Case No. 2407320/2021
& 2408357/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr N Duke

Respondent: B & M Retail Limited

Heard at: Manchester by CVP REMOTE **On:** 24 February 2022

Before: Employment Judge Grundy

REPRESENTATION:

Claimant: Mr L Bronze, Counsel
Respondent: Mr S Brochwicz Lewinski , Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's claims in respect of disability discrimination (claim 1) were in time given that the Tribunal declares the conduct concerned extended over a period and may be viewed as a continuing act.

2. In the alternative the Tribunal declares it is just and equitable to extend the time limit to allow the claimant's first claim to proceed.

3. The Tribunal has jurisdiction to hear the claimant's claims in respect of section 15 disability discrimination arising from something, section 19 indirect discrimination and section 20-21 failure to make reasonable adjustments

4. The respondent’s application to strike out the claimant's claims succeeds in respect of the section 15 claim under the Equality Act 2010 as the Tribunal considers that the section 15 claim has no reasonable prospects of success.

REASONS

1. The respondent is a well-known chain of retail outlets. The claimant was employed by the respondent as a Store Manager his base being Blackburn. His employment commenced on 1 July 2013 and was continuing at the time of the

first claim. However, by the time of the second claim his employment had terminated on 12 April 2021.

2. Early conciliation for the first claim started on 15 March 2021 and ended on 26 April 2021. The first claim form was presented on 25 May 2021. Early conciliation for the second claim started on 15 March 2021 and ended on 26 April 2021. The second claim form was presented on 6 July 2021.

3. The applications before the Tribunal today only concern the first claim. The tribunal was referred to previous tribunal proceedings that resulted in a final hearing on 14-18 September 2021 (Case No. 2401408/2019). That resulted in a judgment with reasons sent to the parties on 15 January 2021.

4. The first claim in the present litigation is about the alleged discriminatory treatment of the claimant by the respondent during the various national and local lockdowns, and under furlough, caused by the Covid-19 pandemic during 2020, which resulted in an internal grievance. The second claim that ensued concerns events that followed upon that earlier period, but which led to the dismissal of the claimant for alleged cause by conduct.

5. This Tribunal accepts that the timings of events is significant as in late March 2020 the country went into a first modern day lockdown, movements and personal liberty were restricted and there was much fear and anxiety surrounding the covid 19 virus which was especially impactful for those who were identified as clinically vulnerable in to which category the claimant fell.

6. The claimant has health issues significantly sarcoidosis /inducible laryngeal obstruction which is the focus of this claim and also lumbar disc degeneration which limits the distance he can drive. He is a disabled person for the purposes of the Equality Act 2010. He was advised not to wear a face covering / visor by his GP as this would exacerbate his respiratory problems.

7. By order of EJ Doyle of 30 September 2021 The preliminary hearing will determine: (1) whether the first claim (or any part of it) is in time and, if not, whether time may be extended, and (2) the respondent’s application under rule 37(1)(a) to strike out the first claim as having no reasonable prospect of success, or alternatively to order a deposit under rule 39 on the basis of the first claim having little reasonable prospect of success. Depending upon the outcome of the preliminary hearing, the parties could expect there to be further case management at that hearing, if required.

8. The case is listed for final hearing in Manchester on 19 to 22 December 2022 on claim 2 and if outstanding regarding claim 1 also.

9. The Tribunal was provided with a Bundle of documents for this hearing titled "final bundle" which contained 734 pages. The Tribunal was not assisted by

such a lengthy bundle referring to all matters, especially working remotely and would have preferred the parties to provide a preliminary hearing bundle. The bundle provided did not assist the over- riding objective in dealing with the matters before the Tribunal expeditiously.

10. It will also have to be re- visited refined and agreed for the final hearing to refine the issues now in dispute and pursued at final hearing.

11. The late start due to filing of documents on the morning of the hearing, the length of the bundle and the extent of the submissions, unfortunately rendered an oral judgment impossible and the Tribunal indicated it would send out a written decision.

12. On the morning of the hearing both parties provided Skeleton arguments and the claimant provided a witness statement. The Witness statement did not give any details of the claimant's ability to pay any deposit as required to be inquired of by virtue of Rule 39 (2). Mr Bronze gave further details to the Tribunal confirming that the claimant has not worked since his dismissal on 12 April 2021 and is in receipt of Job Seekers allowance with no other income. He has very modest savings.

