



EMPLOYMENT TRIBUNALS

Claimant: Mr Ashad Ali
Respondent: BMW (UK) Manufacturing Limited

Heard: By CVP (Reading)
Before: Employment Judge S. Matthews

On: 7 September 2023

Representation

Claimant: Mr. Jupp (Counsel)
Respondent: Ms. Danvers (Counsel)

RESERVED JUDGMENT

1. The respondent's application to strike out the claimant's complaints in respect of matters prior to January 2020 is refused.
2. The question of whether there has been a continuing act of discrimination and whether it is just and equitable to extend time is reserved to the final hearing.

REASONS

1. The issue to be decided is the respondent's application dated 21 October 2022 that the Tribunal dismiss the claimant's complaints in respect of matters prior to January 2020 on the basis that the claimant has no reasonable prospects of establishing that they were brought in time.
2. Case management orders were made by Employment Judge Edmonds on 19 January 2023. This issue was listed for a public preliminary hearing today. Since the case management hearing the respondent has accepted that the claimant has had a disability (severe depression and anxiety) within the meaning of section 6 of the Equality Act 2010 from February 2018.

Background and Issues

3. The claimant is employed by the respondent, a global car manufacturer, as an assembly associate. He was originally engaged through an agency from June

2013 and directly as an employee since 1 December 2018. His employment is continuing.

4. The claimant is a Sri Lankan Muslim. He alleges that he was a disabled person within the meaning of section 6 of the Equality Act 2010 (severe depression and anxiety) from December 2017 and that the respondent was aware from at least January 2018. The respondent now accepts that he was a disabled person from February 2018.
5. The claimant brings proceedings for direct discrimination on the grounds of race and religion or belief in relation to various matters including his contract of employment and the work allocated to him. He brings claims for victimisation following complaints about the treatment he received. He brings complaints of discrimination arising from disability and failure to make reasonable adjustments.
6. The ACAS conciliation period commenced on 13 December 2021 and ended on 23 January 2022. The proceedings were brought on 1 February 2022.
7. Any incidents which occurred before 14 September 2021 are outside the primary limitation period. The claimant alleges a continuing act meaning that any events that occurred before 14 September 2021 would be brought in time by being linked to events that occurred on or after 14 September 2021.
8. The respondent accepts that the issue of whether there was a continuing act in respect of allegations from the beginning of 2020 should be decided at the final hearing. The respondent's application relates to the allegations from October 2013 to the end of 2019.
9. The allegations are listed in the agreed list of issues dated 5 March 2023 (144-152). There are 12 specific factual allegations relating to the period between October 2013 and the end of 2019 and 3 allegations relating to the period from January 2020 to the date of issue. The final hearing is listed for 15 days to take into account the number of witnesses and to allow for adjustments that the claimant will require due to his health.
10. In respect of today's hearing I had before me a bundle of 158 pages prepared by the respondent's solicitors. Numbers in brackets below are references to numbered pages within the bundle. I also had before me Skeleton arguments prepared by counsel for the claimant and respondent (with Appendix), a list of authorities and a chronology prepared by the claimant.

The Law

11. Section 123 of the Equality Act requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. For the purposes of s 123 conduct extending over a period is to be treated as done at the end of that period (s.123(3)(a)).
12. A claimant is entitled to pursue his claim if it is reasonably arguable that he will 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” Hendricks v The Commissioner of Police for the Metropolis [2003] ICR 530 CA at [48]. (emphasis added).

13. The role of the Tribunal on an application to strike out is not to reach a conclusion on whether the events are linked to one another. It is, *“that there is a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs” Aziz v First Division Association [2010] EWCA Civ 304 at [36].*
14. A Tribunal dealing with an application will not strike out unless the claimant has not established *‘a prima facie case relating to the continuing discriminatory state of affairs, the claims were not capable of being part of such a continuing discriminatory state of affairs, and it was not reasonably arguable that there was such a continuing discriminatory state of affairs. All of these are different ways of saying the same thing’, Sridhar v Kingston Hospital NHS Foundation Trust UKEAT/0066/20/LA at [59].*
15. British Coal Corporation v Keeble [1997] IRLR 336) sets out a list of factors that can be useful to take into account when deciding whether to exercise discretion to extend time. The factors include the length of and reasons for the delay.
16. Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, while holding that there is no need to go through a checklist, restated that length and reason for the delay is almost always relevant [19].

