EMPLOYMENT TRIBUNALS

OPEN PRELIMINARY HEARING

Claimant:	And	**Respondent:**
Mr D Turner		Commerzbank AG London Branch

Heard by: CVP **On**: 17 March 2021

Before: Employment Judge Nicolle

Representation:

Claimant: Mr P Strelitz, of Counsel
Respondent: Ms A Beale, of Counsel

JUDGMENT

The Tribunal finds that:

1. The Claimant did not have a disability in December 2018 and January 2019.

2. That the Claimant's wife had a disability at all material times.

3. That the Claimant is required to apply to amend his Particulars of Claim and that leave is granted for such an amendment.

4. That the continuation of the Claimant's claim of direct associative disability discrimination is not struck out but is subject to his payment of a deposit of £500.

5. The claim in respect of reasonable adjustments at paragraph 39.1.2 of the Particulars of Claim is struck out as having no reasonable prospect of success.

REASONS

<u>The Hearing</u>

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

2. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

3. The parties were able to hear what the Tribunal heard.

4. The participants were told that it is an offence to record the proceedings.

5. From a technical perspective, there were no major difficulties.

6. The Tribunal was provided with an agreed bundle comprising of 409 pages. Both parties provided detailed written submissions together with accompanying case authorities. The Claimant together with his wife Mrs Krupa Turner (Mrs Turner) gave witness evidence.

The Issues

7. Was the Claimant disabled at all material times namely from 14 December 2018 by reason of the following impairments?

    a) anxiety and depression; and/or
    b) adjustment disorder.

8. The Respondent concedes that the Claimant was disabled from August 2019 only but makes no concession in respect of knowledge. The Respondent understands that the only allegation of disability discrimination which occurs prior to August 2019 (the date from which disability has been admitted) is that at paragraph 39.1.2 of the Particulars of Claim, relating to paragraphs 11 to 13 of the Particulars of Claim. The issue of the Claimant's disability therefore can be limited to the specific time of that allegation: 14 December 2018 and January 2019.

9. Was the Claimant's wife disabled at all material times by reason of?

    a) acute anxiety;
    b) secondary depression; and/or
    c) agoraphobia.

10. Is the Claimant required to apply to amend his Particulars of Claim? If so, is the Tribunal prepared to grant the application to amend his Particulars of Claim made on the 19 February 2021?

11. Is the Tribunal prepared to grant the Respondent's application to strike out/for a deposit order, of the Claimant's direct associative discrimination claim as per its application made on 19 February 2021?

12. Is the Tribunal prepared to grant the Respondent's application to strike out/for a deposit order, of the Claimant's reasonable adjustments claim at paragraph 39.1.2 of his Particulars of Claim as per its application made on 9 March 2021?

Procedural History

13. The Respondent made a request for further information of the Claimant's claims on 9 December 2020. A Case Management Hearing took place before Employment Judge Grewal on 8 January 2021 following which the Claimant responded to the Respondent's RFI on 5 February 2021 and on 19 February 2021, made an application to further amend the Particulars of Claim, to include claims of associative harassment in connection with the matter set out at paragraphs 38.1-38.6 of the Particulars.

14. On 19 February 2021, the Respondent resisted the amendments; applied to strike out the associative discrimination claims and submitted an amended Grounds of Resistance.

15. On 9 March 2021, the Respondent also applied to strike out the claim for failure to make reasonable adjustments relating to December 2018/January 2019 (paragraph 39.1.2 of the Particulars of Claim).

Findings of Fact

16. The findings of fact are confined to those which are necessary to determine the issues before me. Whilst the Claimant and his wife gave evidence relating some of the substantive issues of the claim these are not relevant for the purposes of the matters to be determined at this Open Preliminary Hearing.

17. The Claimant was employed by the Respondent from 12 June 2017, most recently as GM-Co Vice President in the Respondent's Enhanced Due Diligence (EDD) Team in the Compliance Team (the Team).

18. The Claimant complains of a failure to make reasonable adjustments in respect of two incidents in December 2018 / January 2019 where he states that Shairon Hill, his Line Manager (Ms Hill):

a) conducted a positive oral review but sent an inconsistent negative written summary (paragraph 11 of the POC, P.18); and

b) included in the written report a criticism of the Claimant that she had not mentioned in the year-end review that month and of which she could not provide an example (paragraph 11 of the POC, P.19).