13. Aswell as the " final bundle", the Respondent produced an authorities bundle containing 117 pages. The Respondent referred to a further authority sent to the Tribunal at the Tribunal's request. The Claimant's Counsel also asked the Tribunal to consider the Judgment of EJ Buchanan following the previous claim brought by the claimant heard on 14-18 September 2020. This was also forwarded to the Tribunal.

14. The Order of Employment Judge Doyle required that by 28 October 2021 the respondent shall commit its application for a strike out order or a deposit order in writing to the claimant and to the Tribunal. This was contained in the Respondent's solicitor's letter at page 101 of bundle.

In that letter the following assertions were made--

"The Respondent contends that the Tribunal does not have jurisdiction to hear Claim 1 because it was not presented to the Tribunal within the normal time limits for presenting the complaint. Specifically:
1. Claim 1 concerns the following alleged discriminatory acts:
a. The Respondent’s decision on or around 24 July 2020 not to allow the Claimant to remain on furlough (Allegation 1); and
b. The Respondent’s decision, first communicated to the Claimant in early August 2020 and subsequently confirmed on 7 December 2020, that he could not remain as Store Manager of the Respondent’s Chorley store (Allegation 2)
The Respondent contends that the normal limitation period in respect of Allegation 1

expired on 23 October 2020. The Respondent further contends that the normal limitation period in respect of Allegation 2 expired on 6 March 2021 at the latest.
3. The Claimant delayed contacting ACAS to commence the ACAS Early Conciliation process until 15 March 2021, after the time limit for lodging the claim had already expired. Accordingly, the Respondent contends that the normal limitation period was not extended under section 207B Employment Rights Act 1996 and remained 23 October 2020 and 6 March 2021 respectively.

4. The Claimant then further delayed submitting the ET1 form until 25 May 2021, within one month of the end of the early conciliation period (which ended on 26 April 2021), but over six months after the limitation period in respect of Allegation 1 had expired, and over two months after the limitation period in respect of Allegation 2 had expired. Accordingly, the Respondent submits that Claim 1 was lodged significantly out of time.

5. Insofar as the Claimant may seek to argue that the grievance appeal outcome delivered to him on 22 January 2021 amounted to a discriminatory act, and this renders Claim 1 in time, the Respondent will contend that there is no pleaded basis on which the Claimant can make this assertion.

Furthermore, the Respondent submits that there are no grounds for extending the time limit. In support of this, the Respondent relies on the following:
6. The Claimant has not offered any explanation for why he did not present Claim 1 within the normal limitation period.
7. The Claimant has been legally represented throughout and ought therefore to have been advised of the relevant Employment Tribunal time limits. In any event, the Claimant has previously brought Employment Tribunal proceedings against the Respondent and was presumably, therefore, already aware of the relevant time limits at the relevant time."

15. The Respondent's skeleton argument set out the following chronology

"24/07/20 **R's decision not to allow the C to remain on furlough (Allegation 1)**. See video call with C (p165) at which the R's decision to follow govt advice for those returning from shielding to return to work was communicated. Confirmed at p166 that furlough not an option. (Confirmed in C's ws at §6.)

1/08/20 C was required to return to work (ET1 para 5 at bundle p12)

1/08/20 From this date formal shielding guidance was paused across the UK in England, Scotland and Northern Ireland. Those who were formerly shielding could return to the workplace, if they cannot work from home and as long as the workplace is COVID-secure.]

