Case Number: 3201375/2019

RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss S Gordon**

Respondent: **River Island**

Heard at: **East London Hearing Centre**

On: **21 January 2020**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Mr G Anderson (Counsel)**

JUDGMENT

The judgment of the Tribunal is that:-

1. **All complaints of pregnancy and maternity discrimination were presented out of time, it is not just and equitable to extend time. Those claims are dismissed.**

2. **All claims of harassment were presented out of time, it is not just and equitable to extend time. Those claims are dismissed.**

3. **The application to strike out the reasonable adjustments claim is refused.**

4. **The Claimant's reasonable adjustment claims have little reasonable prospect of success. The Claimant is ORDERED to pay a deposit of £20 in respect of each of the following five breaches for which she contends:**

   (i) failure to provide a locker at an appropriate height;
   (ii) failure to provide rest breaks as requested;
   (iii) failure to provide mental health training for staff;
   (iv) failure to allocate a single manager for contact and regular welfare checks; and
   (v) refusal to allow her to wear warm clothing on the shop floor.

   The deposit must be paid within 28 days of this Judgment being sent to the parties as a condition of being allowed to advance that contention.

REASONS

1 By a claim form presented on 18 May 2019, the Claimant bring complaints of failure to make reasonable adjustments, pregnancy and maternity discrimination and harassment. The Claimant also complains about unpaid wages but this is a new complaint, not included in the claim form.

2 ACAS conciliation commenced on 18 April 2019; unless part of a continuing course of conduct, any act occurring before 19 January 2019 is out of time. At a Preliminary Hearing on 21 August 2019, Employment Judge Prichard characterised the claim comprised of two parts: complaints between July 2017 and the start of the Claimant's 14 months maternity leave and complaints following her return from maternity leave on 18 March 2019. Judge Prichard listed today's Preliminary Hearing to consider not only time points but also strike out and deposit orders on prospects of success.

3 I heard evidence from the Claimant and from Ms Henning on behalf of the Respondent. I was provided with a witness statement from Ms Claire Paine. She did not attend to give evidence. She is no longer employed by the Respondent and is on holiday. I was provided with a bundle of documents and read those pages to which I was taken in evidence.

4 This is a preliminary hearing and I make no make no findings of fact on any dispute of evidence or reach any conclusion as to whether the claims will ultimately succeed when all of the evidence is heard. Before deciding any of the applications, I clarified the issues with the Claimant and Mr Anderson. Mr Anderson had produced a helpful draft List of Issues and the Claimant had produced a useful summary of her complaint. Whilst some of the matters were not pleaded and without prejudice to any need for leave to amend, I proceeded on the premise that all were claims which could be advanced by her.

5 The Claimant relies upon the following as breaches of the duty to make reasonable adjustments upon her return to work from maternity leave: (i) failure to provide a locker at an appropriate height; (ii) failure to provide rest breaks as requested; (iii) failure to provide mental health training for staff; (iv) failure to allocate a single manager for contact and regular welfare checks; and (v) refusal to allow her to wear warm clothing on the shop floor.

6 The Claimant relies upon two matters as pregnancy and maternity discrimination: (i) a written warning given on 31 January 2018 because of her sickness absence levels; and (ii) an argument on 1 February 2018 which a manager named Vlad (said to be caused by the Claimant's need to sit down due to her pregnancy and related ill health).

7 The claim of harassment related to race and/or disability also has two allegations: (i) on 1 November 2017, an argument with the manager at the Beckton shop (Tim); and (ii) on or around 26 January 2018 a colleague, Mr Sullivan, made a racially inappropriate comment.

Time

8 Section 123 of the Equality Act 2010 provides that no complaint may be brought

after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. In order for the primary time limit to be extended by reason of the ACAS early conciliation period, the complaint to ACAS must itself be made within the same three-month period. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

9 An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, **Hendricks v Metropolitan Police Comr.** [2003] IRLR 96, CA at paras 51-52. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

10 The absence of an employee on sick leave or maternity leave does not necessarily rule out the possibility of continuing discrimination. A continuing act may occur where the complaints were not confined to less favourable treatment in the working environment but, for example, extended complaints about lack of contact during absence.

11 In **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548, the Court of Appeal approved **Hendricks** and reminded the Tribunals that it is for the Claimant to show a prima facie case. In other words the Tribunal must ask itself whether the complaints were capable of being part of an act extending over a period. In **Lyfar,** the Court of Appeal accepted that it was permissible to divide a Claimant's allegations into separate categories by reference to distinct periods of time.