19. From 20 December 2019 to mid January 2020, Mrs Turner contacted members of the Claimant's team making serious allegations against the Claimant, including that he had behaved inappropriately and/or sexually harassed a junior female member of his team. The Respondent says that some of the messages appear to have come from the Claimant's own accounts. As a result, the Claimant was suspended on 14 January 2020.

20. An investigation and disciplinary procedure were carried out between January and May 2020, following which it was concluded that:

a) the facts did not support a safe conclusion that the Claimant made inappropriate comments on social media regarding any member of staff; and

b) Mrs Turner had acted in a totally inappropriate manner which damaged the Claimant's relations with colleagues and had a significant impact on both the morale of the team overall and his standing. It was recommended that a review be undertaken to assess the viability of the Claimant's return to his team.

21. The review, which was undertaken by the Respondent's Head of Financial Crime, found that the:

a) Claimant's reputation had been damaged, impacting on the willingness of Team members to work with him, meaning team cohesiveness would be negatively impacted by his return, and that this would potentially undermine the effectiveness of the Team;

b) Claimant may be compromised by his wife's control over him and possible access to his devices; and

c) Claimant had not acted openly, cooperatively and with integrity during the investigation and disciplinary procedure.

22. The Claimant was dismissed on 5 August 2020.

The Claimant's Disability

Meeting on 24 July 2018

23. The Claimant says that prior to a meeting on 24 July 2018 with Peter Czernicki, HR Manager and James Walters, Senior Manager that he was in good health and that his mental state was positive and stable.

24. The Claimant says he became very stressed when during this meeting he was told that the role, he was to leave had been re-evaluated to a director level position with a higher salary.

The Claimant's health from 24 July 2018 until 27 February 2019

25. In his witness statement the Claimant refers to experiencing low mood, insomnia and feelings of exhaustion. He says he was averaging only two to three hours sleep at night.

26. He attended his GP on 14 August 2018 for advice and was diagnosed with insomnia. The notes of Shirley Davis, Nurse at the GP practice (Ms Davis) include:

a) he is eating and drinking normally;
b) reports stress at work; and
c) reports fever and stiff neck/shoulders/back.

27. The Claimant returned to his GP on 2 November 2018. He was seen by Dr Simon Stacey. His notes refer to insomnia and stress at work.

28. The Claimant saw Ms Davis on 16 November 2018 and was prescribed the anti-depressant amitriptyline. He was diagnosed with insomnia. There was a discussion regarding the Claimant's medication. There was no reference to depression in Ms Davis' note.

29. The Claimant returned to his GP on 27 February 2019. In addition to amitriptyline, he was also prescribed citalopram. He was signed off work for a month for stress. The note of Dr Nnadi records insomnia with a history of stress at work. Reference was made to anti-anxiety medication. It is apparent from this point, and not disputed by the Respondent, that the Claimant had a diagnosis of stress and/or depression. The Respondent does, however, dispute that the Claimant was suffering from a condition constituting a disability prior to this time.

30. On 20 March 2019, the Claimant met with Dr R M C McNeill Love, Consultant Occupational Physician who produced a report dated 25 March 2019. This referred to the Claimant's GP having increased his medication in March 2019.

31. The Claimant attended an appointment with Dr Craig Anderson, Consultant Psychiatrist at The Priory on 4 February 2020. In his letter dated 5 February 2020 he referred to the Claimant as having had difficulties with his mental health for the last 18 months.

Mrs Turner's Mental Health

32. Mrs Turner says that she began to suffer with acute anxiety and depression in early 2011. She refers to various traumatic experiences earlier in her life. She says that she was prescribed citalopram following an attempt to take her life in January 2012. She continued to take this until she saw Dr Ram, Consultant Psychiatrist (Dr Ram) in November 2017.

33. In May 2017 she was hospitalised with viral meningitis. This resulted in a plethora of ongoing health issues to include insomnia, nausea, agoraphobia, anxiety, bouts of depression, skin conditions and intermittent headaches.

34. She says that on various occasions she felt suicidal.

35. She met with Dr Ram on 17 November 2017, and he diagnosed acute anxiety, agoraphobia and secondary depression. She was advised to stop taking amitriptyline and citalopram and instead commence sertraline, quetiapine and Prn diazepam/lorazepam.

