THE EMPLOYMENT TRIBUNALS

Claimant **Mrs G Baglow**

Respondent **Nice Systems Technologies UK Limited**

HELD AT: **London Central**

ON: **23 October 2017**
24 October 2017 Chambers

Employment Judge: Mr J Tayler

Appearances

For Claimant: Mr L Varnam, Counsel

For Respondent: Mr J Crozier, Counsel

JUDGMENT

1. The pension contribution claim is struck out.

2. Permission to amend the claim to add the autoenrollment claim is refused.

3. The salary review, personal contribution and salary sacrifice claims have little reasonable prospect of success. The Claimant is Ordered to pay a deposit of £1,000 as a condition of being permitted to continue to advance the salary review claim; £500 as a condition of being permitted to continue to advance the personal contribution claim and £500 as a condition of being permitted to continue to advance the salary sacrifice claim. The payments are to be made not later than 14 days from the date this Order is sent if the claims are to be pursued.

REASONS

1. Between 2001 and 2003 the Claimant worked as Director of Strategic Marketing at Searchspace Limited, a predecessor company to the Respondent.

2. The Claimant commenced a period of ill-health related absence in 2003.

3. The Respondent provided permanent health insurance ('PHI') via a Group Income Protection policy ("the Scheme") held with Friends Provident [p.70].

4. From April 2003, the Claimant was determined to be unfit to return to work and became entitled to receive PHI benefits. The Claimant remains off work to date. It is not currently anticipated that the Claimant will return to work. The Respondent accepts that at all relevant times the Claimant has been a disabled person for the purposes of s.6 of the Equality Act 2010.

5. Under the Scheme, Friends Provident pay the Respondent a sum equivalent to 75% of the Claimant's pay as of the date of the commencement of her absence. It is paid monthly to the Respondent, and then paid by the Respondent to the Claimant, subject to relevant deductions for tax and national insurance.

6. Because the Claimant's entitlement under the Scheme is contingent upon the Claimant remaining in employment the Claimant's employment has not been terminated.

7. The Claimant has brought three previous Employment Tribunal claims about her entitlements, in addition to receiving the PHI payments, as a result of remaining in the Respondent's employment. A fifth claim was lodged on 14 September 2017. Mr Varnam, for the Claimant, stated that the matters raised in the fifth claim are not relevant to the issues to be determined at this Preliminary Hearing; including any argument about conduct continuing over a period for the purposes of limitation.

8. The Claimant submitted this claim to the Employment Tribunal on 6 January 2017. In this claim the Claimant alleges that she has been subject to disability discrimination contrary to the Equality Act 2010 ("EQA") in the way the Respondent affords her access to benefits (s39(2)(b) EQA), by being subject to other detriment (s39(2)(c) EQA) and through a failure to make reasonable adjustments (s29(5) EQA). The Claimant alleges that she was subject to treatment contrary to ss.13 (direct discrimination), 15 (discrimination because of something arising in consequence of disability – the something being her absence from work), 19 (indirect discrimination) and 20 (reasonable adjustments) EQA related to:

    8.1 The Respondent not undertaking annual salary reviews and determining any increase in her salary ("the salary review claim")

8.2 The Respondent not making employer's pension contributions since a contributions waiver agreement has replaced the employers' and employee's pension contributions ("the pension contribution claim")

9. By an application dated 13 March 2017 the Claimant sought permission to amend her Claim Form by addition of three further claims of disability discrimination contrary to ss.13, 15, 19 and 20 EQA related to:

9.1 The Respondent refusing to permit the Claimant to make personal contributions to the existing Aviva pension scheme ("the personal contribution claim"). The Respondent consents to this amendment.

9.2 The Respondent refusing to permit the Claimant to make salary sacrifice contributions to the Aviva or Aegon pension schemes ("the salary sacrifice claim"). The Respondent consents to this amendment.