12 In **Aziz v FDA** [2010] EWCA Civ 304, the Court of Appeal suggested that a relevant, but not conclusive, factor could be whether the same individuals or different individuals were involved in the incidents. Another way of formulating the prima facie test was that the Claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs. The Court of Appeal accepted that the history of Ms Aziz's dealings with the FDA fell into three clearly defined periods and considered each period. There may be a prima facie continuing act during each discrete period, but the Tribunal must then consider whether there was a continuing act *between* the periods.

13 If the claim is presented outside the primary limitation period (that is, after the relevant three months), the Tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- The Claimant bears the burden of persuading the Tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;

- The Tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;

- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the Claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account.

14 The Claimant commenced a period of maternity leave on 24 February 2018. She returned from maternity leave on 18 March 2019. The Claimant was absent due to ill health for most of April and May, worked one day on 3 June 2019 and has been absent thereafter. In total, she worked five days from her return to work and the commencement of sickness absence on 3 June 2019.

15 The Claimant's case is that when pregnant she was poorly treated by her then manager, Ms Charlotte Tuffen, and the Respondent more generally. The specific complaints are the formal meeting to discuss her absences and including pregnancy related absence when deciding that her absence levels warranted a warning. The Respondent's case, based upon contemporaneous notes of the investigation, is that pregnancy related absence was excluded from consideration. This is a dispute of fact which is at the heart of the allegation and which would require Ms Tuffen to give evidence as to what was included and/or excluded from consideration when the warning was given on 31 January 2018. Ms Tuffen is no longer employed by the Respondent.

16 The Claimant raised a contemporaneous grievance about the inappropriate comment by Mr Sullivan. This was investigated and Mr Sullivan was given a disciplinary warning. The Claimant was not aware of the outcome of the process until after her return from work from maternity leave. Her harassment complaint is about the comment but not the Respondent's handling of her grievance or the outcome.

17 The complaint about the argument with Vlad and the argument with the Beckton manager were first raised by the Claimant today in the course of clarifying the issues. Neither complaint had been anticipated by the Respondent. On instruction, Mr Anderson said that Vlad was no longer employed by the Respondent. The employment status of Tim was not known.

18 The pregnancy and maternity claim and the harassment claims all arose prior to the Claimant's maternity leave, with the latest date being 1 February 2018. On the face of it, they are significantly out of time.

19 In her witness statement, the Claimant set out her reasons for delay. The Claimant very sadly experienced a stillbirth at an advanced stage of pregnancy and then started her maternity leave. This was naturally a very upsetting experience for the

Claimant and she relies upon the effects of her bereavement as described in her witness statement as part of the reason for the delay. The Claimant has a complicated and difficult set of health conditions; these are relied upon as a further reason for the delay. The Claimant was experiencing significant difficulties in her home life (detailed in her witness statement but not set out here). She says that she decided to wait until she returned to work before presenting a complaint so that she would be better able to deal with the Tribunal process. Finally, the Claimant says that part of the reason for delay was that she did not know about the disciplinary warning given to Mr Sullivan until she attended the Prichard Preliminary Hearing.

20 However, the Claimant was aware of the ability of bringing a claim in the Employment Tribunal as she had done so in 2017 against a former employer. The Claimant had been in contact with ACAS about her complaints. On 13 March 2018, she had a 33-minute telephone conversation with ACAS. On 13 April 2018, she had a further 42-minute telephone conversation with ACAS. The Claimant was aware of the existence of the Equality Act 2010 and of the protection that it affords against discrimination because she referred to it in her grievance sent on 12 February 2018. Indeed, on the last page of the grievance the Claimant expressly said that she would be taking legal action where necessary as the comment by Mr Sullivan was an act of direct discrimination under the Equality Act 2010. The Claimant was able to contact the Respondent during her maternity leave to raise questions about her pay (14 March 2018), an appeal against the absence warning (31 August 2018, 3 September 2018 and 18 September 2018) and to enquire about her notice period (25 October 2018).

21 Ms Tuffen left the Respondent's employment in or around February 2019 and another manager who may have relevant evidence, Ms Grimley, left in or around September or October 2018. Ms Paine was the Claimant's manager when she returned to work after maternity leave but has also recently left the Respondent's employment, although she has provided a statement in connection with these proceedings. Ms Henning, who gave evidence today, has little or no knowledge of the matters relied upon in the pre-maternity leave claims, including whether the Claimant requested reasonable adjustments. The Claimant says that requests were made to Ms Tuffen but the note of the disciplinary investigation meeting says that no specific requests were identified. This is a central dispute of fact upon which evidence will be required but Ms Henning is not able to provide any evidence as to what may or not have been discussed or what may or may not had been known about the Claimant's disabilities before January 2018. Ms Henning can however give evidence about what happened on the Claimant's return from maternity leave as she discussed the position with Ms Paine.