36. Mrs Turner says that her condition deteriorated markedly in late 2019. She describes her agoraphobia as being out of control and to experiencing uncontrollable panic attacks. She says she was in a "mental crisis". She refers to an incident in November 2018 when she had a cocktail of morphine and two bottles of wine. Various members of her family had to assist.

37. In a letter from Dr Ram, dated 20 November 2017 he refers to Mrs Turner experiencing fleeting suicidal thoughts. His impression was that she was suffering from panic disorder with agoraphobia and secondary depression.

38. In a further letter from Dr Ram dated 16 January 2018 he reports that Mrs Turner had reported feeling a lot better in herself. He refers to her having been to job interviews.

39. On 6 March 2019 Mrs Turner attended her GP surgery where she was seen by Dr Goel. This followed an incident where she experienced an unprovoked attack when walking home with her daughter. His note refers to her anxiety and agoraphobia having got worse. She was diagnosed with an anxiety disorder.

40. On 30 December 2019 Mrs Turner was again seen by Dr Geol. Reference was made to her planning a trip to Mumbai in India for PVT treatment for her back. The Claimant referred to this being for a holistic therapy retreat but she did not make this trip. On examination she was described as euthymic, which means no mood disturbances. When questioned about the absence of any reference to depression or cognate mental health issues in this GP report the Claimant says that she would not refer to her mental health on every GP visit. For example, she had not told her GP about her having consumed the cocktail of morphine and two bottles of wine.

41. Mrs Turner visited her GP again on 17 February 2020. She was seen by Dr Kuppuswamy. He records that lifestyle changes were helping, and that Mrs Turner was hoping to come off the meds soon, at her own pace.

42. On 6 March 2020, the Claimant was seen by Dr Velusamy. His note referred to her as having been doing well until six weeks ago but because of the Claimant experiencing a stressful period was struggling with anxiety and going out.

43. On 6 August 2020, the Claimant was seen by Dr Arkley. His note refers to the Claimant having recently lost his job. On examination she was found to be chatty with normal speech.

The Law

Definition of disability

44. Section 6 Equality Act 2010 (the EQA) provides:

> (1) 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.

45. This core definition is elaborated upon and extended by Sch. 1 of the EQA and by the Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128.

Substantial Adverse Effect on Normal day-to-day activities

46. Normal day-today activities are things that people do on a regular day-to-day basis. Examples include shopping, reading, writing, having a conversation, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities: Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011). They do not include activities which are only normal for a particular person or a small group of people. They do not include highly specialised work activities which are not normal day-to-day activities for most people.

47. S.212(1) EQA provides that the effect on such activities must be 'more than minor or trivial'. In determining whether an effect on normal day to day activities is substantial, a tribunal should have regard to the time taken to carry out the activity and the way in which the activity is carried out.

48. Langstaff P in Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12, [2013] ICR 591 held that in applying the definition of a person with a disability in s.6(1) of the EQA a tribunal had to consider, pursuant to paragraph (b) the adverse effect of the persons impairment on his ability to carry out normal day to day activities, focussing, not on what he could do, but on what he maintained he could not do as a result of his impairment; the tribunal, having established that there was such an effect, then had to assess whether the effect was "substantial", as defined in s.212(1) as "more than minor or trivial"'; that the Act did not create a sliding scale between matters which were clearly of substantial effect and those which were clearly trivial, but provided that unless an effect could be classified as trivial or in substantial it was necessarily substantial."

49. And further at paragraph 14, once someone has established that they have an impairment which has any effect upon his/her ability to carry out normal day-to-day activities, unless a matter can be classified as trivial or insubstantial, it must be treated by the employment tribunal as substantial.

50. The hindering of the full and effective participation by someone in their professional life has been held by the ECJ in Chacon Navas v Eurest Colectividades [2006] IRLR 706 as meaning that they are covered by the definition of disability. Thus, even if they can lead a perfectly normal life outside of work, barriers to being able to do likewise in work must consequently lead to a classification of that person as falling within the definition of someone who has a disability as a protected characteristic.

Long-Term Effect

51. Under paragraph 2(1) of Schedule 1 to the EQA the effect of an impairment is long-term where:

    a) it has lasted for 12 months;
    b) it is likely to last for at least 12 months; or
    c) it is likely to last for the rest of the life of the claimant.

52. Paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if the effect is "likely to recur". "Likely" in this context again means something that "could well happen".

53. How long the effects of an impairment are likely to last must be determined by reference to circumstances existing (and evidence available) at the date of the act complained about, and not by reference to some later date: McDougall v Richmond Adult Community College [2008] ICR 431 at [24].

Mental Impairment

54. There is a distinction to be drawn between a normal reaction to adverse or tragic life events and a "mental illness" such as clinical depression, with the latter constituting an impairment and the former generally not: J v DLA Piper [2010] ICR 1052 at [42]; Herry v Dudley Metropolitan Council [2017] ICR 610 at [54] – [55] and Igweike v TSB Bank plc [2020] IRLR 267 at [53] – [55].

55. Whilst a reaction to adverse circumstances can become entrenched over time, such entrenchment, and any corresponding extended period off work, does not in itself prove the existence of a mental impairment; see Herry at [56]:

> "Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so, must any evidence of diverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment tribunal to assess."

56. In cases concerning mental impairment, which raise complex issues, it is particularly important for the claimant, on whom the burden of proving disability lies, to adduce clear evidence supporting his/her case; see Royal Bank of Scotland plc v Morris, KEAT/0436/10, 12 March 2012 at [63]:

> "The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to

allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted."

57. Mr Strelitz and Ms Beale both made extensive reference to the Court of Appeal's decision in McDougall. Ms McDougall, who had a history of mental illness, was offered a job by the respondent college subject to health clearance. The offer was subsequently withdrawn on the ground that the health report had not cleared her as fit for work. The employment tribunal found that she did not have a disability for the purposes of the Disability Discrimination Act 1995 (the DDA), since, although she had a mental impairment within the meaning of s.1(1) of the DDA, any substantial adverse effect which that impairment had on her ability to carry out normal day to day activities had ceased by the time of the alleged discrimination and was not likely to recur, within the meaning of paragraph 2(2) of schedule 1, so that the effect of the impairment was not long term as required by s.1(1). The Employment Appeal Tribunal allowed her appeal. On appeal by the College the Court of Appeal found that whether an employer had committed an act of discrimination under the DDA had to be judged based on evidence available at the time of the act alleged to constitute discrimination. An employment tribunal should not have regard to subsequent events; and that, accordingly, the tribunal had been right not to take account of the later recurrence of the claimant's mental impairment when finding that she did not have a disability within s.1.

58. I was also referred to various paragraphs within the judgment of Pill LJ in McDougall to include in paragraph 21:

    a) the statute plainly contemplates that, for a disability within the meaning of the Act to exist, an impairment having a "long term adverse effect" must be established;

    b) the starting point is to ask whether the effect of the impairment has lasted for at least 12 months. There is then a predictive element. It is not necessary to establish that the effect has lasted for 12 months if it is established and is likely to last for at least 12 months or the rest of the life of the person effected; and

    c) where the effect of the impairment has ceased, it may still be treated as having a long-term effect if the effect is likely to recur.

59. I was referred to the EAT's judgement in Igweikie v TSB Bank Plc UK EAT / 0119/19/BA and specifically paragraph 53 in the judgment of Judge Auerbach:

    "The discussion in Herry is, I think, pertinent here. Herry and the present case are plainly not factually on all fours, Herry was about the type of case in which a reaction to circumstances at work is found to have expressed itself in entrenched or intransigent behaviour. In that case, that reaction was also found to have little or no adverse effect on normal day to day activity. However, the discussion in Herry makes a more general point, that a reaction to adverse events or

circumstances does not, even if a clinician describes it (in that case) as stress, necessarily by itself bespeak the presence of an impairment."

Deduced effect

60. Where an impairment is subject to medical treatment, paragraph 5(1) of Schedule 1 to the EQA provides that an impact will be taken to be substantial where, but for that treatment, it would likely be substantial. "Likely" in this context means that this "could well happen"; see SCA Packaging v Boyle [2009] ICR 1056 at [41] - [42] and [70].

61. The Court of Appeal in Woodrup v London Borough of Southwark [2003] IRLR 111 held at [13] that, where a claimant seeks to rely on the "deduced effects" of an impairment absent medication, he/she:

> "should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine… should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary."

