EMPLOYMENT TRIBUNALS

Claimant: **Mr A Poojary**

Respondent: **JP Morgan Chase Bank, N.A. – London Branch**

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

On: **20 July 2021**

Before: **Employment Judge Gardiner**

Representation
Claimant: In person
Respondent: Ms Judy Stone, counsel

JUDGMENT AT PRELIMINARY HEARING

The judgment of the Tribunal is that:-

1. The following complaints are struck out pursuant to Rule 37(1)(a) ET Rules 2013 as having no reasonable prospect of success:

   a. The Claimant's indirect age discrimination complaint.

   b. The Claimant's indirect race discrimination complaints.

2. The remainder of the complaints are not struck out pursuant to Rule 37(1)(a) ET Rules 2013 as having no reasonable prospect of success.

3. Separate orders have been made requiring the Claimant to pay a deposit as a condition of continuing to pursue three of the four remaining complaints. These are set out in a separate case management order.

REASONS

1. This Preliminary Hearing has been listed to determine the Respondent's application that the claim should be struck out as having no reasonable prospect of success, or alternatively that a deposit order should be made on the basis that there is little reasonable prospect of success.

2. Employment Judge Massarella also recorded at paragraph 44 of the record of the Preliminary Hearing held on 25 January 2021 that it would be a matter for the Judge conducting this hearing whether to decide time limit issues, or to leave this as a matter to be determined at the Final Hearing. In discussion with the parties, I decided that time limit issues should be considered only insofar as it had a bearing on the prospect of a complaint succeeding for the strike out or deposit applications. However, it would not be appropriate to make any final determination of time limit issues in the absence of any live oral evidence and without considering all the circumstances. A final decision on time limit issues would be taken at the Final Hearing.

3. At this Preliminary Hearing, the Claimant has represented himself. The Respondent was represented by Ms Judy Stone of Counsel. Both parties supported their case with oral submissions. Ms Stone had prepared a skeleton argument which referred to several legal authorities, which were also provided. There was an agreed bundle comprising 177 pages. Although a witness statement had been prepared on behalf of the Respondent by Rachel Wellen, Ms Wellen was not called to give oral evidence. Ms Wellen is the Head of Investigations within the Respondent's Employee Relations Team.

4. The issues raised by the Claimant were set out in a List of Issues included at page 45 of the Bundle. This had been drafted by the Respondent but included additional wording at the Claimant's request, identified with italics, which the Claimant considered better reflected how he wanted to advance his case. The Respondent's position was that this italicised wording was not expressed in appropriately neutral language and did not significantly add to the issues identified by the Respondent's wording. This List of Issues was discussed at the start of the case, and agreement was reached as to the appropriate wording for each issue. Miss Stone kindly redrafted the List of Issues to reflect the agreed wording. That revised wording has been the basis on which this application has been considered.

5. There was insufficient time to deliberate and give judgment at the end of the hearing. The Tribunal's decision on the Respondent's application was therefore reserved.

Relevant legal principles on a strike out or deposit order application

6. In her Skeleton Argument, Ms Stone summarised the applicable legal principles when considering whether to strike out a claim or make a deposit order. The principles were not disputed by the Claimant. The Tribunal considers that they are a fair summary of the approach that the Court should adopt on an application such as the present.

Strike out orders

7. Pursuant to rule 37(1)(a) of the ET Rules 2013, a claim or part of a claim may be struck out if it has no reasonable prospect of success.

8. Authorities such as *Anyanwu v South Bank Students Union* [2001] ICR 391 and *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 emphasise that striking out is a draconian step and have cautioned against striking out discrimination claims in all but the clearest cases. However:

a. This is because discrimination cases are generally fact-sensitive, and with central disputed facts that dispute can only resolved with evidence (see *Anyanwu* at para 24 and *Ezsias* at 29).

b. As Underhill P (as he then was) noted in *Abn Amro Management Services Limited v Hogben* UKEAT/0266/09, the force of the observations about caution will "*inevitably vary depending on the nature of the particular issues*".

c. Even in *Anyanwu* itself, Lord Hope confirmed that in an appropriate case a claim for discrimination could and should be struck out if the tribunal can be satisfied that it has no reasonable prospect of success (at para 39).

d. The Court of Appeal has since confirmed that a Tribunal should not be deterred from striking out claims, even when there are disputed facts, provided that it can be established that there was no reasonable prospect of success: see *Ahir v British Airways Plc* [2017] EWCA Civ 1392 at para 16.

e. The correct approach is to take the claimant's case at its reasonable highest and to decide whether it can succeed (*Patel v Lloyds Pharmacy* UKEAT/0418/12/ZT Mitting J at para 19).

f. It is not enough for a claimant to contend that "*something may turn up*" during cross examination. There must be a reason to believe that the facts will be as the claimant alleges (*Patel* at para 20).

9. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, Underhill LJ expressed similar caution about striking out a constructive unfair dismissal claim, on the grounds that constructive dismissal cases too are often fact sensitive (para 76). However, his Lordship also confirmed that there was no absolute rule against strike out, as this will depend on a consideration of the nature of the issues and the facts that can realistically be disputed. In *Kaur*, Underhill LJ upheld the ET's decision to strike out the claim.

Deposit orders

10. Where the ET considers at a Preliminary Hearing that any specific allegation or argument has "*little reasonable prospect of success*", the ET may order a deposit order pursuant to rule 39 of the ET rules 2013 in respect of "*any specific allegation or argument*".

11. Deposit orders are a lesser sanction than a strike out order and the test is less rigorous. However, the Tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the essential facts: see *Wright v Nipponkoa Insurance (Europe) Ltd* EAT 0113/14 at para 34 per HHJ Eady (as she then was). Further:

> "*When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case*." (ibid at para 34)

12. £1,000 is not an overall cap. A party may be ordered to pay £1,000 for each aspect that has little reasonable prospect of success. However, the Tribunal should stand back and review the overall proportionality before finalising the orders: *Wright*.

13. The ET must make reasonable enquiries into the paying party's ability to pay the deposit and have regard to that information when deciding the amount of the deposit (rule 39(2)).

Constructive dismissal

14. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, Underhill LJ set out the following guidance as to the approach to take when considering a constructive dismissal claim, where the claimant relies on a series of events culminating in a "last straw" which led to the claimant's resignation. This is what he said (at paragraph 55):

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?
>
> None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

15. In the revised list of issues, the Claimant relies on nine separate incidents, which he argues cumulatively destroyed or seriously damaged the relationship of trust and confidence. There is some prospect, if the Claimant's evidence is accepted, that some of the earlier incidents could individually be found to damage the relationship of trust and confidence. Specifically, if the Claimant establishes he was given unjustified negative feedback in his appraisal in December 2018 (issue 3(viii)), if he establishes that an inflexible requirement was imposed that he explain any lateness after 9am (issue 3(iii)), if he was required in May 2019 to complete a monthly questionnaire in circumstances where the responses were not confidential[1]

[1] Whilst the alleged lack of confidentiality is not spelt out in the List of Issues, this is alleged in the way that the Claimant puts his revised claim.

(issue 3(iv)), or if his workload had increased to some extent with the prospect of further increases in the future (issue 3(v)). The other issues listed by the Claimant appear to be substantially weaker, even taking the Claimant's case at face value. If the issues I have specifically identified within this paragraph are proven, they could conceivably cumulatively seriously damage the relationship of trust and confidence, although on the evidence before the Tribunal none by itself, even if established, is likely to cross that high threshold.

16. That said, in advance of this Preliminary Hearing, the Claimant has not specifically explained why the negative feedback was unjustified, nor has he quantified the extent of the excessive work or evidenced why he asserts that responses to the monthly survey would not be anonymous. Furthermore, the Respondent has disclosed various instant messages at pages 163 onwards in the bundle which appear to show that the Claimant's lateness was addressed with considerable patience and sensitivity. Therefore, assessed at this preliminary stage, the prospects of the Claimant making good his factual assertions in these specific respects appear limited.

17. The most proximate alleged incidents to the Claimant's resignation at 11:29 on 29 July 2019 were issues 3(vi) and 3(vii), namely: "Declining the Claimant's request for voluntary redundancy on 24 July 2019 and only providing written justification in September 2019"; and "In July 2019, not approving the Claimant's second flexible working request before his resignation".

18. In fact, as confirmed in an email sent to the Claimant at 08:45 on the morning of his resignation, and in advance of his resignation, the Claimant's flexible working request appears to have been approved. He was informed he was permitted to start at 9:30am and work until 5:30pm in terms of his core hours. Furthermore, this second flexible working request had only been submitted on 30 June 2019 and the outcome had been communicated to him within a month. Given that timescale, it appears that the flexible working request was dealt with timeously, and well within the maximum three-month time period prescribed by statute.

19. Insofar as the Claimant is arguing that he ought to have been permitted to leave the office every day at 5.30pm, there is no reasonable prospect of persuading a Tribunal that refusing such a change to his working conditions was either a fundamental breach or part of a course of conduct amounting to a fundamental breach. This is because, as was standard practice, his contractual terms specified at Clause 4.1 that the Respondent "may require you to work such other hours as are reasonably necessary for the conduct of its business".