9.3 The Respondent refusing to enrol the Claimant in the Respondent's new pension scheme (the qualifying scheme for the purposes of auto-enrolment pursuant to the Pensions Act 2008) for which the stating date was 1.4.14 ("the autoenrollment claim"). The Respondent does not consent to this amendment.

10. The matter was considered at a Preliminary Hearing for Case Management before me on 19 April 2017. I fixed this Preliminary Hearing to consider:

10.1 Whether the claim should be amended to add the complaint that the Respondent does not consent to

10.2 The dates on which the events occurred in respect of which the Claimant complains

10.3 Whether the events involved acts or omissions

10.4 Whether any claim in respect of an event should be struck out as having no reasonable prospect of success or subject to a deposit order as having little reasonable prospect of success.

10.5 Whether the events are occurred within the primary 3-month time limit (amended so far as relevant to take account of ACAS early conciliation)

10.6 Whether it would be just and equitable to apply a longer time limit.

10.7 Do the Claimant's discrimination claims require the Employment Tribunal to construe the Claimant's contract in order to determine her claims?

10.8 If they do, does this mean the Tribunal has no jurisdiction to determine her claim on the basis that, under Regulation 7 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the Tribunal

only has jurisdiction to determine contractual matters after the termination of an employee's employment?

11. The Respondent did not pursue the final two points in the light of the decision of the EAT in **Weatherilt v Cathay Pacific Airways Ltd** UKEAT/0333/16/RN

12. The Claimant gave evidence.

13. The Respondents called Leo Ross, Vice President Human Resources, EMEA.

14. The witnesses gave evidence from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

15. I was provided with three bundles of documents. References to page numbers in this Judgment are to the page number in the agreed bundles: B = Core Bundle; A = Autoenrollment Bundle; C = Claimants Bundle.

16. On 2 January 2001, the Claimant commenced employment with Searchspace Limited, a company that creates and licenses software; a predecessor of the Respondent. The Claimant was employed as Director of Strategic Marketing. The Claimant was provided with PHI insurance via a Group Income Protection policy ("the Scheme") the Respondent held with Friends Provident.

17. The Claimant's contract of employment included the following terms:

> "1.1 Your employment with the Company will commence on TBA and will continue unless and until terminated by either party giving to the other not less than three (3) months' notice or unless terminated in accordance with paragraph covering "Termination" of this letter.
>
> 2.2 You shall perform such duties and exercise such powers as are consistent with your employment or as otherwise may be requested of you by your direct supervisor or a director of the Company
>
> 5.1 Your initial gross salary shall be £78,000 per annum and shall be subject to a review annually. The said salary shall be payable by equal monthly instalments in arrears ….
>
> 6.1 The Company will provide you with the private health plan ("the Plan") as the Board may from time to time determine for your benefit, subject to the rules of the Plan in time to time in force.
>
> 7.1 The Company agrees to contribute, on a monthly basis, 5% of your gross monthly salary to your personal pension plan …
>
> 10.1 If you are prevented by injury or sickness from fully and properly performing your duties you shall continue to be entitled to receive your full salary up to 13 weeks …"

18. In late December 2002, the Claimant was diagnosed with breast cancer and stopped work in January 2003, just before surgery.

19. From April 2003, the Claimant was determined to be unfit to return to work and became entitled to receive PHI benefits. Under the Scheme, Friends Provident pay the Respondent a sum equivalent to 75% of the Claimant's salary as of the date of the commencement of her absence on a monthly basis, which is then paid by the Respondent to the Claimant, subject to relevant deductions for tax and national insurance.

20. Since going off sick the Claimant's salary has not been reviewed and has not increased.

21. From 2005, pension contributions were paid under the waiver policy. The Respondent ceased making 5% pension contributions to Aviva scheme and was repaid contributions from 2005.

22. In December 2006 Searchspace Limited changes its name to Fortent Limited.

23. The Claimant first sought a salary review in November 2006 (see B80). In September 2007, the Claimant again raised the issue of salary review (B77-66). On 26 January 2009, the Claimant raised a grievance relating to failure to grant salary increases and the consequences this had on her PHI benefits (B79).