22 As for possible merits, the contemporaneous documentary evidence tends to support the Respondent's case that pregnancy related absence was disregarded when the warning was given and that the Claimant did not identify any required reasonable adjustments. On the face of it, this part of the claim appears weak. I cannot form any sensible assessment of the merits of the complaints arising from the arguments with Vlad and Tim as there is no documentary evidence and oral evidence will be required. Indeed, initially today the Claimant herself seemed uncertain that the Tim argument was in any way connected to her disability. The Claimant's complaint about Mr Sullivan's comment appears stronger as the contemporaneous grievance investigation upheld her complaint and it led to disciplinary action against him.

23 Applying the law to the matters set out above, I conclude that the complaints of

pregnancy and maternity discrimination are discrete claims said to have occurred on 31 January and 1 February 2018. The Claimant returned from work on 18 March 2019 and she does not rely upon any further act of pregnancy or maternity discrimination. Upon her return, the Claimant's line manager was no longer Ms Tuffen and there is no suggestion of ongoing work with Vlad. The complaints were not part of an ongoing situation or continuing state of affairs. They were presented out of time.

24 The harassment complaints are also discrete claims, each alleging a single act by another employee and with no repetition or ongoing treatment after the Claimant started her maternity leave on 24 February 2018. The only complaints of discrimination after the Claimant started maternity leave are for a failure to make reasonable adjustments on her return to work. There was no continuing course of conduct and the complaints were presented out of time.

25 In considering whether it was just and equitable to extend time, I took into account the Claimant's bereavement, health and ongoing domestic difficulties. Each factor is relevant, genuine and of weight. Had this been a short delay, then it may well have been just and equitable to extend time. However, the delay was over a year and the effect of the extended delay is to cause significant prejudice to the Respondent. The Claimant was absent from the workplace and the Respondent could not have anticipated that litigation may arise from such historic matters, indeed the Vlad and Tim arguments were only raised today for the first time. Despite the significant impact of her personal circumstances, the Claimant was able to deal with employment related matters. Her conversations with ACAS in March and April 2018 were lengthy and took place when she would still have been in time to submit a complaint. The Claimant was aware of the Tribunal process and her legal rights, she could reasonably have completed an on-line application even if her personal circumstances may have required an adjournment or stay of proceedings. The Claimant made a deliberate choice to prioritise her health and to wait until she was able to return to work. This was entirely understandable but the effect of the delay has caused significant prejudice to the Respondent given the absence of Ms Tuffen, Ms Grimley and Vlad to give evidence. Mr Sullivan is still apparently employed and could give evidence, there was a contemporaneous investigation but even if prejudice caused by the passage of time is less for the harassment related to race case, it is still material in circumstances where oral evidence about the context of the comment and the Claimant's reaction will be significantly impaired by the fact that two years have already elapsed and the final hearing is still months away.

26 On the face of it, the pregnancy and maternity complaint and the disability related harassment claims seem weak for the reasons given above. The prejudice to the Claimant of being deprived of the ability to bring a weak claim is minimal and is reduced yet further by the fact that her complaints of failure to make reasonable adjustments were presented in time. Such a claim arises following her return to work, but earlier matters may be relevant background evidence. For all of these reasons, I am satisfied that it is not appropriate to extend time and the claims are dismissed.

Strike out and deposit orders

27 An Employment Judge has power to strike out a claim on the ground it has no reasonable prospect of success under Employment Tribunal Rules of Procedure 2013 rule 37. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, **Balls v Downham Market High**

School & College [2011] IRLR 217 EAT. In that case Lady Smith said:

> **"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral submissions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".**

28 A case should not be struck out where there are relevant issues of fact to be determined **A v B [2011] EWCA Civ 1378.**

29 The Employment Tribunal Rules of Procedure 2013, rule 39 provide that if an Employment Judge considers that the contentions put forward by a party in relation to any matter to be determined by a Tribunal have little reasonable prospects of success, he or she may order that party to pay a deposit of an amount not exceeding £1,000 as a condition of being permitted to take part in the proceedings relating to that matter. Before making the Order a Judge must take reasonable steps to ascertain the ability of the party to comply with the Order.

30 Unlike strike out orders, when considering a deposit order the Tribunal may consider the Respondent's case when determining the legal and factual prospects of a complaint, including a provisional assessment of credibility, **Spring v First Capital East Ltd** UKEAT/0567/11.