20. Therefore, even taking the Claimant's case at its highest, the Claimant's prospects of showing that these last two events (issues 3(vi) and 3(vii)) constituted a "last straw" are extremely limited.

21. In addition, the Claimant has a potential causation difficulty with his constructive unfair dismissal case. This is created by the wording of his resignation email, worded as follows:

> "Louise, I would like to resign from this job due to unacceptable fact that there is no voluntary redundancy policy even though there is offshoring of

> roles resulting in a stressful environment and also due to redundancy benefits capping at 12 months' pay within the new redundancy policy, since that leaves no incentive to work for more than 12 years in JP Morgan for me"

22. The absence of a voluntary redundancy policy is not listed in the revised List of Issues amongst the incidents which are said to be breaches of the implied term of trust and confidence. This is perhaps unsurprising. It is inherently unlikely that a failure to offer an enhanced financial package upon resignation over and above the contractual entitlement could itself be a breach of the terms of the employment contract, in the absence of specific evidence it was being offered to others. Further, the Claimant's role was not regarded by the Respondent as redundant and therefore the terms on which redundancy might be offered did not arise.

23. The Claimant makes no reference in the resignation email to the various matters that he now alleges amounted to a fundamental breach of contract and prompted his resignation. When he discussed the reasons for his resignation at a subsequent meeting, his focus was still on the voluntary redundancy policy, as shown by the wording of the email dated 9 August 2019. That email did not mention the other matters on which he now relies. During the course of this Preliminary Hearing, the Claimant sought to explain these omissions by saying that he needed time to draft the list of issues which had prompted his resignation.

24. Whilst I do not find that the Claimant has no reasonable prospect of success with his constructive dismissal case as a whole, I consider that the Claimant has little reasonable prospect of success of showing that his resignation was in part the result of the matters he now relies on as being aspects of constructive dismissal. This is an integral part of his constructive dismissal claim. Therefore, the Tribunal has the discretion to make a deposit order. It would be appropriate to exercise the Tribunal's discretion to make a deposit order as a condition of the Claimant continuing with his constructive dismissal claim.

Discrimination

Legal principles

25. As Miss Stone correctly notes in paragraphs 30 and 31 of her Skeleton Argument, the initial burden of proof in a direct discrimination claim is on the Claimant. The Claimant must show facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has treated the Claimant less favourably than it has or would treat others. At that point, it is for the Respondent to show, on the balance of probabilities, that the protected characteristic formed no part of the reason for the difference in treatment.

26. In order to establish a prima facie case, it is insufficient for the Claimant to show a difference in status and a difference in treatment. There must also be something to suggest that any difference in treatment could be due to the claimant possessing the relevant characteristic (see paragraph 56 of *Madarassy v Nomura International plc* [2007] ICR 867 per Mummery LJ).

27. The test for a claim of indirect discrimination is set out in Section 19 of the Equality Act 2010, which is worded in the following way:

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

a. A applies, or would apply, it to persons with whom B does not share the characteristic,

b. It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons whit whom B does not share it,

c. It puts, or would put, B at that disadvantage, and

d. A cannot show it to be a proportionate means of achieving a legitimate aim.

The Claimant's direct race discrimination complaints

28. The Claimant relies on two incidents, the first being the rejection of his first Flexible Working request on 20 September 2018 and the second being the negative feedback that he received in his appraisal in December 2018.

29. Both allegations are out of time. The Claimant will therefore have to persuade a tribunal it would be just and equitable to extend the primary time limit. By way of explanation, the Claimant says he did not complain of race discrimination internally at the time of the incidents because it would have created a "negative vibe", and he was afraid of retaliation. He did not know that ACAS existed. Although he went to the CAB website in the middle of 2019, he did not speak to a CAB adviser. He delayed until November 2019 in initiating early conciliation because the Respondent "sat on my offer for a month".

30. The issue of time limits will need to be determined at the Final Hearing. However, the Claimant has not obviously advanced a good reason why he did not issue proceedings earlier in relation to these two complaints. On the other hand, the rejection of the first Flexible Working request will need to be considered as part of the constructive dismissal case in any event, which has been brought within time. In addition, the Respondent has not pointed to any particular evidential prejudice in having to respond to this issue on the merits, given the delay.

31. More pertinently to the strength of these direct discrimination claims, the Respondent's explanation to the Claimant for refusing his first flexible working request, in the letter dated 20 September 2018, appears to be a cogent one. The Claimant has not identified any particular error in this explanation or any evidence on which he will rely to argue that a substantial reason for the outcome of this flexible working request was his Indian national origin.

