EMPLOYMENT TRIBUNALS

Claimant: Mr M Khokhar

Respondent: Walkers Snacks Limited

Heard at: (by video) **On:** 20 July 2023

Before: Employment Judge Dobbie

Appearances
For the Claimant: in person
For the Respondent: Ms L Amartey (Counsel)

JUDGMENT

1. The *argument* that the fifth harassment claim is in time (that the Claimant's supervisor, Haris Khan, was rude and arrogant to the Claimant in about August 2020, per paragraph 12(v) of EJ Burns' Case Management Order (CMO)) is struck out for having no reasonable prospects of success. However, the Claimant is at liberty to argue that time should be extended on the just and equitable basis (if he has paid the deposit I have attached to this claim on merits, as set out in the associated Deposit Order).

2. All of the other applications by the Respondent for strike out of the Claimant's claims are dismissed for the reasons set out below.

REASONS

1. The hearing was listed as a public preliminary hearing (PH) to consider such of the following as the judge deemed appropriate:
   (a) whether the Claimant requires permission to amend his ET1/s to bring the claims in Schedule 1 to this CMO and if so whether or not permission should be granted.

(b) whether or not to make an order striking out the claims on the grounds that they have been brought out of time,

(c) whether or not to make an order striking out any claims on the grounds that they have no reasonable prospect of success;

(d) whether or not to make an order requiring the Claimant to pay a deposit or deposits not exceeding £1000 per claim as a condition of permitting him to continue with any claim, on the grounds that it has little reasonable prospect of success.

2. On 11 July 2023, the Respondent informed the Tribunal of its position as follows:

> **"The Respondent's position is that the following claims identified in the provisional claim list are <u>out of time</u> and should be struck out:**
>
> <u>Failure to make reasonable adjustments</u>
> 1. Changing the Claimant's territory to remote areas in 2019
> 2. Changing the Claimant's territory again in the spring of 2020
> 3. Requiring the Claimant to increase his working days in September 2020
> 4. Not being allowed to avoid or reduce his driving by working from home on line or on the telephone
> 5. Not being allowed to a more flexible work pattern.
> 6. Not being given a more flexible role
>
> <u>Harassment (relating to disability)</u>
> 1. The disciplinary process resulting in 2 written warnings in the second half of 2020
> 2. Being pressured by line manager to come back to full time work too soon.
> 3. Supervisor Zeeshan Khan forcing the Claimant to carry on working on physical calls to shops in 2020
> 4. Supervisor Haris Khan being rude and arrogant to the Claimant in about August 2020
>
> (c) **Whether or not to make an order striking out any claims on the grounds that they have no reasonable <u>prospects of success</u>.**
>
> <u>Direct discrimination</u>
> 1. The Respondent will be pursuing a strike out application in relation to the Claimant's claim (for direct discrimination) that he was dismissed because of his disability
>
> <u>Harassment</u>
> The Respondent will be pursuing a strike out application in relation to the Claimant's claims of:
> 1. The disciplinary process resulting in 2 written warnings in the second half of 2020
> 2. Being pressured by line manager to come back to full time work too soon.

3. Supervisor Zeeshan Khan forcing the Claimant to carry on working on physical calls to shops in 2020
4. Supervisor Haris Khan being rude and arrogant to the Claimant in about August 2020

(d) Whether or not to make an order requiring the Claimant to pay a deposit or deposits not exceeding £1,000 per claim as a condition of permitting him to continue with any claim, on the grounds that it has little reasonable prospect of success.
This is only being pursued as an alternative to strike out."

3. Ms Amartey for the Respondent confirmed at the outset of the PH that the strike out / deposit argument being run in respect of time limits was not a decision whether the claims were *in fact* in or out of time, but rather whether the Claimant has no or alternatively little reasonable prospect of demonstrating that that claims were in time.

4. The application to strike out was therefore to strike out the *argument* that the claims were in time (as part of some continuing act). It was not an application to strike out the *claims,* because even if the argument on time is struck out, and the claims are held to be out of time, the Claimant might still seek to persuade the tribunal that time should be extended in respect of those claims.

5. Ms Amartey sought to argue that because the Claimant was required to provide a statement on the issue of extension of time (by EJ Burns' Order) and had not done so, that he should therefore be debarred from being able to argue that time should be extended. I disagree. The Claimant is. a litigant in person and informed me that he would want to argue for an extension of time but was unaware of what was required of him and he believed his ET1 addressed all that he needed to say. I therefore see no basis for debarring him from running this legal argument at the full merits hearing, but it is his responsibility to provide evidence as to why it would be just and equitable to extend time.

