondent might reasonably be expected to comply with the duty which should be assessed from the claimant's point of view. The claimant says this is when the appeal outcome was issued – 24 October 2018.

123. The claimant argues that as he contacted ACAS on 9 December 2018, received an Early Conciliation Certificate on 7 January and raised his claim on 17 January 2019, the claims are in time.

124. In the alternative the claimant argues that it is just and equitable to extend the time limit. The claimant was unwell in 2017 and says he would have done anything to move to a smaller store. He was not aware other colleagues were being paid more than him until April 2018, at which point he raised the issue.

125. The claimant also relies upon the fact he remained in employment and had to maintain a continuing working relationship with the respondent. He tried to raise matters informally and ultimately raised matters formally.

126. The claimant maintains there is greater prejudice to the claimant in not having his claim heard as opposed to the respondent who would be able to set out its defence.

Respondent's response

127. The respondent's agent argued that the failure to make the adjustment was a one off act that happened on 30 April 2017. That is when the respondent must have made a decision. The claim was not raised within 3 months of that date and relying on **Bexley,** supra, extending time limits is the exception not the rule.

128. The respondent argued that the claimant knew of the 3 month rule possibly in April 2018 but certainly by October 2018. The claim should have

been brought by July 2018and yet he did not raise a grievance until after 3 months after he became aware of the time limits

129. A further issue the respondent's solicitor raised was that the respondent's principal witness in this case retired in April 2018. The claimant had raised a grievance following his departure.

130. The respondent understands that the witness now lives abroad and has not worked for months. He has retired and so the respondent argues that it is disproportionately disadvantaged. It was open to the claimant to have raised matters in 2017 if not in 2018. The claims should therefore be dismissed.

Time bar – Reasons and decision

131. I must firstly decide whether to allow the claimant to withdraw his concession that his claims were only based on a single date. Having considered both parties' submissions and balanced the effect on the parties I have decided it is just to allow the claimant so to do.

132. The claimant's claims were clearly based (in part) upon the respondent's policy to pay managers based upon their store size. That was not a one-off act. The indirect discrimination claims clearly rely upon this practice which was not a discrete act. This is something about which the respondent has known not least since the formulation of the claims and issues at the preliminary hearing on 12 June 2019. That hearing note that was issued had also stated that the purpose of today was to consider whether not the claims were in time and if not to consider time bar. It was not therefore axiomatic or automatic that the claims were necessarily out of time.

133. The respondent is not prejudiced by my allowing the concession to be withdrawn since they had knowledge of this issue and knew of the facts relied upon by the claimant in support of his claims.

134. I therefore allow the claimant to withdraw the concession as to the time limit issue such that the claims as set out in the Note can be fully considered. I do not consider the respondent to be prejudiced. It knew as to the medical position in relation to the claimant (as set out in his Impact Statement and Witness Statement). The respondent has been able to deal with the legal and factual issues arising as a result of the withdrawal of the concession fully and without any difficulty.

Were the claims brought in time?

135. The next issue to determine is whether the claims are time barred at all. It is necessary to look at each specific claim in turn.

Direct disability discrimination

136. The first claim is that the claimant suffered direct disability discrimination when his salary was reduced upon relocation on 1 May 2017. That is a discrete one-off act and was not suggested to be a continuing act of

direct discrimination. It was a single act which had continuing consequences. That claim is accordingly considerably out of time, having been lodged 18 months after the event in question, albeit the claimant only learned of the potential for his claim in April 2018 when he learned that 2 comparators whom he says have the same circumstances as him (aside from disability) did not suffer a pay reduction. As a claim for direct discrimination the less favourable treatment was paying the claimant at the agreed rate for the new role which was a single isolated act.

137. The only way in which it could be considered in time is if the claimant can show that it formed part of a policy or continuing state of affairs with the claim being raised within 3 months following that policy ceasing to apply. I shall consider the other claims in this regard to assist in determining whether or not the requisite continuing discriminatory effect is present from the substance of the complaints.

Reasonable adjustments

138. The second claim is one of reasonable adjustments, where the claimant says the provision, criterion or practice relied upon was the operation of a pay band structure based on store performance which he says put him at a disadvantage. In the alternative it is argued that ether was a failure to make a reasonable adjustment where his increased pay of £26,000 was not backdated 18 months when it was offered, on 24 October 2018.