32. In relation to the appraisal feedback, the email of 9 October 2018 summarises Ramin Jarvand's assessment of the Claimant's performance. The Claimant has put forward no evidence to support the contention that his Indian national origin had anything to do with how he was assessed.

33. Therefore, in relation to both allegations of direct race discrimination, given the absence of any evidence to infer direct discrimination apart from the Claimant's Indian national origin, the Tribunal considers that the Claimant has little reasonable prospect of success. However, it would not be appropriate to strike out either direct discrimination claim as having no reasonable prospect of success in circumstances where, on the Claimant's evidence, the negative appraisal feedback was unjustified and there was no good reason for refusing the first flexible working request, at least insofar as he was seeking to start work by 9.30am rather than at 9am.

34. The Tribunal therefore has the discretion to make a deposit order. It would be appropriate to exercise that discretion here to make a deposit order in relation to both of the direct race discrimination complaints.

The Claimant's direct sex discrimination complaint

35. The only allegation relates to the refusal of his first flexible working request on 20 September 2018. Early conciliation was initiated over a year later, substantially outside the three-month time limit. The Claimant's explanation for the delay is as set out above in relation to the race discrimination claim. This is not a particularly persuasive reason for extending the usual three-month time limit to over a year. However, in circumstances where the Tribunal will need to consider this flexible working request as part of the constructive dismissal case in any event; and the Respondent has not indicated it has suffered any particular prejudice, the Tribunal may consider it just and equitable to extend time.

36. There is some evidence that a female employee, SV, may have been granted a flexible working arrangement since February 2016 which resulted in a change in a change to her contractual hours so she was permitted to start earlier at 8:30 but finish at 16:30. The extent to which the Claimant's position and that of SV are truly comparable will need to be explored in the evidence at the Final Hearing. Without that detailed exploration it is not possible to say that the apparently more favourable treatment given to SV is not a plausible basis for inferring that the treatment of the Claimant was on grounds of his gender. In these circumstances, I am unable to conclude that this direct sex discrimination claim has no better than little prospects of success. As a result, it should not be made the subject of a deposit order.

The Claimant's indirect age discrimination complaint

37. The Claimant argues that the Respondent applied a provision, criterion or practice (PCP) of capping discretionary enhanced redundancy payments at 12 months' salary (one months' salary for each year of service up to 12 years, with service in excess of 12 years not resulting in any higher redundancy payment). This indeed appears to be part of the Respondent's redundancy policy. The Claimant argues that this put older employees, including the Claimant, at a particular disadvantage

because older employees are more likely to have more than 12 years' service than younger employees, but their additional service beyond 12 years would not be reflected in a higher enhanced redundancy payment reflecting those additional years.

38. The Respondent contends that its enhanced redundancy policy was justified, whatever the discriminatory effect, as a proportionate means of achieving a legitimate aim. Ms Wellen explains in her witness statement that the redundancy entitlement was capped in the way that it was to ensure that payments were proportionate and affordable. Whether this is a sufficiently good justification would have to be tested on the evidence at a Final Hearing. The more fundamental point raised by the Respondent is that the Claimant was not redundant. Therefore, the enhanced redundancy policy did not apply to his employment. The Respondent did not have a voluntary redundancy policy whereby those who were not at risk of redundancy could volunteer to leave and benefit from the terms of the enhanced redundancy policy.

39. The Claimant contends that there was an ongoing process at the Respondent that roles would be discontinued in the United Kingdom and instead the work would be carried out abroad. However, the Claimant does not contend he was told that his role was redundant. In fact, the Claimant's evidence, as part of his constructive dismissal case, is that his workload had increased to some extent and was likely to increase further so as to become excessive. Nor does he argue that the Respondent had a policy of offering voluntary redundancy in these circumstances. Rather he relies on the terms of the redundancy policy itself in circumstances where on his own case he does not contend he was redundant.

40. Therefore, even on the Claimant's own factual case, this PCP was never applied to the Claimant, because the Claimant was never made redundant (whether on a voluntary or a compulsory basis). As a result, even on the Claimant's own factual case, he cannot satisfy the requirement in Section 19(2)(c) Equality Act 2010 that the PCP puts, or would put, the Claimant at a particular disadvantage. For this reason, I conclude that the indirect age discrimination claim must be struck out as having no reasonable prospect of success.