Submissions

17. I have carefully considered all the points which were argued orally and in writing. I summarise below the arguments which have been most relevant to my conclusions.

Respondent

18. Counsel for the respondent pointed out gaps of time in respect of some of the allegations. The claimant was not promoted in 2013 and did not challenge it until 2017, a four-year gap. There are no allegations of discrimination from 1 December 2018 to January 2020 when the claimant had a different manager, a one year gap.
19. Counsel invited me to divide the allegations into six categories: three before 2020 and three after 2020. The first three were 1) verbal assaults and threats, 2) failure to give a permanent contract and extension of the probation period and 3) grade and rate of pay. The latter three are 4) the reallocation to APU 2 on 17 January 2020, 5) the management of his fifth grievance (race, religion and victimisation) and 6) the management of his sick leave.

20. Counsel asserted that it was not possible for the claimant to demonstrate that the first three related to the latter three. The decision makers in 4,5 and 6 are not the same decision makers as 1,2 and 3. In 2017 and 2018 events and processes were managed by the GI Group, which was separate from the respondent.
21. There are different types of discrimination. The claimant asserts that the earlier discrimination caused his disability and therefore creates the context for his treatment on sick leave; that is a 'but for' connection, it is not a link.
22. The claimant does not have reasonable prospects of establishing that it is just and equitable to extend time. He was able to work and engage with his employer between November 2019 to December 2020. He had raised four grievances and received advice about time limits.

Claimant

23. In response Counsel for the claimant submitted that 'Slicing and Dicing' into categories of allegations is not appropriate. The function of the Tribunal at this stage is to stand back and look at the case as a whole.
24. The claim is against the respondent and the issue is whether the respondent had a continuing state of affairs. A conspiracy between individual perpetrators is not required. The individuals named all worked in related teams on the same process. The process is 24 hours and highly intensive with continuous communication. It is led by the process leaders who are named as individuals and their role and that of the union representatives is underpinned by HR. The claimant may not know which perpetrators were decision makers or who the perpetrators were influenced by at the time he brings the claim but the fact that they work closely together may be evidence of a continuous state of affairs.
25. The failure to promote in 2013 was the first incident in a continuous course of conduct which characterises the claim. The decision to promote was not a one off decision. The respondent had a discretion to promote at any time. It cannot be isolated from the subsequent requests to be promoted in 2017, the statement that the claimant would be kept at grade 2 indefinitely in November 2017, the allegations of assault and other acts of discrimination which occurred in 2017 and 2018, culminating in the claimant being told he would have to move to APU 2 in 2020, under Bowman who had discriminated against him in 2017.
26. There is a gap in the allegations in 2019 when the claimant worked under a particular manager but that did not mean that the discriminatory state of affairs was not continuing. The claimant did not want to 'rock the boat' during that period because of his ill health. The matter of his extended probation period remained live during most of it.
27. Mr Blewett, General Manager, required the claimant to sign a contract with the extended probationary period in November 2018. He was named as the decision maker who allocated the claimant to APU 2 in January 2020 and the

claimant's request to speak to him about his move to APU 2 in January 2020 was refused.

28. The Tribunal does not have evidence today to establish that the claimant has no prospects of demonstrating that it is just and equitable to extend time. The claimant has fragile mental health, as accepted by the respondent from at least February 2018, and evidence regarding this will need to be considered by the Tribunal at the final hearing.

Conclusions

29. In considering whether to strike out claims that relate to matters prior to 2020 I do not have to decide if there has been a continuing state of affairs or whether it is just and equitable to allow the claims to proceed, but whether there are reasonable prospects of the claimant demonstrating a continuing state of affairs or persuading the Tribunal that it is just and equitable to allow the claims to proceed.
30. I have considered whether the claimant has established a prima facie case on the pleadings that the factual allegations relating to the period prior to 2020 are capable of showing a continuing state of affairs when taken together with the allegations that relate to the period from 2020 onwards (the respondent having accepted that the issue in respect of the post 2020 allegations will be decided at the final hearing).
31. I have not heard evidence today. I have taken the claimant's case at its highest as set out in the Amended Particulars of Claim. References to paragraphs in the Amended Particulars of Claim are (APoC/ XY).