24. On 31 August 2009 Tiltgrange Limited (together with (i) its wholly owned subsidiary Searchspace Group Limited ("SGL"); and (ii) Fortent Limited, a wholly owned subsidiary of SGL) was acquired by Nice CTI Systems UK Limited (now NICE Systems UK Limited) by way of a share purchase. Employees of Fortent, such as the Claimant, became employees of the NICE Group.

25. On 7 September 2009 Tiltgrange Limited's name was changed to Fortent Holdings UK Limited; then the Claimant's employer.

26. In March 2010, a letter was prepared in which consideration was given to reviewing the Claimant's salary but granting no increase. The letter was not sent. I conclude that a finalised review was not undertaken.

27. On 23 November 2012, the Respondent sent an email to the Claimant noting the waiver of pension contributions.

28. Since early 2013 the Claimant's sole contact within the Respondent has been Leo Ross, VP HR EMEA. None of the current management were in place at the time that the Claimant went off sick in 2003 and the HR managers she dealt with prior to 2013, save for one HR Business Partner, Mairead Buckley, are no longer employed. The Respondent has limited records in respect of the period prior to 2009 When the NICE Group took over.

29. In February 2013, the Claimant commenced her first Employment Tribunal proceedings raising a complaint about the termination of life assurance cover.

30. On 27 February 2013, the Claimant sent an email in which she challenged whether she had been provided with an up-to-date staff Handbook and noting provision for salary review in the version that she had been provided with.

31. On 2 April 2013, the Respondent's name was changed to Nice Systems Technologies UK Limited.

32. On 15 April 2013 Mr Ross sent an email to the Claimant stating he did not believe that the Respondent was obliged to increase to her salary as there was no general practice of providing RPI increases and that increases were based on merit and contribution to the business. He contended that the payments the Claimant was receiving under the Scheme were fixed at two thirds of annual basic salary at the time that absence commenced [B131].

33. In August 2013 Mr Ross sent the Claimant a summary of benefits [B146] which included mention of making additional pension contributions by salary sacrifice.

34. On 22 August 2013, the Claimant commenced her second Employment Tribunal claim seeking payment of holiday pay.

35. The Aviva pension scheme is not a qualifying pension for the purposes of autoenrollment pursuant to Pensions Act 2008. The staging date for autoenrollment for the Respondent was 1 April 2014. The Respondent has a new pension scheme with Aegon that does qualify. The Respondent was keen to avoid the Claimant transferring to the Aegon to avoid loss of the contribution waiver relates only to the Aviva pension. Losing the contribution waiver would be detrimental to both the Claimant and the Respondent.

36. On 5 June 2015, the Claimant sent an email to Mr Ross contending that the Respondent was required under her contract to make pension contributions 5%.

37. On 12 April 2016, the Claimant commenced her third Employment Tribunal proceedings claiming regulations 13A holiday pay and access to employee information.

38. On 28 July 2016, the Claimant received access to the Respondent's intranet.

39. On 30 August 2016, the Claimant sent an email to the Respondent's solicitors asking them to include a page from the intranet dealing with the Respondents pension, including autoenrollment.

40. On 24 October 2016, the Claimant raised a grievance complaining about the Respondent's alleged failure to conduct salary reviews and grant her salary increases.

41. On 25 January 2017, the Claimant sent an email complaining that she had not been auto-enrolled into a qualifying pension [C105]. On 7 February 2017 Mr Ross replied that their advice at the time had been that the Claimant was not eligible to auto enrolled [C99].

42. On 19 February 2017, the Claimant sent an email to the Respondent stating that she had become aware of the possibility of salary sacrifice and would like to be able to be able to make salary sacrifice to the Aviva pension and, once enrolled, the Aegon schemes [A31].