Direct disability discrimination (s.13 EQA)

62. In order to establish direct disability discrimination, a claimant must have been treated less favourably than an actual or hypothetical comparator whose material circumstances, including his/her abilities are the same as his/her own (s. 23(1) and (2) EQA Thus, in High Quality Lifestyles Ltd v Watts [2006] IRLR 850, where the claimant was dismissed because of the risk of transmission arising from his HIV, the appropriate comparator was a person who had an attribute which carried the same risk as HIV of causing to others illness or injury of the same gravity (see [48] – [49]).

63. In the Court of Appeal's decision in Chief Constable of Norfolk Constabulary v Coffey [2019] EWCA Civ 1061 the judgment of Underhill LJ at paragraph 67 referred to the decision in Stockton-On-Tees Borough Council v Aylott [2010] ICR 1278 involving a case with a claimant with a bipolar condition and the employer taking what the employment tribunal described as "a stereotypical view of mental illness" and dismissed him. In this case Mummery LJ said at paragraph 48:

> "Direct discrimination can occur, for example, when assumptions are made that a claimant, as an individual, has characteristics associated with a group to which the claimant belongs, irrespective of whether the claimant or most members of the group have those characteristics".

64. And at paragraph 50:

> "The Council's decision to dismiss the claimant was based in part at least on assumptions that it made about his particular mental illness rather than on the basis of up-to-date medical evidence about the effects of his illness on his ability to continue in the employment of the Council."

65. And that paragraph 74 in which Underhill LJ stated:

> "I would emphasise that it does not follow that a claim of direct discrimination can be brought in the generality of cases where an employee suffers as detriment because they are (or are perceived to be) unable to do the work required by the employer, or to do it to a sufficient standard, as result of disability: on the contrary, such cases will typically have to be brought under s.15 (if available), and the employer will have the opportunity to seek to justify the treatment complained of".

66. Simler J (as she then was) in *Zeb v XEROX (UK) Ltd UK in ATC/0091/15/DM reminded an employment tribunal* that it is a necessary part of its function to consider the drawing of inferences.

PCPs and reasonable adjustments for disabilities

67. In Ishola v Transport for London [2020] ICR 1204, the judgement of Simler LJ in the Court of Appeal analysed the concept of the PCP within a reasonable adjustments claim as follows:

> "In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability-related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."

68. She held that the words "provision, criterion or practice" in s.20(3) of the EQA were not terms of art but were ordinary English words, broad and overlapping and, in light of the object of the legislation not to be narrowly construed or unjustifiably limited in their application; but that, however widely and purposefully the concept was to be interpreted, it did not apply to every act of unfair treatment to the particular employee, as that was not mischief which the concept of indirect discrimination and the duty to make reasonable adjustments was intended to address; that in context, all three words carried the connotation of a state of affairs indicating how similar cases were generally treated or how a similar case would be treated if it occurred again; that, therefore, a one off decision or act could be a practice, but it was not necessarily one; and that the employment tribunal had been entitled to find that the particular timing and circumstances of the claimant's grievance explained why it had not been investigated before the dismissal and that, therefore, it was a one off decision in the course of dealings with that particular employee.

69. And went on to explain that the function of the PCP in a reasonable adjustments context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee, and as in a case of indirect discrimination, the act of discrimination that must be justified is not the disadvantage suffered by the claimant, but the PCP under, by

or in consequence of which the disadvantageous act is done. To test the PCP, it must therefore be capable of being applied to others (whether actual or hypothetical comparators).

Harassment on account of the disability (s.26 EQA)

70. IDS Employment Law Handbook makes clear at para. 18.74 says:

> *As we have seen, an alleged harasser does not need to have used ageist, sexist, racist, etc, language or engaged in behaviour that is overtly age, sex or race specific before a harassment claim can be made under s.26 EQA, although it will obviously be easier to establish the necessary link if that is the case. Practical jokes, ignoring or marginalising an employee, and other forms of unpleasantness that are ostensibly 'neutral' are equally capable of constituting unlawful harassment. In most cases of this sort the issue will be whether the surrounding circumstances (including the treatment of other people) yield evidence from which a tribunal could draw an inference that the conduct in question is related to a relevant protected characteristic*

Associative disability discrimination

71. In Coleman v Attridge Law [2008] ICR 1128, the CJEU held that, where an employee has been treated less favourably than another in a comparable situation on the grounds of his/her child's disability, that will constitute direct discrimination (see judgment at [48]).