31 In considering the prospects of the reasonable adjustments complaints, I had some sympathy with the submission of Mr Anderson that the Claimant has not identified the substantial disadvantage said to be caused by any alleged PCP. However, this is something which may be addressed in requiring further information or even in evidence and the Claimant is a litigant in person. I do not consider it appropriate that the draconian sanction of a strike out order be visited upon her for a deficiency in the pleadings. There are relevant disputes of fact which the Tribunal will need to decide: what was said at the return to work meeting in April 2019 and what happened in the very few days the Claimant worked subsequently. This requires evidence to be heard and it would not be in the interest of justice to strike those claims out.

32 The apparent weakness in the claims insofar as they are currently articulated is better addressed in my judgment by a deposit order. To assist the Claimant, the reasons why I consider that her complaint of failure to make reasonable adjustments has little reasonable prospects of success are as follows.

32.1 Provision of a locker. On the evidence available today it seems that the Claimant was not required to use a locker at ground level as the Respondent agreed to provide an alternative locker and, as she accepts, told her to use a colleague's locker in the meantime. The Claimant was at work for only two days after the meeting in which it is not in dispute that the Respondent agreed to provide an alternative locker and therefore has little reasonable prospect of showing substantial disadvantage or that it was a reasonable requirement that the alternative locker be provided immediately.

32.2 Rest breaks. The Claimant has reasonable prospects of establishing substantial disadvantage if there was a failure to provide rest breaks as it is reasonably arguable that an employee suffering from bipolar disorder and the Claimant's complex health issues will require greater rest breaks. However, the evidence currently available tends to show that the Respondent agreed on 2 April 2019 to allow extra rest breaks in principle subject to the provision of medical evidence. It is not in dispute that the medical evidence was not provided. The Claimant has little reasonable prospect of establishing that it was unreasonable for the Respondent to allow rest breaks immediately, without the requested evidence.

32.3 Mental health training for staff/dedicated manager/welfare checks. The claim as currently advanced does not set out the provision, criterion or practice which it is said that the Respondent applied or the substantial disadvantage caused, focusing instead on the adjustment which the Claimant says should have been made. Nor does the Claimant's case adequately address how such steps if taken would have reduced or removed any such disadvantage. It seems to me on the material before me today, that the Claimant has little reasonable prospects of success.

32.4 Warm clothing. Although not included in the time arguments above, this failure to make a reasonable adjustment arose before the Claimant's maternity leave and was by a different manager. There are little reasonable prospects of successfully arguing that it formed part of a continuing act or that it was in time.

33 This is not to say that the Claimant's reasonable adjustments claims will necessarily fail, it may be that having given some thoughts to the apparent areas of weakness, the Claimant is able to address them in her evidence. The Tribunal at the final hearing may agree with her, but if the claims fail for the reasons identified, the Claimant is at risk of costs.

34 Having given Judgment and Reasons orally, I enquired about the Claimant's means to ascertain the appropriate level of the deposit to be paid. The Claimant lives in rented accommodation and has two dependent children. The Claimant remains employed by the Respondent and says that she is fit to return to work, although she has not yet done so and has exhausted her sick pay. She is in arrears of rent, is in receipt of benefits and family support but has no savings. A deposit order is not intended to be a barrier to justice and must not be set at a level which is unaffordable. It is intended to give the Claimant pause for thought and should be at a sufficient level to require to her to think very carefully. Taking all of this into consideration, I decided that the appropriate level of the deposit order should be £20 for each of the five reasonable adjustments for which she contends. I explained that the deposit must be paid within 28 days of this Judgment and written reasons being sent but that this would take at least two weeks (indeed it has taken almost a month). Given this period of time, I was satisfied that the sums required were not unaffordable. I advised the Claimant to contact a Citizens Advice Bureau or other provider of free legal advice.

Further claim – unpaid wages

35 If the Claimant wishes to bring a complaint that the Respondent has made

unauthorised deductions from wages and/or discriminated against her because of her disability because she is fit to return to work but has not been permitted to do so, this must be done in a separate claim. At the date of the hearing, the Claimant was still in time to bring such a complaint but I encouraged her to act without delay to avoid any further time points being raised. If the Claimant does bring a new claim, it should set out the amounts that she is claiming and the clear reasons why she says that she was entitled to these payments contractually and/or the link to her disability.

36 If a new claim is presented, the files will be considered and it may be appropriate to consolidate the two cases.

Employment Judge Russell

17 February 2020