43. On 23 February 2017, the Claimant wrote by email to the Respondent stating that she wished to make salary sacrifice of £300 per month to her Aviva pension but if this could not be done she stated "I will simply have £300 per month from my salary into it". The parties agreed that there is a small financial benefit where salary sacrifice is operated by the employer in relation to employer's National Insurance contributions. On 23 February 2017, Mr Ross replied stating that the Respondent was looking into the requests that the Claimant had made. He stated that the Respondent would review whether it was obliged to auto-enrol the Claimant into the Aegon scheme and whether the Claimant could make personal contributions into the scheme. He stated that the Respondent did not offer employees the opportunity to make payments into legacy schemes such as the Aviva scheme. Despite this he made enquiries as to whether such payments could be made in the case of the Claimant.

44. On 21 March 2017 Mr Ross wrote to the Claimant stating that as a result of further enquiries with the pension regulator it appeared that the Claimant might be able to join the Aegon Scheme as an Entitled Worker under the auto enrolment provisions. He also stated that as a matter of principle they were prepared to agree with personal contributions being made direct to the Aviva pension scheme. He stated that the issue had been raised with Aviva and they were awaiting a response [A37].

45. On 6 April 2017, Aviva wrote to the Respondent stating that they could accept additional regular contributions into the pension [C108].

46. On 7 June 2017, the Respondent wrote to the Claimant stating that following correspondence with the pension regulator it had been determined that the Claimant was entitled to be auto enrolled and that they proposed to do so on the basis of a 1% employer's contribution and a 1% employees contribution with effect from 23 June 2017. They stated that they would backdate the contributions to 1 April 2014 [A54].

47. On 30 June 2017, the Respondent wrote to the Claimant stating although they had found it difficult to get confirmation from HMRC or Aegon as to whether it was possible to make salary sacrifice of PHI payments they had the agreement of Friends Provident to forego an amount of the payment made under the scheme each month and suggested that this could be paid into the Aegon policy [A59]. He noted that it could not be guaranteed that HMRC would accept this as a valid salary sacrifice arrangement. He suggested that any salary sacrifice should be made into the Aegon scheme rather that the Aviva scheme.

48. Applications of strike out should only be made in the clearest of cases. When seeking to strike out on the basis that the claim has no reasonable prospect of success Lady Smith emphasised in **Balls v Downham Market High School & College** [2011] IRLR 217 at para 6:

> ". . . 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 prospect 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 the matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

49. The importance of determining discrimination claims on the merits was emphasised by Lord Steyn in **Anyanwu v South Bank Students' Union** [2001] IRLR 305, at para 24.

50. Although the threshold for strike out is high it does not mean that it is impermissible in discrimination claims. If a claim does not have a realistic, as opposed to merely fanciful, prospect of success it should be struck out: **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603, CA at para. 26, per Maurice

51. A claim should not be permitted to proceed merely on the basis that "something might turn up" at trial: **Patel v Lloyds Pharmacy Ltd** [2013] UKEAT / 0418/12.

52. The scope for making a deposit order is wider. That is obvious on the wording of the regulation and was emphasised by Elias P, as he then was, in **Van Rensburg v The Royal Borough of Kingston Upon Thames** [2007] UKEAT /0096/07, para. 27:

> "...the test of little prospect of success...is plainly not as rigorous as the test that the claim has no reasonable prospect of success... It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

53. The effect of making a deposit order is two-fold. In order to pursue the claim, the Claimant must pay the deposit. That gives the Claimant cause to consider the merits of the claim. More importantly, the effect of making a deposit order is that the normal costs regime in the Tribunal is changed to something approaching costs following the event in respect of the argument or allegation to which the deposit order is applied. Failure in the argument or allegation for substantially the reason set out in the deposit order shall have the consequence that advancing it was unreasonable unless the contrary is shown: rule 39(5)(a). If advancing the argument was unreasonable the threshold for making an award of costs will have

been passed. Where a Claimant continues with an argument or allegation that is subject of a deposit order the Claimant is at risk of cost that may greatly exceed the amount of the deposit.