Strike out

72. Under Rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules), a claim may be struck out on the ground that it has no reasonable prospect of success.

73. I reminded myself of the well-established principles in relation to strike out under Rule 37(1) on the basis that a case has no reasonable prospect of success. Mechkarov v Citibank NA [2016] ICR 1121 is authority for it only being in the clearest case that a discrimination case should be struck out and that a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

74. Anyanwu v South Bank Students' Union [2001) IRLR305, HL per Lord Steyn at para 24 to the effect that it should be only in the most obvious and plainest cases that discrimination claims should be struck out and that such cases are generally fact sensitive.

75. Tribunals should be reluctant to strike claims out other than in the clearest cases and as set out in Citibank a claimant's case must ordinarily be taken at its highest.

76. And further as set out in the Court of Appeal's judgment in Ahir v British Airways Plc [2017] EW CA Civ 1392, at paragraphs 10 – 16.

77. However, that does not preclude striking out in cases where a tribunal is satisfied that "there is no reasonable prospect of the facts necessary to liability being established provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context" (Ahir at [16]). Thus, where the facts, even taken at their highest, could not reasonably establish a claim, strike out will be an appropriate course.

Deposit orders

78. Rule 39(1) provides that where at a preliminary hearing a 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 ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument".

79. The test of little prospect of success is not as rigorous as the test applicable in a strike-out application, and a tribunal has greater leeway when considering whether to order a deposit. The tribunal must have a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim or response. See Van Rensburg v Royal Borough of Kingston-upon-Thames and Ors UKEAT/0096/07 per Elias P (as he then was) at paragraph 27.

Amendments

80. I reminded myself of the guidance on considering amendment applications set out in Selkent Bus Co Ltd v Moore [1996] ICR 836:

"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."

81. The following are potentially relevant:

a) *The nature of the amendment.*

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal must decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

b) *The applicability of time limits.*

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.

c) *The timing and manner of the application.*

An application should not be refused solely because there has been a delay in making it. Amendments may be made at any time. However, delay in making the application is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, because of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

82. If a proposed amendment goes beyond a mere "re-labelling" of an existing claim, it is necessary to consider whether the new claim has been brought within the time limit, and if not, whether the time limit should be extended.

83. At this stage of proceedings, the tribunal is not required definitively to determine any time points, but rather to consider whether the claimant has established a prima facie case that the claim has been brought within time or that it is just and equitable to extend time for bringing the claim; see Galilee v The Commissioner of Police of the Metropolis [2018] ICR 634, as followed in Reuters Ltd v Cole UKEAT/0258/17/BA.

Time limits

84. S.123 (1) (a) of the EQA provides for a time limit of three months starting with the date of the act which the complaint relates to or under s.123 (1) (b) such other period as the tribunal thinks just and equitable

85. S.123 (3) (a) provides that conduct extending over a period is to be as done at the end of that period. For acts extending over a period, it is relevant to consider whether a discriminatory regime, rule, practice or principle, which had a clear and adverse effect on a complainant, existed. There is a distinction between a continuing state of affairs and a one-off act with ongoing consequences.

86. We also need to consider is whether it would be just and equitable for the tribunal to exercise its discretion to extend time taking into account the relevant criteria set out under s.33 of the Limitation Act 1980.

87. For a tribunal to exercise its discretion the onus is on a claimant to convince the tribunal that it is just and equitable to do so. The claimant needs to evidence and explain the reason for the delay.

Conclusions

Was the Claimant disabled at all material times in December 2018 and January 2019 (the Relevant Period) by reason of the following impairments?

(a) Anxiety and depression; and/or
(b) Adjustment disorder

88. I find that the Claimant was not suffering from a disability as defined under s.6 of the EQA during the Relevant Period. I make this find for the following reasons.

89. Prior to the meeting dated 24 July 2018 the Claimant says that his health, and more specifically his mental health, was good. He does not refer to any pre-existing mental health issues.

90. I considered the burden of proof being on the Claimant to establish the existence of a disability and all he has been able to adduce for the material time is his subsequent witness statement but more significantly contemporaneous GP notes. I do not consider these sufficient to satisfy the burden of proof.

