



# EMPLOYMENT TRIBUNALS

## Claimants

## Respondent

1. Mr D Burke
2. Ms E Hodzik

v The Embassy of the United Arab Emirates

**Heard at:** London Central

**On:** 19 November 2021

**Before:** Employment Judge Lewis

## Representation

For the 1<sup>st</sup> claimant: Mr P Ward, Counsel  
For the 2<sup>nd</sup> claimant: Representing herself

For the respondent: Mr L Davies, Solicitor

# PRELIMINARY HEARING JUDGMENT

## RESERVED JUDGMENT

1. Mr Burke can show a prima facie / reasonably arguable basis for the contention that the following complaints of racial harassment were so linked as to be continuing acts: (1) that he was routinely called 'Jamaican Mafia' by Mr Berkane and (2) his redundancy dismissal. These claims can therefore proceed to the final hearing where it will be decided whether they do in fact form part of such a course of continuing acts and if not, whether it is just and equitable to allow them as late claims.
2. Mr Burke cannot show a prima facie/ reasonably arguable case that the promotion decision (whether direct race discrimination or racial harassment) was part of a continuing act which is in time. Further, it is not just and equitable to allow this to proceed as a late claim.
3. Mr Burke's claim that the promotion decision was direct race discrimination is in any event dismissed on withdrawal.

4. Ms Hodzik can show a *pri ma facie* / reasonably arguable case that the following claims for harassment and discrimination are in time: those listed at paragraphs 6.1.17 – 6.1.24, 6.3, 6.4, 7 and 8 of the list of issues at page 233 of the preliminary hearing bundle). These claims can therefore proceed to the final hearing where it will be decided whether they do in fact form part of such a course of continuing acts and if not, whether it is just and equitable to allow them as late claims.
5. Ms Hodzik cannot show a *prima facie* / reasonably arguable case that her claims for harassment and discrimination listed at paragraphs 6.1.1 – 6.1.16 of the list of issues are part of a continuing act which is in time. Further, it is not just and equitable to allow these to proceed as late claims.
6. A case management preliminary hearing will be arranged to discuss preparation for the full hearing of the remaining claims.

## **REASONS**

### **The claims and issues**

1. This preliminary hearing was conducted on CVP remote video platform.
2. The preliminary hearing was fixed to decide
  - a. Whether the claimants can show a *prima facie* / reasonably arguable basis for the contention that their various complaints are so linked as to be continuing acts, so that they can proceed to a final hearing where the question of whether they do form part of such a course of continuing acts will be determined
  - b. If the claimants cannot show such a *prima facie* case, so that the acts are out of time, whether it is just and equitable to extend time for them.

### **Procedure**

3. Until this week, Mr Ward represented both claimants. Ms Hodzik is now representing herself. The respondent was informed of this at about 4 pm on 15 November 2021.
4. It was agreed that I only needed to look at the 'agreed trial bundle' and specific documents which Ms Hodzik selected from the 'unagreed' bundle. Mr Davies scanned and circulated these to everyone on her behalf. Ms Hodzik was also allowed to refer to additional documents in the unagreed bundle and to show the original Whats App photographs on her telephone. I

accepted that, when she read out a document from the unagreed bundle, she was reading it accurately.

5. Mr Burke's witness statement was in the trial bundle. Ms Hodzik did not want to use her original witness statement in the trial bundle but to use a more detailed witness statement which she only provided to the respondent at 2.43 pm the day before this hearing. It was agreed that I should only look at the more recent witness statement. It was also agreed that, since Mr Davies had not had time to speak in detail to his clients about the new witness statement, any matter in there which he did not challenge when cross-examining Ms Hodzik would not be taken as accepted by the respondent. Mr Ward further accepted that the same should apply to any matter not challenged in Mr Burke's witness statement.