54. In considering the application to amend I had regard to **Selkent Bus Co v Moore** [1996] ICR 836 at 843F. Mummery J as he then was, stated that whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Mummery J noted a number of relevant factors; including, the nature of the amendment and the applicability of any time limits and the timing and manner of the application. Those are examples of factors that should be taken into account. Essentially, the approach in Selkent is at one with the overriding objective: the focus is on the balance of hardship in allowing or refusing the amendment, which is a key component of dealing with cases fairly and justly. This is also the approach set out in the Presidential Guidance.

55. The time limit in which complaints of discrimination should be brought is set out in Section 123 of the EqA:

> "(1) … proceedings on a complaint … 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."

56. The time limit has to be adjusted to take account of pre-claim conciliation.

57. A distinction is to drawn between conduct extending over a period and a one off act that has continuing consequences: **Barclays Bank v Kapur** [1991] 2 A355, [1989] ICR 753; **Owusu v London Fire and Civil Defence Authority** [1995] ICR 574 c.f. **Sougrin v Haringey Health Authority** [1992] 650.

58. It is clear from the Judgment of the House of Lords in **Kapur** that exclusion of entitlement to a benefit provided to other employees is a paradigm of an act extending over a period; even if a decision was taken at the outset of the period that the employees would be so excluded. The fact that exclusion from entitlement to a benefit might be argued to be an omission does not alter this position. Lord Griffiths stated at 366H to 367C:

> "Barclays submit that the act of discrimination of which the applicants complain is to be classified as a deliberate omission within the meaning of subsection (7)(c) and therefore done when Barclays decided not to credit them with their previous service in East Africa, a decision taken at the commencement of their employment in the United Kingdom, and Barclays rely on section 78(1) which provides that "act" includes a deliberate omission. The applicants rely on subsection (7)(b) and say that the term upon which they are credited with a pension is to be classified as an act extending over a period, namely, the length of their employment, and therefore to be treated as done at the end of the period of employment for the purposes of section 54(1). If this is the right view it is conceded that these applications are not time-barred.
>
> It seems to me to be a very artificial way of looking at the facts of these cases to say that they constituted "deliberate omissions." The complaint here is that Barclays did not employ the applicants on as favourable terms as their European comparators. Whenever terms of employment are less favourable it is possible to dress up the complaint as a deliberate omission by saying that the employer "deliberately omitted" to include the more favourable term in the contract of employment. But that "deliberate omission" was not intended to cover such a situation is, I think, made clear by the wording of section 68(7)(a)"

59. There is a case law that is not entirely consistent on the approach to be taken to time limits in reasonable adjustment cases. In **Humphries v Chevler Packaging Ltd** UKEAT/0224/06, a case brought under the Disability Discrimination Act, it was held that a failure to make a reasonable adjustment is an omission and, therefore, could not be a continuing act.

60. In **Matuszowicz v Kingston-upon-Hull City Council** [2009] ICR 1170 the Court of Appeal followed Humphries, accepting that a failure to make a reasonable adjustment is an omission rather than an act. Lord Justice Sedley concluded that if there is a failure to make an adjustment there must come a time when the employee concludes that were the adjustment to be made it should have been made by that point, from which point the time limit will run. This prevents a situation of neglect from dragging on indefinitely.

61. **Matuszowicz** was followed by the EAT in **Mears Group plc v Mr R Vassall** UKEAT/0101/13/LA. However, in a more recent decision of Mr Justice Langstaff, **Secretary of State for Work and Pensions (Job Centre Plus) v Jamil** UKEAT/0097/13/BA, the EAT considered that a failure to make an adjustment was conduct extending over a period for the purpose of the EqA time limit. Subsequently, Mr Justice Langstaff appeared to follow **Matuszowicz** in **Viridor Waste v Edge** UKEAT/0393/14/DM, although he suggested the possibility that the change to term "conduct extending over a period" in the EqA might be apt to

include the possibility of a failure to make an adjustment being conduct extending over a period.