139. The latter claim was therefore raised in time (with the relevant event occurring on 24 October 2018 and the clam being raised on 17 January 2019).

140. The former reasonable adjustments claim arises because the claimant says the respondent should have adjusted his pay when he transferred to the new role, on 1 May 2017. This requires analysis to determine whether it was lodged in time given the statutory provisions.

141. The calculation of the relevant date in reasonable adjustment cases for time bar purposes involves examining the period during which the respondent might reasonably have been expected to make the adjustments in question (from the claimant's perspective) and deciding on the date when that period ended, as that will be the date which will be treated as the beginning of the limitation period. This is when the employer is able to take the requisite steps to avoid the relevant disadvantage to the claimant.

142. There are a number of possible stages when it might be said that the respondent could reasonably have taken the requisite steps:

a. It could be said that the respondent did an act inconsistent with making a reasonable adjustment upon the claimant's appointment to the role in May 2017 when, according to the claimant, the respondent knew he asked to be moved due to his health concerns and yet the respondent maintained their banding policy.

b. Another option would be following the claimant raising the issue about his pay being discriminatory which he raised his first grievances in August 2017 (which did not specifically mention pay discrimination).
c. When the claimant raised his second grievance in July 2018 (which specifically referred to pay discrimination issue) the respondent was certainly on notice as to the issue.
d. It could also be said that the respondent could reasonably have dealt with matters when it dismissed the claimant's grievance on 7 September 2018,
e. Or finally (as maintained by the claimant) when the respondent dismissed his appeal, on 24 October 2018 having finally determined his request.

143. The assessment is when, reasonably, the claimant could have expected the respondent to have made the adjustment. In my judgment, looking at matters from the claimant's perspective, as the authorities require me to do, and taking a step back and assessing the position, the respondent could reasonably have been expected to have made the change on 24 October 2018. I accept the claimant's submission that this was the final stage when the respondent had the chance to make a final decision in relation to the adjustment. There is parity of reasoning with **Jamil, supra**. I apply the reasoning set out in **Matuszowicz, supra**, and I conclude that the time limit starts on 24 October 2018.

144. That claim is therefore within time.

Indirect disability discrimination

145. The final claim raised by the claimant is for indirect disability discrimination and is based upon the same grounds as the failure to make reasonable adjustments. Neither party made specific submissions upon these claims.

146. The first indirect discrimination claim is based upon the pay banding structure for managers which he says put him at a disadvantage (presumably for the period he took the role, 1 May 2017, to date).

147. The second claim is that the decision to increase his pay to £26,000 but not backdate it (which happened on 24 October 2018) was indirect disability discrimination.

148. While superficially these claims might be said to be identical to the reasonable adjustment claims, upon proper analysis I do not consider this to be correct. The Employment Appeal Tribunal case of **Fairlead Maritime Ltd v Parsoya, supra** is relevant in respect of these claims. In that case there was a policy to reduce pay for certain categories of staff. That is not dissimilar to the current situation.

149. The court noted that a complaint which related to conduct extending over a period of time had to be treated as done at the end of that period. A

distinction has to be drawn between a continuing act of discrimination extending over a period of time, when section 123(3) applied, and the consequences of an act of discrimination, where the time limit was determined by the date of the act and not by the date of any consequence. Where an employer had adopted a discriminatory policy that it continued to operate, the relevant date of that continuing act of discrimination was the date on which the policy came to an end.

150. In that case, the act complained of was not limited to the mere existence of the employer's policy of not paying full salary to those who required a visa for their employment; it was the application of that policy to the employee. The policy continued beyond the point when the employee's visa status was resolved, and even after the employer had started paying the correct rate, since it had continued to refuse to make good the shortfall. Thus, the employer was continuing the discrimination by refusing to pay the full salary that had been due to the employee from the start of his employment.