6. The Respondent conceded that the unfair dismissal claim was in time, having been presented to the Tribunal on 27 March 2021 (following ACAS Early Conciliation from 19 January 2021 to 2 March 2021). The effective date of termination was 18 December 2021.

RELEVANT LAW

Time Limits

7. Section 123 of the Equality Act 2020 (EqA) states:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

Continuing acts

8. The leading case on continuing acts is the decision of the Court of Appeal (CA) in **Hendricks v Metropolitan Police Comr** [2003] IRLR 96, which makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an *ongoing situation* or *continuing state of affairs* in which the group discriminated against (including the claimant) was treated less favourably. At paragraph 48, it was stated that:

> '48. … She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'. I regard this as a legally more precise way of characterising her case than the use of expressions such as 'institutionalised racism', 'a prevailing way of life', a 'generalised policy of discrimination', or 'climate' or 'culture' of unlawful discrimination.
> …
> 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 sidetracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints 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' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'.

9. In **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548, CA, the Court of Appeal clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in **Hendricks**. Thus tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer

10. In deciding whether a particular situation gives rise to an act extending over time it will be appropriate to have regard to (a) the nature of the discriminatory conduct of which complaint is made, and (b) the status or position of the person responsible for it. A single person being responsible for discriminatory acts is a relevant, but not conclusive, factor in deciding whether an act has extended over a period (as the Court of Appeal warned in **Aziz v FDA** [2010] EWCA Civ 304).

11. In **Robinson v Royal Surrey County Hospitals NHS Foundation Trust** UKEAT/0311/14/MC, the EAT noted that it is possible for claims of different types to be deemed to form part of a continuing act, depending on the circumstances (paragraph 65).

No reasonable prospects of success

12. A tribunal may strike out all or part of a claim or response on the grounds that (inter alia) it has no reasonable prospect of success (rule 37(1)(a) Employment Tribunal Rules of Procedure 2013 (ET Rules)).

13. When considering whether to strike out an argument, a tribunal must apply a two-stage test and consider: (1) whether any of the grounds set out in rule 37(1)(a) to (e) have been established; and (2) whether to exercise its discretion to strike out (see **HM Prison Service v Dolby** [2003] IRLR 694, EAT, at paragraph 15).

14. In **Hasan v Tesco Stores Ltd** UKEAT/0098/16, it was held that an employment judge had erred in failing to consider whether to exercise their discretion to strike out claims on the basis that they had no reasonable prospect of success. The factors that could have been considered included the early stage of the proceedings, the ability to direct further and better particulars and the absence of any application from the respondent for the claims to be struck out.

15. The threshold for striking out a claim for having no reasonable prospects of success is high. In **Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330, the CA held that where there are facts in dispute, it would only be "very exceptionally" that a case should be struck out without the evidence being tested.

16. In **Balls v Downham Market High School & College** UKEAT/0343/10, the EAT held that it is a power that should be exercised only after a careful consideration of all the available material, including the evidence put forward by the parties and the documentation on the Tribunal's file.

17. However, neither of these statements is to be taken as amounting to a fetter on the tribunal's' discretion, per **Jaffrey v Department of the Environment, Transport and the Regions** [2002] IRLR 688 at paragraph 41, EAT).

18. In **Bahad v HSBC Bank plc** 2022 EAT 83 the EAT held that the employment judge had erred by failing to take the claimant's case at its highest. The judge had wrongly expected the claimant to demonstrate, prior to disclosure, 'evidence of a causal link' between his protected characteristics and his treatment. Furthermore, the employment judge had failed to heed the necessary caution against expecting a litigant in person to explain his or her case under the pressure of questioning, without adequately considering the pleaded case, including attempts by the claimant to provide additional information.

19. However, in **Ahir v British Airways plc** 2017 EWCA Civ 1392, the CA stated that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of success, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored.

20. The EAT issued guidance on how tribunals should deal with litigants in person and strike out applications in **Cox v Adecco and others** EAT/0339/19. It was stated that litigants in person should not be expected to explain their case and take the judge to relevant materials, rather the onus is on the judge to consider the pleadings and other core documents that explain the case. The tribunal must take reasonable steps to identify the claims and issues; it is not possible to decide whether a claim has reasonable prospects of success if the tribunal does not know what the claim is. The parties' roles were clarified: legally represented respondents are required to assist the tribunal in identifying documents which set the claim out and claimants should attempt to explain their claims clearly and focus on core claims rather than trying to argue every conceivable point.