91. There is no reference in the Claimant's contemporaneous medical records to clinical depression or cognate conditions prior to 27 February 2019. Whilst it is apparent that from at least 14 August 2018 the Claimant was suffering from stress at work and insomnia I do not consider that these conditions were themselves conditions amounting to a disability in the Relevant Period.

92. Whilst the Claimant undoubtedly had an extreme, or exaggerated, reaction to matters divulged to him during the meeting on 24 July 2018 this does not in itself represent evidence that at that time, he already had a mental health condition. I do not consider that the Claimant experiencing insomnia and work-related stress from 24 July 2018 until 31 January 2019 to be sufficient to fall within the definition of a disability. At this time, it would not have been possible to assess whether the symptoms experienced by the Claimant constituted reactions to adverse circumstances and may not have been expected to be long lived, in other words the situation envisaged in Herry.

93. I took account of the guidance provided in RBS v Morris which stresses the importance of contemporaneous medical notes or reports.

Was the Claimant's wife disabled between 28 February 2020 and 25 August 2020 (the Relevant Period) by reason of?

a. Acute anxiety;
b. Secondary depression; and/or
c. Agoraphobia

94. I find that Mrs Turner was suffering from a disability throughout the Relevant Period. I reach this finding for the following reasons.

95. It is incontrovertible from Mrs Turner's witness statement, but more significantly her medical records, that she suffered from, and continues to suffer from, substantial mental health issues from at least 2012.

96. Mrs Turner was diagnosed with the mental impairments of panic disorder, agoraphobia and secondary depression by Dr Ram in November 2017. Whilst she reported to Dr Ram that she was feeling "a lot better" on 15 January 2018 I find that this is consistent with the variable nature of mental health impairments when the extent of a person's condition is not constant but will have fluctuating

peaks and troughs which may, to a greater or lesser extent, be reactions, or sometimes disproportionate reactions to the ordinary vicissitudes of life at least in part attributable to their underlying mental health condition.

97. I do not accept Ms Beale's submission that Mrs Turner's witness statement is almost entirely at odds with the contemporaneous medical records. Whilst it is true that the emphasis in her witness statement is on her mental health conditions, and that her medical records include her attendance at her GP with a plethora of other conditions, principally her back condition, this does not necessarily mean that she was not continuing to suffer from mental health issues throughout the material time. I find that she was.

98. I also need to take account of the deduced effect of what Mrs Turner's condition would have been had she not been taking the various anti-depressant medications since 2012 to support her daily functioning. Her evidence on this point is that she would have been unable to cope. I accept her evidence in this respect notwithstanding the absence of expert medical evidence. I take account of the obvious concern that she had prior to a trip to Dubai, where anti-depressant medication is restricted, that she would not be left in a situation where she was without medication.

Is the Claimant required to apply to amend his Particulars of Claim? If so, is the Employment Tribunal prepared to grant the application to amend his Particulars of Claim made on 19 February 2021?

99. Mr Strelitz says that an amendment is unnecessary as the claim is already pleaded. He says that the use of the indefinite article "a" in paragraph 38 of the original Particulars of Claim is apt to cover any relevant person's disability.

100. Having reviewed the relevant paragraphs within the original Particulars of Claim I find that it does not disclose an unequivocal and unambiguous claim predicated on the disability of Mrs Thornton. I find that the use of the indeterminate "a" is equally capable of applying to one or more disabilities of the Claimant rather than of a disability of his wife. Had it been the unequivocal intention of the Claimant to refer to his wife's disability I consider that this would have been expressly stated together with full particularity as to why, and on what statutory basis, a claim for associative disability discrimination was being brought. I find that it was not.

101. I therefore find that the Claimant requires an amendment to his original Particulars of Claim to pursue the proposed arguments in relation to associative disability discrimination. I have addressed the considerations set out in Selkent as to whether an amendment should be permitted.

102. I find that this constitutes more than a mere relabelling exercise. It is therefore necessary for me to consider relevant time limits. As such the claim is brought outside the applicable time limit given that the amendment application was made on 19 February 2021 when the last act complained of in paragraph 38 of the originally pleaded Particulars of Claim occurred on 25 August 2020.