151. That reasoning is applicable to the current claim given the respondent's decision not to amend its policy in respect of the claimant. This claim relates to an ongoing policy about which the claimant complained (not a one off act or decision, in contrast to the other claims). Applying the legal reasoning from that case results in the indirect disability discrimination claims being in time since they rely upon the respondent's policy of paying managers a salary based upon the store size and not backdating the claimant's salary (which contrasts with the position in respect of the reasonable adjustments claim, which are assessed as omissions). The policy on which these claims are based continued even after the claimant accepted the job and raised his concerns about the sums.

152. I find that the indirect discrimination claims are therefore in time given the policy continued in force.

Continuing act?

153. For the claim that is out of time, the direct disability claim, it is necessary to consider whether or not it is reasonably arguable that the respondent operated a discriminatory policy which continued to apply, such that the claims formed part of a conduct that extended over a period and were therefore raised within time. This requires there to be some form of specific policy, practice or state of affairs in connection with alleged discriminatory treatment of the clamant. As the court said in **Hendricks**, **supra** the question is whether there are incidents which are linked to each other which evidence a continuing state of affairs (rather than focussing on a policy as such).

154. In **Hendricks, supra** the allegation was that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the police force were treated less favourably. In the instant case the clamant is raising separate claims. He is essentially saying firstly the respondent paid him less because he was disabled and secondly they applied a policy of paying staff according to the size of their store.

There is no suggestion of a continuing state of affairs whereby disabled staff were treated less favourably.

155. Whether or not there is a continuing act would require to be determined by the Tribunal hearing the evidence. It does not appear to me that it is reasonably arguable that there was a continuing state of affairs, since the claims arising appear to be discrete claims which cannot be considered together and that the claims raised by the claimants are essentially isolated claims – one about direct discrimination (to pay him less than non-disabled colleagues in similar circumstances) and a separate claim that relies upon the pay banding structure, this is a matter for the Hearing to determine, albeit my decision in connection with the time limit issue may render this otiose. In any event, whether or not there is a continuing act would be a matter for the final Hearing, having heard evidence on the matter.

156. Assuming there was no continuing act, the claims for direct disability discrimination and the first reasonable adjustments claim were lodged outwith the statutory time scale.

Just and equitable?

157. Next, I require to consider whether the direct disability discrimination claim, the only claim I have found to be out of time, was lodged within such period that was just and equitable. In this regard I must look at all the factors set out above and balance them carefully to determine whether or not the claim was lodged within such other period that is just and equitable given the statutory wording.

Direct disability discrimination claim

158. This claim relates to an act that took place on 1 May 2017, when the claimant accepted the role in the smaller store. He did not find out that others had been paid more in similar circumstances until April 2018 and raised the point in his grievance in July 2018, with the matter being dismissed in July 2018 and then in October 2018.

159. The first question is the balance of prejudice. Denying the claimant the opportunity to have his claims of discrimination heard would clearly prejudice him. The prejudice the respondent relies upon if the claims are to proceed is that their key witness is absent as he has since retired. There was no evidence of the respondent having sought to contact the witness or any reason why his evidence could not be obtained in some other way, such as in writing or via video link. In any event that witness's relevance may well be limited given the issue is likely to be more upon the respondent's justification in respect of the banding and its application to the claimant, rather than what the claimant is alleged to have said to his manager. I find that the balance in this regard favours the claimant.

160. Next, I need to consider the delay and reason for it. The delay is significant in this case. The claim was not raised until January 2019 in respect of a move that happened on 1 May 2017. The claimant tried to resolve matters

internally and only raised matters in the Tribunal once that had not yielded an appropriate outcome. He raised 2 grievances. The claimant did have the benefit of trade union advice but only learned of the 3 month rule in or around October 2018. He did raise his claim within 3 months out the outcome of the grievance. I find that the claimant did not act unreasonably and he acted without any material delay.

161. The claimant progressed matters without undue delay once he learned of the time limits. Any failure by his union (in relation to time bar) ought not to be visited upon him. The claimant acted reasonably throughout this matter and without undue delay.

162. As I set out below, as to the impact on the cogency of the evidence, the respondent argues they are materially affected as the claimant's then line manager has retired abroad. I have taken that into account but I do not consider that determinative. The issue in this case was why the claimant was treated in the way he was. The respondent is still able potentially to lead that witness and in any event will have evidence as to why the claimant received the sum he did (since it was their policy) and why the comparators received the sums they did. The evidence is not likely to be seriously affected and the respondent ought reasonably still be able to fairly and fully set out its position.