CONCLUSIONS

No reasonable prospects – time points

Reasonable adjustments claims

21. The Respondent maintains that the Claimant has little or no reasonable prospect of demonstrating that the first and second reasonable adjustments

claims (changing the Claimant's territory in 2019 and again in 2020) are in time. According to EJ Burns' Case Management Order (CMO), these are in fact set out as one claim, at paragraph 11(a). Counsel stated that the claim in respect of the change in 2019 is out of time by at least 10 months and that given there was a TUPE transfer in March 2020, when the management team changed, it cannot be said that the same individuals were involved in these decisions and later acts, hence they are not connected in any way with later acts that are in time.

22. According to the Claimant's claim form, the first territory change was in July 2019 and it would appear that the second change was in early spring 2020. He states in the ET1 form that "I did complain to my line manager and the national sales manager Julie Fedyk during our return to work meetings, their reply was that it was a Pepsico decision, and they were unable override it.". Accordingly, under s.123(3) EqA, time would begin to run from the date management decided not to re-adjust the Claimant's territory.

23. On the dates of ACAS early Conciliation and presentation of the claim form, it would appear that any act occurring wholly on or before 19 October 2020 is out of time. As such, the first territory change is out of time by up to 15 months and the second territory change is out of time by up to 8 months if it does not form part of a continuing act with claims which are in time. On its face, it is not immediately obvious that these claims are connected to claims that are in time, either in subject matter or in terms of who made the decisions. The Claimant argued that the connection was that his inability to cover the new territories led to the later capability and dismissal process. However, this is an argument about the continuing *effects* of the omissions, not that the omissions themselves continued, nor that they were connected to later acts / omissions as part of a continuing state of affairs.

24. I also note that due to the TUPE transfer, the management team changed in March 2020. The Respondent argued that the first and second decisions to change the Claimant's territories were made by the outgoing transferor managers. However, the Claimant says that it was a decision by the transferee and merely explained to him by his outgoing managers at the time. After the TUPE transfer, he would have been directly managed by the transferee. Hence his argument it that the pre-TUPE decisions on territory were taken by the Respondent (before he TUPE transferred to it) and that the later acts / omissions were also taken by the Respondent. Neither the Claimant nor Respondent argued who specifically was involved in these decisions.

25. On balance, I consider that the Claimant has little reasonable prospect of success in successfully arguing that these two matters (the territory changes in 2019 and 2020) are themselves ongoing acts (as opposed to one-off acts with ongoing effects). Further, I find he has little reasonable prospects of success in demonstrating that these acts are linked with later acts / omissions

that are in time to form part of a continuing act. I do not find that there are *no* reasonable prospects of this, because this is a high hurdle and it is difficult to assess the prospects of a continuing act argument in a vacuum, isolating specific claims without considering the whole. Further, I do not know who specifically was involved in each decision. Therefore, in respect of the arguments that the first 2 reasonable adjustments claims are in time, I attach a deposit order of £200 (for the reasons set out above and below). I find that it is just and equitable to do so to give the Respondent some security for costs in respect of those claims but noting that such an order is less draconian than a strike out order. This is the subject of a separate but associated Deposit Order.

26. It should be noted that the deposit applies only to the argument that these claims are in time (as part of a continuing act) it is not a deposit that the entire claims have little reasonable prospect of success. Even if the Claimant fails to pay the deposit ordered, he is at liberty to persuade the tribunal that time should be extended in respect of these claims at the full merits hearing. If he pays the deposits, both the continuing act argument and the just and equitable extension of time argument will be live issues.

27. As to the second reasonable adjustments claim (requiring the Claimant to increase his working days in September 2020, set out at paragraph 11(b) of the CMO) the Respondent argued that he was always contractually obliged to work full time, his hours had never been formally reduced. However, I note from paragraph 12 and 13 of the Respondent's grounds of resistance it states that the Respondent agreed he could work three days a week as reasonable adjustment and that this was reviewed and adjusted to 4 days a week from 17 August to 11 September and from the ET3 it appears the Respondent continued to want him to move back up to full hours (5 days a week) but there were ongoing discussions about his employment. Accordingly, even if there never was a formal permanent variation to his hours (rather a short-term reasonable adjustment) this does not matter. The fact remains that he was at all times expected to work up to 5 days a week and this increase was happening in stages, with the expectation that after 11 September 2020, he would go up to 5 days. The requirement to work full time was therefore ongoing and it was a continued expectation, and hence an ongoing PCP. I cannot see how the Respondent seeks to argue that there are no (or little) reasonable prospects of the Claimant demonstrating that this was a continuing act. I do not uphold either of the Respondent's applications (strike out or deposits on the time point) in respect of this claim.