62. Generally, at a Preliminary Hearing where the tribunal is considering the possibility of there being conduct continuing over a period, the Employment Tribunal will consider whether the Claimant has established a prima facie case that there was a continuing act: **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530; **Lyfar v Brighton & Sussex University Hospitals Trust** [2006] EWCA Civ 1548). In effect, this is by consideration of whether the claim should be struck out on the basis that there is no reasonable prospect of the Claimant establishing a conduct continuing over a period. Similarly, a deposit order might be made if there is little reasonable prospect of such conduct being established.

63. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. Extension of time should be the exception, although the Tribunal has a broad discretion to extend time when there is a good reason for so doing: **Robertson v Bexley Community Centre (t/a Leisure Link)** [2003] IRLR 434. The fact that an employee is pursuing an internal grievance or other procedures is a factor that may be taken into account in determining whether time should be extended: **Apelogun-Gabriels v Lambeth London** BC [2002] ICR 713.

64. Each of the five claims that the Claimant seeks to bring are put as complaints of direct discrimination, discrimination because of something arising in consequence of disability, indirect discrimination and failure to make reasonable adjustments. It is a feature of disability discrimination claims that the same facts could, on occasion, be analysed as different types of discrimination. In considering these applications I have focused on what I consider to be the most apt analysis; disability because of something arising in consequence of disability; the Claimant's absence from work. The question of whether it is correct that the claims be best characterised as claims of discrimination because of something arising in consequence of disability; or under any of the other heads advanced; is a matter I leave to any final hearing. At this stage I will consider whether any of the five claims, on what I consider to be the Claimant's best case, should be permitted to proceed and/or be subject of a deposit order.

65. I deal first with the salary review claim. The Claimant's contract provided for an annual salary review. It is accepted that such salary reviews were carried out for employees at work. While I consider it is questionable whether the payments that are made to the Claimant should be characterised as salary, that does not necessarily preclude an annual salary review taking place. It was suggested by the Respondent that they had from shortly after the commencement of the Claimant's absence, in 2003, determined that no salary reviews would take place. There is no direct evidence to support that contention. Indeed, the evidence suggests that some thought was given to the possibility of a salary review; at least in 2010. Even if a decision was taken in or about 2003 that no salary reviews would be undertaken, I consider that it is properly arguable that this is an example of conduct extending over a period. On each anniversary date, the Respondent could decide to undertake a salary review. Each year the Claimant did not receive such a review while her colleagues at work did. The situation is analogous to an on a one-off decision as a result of which employee is thereafter

excluded from a benefit provided to employees at work. That is an example of conduct extending over a period described in **Kapur**. I also consider it is arguable that even though the Claimant is not in receipt of her normal contractual salary there could be a detriment as a result of the review not being undertaken, because it could affect matters such as holiday pay and pension contributions. However, I consider there is little prospect of the Claimant establishing that had any reviews been undertaken a decision would have been taken to increase her contractual salary in circumstances where she was absent from work, had not contributed to the company's performance and was being remunerated by the benefit paid through the PHI scheme, rather than normal contractual salary. While I do consider it is just arguable that such increases might have been granted and so do not strike out the, I consider that the Claimant has little prospect of establishing that any such salary increases would have been decided upon and, therefore, that she has suffered any loss.

66. The Claimant was asked to provide any evidence of her means by letter dated 25 October 2017. The Claimant replied stating that she was not alleging that she did not have the means to pay a deposit order. She did not copy the letter to the Respondent on the basis that she was not alleging that her means prevented the making of a deposit order. I do not consider that was a sufficient basis not to copy the letter to the Respondent and direct that the Claimant should in future copy all correspondence to the Respondent. I consider it appropriate to make a deposit order of £1,000 in respect of this allegation as there has been no suggestion that the Claimant does not have the means to pay.