	R's decision that the C could not remain as mgr of Chorley store (Allegation 2)
29/09/20	Welfare Meeting – C working at Chorley. Explained that considered appropriate given reduced footfall in store for C to return to Blackburn. (p181)
23/10/20	**Expiry of Allegation 1**
11/11/20	C's Grievance (p214) – complaining of lack of consideration for latest Occ H report. C suggests (p215) that adjustments remain permanently in place.
7/12/20	Grievance outcome letter - Confirmation of R's decision that C could not remain as mgr of Chorley store (ET1 para 9 at p13) Grievance letter at p250: At p253, point 5, <u>confirmation that furlough has not been offered since Aug 2020 and there are no plans for that to change.</u> At p254, bottom, upon the return of the Chorley store manager, it is now necessary for you review alternative stores, and will not possible for you to remain as store mgr of Chorley. At p255, propose: temporary relocation to tier 1/2 area store mgr; return to base store at Blackburn on normal or reduced hours; alternative job roles, attaching list of vacancies; or annual leave or SSP. At p256, <u>decision made that: "*your role in Chorley Stores will come to an end on 15/12/20.*"</u>
13/12/20	C's appeal grievance email (p264) – At p268, furlough is best possible outcome for a lockdown as a reasonable adjustment. At p269, happy to be shown a store that takes into account disability needs, which require a store mgr, to which C could be temporarily relocated, and which is within 40 mins. At p269, re return to Blackburn, fail to understand why you would consider this with the high infection rate and my medical advice.

15/12/20	Letter R to C discussing reasonable adjustments (p273) – At p274, suggesting temporary move to Hyndburn store as Temp Mgr – 22 mins from home address, low covid, salary more than the 80% applicable to furlough. Confirmed current position at Chorley will come to an end today.
22/01/21	Grievance appeal outcome letter (ET1 para 10, p13) (at p326). At p327, repeated that R does not participate in the furlough scheme. Also repeated that the position in the Chorley store was only a temporary measure while the store manager was working on another project, and now that she had returned, there was no vacancy available in the store. [no reconsideration of either]
24/01/21	C grievance (p333) – At p334 claiming the right to 26 weeks paid suspension from work on H & S grounds.
17/02/21	Grievance outcome (p382) – Finds that no right to be placed on medical suspension if shielding. SSP or ESA (Employment Support Allowance) available if unable to work. Happy to authorise annual leave or sick leave for one week until vaccine has taken effect.
18/02/21	C appeal (p387)
6/03/21	**Expiry of Allegation 2**
15/03/21	ACAS EC notification (p1)
23/03/21	Appeal outcome (p448) – Do not find that R was obliged to medically suspend C.
26/04/21	ACAS EC certificate issue date (p1)
25/05/21	Date of issue of proceedings (p2)"

16. Whilst there does not seem to be a dispute about the chronology of factual events, the Claimant seeks to argue that the disputes surrounding the claimant's disability and particularly his treatment and the reasonable adjustments sought by him were part of a continuous act which crystallised with the decision of the Respondent's to reject his grievance appeal on 22 January 2021 and therefore it was submitted the claim 1 remained in time. However proceedings were not in fact issued until 25 May 2021.

17. This could only be the case if the continuous act involved all of the grievance meetings - to encompass the appeal outcome on 23 March 2021, which would then bring the 25 May 2021 claim in time. The claimant went through the EC process and no issue is taken with that.

18. The Respondent sought to argue the claims were out of time based on the chronology above and what is described as the expiry of each allegation as stated above. The fuller arguments are considered later in this judgment.

19. The law
section 123 Time limits
(1) Proceedings on a complaint within section 120 may not be brought after the end of—
(a) **the period of 3 months** starting with the date of the act to which the complaint relates, or
(b) **such other period as the employment tribunal thinks just and equitable.**
(3) For the purposes of this section—
(a) **conduct extending over a period is to be treated as done at the end of the period;**(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—(a) when P does an act inconsistent with doing it, or (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

20. The tribunal had regard to Rule 37(1) of the ETs 2013 Regulations relating to strike out:

"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –

(1)(a) that it is scandalous or vexatious or **has no reasonable prospects of success."**

21. Both parties referred the Tribunal to a considerable number of authorities. These are listed below as cited by each party.
Respondents list of authorities

1. Robinson v Royal Surrey County Hospital NHS Foundation Trust (UKEAT/0311/14/MC)
2. Van Rensburg v Royal Borough of Kingston-upon-Thames

(UKEAT/0095/07)
3. N Glamorgan Trust v Ezsias [2007] IRLR 603, CA
4**. Mechkarov v Citibank [2016] ICR 1121, CA**
5. Ahir v British Airways (A2-2016-1846, CA)
6. Hemdan v Ishmail [2017] IRLR 228, EAT
7.Morgan v DHL Services Ltd (UKEAT/0246/19/BA)
8.**Cast v Croydon College [1998] IRLR 318, CA**

The Respondent provided the Tribunal with copies of the above and before reaching its conclusions, the Tribunal read the authority bundle of 117 pages in full.