28. As to the third claim, set out at paragraph 11(c) of the CMO (not being allowed to avoid or reduce his driving by working from home on line or on the telephone) whilst it could be argued that the PCP no longer applied to the Claimant after he was no longer at work from 16 September 2020 (such that no duty to make an adjustment continued beyond that date), I consider that this requirement could be said to be linked to the capability process because

in that formal process he was assessed against his ability to do his role which included an obligation to carry out these tasks. Therefore, I do not strike this argument out or make a deposit order.

29. As to the claims at 11(d) and (e) of the CMO, these pertain to flexible working and alternative duties. The Respondent maintains that the Claimant made a formal flexible working request which was rejected on 16 September 2019 and was not renewed. Counsel argued that because there was more than three months' gap between that determination and the start of the "viability of employment" process (a capability process) which commenced in April 2020, this effectively breaks the chain and there can be no continuing act. I disagree. There is no authority (as there is in respect of deductions from wages case law) that a gap of three months will break the chain / continuation. I am not aware of who made the decision on the flexible working request and whether the same people were involved. Further, whilst Counsel informed me that the Claimant did not make a fresh formal flexible working request, I have no information as to whether flexibility of working was discussed during the capability process. The claims do not centre on the formal flexible working request and the submission that references to "flexible working" can only pertain to that is too narrow, literal and formulaic. The claims as clarified are not so confined and indeed include consideration of flexibility more generally and alternative duties too. Accordingly, I do not uphold either of the Respondent's applications (strike out or deposits on the time points) in respect of these claims.

Harassment related to disability

30. The Claimant advances five harassment claims, and the Respondent makes applications in respect of the time points on 4 of them:

31. As to the first claim, (the disciplinary process resulting in 2 written warnings in the second half of 2020 per paragraph 12(i) of the CMO), the Respondent stated that the process started on 3 August 2020 and the warning given on 25 August 2020 is out of time. Counsel conceded that the second warning given on 20 November 2020 is in time. As to the first warning, Counsel argued that it was issued for a conduct reason (per paragraphs 21 to 22 of the ET3 Grounds of Resistance) which was not connected to the later capability process. I agree that there is no connection in subject matter between the earlier warning for a conduct issue and the later capability process. However, I am not persuaded that the Claimant has no reasonable prospect of demonstrating that this matter formed part of a continuing act with matters that are in time. I have not been told who was involved, and the first warning could be similar in nature to the second disciplinary warning which is in time. Accordingly, I do not strike out this argument and I make no order in respect of this argument (that the earlier warning is in time). It is a matter for the tribunal at the final hearing.

32. As to the second harassment claim (being pressured by line manager to come back to full time work too soon, per paragraph 12(ii) of the CMO), the Respondent contends that this pressure was as early as July 2019 and is long out of time. Counsel also argued that the Claimant was always *contractually* required to work full time hours for employment from 2017. She also argued that there was the change in management as a result of the TUPE process and that this matter is not connected to the later capability process. As stated above, under the reasonable adjustments claims, it appears that the expectation to work full-time hours continued into autumn 2020 when there were fresh discussions about increasing his hours.

33. Further, as far as I am aware, his ability to work full-time hours was something discussed in the later capability process also. Accordingly, this appears to me to be the sort of matter that could be said to be a continuing act and his inability to work full time is likely to have been something that weighed in the balance when he was dismissed for being incapable of fulfilling his full contractual duties. Accordingly, I do not strike out the argument that this claim is int time and I make no deposit order either.

34. As to the fourth claim (that the Claimant's supervisor, Zeeshan Khan, forced the Claimant to carry on working on physical calls to shops in 2020 etc. per paragraph 12(iv) of the CMO) Counsel informed me that the Claimant cannot have done this after 16 September 2020, when he was signed off sick. She says that it is therefore out of time. I accept that after he was signed off sick, the Claimant was not physically put to the detriment of undertaking physical, in-person calls to shops. However, the expectation that he should do this as part of his role persisted and no doubt formed a relevant feature of the capability process which led to his dismissal. Accordingly, I neither strike this out nor make a deposit order in respect of the time point on this.