The Claimant's indirect race discrimination complaints

41. The Claimant alleges that there were the following provisions, criteria and practices (PCPs), namely:

    a. Requiring employees in the Equities Product control team (which the Claimant asserts predominantly comprised employees of non-UK national origin) in May 2019 to complete an anonymous monthly questionnaire;

    b. Not offering voluntary redundancy to the Product Control team;

    c. Promoting only or mainly employees of UK or EU national origin to the status of Vice President;

    d. Publishing a redundancy policy in December 2018, which the Claimant asserts was more likely to impact non-UK origin employees;

e. Capping discretionary enhanced redundancy payments at 12 months' salary, which the Claimant asserts disadvantaged employees of non-UK national origin as he asserts they were more likely to have longer tenures.

42. The Claimant contends that these PCPs put both the Claimant and those sharing his protected characteristic, of being of Indian national origin, at a particular disadvantage.

43. As to (a), if on the Claimant's factual case, this requirement was only imposed on the Equity Product control team, then it is arguable that this put those of the same national origin as himself at a particular disadvantage if the majority of those in the team were on non-UK national origin. If it was an extra requirement which was not imposed on other teams where the ethnic composition was different, this was potentially indirectly discriminatory. However, anonymous staff surveys are often devised in order to better understand particular concerns and so take action to address those concerns. In those circumstances, the Respondent may well be able to establish that introducing a monthly survey was a proportionate means of achieving a legitimate aim. Therefore, whilst I do not consider that this argument has no reasonable prospect of success and therefore it would be inappropriate to strike it out on that basis, it is an argument that has little reasonable prospect of success and should be subject to a deposit order. It would be an appropriate exercise of discretion to make a deposit order in the Claimant's case.

44. Allegation (b) is not an allegation that there was a particular provision, criterion or practice, but rather that there was no particular provision criterion or practice to offer voluntary redundancy to the Product Control team. As a result, as a matter of law, even on the Claimant's own case, this is an indirect discrimination complaint that has no reasonable prospect of success and should be struck out.

45. The allegation regarding promotion (allegation (c)) alleges a discriminatory promotion policy, namely that only employees of UK or EU national origin would be promoted to the status of Vice President and so, by implication, that those of Indian ethnic origin would not be promoted to the status of Vice President. This alleged policy is a discriminatory policy and therefore not an appropriate basis for an indirect discrimination claim. Furthermore, there is no evidence advanced by the Claimant that he had in fact applied for a position as Vice-President. In the course of argument during the Preliminary Hearing, he accepted he had not applied for promotion, but said he was not in a position to do so given the negative appraisal. However, that is a separate point from the alleged policy not to promote those of a non-UK or non-EU origin. Therefore, even if the Claimant had such a policy, it does not appear to have placed the Claimant at a particular disadvantage. There is no evidence from the Claimant that others of Indian national origin were disadvantaged in applying unsuccessfully for promotion. For these reasons, as assessed at this Preliminary Hearing, I conclude that this allegation is one that has no reasonable prospect of success and should be struck out.

46. For the same reasons as discussed in relation to the indirect age discrimination claim, on the evidence at this Preliminary Hearing, the Claimant was never subject to the redundancy policy. As a result, this policy never placed him at a particular disadvantage. There is no evidential basis for suggesting that capping the enhanced redundancy pay at 12 months would put any particular racial or ethnic

group at a particular disadvantage. Therefore, the Claimant has no reasonable prospect of succeeding in relation to categories (d) and (e), which both rely on the terms of the policy, and they are to be struck out.

Amount of deposit order

47. I have decided that it would be appropriate to make a deposit order in relation the complaint of constructive dismissal and in relation to each of the two complaints of direct race discrimination.

48. The Claimant told the Tribunal that he was about to start a new job earning £40,000 gross per annum in August 2021. This is around £30,750 net each year, or £2,500 net a month. He has no savings. He and his wife between them spend about £3,400 a month on bills, being £1400 on the mortgage, £1000 per month on the children and £1000 a month on food and other expenses. He said that they each contributed equally to the household bills, being about £1700 each a month. This is because his wife also works and brings in extra income. As a result, after bills and essentially living expenses, he has around £800 a month.

49. In those circumstances, I consider it would be appropriate to require the Claimant to make a deposit of £250 per complaint, which in relation to the three complaints subject to a deposit order (constructive dismissal and two race discrimination complaints) is a total of £750 as a condition of being able to continue with these complaints. It is open to him to pay the deposit in respect of some complaints but not in respect of other complaints if he decides, on reflection, having reviewed the strength of his case, that he will continue with some of his complaints but withdraw others.

Directions

50. I will issue directions for the progress of the case to a Final Hearing in a separate document, which will be confidential to the parties.

Employment Judge Gardiner

20 September 2021