The additional case of APELOGUN-GABRIELS (applicant) v. LONDON BOROUGH OF LAMBETH and another (respondents) [2001] EWCA Civ 1853 was cited by the Respondent and sent to the Tribunal.

In his skeleton argument Mr Lewinski also referred to Amies v Inner London EA 1977 ICR EAT, Basildon Academies Trust v Polius - Curran 2015 Unreported

Sougrin v Haringey HA 1992 IRLR 416

Osuswu v London Fire and Civil Defence Auth 1995 IRLR 575

Virdi v Comr of the Police of the Metropolis 2007 IRLR 24 disapproving Aniagwu

22. The Claimant also referred to a number of authorities referred to in the Skeleton argument provided by Mr Bronze:-

Barclays Bank plc v Kapur 1989 IRLR 387

Calder v James Finlay Corpn Ltd 1982 / 1989 IRLR 55

Owusu v London Fire and Civil Defence Authority 1995 574

Hendricks v Met Police Cmr 2002 EWCA Civ 1686 (cited in the Respondents' authorities also)

Pugh v National Assembly for Wales UKEAT/ O251/06

Kells v Pilkington PLC 2002 IRLR 693

Cast v Croydon College as above

Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/ 0342/16

Matuszowicz v Kingston upon Hull City Council 2009 EWCA Civ 22

Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 EWCA CIV 640

Sridhar v Kingston Hospital NHS Foundation Trust UKEAT 0066/20

Southern Cross Healthcare v Owolabi UKEAT /0056/11

Veolia Environmental Services UK v Gumbs UKEAT /0487/12

Moxam v Visible Changes Ltd & Anor 2012 eQ LR 202

Bexley Community Centre t/a Leisure Link v Robertson 2003 EWCA Civ 576

Hutchinson v Westward TV Ltd 1977 IRLR 69

Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23
Afolabi v Southwark London Borough Council 2003 EWCA Civ 15

Rathakrishnan v Pizza Express Restaurants Ltd 2016 IRLR 278

Brittain v Nottingham City Homes Ltd ET 2601808/16

DPP v Marshall 1998 IRLR 494

Blockbuster Entertainment Ltd v James 2006 IRLR 630

Notts County Council v Meikle 2004 IRLR 703

O'Hanlon v Cmrs for Revenue and Customs 2007 IRLR 404

Cordell v Foreign and Commonwealth Office 2012 ICR 280

G4S Cash solutions (UK) ltd v Powell 2016 IRLR 820

Ministry of Defence v Jeremiah 1980

Shamoon v CC of RUC 2003

Hasan v Tesco Stores Ltd UKEAT /0098/16

Balls v Downham Market High School & College UKEAT /0343/10

Anyanwu v South Bank SU and South Bank University 2001 IRLR 305

Tree v South East coastal Ambulance service UKEAT /0043/17

H v Ishmail UKEAT /0021/16

There were also another couple of cases cited dealing with the CVJR Scheme not listed here.

23. The Tribunal also considered s33(3) Limitation Act 1980

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 , by section 11A, by section 11B or (as the case may be) by section 12;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

24. The Tribunal noted the following quotations and propositions of assistance when considering its approach.

MRS B ROBINSON v Royal Surrey County Hospital NHS Foundation Trust
In the note of the judgment before HER HONOUR JUDGE EADY QC as she then was,

" In the case of Ali v Office of National Statistics [2005] IRLR 20 I it was held that claims of direct discrimination and claims of indirect discrimination are two distinct forms of claim. As to whether conduct has "extended over a period of time", however, the touchstone remains the guidance provided in the Judgment of Mummery LJ in the case of **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530, in particular:
"52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the appeal tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaint that the commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is "an act extending over a period" is distinct from a succession of unconnected

or isolated specific acts, for which time would begin to run from the date when each specific act was committed."
23. At a Preliminary Hearing on this question, the test to be applied is whether the Claimant has established that the complaints are capable of being part of an act extending over time, a prima facie case that that is so; see paragraph 10 of the Judgment of Hooper LJ in Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 1548. In testing this question, in the case of Aziz v FDA [2010] EWCA Civ 304, Jackson LJ observed that:
"33 . ... one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents ... "