67. I next consider the pension contribution claim. I consider that this is a paradigm example of conduct extending over a period, even if there was a decision at the outset that contributions should not be made. However, I consider that the claim has no reasonable prospect of success. The Respondent has not made contributions into the pension scheme because provision is made for replacement of both the Claimant's and Respondent's contributions under an insurance type arrangement, in circumstances of long-term ill health. It is the nature of such insurance arrangements that the payment will only be made to replace the contributions if those contributions are not being made by the employer or employee. I consider it is fanciful to suggest that should the Respondent start making contributions they would still be paid under the contribution replacement scheme. The Claimant would obtain no advantage by the Respondent making such contributions. This is not a claim that should be permitted to proceed.

68. In respect of the personal contribution and salary sacrifice claims I consider that they are potentially examples of conduct extending over a period. The alleged refusal is stated in the skeleton argument produced by Mr Varnam to have been made in Mr Ross's letter of 23 February 2017. Although Mr Ross stated that the Respondent did not offer employees the opportunity to make payments into legacy schemes, I consider that was a general comment. At the outset of the letter he specifically stated that he was looking into the requests that the Claimant had be made. In his subsequent letter of 21 March 2017 he made it clear that the Respondent was seeking to find a mechanism whereby the Claimant could make such contributions as she wished, if possible by way of salary sacrifice. Although it is just arguable that there was a refusal in the letter of 23 February 2013, I consider that the Claimant has little prospect of establishing that she has an been subject to a refusal to make either personal pension contributions or contributions

by salary sacrifice. Even if the claim was pleased as one of delay in permitting to make such payments I see no realistic prospect of this being considered to be direct disability discrimination and consider it is highly likely to be justified by the requirement for the Respondent to ensure that it is acting within the terms of the relevant pension schemes and statutory provisions. I ordered that the Claimant pay a deposit in order to be able to continue with these two claims. As they are factually interrelated, I ordered that she pay a deposit in the sum of £500 in respect of each claim.

69. The Claimant required permission to amend to bring the auto enrolment claim. The principal point made by Mr Crozier in his skeleton is that the claim would be out of time. I do not accept that is the case. Again, I consider that not allowing auto enrolment would be not providing the Claimant with the benefit provided to other employees which is a paradigms example of conduct extending over a period. However, the position is that auto enrolment has now been permitted and contributions have been backdated to the staging date of 1 April 2014. Any claim is limited to any loss that might occur as a result the delay in making those payments. I consider that with proper researches the Claimant should have been aware of auto enrolment by the staging date of 1 April 2014 or, at the latest, on obtaining access to the Respondents intranet in August 2016. This is a claim that could and should have been brought in the original Claim Form. It now adds relatively little to the Claimant's claim. I also consider this is a claim that has little reasonable prospects of success. It is highly likely that the Respondent will establish that the Claimant was not auto-enrolled into the scheme because the Respondent genuinely believed, after making reasonable enquiries, that this was not possible under the relevant legislation as she was in receipt of PHI benefits. There is no reasonable prospect of this being found to be direct discrimination and it is highly likely that such an honest mistake would provide justification for the Claimant's treatment that arose from her absence from work and receipt of PHI benefits that were a consequence of her absence from work. Adding the claim at this stage would involve further cost to the Respondent in pleading to it by amendment (rather than pleading a defence all at one time) that is out of proportion to the additional value that would be added to the Claimant's claim by permitting this amendment to add a claim that has little reasonable prospect of success. It will also take up additional tribunal time which is limited and has to be apportioned between the many parties seeking determination of claims. I do not see any good reason why the claim was not brought in the original Claim Form and I refuse the amendment

Employment Judge Tayler
15 November 2017

NOTE ACCOMPANYING DEPOSIT ORDER

Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that/those allegation(s) or argument(s), a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the allegation(s) or argument(s) to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the allegation(s) or argument(s) to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation(s) or argument(s) against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 916 5015. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

To: HMCTS

Finance Support Centre

Spur J, Government Buildings

Flowers Hill

Brislington

Bristol

BS4 5JJ

Case Number _____

Name of party _____

I enclose a cheque/postal order (delete as appropriate) for £_____

Please write the Case Number on the back of the cheque or postal order