Individual categories of allegations

32. Counsel for the respondent invited me to break the factual allegations into categories (see paragraph 19 above). I decided against this approach as it potentially creates artificial distinctions. For example, Counsel's second category was the failure to give a permanent contract and putting the claimant on an extended probation period. These acts may not necessarily be distinct from the allegations relating to the claimant's grade, promotion, pay and the work allocated to him (APU 2, which he alleges is punishment work (APoC/13)). Taking the claimant's case at its highest there could be a discriminatory thread of treatment; the delay in promoting, the delay in offering a permanent contract, the extended probation period and the type of work allocated to him, which culminated in him being told he had to work on APU 2 in 2020. These all relate to the claimant's role within the respondent company.

Individual perpetrators

33. A number of individuals are named in the pleadings in relation to events in 2017-2018. The claimant will say they worked closely together on the same process and their actions and attitude led to the thread of treatment set out above. That is fact sensitive and cannot be determined at this hearing.

Evidence may emerge during disclosure or at the hearing or the Tribunal may draw an inference having heard all the facts.

Agency

34. Although the respondent says that the claimant was managed by the GI Agency until 1 December 2018 the claimant may potentially show a link between the Agency and respondent; it is suggested they worked closely together with regard to the claimant being offered a permanent contract (APoC/21). The delay in offering him a permanent contract may be linked to the extended probation period and the type of work assigned to him as set out at paragraph 32 above.

The alleged gaps

35. Having decided that the claimant may potentially establish a thread of treatment that amounts to a continuing state of affairs, I will specifically deal with the periods when there is a substantial gap of time between the allegations. These are the periods from 2013 to 2017 and from 1 December 2018 to January 2020. I decided that it was reasonably arguable that the gaps did not break the continuing state of affairs for the reasons set out below.

2013-2017

36. From October 2013 to 2017 the claimant alleges that he should have been promoted to grade 3; he says he first raised this as early as October 2013. He raised it again in July 2017 (APoC/6). Counsel for the claimant submitted that the failure to promote in 2013 was not a one off act because the promotion was a matter of discretion for managers to decide. The failure to promote was therefore a continuing state of affairs between 2013 to 2017. I accept that this is a fact sensitive issue which should be considered at the final hearing when all the evidence can be heard.
37. Although the claimant was promoted in March 2019, the delay in promoting him is potentially linked to the ongoing thread of treatment comprising the delay in offering a permanent contract, the probation period and the work assigned to him, including being assigned to APU 2 in January 2020.

2018-2020

38. From December 2018 to January 2020 there was period when the claimant says he was 'taken under the wing' of a particular manager, Mr Wyatt, and no fresh allegations of discrimination were made (APoC/27).
39. In deciding that it was arguable that the gap did not break continuity I took into account the underlying issue of the extended probation period. This was an issue for all of the time the claimant worked under Mr Wyatt, apart from the final month (APoC/25-27). The failure to confirm the successful completion of the probation period for the permanent contract could potentially be linked to moving the claimant to APU 2 in January 2020; the claimant had been told that he should go on there for six months in return for being considered for a permanent contract on 11 July 2018 (APoC/13). There was also an outstanding grievance from 23 March 2018 to 15 May 2021 which related to the time taken to deal with his previous grievances about his

treatment (APoC/14). These are all matters relating to his role and treatment by the respondent.

Disability

40. I accept the respondent’s argument that the discrimination prior to 2020 is the context and not the link between pre 2020 events and post 2020 events. However all the disability complaints relate to events post 2020 and so I do not need to find a link with events prior to 2020.

Continuing state of affairs

41. I therefore find that the claimant is entitled to pursue his pre 2020 claims beyond this preliminary stage. The burden will be on him to prove a continuing state of affairs. If he does not succeed it will be open to him to argue that it would be just and equitable to extend time.

Just and Equitable extension

42. The Tribunal will consider the length and reason for the delay and the prejudice to both parties. The respondent accepts that the claimant had a disability from February 2018. It is open to the claimant to seek to persuade the Tribunal that his mental health prevented him from bringing proceedings earlier. It is not possible to decide that the claimant has no reasonable prospects in succeeding in that argument without hearing evidence from the claimant.

43. For those reasons I find that the question of whether there was a continuing act and whether it was just and equitable to extend time should be decided at the final hearing and the respondent’s application is refused.

Employment Judge S. Matthews

Date 29 September 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
13 October 2023

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FOR EMPLOYMENT TRIBUNALS