24. On the question of a strike-out of a claim the ET's power is derived from Rule 37(l)(a)of the Employment Tribunal Rules 2013. That enables it to strike out a claim that has "no reasonable prospect of success''. The case law, however, cautions ETs against striking out a claim in all but the clearest of cases, particularly where that claim might involve allegations of discrimination or, by analogy, of whistle-blowing detriment; Anyanwu v South Bank Student Union [2001] ICR 391, Ezsias v North Glamorgan NHS Trust [2011] IRLR 550. An ET should be particularly careful not to strike out a case where there is a dispute of fact, albeit that there may be cases where it is appropriate to do so because the case simply has no reasonable prospects of success; see paragraph 27 of Ezsias. **Strike-out should be recognised as a draconian act;** see the guidance of Lady Smith in Balls v Downham Market School [2011] IRLR 217:

"6. where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same ;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 ii 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 ET3or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects." (Lady Smith's emphasis)

25. In **Van Rensburg v Royal Borough of Kingston-Upon-Thames and others**
A case regarding the Employment tribunal striking out and considering reasonable prospects of success, the Tribunal ordered the employee to pay a deposit and the employee failed to pay the deposit -so the Tribunal then struck out the employee's claim and the question was whether the tribunal erred.
Paras 23-27 cited to the Tribunal directed towards consideration of a deposit order being made and the "greater leeway " than in the "rigorous" test for strike out.

26.In **Mechkarov v Citibank NA Employment Appeal Tribunal** UKEAT/41/16 2016 May 11 Mitting J at page 47, it was held allowing the appeal, that only in the clearest case should a discrimination claim be struck out as having no reasonable prospect of success, taking the claimant's case at it highest; that, if a claimant's case was conclusively disproved by, or was totally and inexplicably inconsistent with, undisputed contemporaneous documents, it might be struck out; that, "**where there were core issues of fact that turned to any extent on oral evidence, they should**

not be decided without an oral hearing, but the tribunal should not conduct an impromptu mini-trial of such facts; that, by determining the respondent's application on the basis of oral evidence, the employment judge had impermissibly conducted a mini-trial, and had done so without the production of contemporaneous documents,"

27. **In** **Ahir v British Airways PLC [2017] EWCA Civ 1392**. the Court of Appeal determined that Employment Tribunals should not be deterred from striking out claims including discrimination claims which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence had not been heard and explored, perhaps particularly in a discrimination context. The paragraph goes on:

    "Where the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between exceptional and most exceptional circumstances or other such phrases as may be found in the authorities. **Nevertheless it remains the case that the hurdle is high and specifically that it is higher than the test for the making of a deposit order, which is that there should be little reasonable prospects of success**."

THE RIGHT HONOURABLE LORD JUSTICE UNDERHILL
"5. I will have to consider elements of the employment judge's reasoning in more detail later,but at this stage I will simply adopt Judge Eady's helpful summary at paragraph 10 of her judgment, which was as follows:
'The ET reminded itself that, as a general principle, discrimination cases should not be struck out, save in the very clearest circumstances. It concluded, however, that there was no prospect of the Claimant's case succeeding here.
.The claims were described as fanciful.

28. In **Hemdan v Ismail & Another [2017] IRLR 228** paragraphs 10 & 13 were referred to by the Respondent:

Judgment at para 10 draws the Tribunals attention to the likely cause of both " wasted time and resources and unnecessary anxiety" if time is spent on cases with little prospect of success.

"(13) The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, **a mini trial of the facts is to be avoided just as it is to be avoided on the strike out application because it defeats the object of the exercise.** Where for example, as in this case, the preliminary hearing to consider whether deposit orders should be made was listed for three

days…If there is a core factual conflict it should properly be resolved at a full merits hearing where the evidence is heard and tested.

(para 12 draws attention to the Proper basis for doubting the likelihood of a party being successful in establishing the facts of a case.)

29. In **MORGAN V DHL SERVICES LIMITED**
Before HIS HONOUR JUDGE AUERBACH)
This was a race discrimination case in which the claimant appealled against a strike out of claims disputed on facts dismissed.