163. This is ultimately a balancing exercise, bearing in mind this is a discrimination claim and the question is whether the claim was lodged within such time that was just and equitable.

164. Having considered all the relevant matters carefully and in light of the above authorities I have concluded that the claim was raised in a period that was just and equitable. The claimant raised the claims within 3 months of learning of the time limits and upon receiving advice from his trade union. The respondent will be able to lead evidence to explain why the comparators relied upon by the claimant are not correct (as alleged in their submissions below) and the respondent is able to lead evidence as to the reason for their treatment of the claimant, which is likely to be the application of their policy. The respondent is not likely to be substantially prejudiced, in contrast to the claimant whose claim would not be heard. The claim should accordingly be allowed to proceed.

Other claims

165. In the event that I was wrong in relation to my findings as to the time limits above, I have considered whether the other claims would similarly have benefited from the statutory extension of time.

166. The claimant would be prejudiced to a greater extent than the respondent if this claim is not allowed to proceed.

167. The claimant acted reasonably quickly once he was equipped with the knowledge as to time limits. He did raise matters internally as he understood he had to do. He gave the respondent the opportunity to resolve matters and raised proceedings when it was clear the internal route was concluded. He acted reasonably quickly once he learned of the time limits.

168. The claims clearly relate to an ongoing policy by the respondent with regard to pay banding. The respondent's defence of that policy need not be based upon the claimant's then line manager but could clearly be based upon the evidence that justified the policy at the time from those who were responsible for the policy.

169. I accept that the manager's evidence may be of relevance (such as in relation to knowledge of disability) but there was no suggestion the individual was unable to attend, rather that he had retired and moved abroad. It is possible that steps could be taken to locate the individual and it may be possible for him to give evidence, even potentially in some other way other than by physical attendance.

170. I have taken into account the delay and the prejudice to the respondent but I have balanced this with the facts in all the circumstances. The claimant did not unreasonably delay once he knew of the time limits. Having balanced all of the factors and acting judicially I would have exercised my discretion in favour of the claimant and allowed the claims to proceed, if they had been found to have been lodged outwith the statutory timescale.

171. In making my decision as to time bar, I have carefully considered the evidence and applied each of the factors set out above in the authorities. Having done so, and taken a step back, I have concluded in all the circumstances that even if the claims were lodged outwith the statutory time period, the claims were lodged within such other period that is just and equitable.

Strike out/deposit order - the law

172. Under Rule 37 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, an Employment Tribunal may strike out all or part of a claim or response on a number of grounds, including that the claim or response, or some part of either, has no reasonable prospect of success.

173. Rule 37 imports a two-stage test. The first is to consider whether the ground has been established. The second is to consider whether or not to exercise the discretion in favour of striking out. The second stage is important as it involves a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit.

174. In **Hasan v Tesco** UKEAT/98/16, the Employment Appeal Tribunal held that relevant factors in the exercise of that discretion that might have weighed heavily included the early stage of the proceedings, the ability to direct that further and better particulars of each claim be specified and the absence of any application on the part of the respondent for striking out.

175. In determining whether or not there are reasonable prospects of success, strike out should only be ordered where the tribunal is in a position to conclude that there are no reasonable prospects. If central facts remain in

dispute it will only be in an exceptional case that a case is struck out on the grounds that there is no reasonable prospect of success.

176. This is particularly so for discrimination cases because of the particular public interest in examining such claims on their merits rather than striking them out at a preliminary stage, but there are exceptions. It was held in **Mechkarov v Citibank** [2016] ICR 1121 that it is possible to strike out discrimination claims in the clearest of cases. If the issue turns on oral evidence, evidence should be heard (**Anyanwu v South Bank Students' Union** [2001] IRLR 305).