35. As to the fifth harassment claim (that the Claimant's supervisor, Haris Khan, was rude and arrogant to the Claimant in about August 2020, per paragraph 12(v) of the CMO) the Respondent argues that this is out of time on its face and has no connection to the later capability process that was managed by others. It is a one-off act. I agree that it is prima facie a one-off act and appears to have been done by different person than the later capability process. It is not logically connected with that process in the way the other claims that I have identified are. Accordingly, I agree that the Claimant has no reasonable prospect of demonstrating that this is part of a continuing act with other matters that are in time. I therefore strike out the argument that this claim is in time, but the Claimant is at liberty to seek to persuade the Tribunal at the full merits hearing that time should be extended on the just and equitable basis (if he has paid the deposit I have attached to this claim on merits, as set out below).

STRIKE OUT ON MERITS

Direct discrimination

36. The Respondent applies to strike out or obtain a deposit in respect of the direct disability discrimination claims (that the capability process and dismissal were acts of direct disability discrimination, per paragraphs 5 and 6 of the CMO). Counsel argued that it is for the Claimant to demonstrate the link between the acts and his disability and that in this case, it was bare assertion. She also argued that the various other reasons advanced by the Claimant for the dismissal undermine the argument that disability was the reason.

37. Per **Bahad** (above) I do not consider it appropriate to expect a Claimant to demonstrate a prima facie case of the causal link at a preliminary hearing on strike out, especially a litigant in person. However, when I explained the difference between direct discrimination and disability-related discrimination, and asked the Claimant which he thinks applies, the Claimant answered:

> "The whole focus of the process was to return back to full-time hours, not because of my condition and ability. It was against medical advice. I do not think they wanted to get rid of me because of the osteoarthritis, it is more because of my health condition and inability to do the hours that they wanted me to do. So that was the issue so far as they were trying to push me trying to do the extra hours. At no stage did anyone suggest you have osteoarthritis, we must get rid of you. They were willing to make adjustments such as a trolley, but when it came to real adjustments such as territory change, they did not."

38. Accordingly, it would seem that even on the Claimant's own account, he is advancing facts that would support a claim for disability-related discrimination better than a claim for direct discrimination. That said, he does refer to the reason being "because of my health condition and inability to do the hours that they wanted me to do". It is thus ambiguous. In any event, I do not consider it just and appropriate to strike out the direct discrimination claim because the dismissal will have to be closely assessed / analysed and the reasons for it determined. Therefore, striking out this claim would not have the benefit of reducing the evidence heard, or the number of witnesses etc. Accordingly, I decline to exercise my discretion to strike out this claim.

39. I do however consider it appropriate to apply a deposit order to this claim, noting that the same acts are pleaded as disability-related claims in any event (per paragraphs 7 and 8 of the CMO). I apply a deposit order of £200.00 to be paid to continue with this claim, as set out in the associated Deposit Order.

Harassment

40. The Respondent applies to strike out or obtain deposits in respect of all 4 of the 5 harassment claims that are listed above. Counsel argued that the matters complained of were not serious enough to meet the high threshold for harassment and that in respect of the second and fourth claims (paragraphs 12(ii) and (iv) of the CMO) the Claimant was merely being asked to adhere to his contractual obligations. As to the final claim (paragraph 12(v)) the

Respondent argues it is very vague, not linked to disability and is not serious enough.

41. I am not persuaded that the claims have no reasonable prospects of success, but am persuaded that claims at paragraphs 12(i), (ii) and (v) have little reasonable prospects of success as harassment claims. This is because 12(ii) is better categorised as a breach of the duty to make reasonable adjustments (and is at paragraph 11(b) of the CMO as that sort of claim). The matter at 12(ii) is not logically connected to the Claimant's disability, on the information available to me. The matter set out at paragraph 12(v) is also not logically connected to disability. Hence in respect of 12(i) and (v) it is difficult to understand how the Claimant will argue that these are related to disability. Therefore, I apply deposit orders in respect of the harassment claims at paragraph 12(i), (ii) and (v) (per the associated Deposit Order) but I make no order as to the claim at paragraph 12(iv) of the CMO which could well be related to disability.

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Employment Judge Dobbie
7 August 2023

JUDGMENT SENT TO THE PARTIES ON
13 September 2023
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FOR THE TRIBUNAL OFFICE