### **The claims: introduction**

6. On 30 June 2020, the respondent made 15 employees redundant without prior consultation. The respondent says that the reason for this was the need to make immediate budget cuts because of the recessionary impact of the Covid-19 pandemic. The redundancies included Mr Burke and Ms Hodzik.
7. Mr Burke presented his tribunal claim form on 29 September 2020. He notified ACAS under the ACAS early conciliation scheme on 27 July 2020 and ACAS issued its certificate on 27 August 2020.
8. Ms Hodzik presented her tribunal claim form on 30 October 2020. She notified ACAS under the ACAS early conciliation scheme on 20 August 2020 and ACAS issued its certificate on 20 September 2020.
9. Certain claims were dismissed on withdrawal on 17 September 2021. The remaining claims as at the start of this preliminary hearing were as follows.
10. For Mr Burke: direct race discrimination, race harassment and failure to pay accrued but untaken holiday pay on termination. For Ms Hodzik, failure to provide a statement of employment particulars, direct sex discrimination, sex harassment, direct race discrimination, race harassment and failure to pay accrued but untaken holiday pay on termination. There is a dispute regarding whether the pregnancy / maternity discrimination claim had been withdrawn and dismissed, but for the purposes only of the hearing today, the respondent was content to assume that it remained as a claim.
11. Subject to that point, Mr Davies agreed the list of issues produced by Mr Ward at a time when he was representing both claimants and which was in the trial bundle. This usefully itemised the alleged discriminatory actions and dates. Both Mr Burke and Mr Hodzik agreed in their evidence that the list of issues set out their claims.

12. Ms Hodzik's latest witness statement set out far more detail of her claims, and provided supporting evidence by reference to incidents which she said occurred between the dates of the incidents in her claim form.

**Mr Burke's claims and facts relevant to the Equality Act 2010 time-limits**

13. Mr Burke's Equality Act claims were:
  - a. Not considering him for promotion / not promoting him on 1 April 2016 because of his race (black/African-Caribbean) and promoting Mr Berkane instead. This was alleged to be direct race discrimination or race harassment.
  - b. Being routinely called 'Jamaican Mafia' by Mr Berkane by way of greeting. This was alleged to be racial harassment. Mr Burke could not specify a date when this started except to say that it was after Mr Berkane's promotion, which gave Mr Berkane the confidence to speak like that. By way of background evidence, Mr Burke said that Mr Berkane would also make other racist remarks and so-called jokes, and that he was emboldened by other drivers laughing. Mr Burke said that Mr Berkane would come up with the Jamaican Mafia greeting routinely right up to about a month before he was made redundant. When pressed, he said that on average it would be about once a fortnight. Mr Davies points out that there is no corroborative evidence, whether in writing or through a witness, that such comments were made.
  - c. Redundancy dismissal on 30 June 2020. This was alleged to be racial harassment. The respondent says that Mr El Mazmi took the decision. Mr Burke says Mr Berkane would have influenced the decision to choose him and was effectively responsible for it.
14. Mr Burke said that he was furious when he first heard the Jamaica Mafia comment, but over time, he became thick skinned and kept himself to himself. He did not want to take any legal case because he loved his job and the Embassy had been very good to him when he started at a difficult time of his life. In any event, he understood the Embassy was not governed by UK laws. He did not find out about time-limits until he took advice after he had been made redundant.
15. When questioned by Mr Davies, Mr Burke said the promotion decision was taken by Mr Alharbi. He said that Mr Alharbi did not act in a racist way towards him at any time and did not racially discriminate against him in the promotion decision. Nevertheless, he still felt the decision not to promote him might have been racist because Mr Berkane is an Algerian of lighter coloured skin. Mr Davies asked if he was therefore withdrawing his promotion claim. I suggested that Mr Burke discuss this with Mr Ward when he had completed his evidence.

16. Later in the preliminary hearing, having discussed the matter with Mr Burke, Mr Ward said that Mr Burke was withdrawing his claim that the failure to promote was direct race discrimination. I said that I assumed he also intended therefore to withdraw the claim that it was racial harassment. Mr Ward said not. The reason he gave for withdrawing the claim for direct race discrimination was simply that it was a single action and considerably out of time. By consent, the claim that failure to promote / consider for promotion was direct race discrimination was then dismissed on withdrawal.