177. In **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603 the Court held that the claimant's case must be taken at its highest and it is only if the claimant's case is 'conclusively disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, that strike out should be considered

178. Rule 39 of the Rules allows a Tribunal to order that the claimant pay a deposit in the event of claims or arguments are found to have "little reasonable prospects of success". The Employment Appeal Tribunal in Hemdan v Ishamail 2017 ICR 489 em,phasiosed there must be a proper basis to doubt the likelihood of a claimant being unable to establish facts essential to a claim and the Tribunal still retains discretion which needs to be exercised in accordance with the overriding objective. The Tribunal also requires to consider the means of the claimant before making any such order.

Submissions

179. The respondent argues that it was never told of the claimant's disability and knowledge is therefore disputed. The respondent's agent noted that the claimant' s own evidence was that he kept matters to himself, which supports the respondent's position that it could not have known about the claimant's disability.

180. The respondent argues that for direct disability discrimination the claimant is comparing himself with 2 specific individuals. Their circumstances are fundamentally different to the claimant's and so they are not relevant comparators. There are also factual disputes as to the banding situation as to specific stores. It was therefore argued that the direct disability discrimination claim has no prospect of success or limited prospects.

181. With regard to the indirect disability discrimination claim, the respondent argues that a disabled employee does not need to work at a smaller store. It is entirely possible that a larger store may be better since there would be more colleagues to whom tasks could be delegated. There was in any event a clear defence given the need for pay structures, which is a legitimate aim which was proportionately applied.

182. Finally with regard to reasonable adjustments, the respondent argued that the respondent had already made reasonable adjustments. They acceded

to the claimant's request to move to a smaller store. The respondent is not obliged to put the claimant at a better position. He knew when he agreed to move that his pay would be reduced.

183. Thus the respondent argued the claims had no reasonable prospects of success which failing limited prospects.

Claimant's response

184. The claimant's agent contested the comparators and the respondent's submissions. There is also disagreement as to the banding position. The claimant also argued that while he did know the move resulted in a lower salary, that does not stop there being an argument that the policy was discriminatory and/or the decision not to backdate his pay was discriminatory. It is for the respondent to justify the policy it had.

185. In response, the respondent's agent conceded that the disputes would be a matter of evidence

186. As to the claimant's means, he had an income of £26,250 with savings of £5,000 His property was worth £145,000 with no mortgage. He also owed his car, worth £1800. There were outstanding liabilities in the sum of around £4,000 At the end of each month the claimant had an excess of around £200 month

Decision and reasons on strike out and deposit order

187. The claimant's first claim is that he was directly discriminated against because of his disability. He compares himself against 2 colleagues whom he says have circumstances not materially different to his, aside from his disability. This is disputed.

188. The law requires me to take the claimant's claims at their highest in assessing whether or not there are no reasonable prospects or little reasonable prospects. If the claimant is correct and the individuals are relevant comparators, it is not possible to say that his claim has no or little reasonable prospects of success. That is a matter for the Tribunal hearing the evidence to make an assessment.

189. With regard to the indirect disability discrimination claim, the claimant argues the practice of paying managers per the store turnover puts him at a disadvantage because of his disability and that disabled people generally are at a disadvantage. There is some merit in the respondent's argument that there is a lack of detail as to precisely why this may be so given the reason (within the submissions) is stated as "because they need to work in a small store". This lacks detail and it is not clear why disabled staff in the position of the claimant would need to work in a smaller store. Nevertheless I cannot say that such a claim has no reasonable or little reasonable prospects of success. This is again a matter for the Tribunal hearing the evidence to determine in all the circumstances.

190. Finally, in respect of the claim for reasonable adjustments, the respondent argues that they had already made a reasonable adjustment. That does not, by itself, mean that the adjustment sought by the claimant (in addition to moving store) is not reasonable. Ultimately whether or not the position advanced by the claimant is reasonable is a matter that requires to be determined by the Tribunal hearing the evidence and assessing the matter in light of the facts and applicable law.

191. In all the circumstances I am not satisfied that there are no reasonable prospects of success nor little reasonable prospects of success in respect of the claims advanced by the claimant. I am also not satisfied that it would be proportionate to dismiss the claims in light of the overriding objective. Each of the claims shall now proceed to a Hearing.

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Employment Judge Hoey

Dated: 27 November 2019

JUDGMENT SENT TO THE PARTIES ON

28 November 2019

FOR THE TRIBUNAL OFFICE