"Discussion and Conclusions
24. In relation to the first of his two over-arching grounds, Mr Wallace particularly relied on Malik v Birmingham City Council, UKEAT/0027/19, 21 May 2019. In that case, claims of direct race discrimination brought by a litigant in person were struck out and he then appealed.
25. Choudhury P set out the law in a very helpful summary, which 1 gratefully adopt:
"'29. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure} Regulations 2013 provides:
"Striking out37.- (l) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out nil or part of a claim or response on any or the following grounds-
(a) that it is scandalous or vexatious or has no reasonable prospect or success ... "
30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank Univcrsitv and South Bank Student Union [2001 I !CR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank N.A [20161 !CR 112 I, which is referred to in one of the cases before me, HMRC v Mabaso UKEAT/0143/17.
31. In Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:
(1) only in the clearest case should a discrimination claim be struck out;
(2) where there are core issues of fact that tum to any extent on oral evidence, they should not be decided without hearing oral evidence:
(3) the Claimant's case must ordinarily be taken at its highest;
(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."
32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In Communitv Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the lime and resources of the ETs ought not be taken up by having to hear evidence in cases that are bound to fail."
There must be a plain and obvious basis to strike out.

Paragraph 52 makes clear that
", while the draconian nature of a strike out, and the high threshold for it, must be kept in mind, this does not mean that complaints which the complainant knows, or reasonably ought to know, have no foundation, can be pursued with impunity."

30. In **Cast v. Croyden College - [1998] Court of Appeal, (CA)**
The industrial tribunal and the EAT also erred in finding that the only relevant act of discrimination for the purpose of the time limit was the first refusal of the appellant's request before she took maternity leave, notwithstanding that the employers reconsidered the matter again after she returned to work.
A decision by an employer may be an act of discrimination whether or not it is made on the same facts as before, providing it results from a further consideration of the matter and is not merely a reference back to an earlier decision. If the matter is reconsidered in response to a further request, time begins to run again. If it is not, and the complainant is merely referred to the previous decision, no new period of limitation arises (although there are different considerations where the successive acts indicate a policy or regime).
The present case was a complaint relating to a number of decisions, each amounting to a fresh refusal of a fresh request to work part time. Therefore, the most recent refusal was the relevant one for the purpose of the time bar.

The Claimant relied on this case to support the proposition of on-going consideration of the claimant's requests for reasonable adjustments. The Respondent relied on it to assert there was no reconsideration and a decision was made in December 2020.

31. The Respondent also referred to **APELOGUN-GABRIELS v. LONDON BOROUGH OF LAMBETH - [2002] IRLR 116** In which the **Court of Appeal, (CA) held**

"The EAT had correctly held that the employment tribunal had erred in regarding it as just and equitable to hear the applicant's complaint of race discrimination, notwithstanding that it was out of time on the basis that the decision in *Aniagwu v London Borough of Hackney* laid down a general principle that it will be just and equitable to extend the time limit where the applicant was seeking to redress a grievance through the employer's grievance procedure before embarking on legal proceedings.

The correct law for whether it is just and equitable to extend the time limit for presenting a discrimination complaint which is out of time because the applicant was pursuing internal proceedings was laid down by *Robinson v Post Office* rather than by *Aniagwu*. The fact, if it be so, that the employee had deferred proceedings in the tribunal while awaiting the outcome of domestic proceedings is only one factor to be taken into account.

What was said in *Aniagwu* was intended to be limited to the particular circumstances of that case, and on those facts the EAT was expressing the opinion that every tribunal, unless there was some particular feature about the case or some particular prejudice which the employers could show, would take the view that to await the outcome of the grievance procedure was an appropriate course to take. To the extent that *Aniagwu* goes any further than that and lays down some general principle that one should always await the outcome of internal grievance procedures before embarking on litigation, it was plainly wrong. As the applicant had no real prospect of success on the points which he raised, permission to appeal would be refused. The Tribunal considers that delaying to the exhaustion of internal processes would be one factor to place in the balance.

32. The purport of the Respondent's submissions in brief form set out in full in writing in the written document were as follows:-

The Respondent relied upon the chronology set out above. The Respondent says there is little dispute of fact and the claimant's assertions are inherently weak.