103. Having considered the relevant factors set out in s.33 of the Limitation Act I find that it would be just and equitable to extend time. I reach this finding notwithstanding the fact that the Claimant had legal representation throughout the period since his claim was submitted on 3 September 2020.

104. Whilst I have found the amendment to constitute more than relabelling, I do not consider that it substantially prejudices the Respondent in that the claim to be answered remains fundamentally the same in that it relates to the circumstances giving rise to the Claimant's dismissal, to include the conduct of his wife, and the risk of recurrence. In other words, the addition of the associative disability discrimination claim is a different element of what in effect is the same claim. I therefore consider that the prejudice to the Claimant of this amendment being refused would be greater than the prejudice to the Respondent of it being accepted.

105. I do not consider that the time delay is such that there would be a real and serious risk of prejudice because of memories fading. The matters in question are well documented and known to the parties.

Is the Employment Tribunal prepared to grant the Respondent's application to strike out/for a deposit order, of the Claimant's direct associative discrimination claim as per its application made on 19 February 2021?

106. I do not consider it appropriate to strike out the claim. I do, however, consider it is appropriate to make its continuation conditional on the payment of a deposit as set out in the deposit order of even date.

107. Whilst I consider that the Claimant has significant legal difficulties in being able to pursue a s.13 direct disability discrimination claim, based on his wife's actual or perceived disability, I nevertheless consider that it would be draconian to strike the claim out as having no reasonable prospect of success. I accept Mr Strelitz's submissions that there is potential scope to make arguments in relation to the Respondent making stereotypical assumptions regarding disability, and the likelihood of recurrent actions, which contributed to its decision to terminate the Claimant's employment.

108. I do nevertheless consider that these arguments have little reasonable prospect of success as an interpretation of the relevant provisions, s.13 and s.15, in the EQA, and the accompanying case law authorities, strongly infers that a claim of associative disability discrimination is one which would fall within s.15 and not s.13.

109. I find that this is very unlikely to constitute an associative direct disability discrimination claim.

110. In essence I consider that the Claimant's allegation is one of unfavourable treatment because of something said to have arisen in consequence of his wife's disability; her "loss of control" and "out of character behaviour" in communicating personally with members of the Claimant's Team.

Is the Employment Tribunal prepared to grant the Respondent's application to strike out/for a deposit order, of the Claimant's reasonable adjustments claim? At paragraph 39.1.2 of his Particulars of Claim as per its application made on 9 March 2021?

111. I find that it is appropriate to strike out this claim as having a no reasonable prospect of success under Rule 37 (1) (a). I reach this finding for the following reasons:

112. I do not consider that the Claimant has been able to demonstrate the existence of a PCP as set out in paragaraph 39.1.2 of the Particulars of Claim, namely:

A practice, alternatively a policy, that Line Managers would record negative criticism of employees that did not reflect oral meetings and/or evidenced reasoning which placed the Claimant at a substantial disadvantage, and then failed to make reasonable adjustments.

113. There is no evidence of such a practice applying more generally and the only argument advanced is in respect of two meetings between the Claimant and Ms Hill in respect of which the Claimant contends that subsequent written material contradicted the oral meetings. I consider that these constituted isolated instances of alleged unfair conduct towards the Claimant by a particular manager. I do not consider that this could possibly constitute a PCP which would require evidence that it represented a deliberate policy or practice of the Respondent. I do not consider that any such evidence exists, or is likely to exist, even putting the Claimant's case at its highest.

114. Further, I do not consider that the matters referred to in December 2018 and January 2019 constituted a continuing course of conduct linked to the subsequent matters from February 2020 which culminated in the Claimant's dismissal on 5 August 2020.

115. I find that these were very different matters with a substantial time gap between them, different individuals involved, different circumstances giving rise to them and the application of different policies and procedures. All the Claimant's other claims relate to the investigation into the allegations made by his wife; his dismissal and his grievance, in the period from 1 January 2020 until 5 August 2020. As such I would, in any event, have found that this claim was substantially out of time and nor would it be just and equitable to extend time.

116. For the avoidance of doubt all other elements of the claim save for that which has been struck out continue to a full merits hearing, with the conditionality of the payment of a deposit for the direct associative disability discrimination claim, as set out above.

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Employment Judge Nicolle

20 March 2021

Sent to the parties on:
22/03/2021
For the Tribunal:
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