Mr Lewinski in oral amplification cited many of the authorities referred to above. If there are no reasonable prospects of success there should be a strike out. He sought to weave into the argument the time point, which he says bars out the claimant in any event.

33. He accepted the respondent was not subjected to substantial litigation prejudice here as the case is already timetabled to a final hearing and evidence largely gathered including the final hearing bundle.

On the issue of deposit orders he pointed out the high hurdle of little reasonable prospects of success.

He cited authorities illustrative of single acts with continuing consequences in dealing with what the Tribunal may view as a policy or practice which may be continuing and acts and the consequences of a discriminatory act.

He asserted the respondent did not "re-consider" the decision on furlough or Chorley base placing the date of decision firmly out of time.

The Respondents submit the case as to the defence to proportionate means of achieving a legitimate aim ie. requiring staff to be in stores to do business is unassailable in respect of the section 19 claim.

He invites that the section 15 claim is not comprehensible and should be dismissed.

34. Mr Bronze's oral submissions taken with the claimant's witness statement- were to the effect that the consideration of the claimant's requests and the process of consideration should be taken as a continuous act. He accepts the chronology set out. He asserted the Tribunal should look at the policy applied by the Respondent with a wide interpretation and that there were interlinking incidents, which justify a conclusion of a continuing act.

35. As to the reasonable adjustments claim he asserts that in the context of the unprecedented events and the fluid situation of changing restrictions impacting on the claimant and the Respondent it was proper to allow consideration within its internal processes. He asserts the claimant was reasonable to follow those processes and it is not fatal that the claim was submitted after the grievance, when there was a " constantly evolving situation". He asserts there is no little prejudice to the Respondent. He submitted the claimant himself acted reasonably and the fact of him being legally advised was not fatal to the limitation point. He drew attention to the relevant criteria in the Limitation Act section 33.
36. He made no submissions as to the section 15 claim in itself.

CONCLUSIONS

37. The Tribunal hearing this case in February 2022 has to take account of events which have occurred which are unprecedented. Now leaving restrictions behind it is easy to view life through the new normal of no restrictions post the covid 19 epidemic. It is therefore necessary to be reminded of the events of this claim, which were very much at the business end of the first wave of the virus and very much fear, shock and awe abounded at the restrictions placed on personal liberty and the desire to preserve good health in the face of deaths and the unknown path of the virus at the outset.

38. What is absent from the chronology but evident from the ET1 is that this Respondent did avail itself of the furlough scheme in the first national lockdown. It later determined that it had not been impacted as anticipated and did not fit the criteria for furlough payments and repaid HM Government. From the claimant's perspective one would not have knowledge of the internal workings of the Respondent's finances and considerations at play. It was not unreasonable in principle for the claimant to consider all possible options could be available, in the light of the previous use of the scheme. In this regard he was asking for "further consideration" and the Tribunal accepts he viewed this as what the Respondent were doing during the process. The Tribunal looking at the matter through a wide lens accepts that there was a "re-consideration" of the decisions on the claimant's ability to and willingness to attend work in the face of the pandemic when he was classed as vulnerable.

39. The Tribunal has considered the contemporaneous documents and accepts the claimant's submissions that there is sufficient to rely on to conclude that there was a continuous act based on the timing of the process which led to the appeal outcome on the 23 March 2021 and the claim being issued on 25 May 2021. If the last part of the continuous act occurred on 23 March 2021.Therefore the Tribunal concludes claim 1 is in time and or it is just and equitable to allow it proceed in the circumstances.

40. Looking at the relative merits of the claims to assess whether strike out or deposit orders are appropriate, the Tribunal can see no basis for allowing the section 15 claim to proceed. In submissions Mr Bronze did not articulate the " something arising" and the Tribunal accepts the submission of Mr Lewinski that this was an incomprehensible claim and therefore this can have no reasonable prospects of success and the claim under section 15 is struck out.

41. The Tribunal makes no further Case Management Orders for the final hearing, which elements are to be litigated shall remain listed from 19- 22 December 2022.

Employment Judge Grundy
Date: 24th February 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON 10 MARCH 2022

FOR THE TRIBUNAL OFFICE