### **My conclusion on time-limits in respect of Mr Burke's claims**

#### Continuing discrimination

17. If Mr Burke's evidence is accepted, the tribunal at the full merits hearing will potentially find that he was subjected to race harassment by being referred to as Jamaican Mafia from soon after Mr Berkane's promotion and that this continued until the end of his employment. If the tribunal makes this finding, it is likely it will consider this repetition of the same words by the same person to be a continuing discriminatory state of affairs. The termination date was 30 June 2020, and Mr Berkane notified ACAS under the early conciliation procedure on 27 July 2020. I therefore leave this to be decided at the full merits hearing.
18. Mr Burke has not satisfied me that it is reasonably arguable that the promotion decision was part of a discriminatory state of affairs, whether it is considered as direct race discrimination or as race harassment. The claim is made in respect of a vacancy which arose in April 2016, to which Mr Berkane was promoted without any formal recruitment process.
19. The decision was made by Mr Alharbi. Mr Alharbi is not accused of any other form of discrimination or harassment against Mr Burke, whether because of race or indeed because of any other protected characteristic, before or after the promotion decision. Indeed, Mr Burke said that the decision not to promote was also not a racist decision by Mr Alharbi, but he did not suggest anyone else took the decision. He did not put forward any alternative basis for continuing to contend that the promotion decision was nevertheless because of race or related to race other than that he is black and the successful candidate, Mr Berkane, is not.
20. Even if I assumed that the decision not to promote was proved to be race discrimination or race harassment, I do not think it is reasonably arguable that the fact that the person who was promoted instead of Mr Berkane makes racist remarks means the promotion decision by someone else was an act of discrimination extending over a period. Mr Alharbi was not involved in the racist remarks by Mr Berkane or in the redundancy dismissal. I do not think it is reasonably arguable that the decision not to promote was anything other than a separate self-contained action which started and finished in April 2016.

The just and equitable discretion

21. I went on to consider whether it is just and equitable to allow the claim late. I find that it is not. The tribunal claim was presented almost four and a half years after the promotion decision. Mr Alharbi left his position at the Embassy in 2016 or 2017, even if he continued to do some periodic work there. The final hearing will be at least 6 years after the event. Even by the standards of most discrimination cases, that is a very long time ago and it will be very hard for people to remember who took or influenced decisions and why.
22. Mr Burke could have taken legal advice in 2016. Had he done so, he would have found out about time-limits. He decided not to take advice because he did not want to take any legal case. Until Mr Berkane took over, it was his dream job. Even after that, Mr Burke took no advice about the racist remarks because he was grateful to the Embassy for giving him a job at a difficult time in his life.
23. He wants to change his mind now, but I believe the events were too long ago to have a fair hearing. That would be reason enough not to say it is just and equitable to allow the claim. I would add that Mr Burke does not even seem to think that the decision-maker took a racist decision, so Mr Burke does not appear to be losing the chance of bringing a claim which he would win. Mr Burke is not left without any claims. He can still bring his other claims which are for the racist remarks and in regard to the dismissal. He can still refer by way of background evidence to the fact that, according to him, Mr Berkane did not make any racist remarks until he gained confidence by being promoted in this way.

Summary

24. Mr Burke may bring his claims for racial harassment in respect of (1) being routinely called 'Jamaican Mafia' by Mr Berkane and (2) his redundancy dismissal. The tribunal at the final hearing, having heard all the evidence and having decided whether any acts were race discrimination or harassment, will go on to decide whether they are in time, either as part of a continuing discriminatory state of affairs, or by exercising its just and equitable discretion.

**Ms Hodzik's claims and facts relevant to Equality Act 2010 time-limits**

25. Referring to the list of issues, which is in turn based on Ms Hodzik's claim form, the pleaded claims can be grouped as follows in terms of dates. I am only paraphrasing the claims here.
  - a. Harassment by Mr Alharbi in 2012. (6.1.1)

- b. Harassment by Mr Alharbi or a security guard at his instigation in October and November (and one unknown date) 2015. (6.1.2 – 6.1.14)
- c. Harassment by way of a written warning in November 2016, delivered by Mr Al Mazmi and not corrected by the Ambassador (Mr Alamazroui). (6.1.15 – 6.1.16) Ms Hodzik says this was based on a false allegation that she hit diplomat Mr Aljarman on the head and that the latter later told her this was made up at Mr Alharbi's instigation. (Paragraph 31 of the particulars of claim.)
- d. Paying Ms Hodzik less because she is Bosnian, Ms Alqalwani told her that was the reason, but Mr Al Mazmi said he did not care, and forcing her to sign a contract with a salary reduction after she complained in August 2017 (harassment). Paying Ms Hodzik less from August 2017 to date (direct race discrimination) (6.1.17 – 6.1.19; 7.1.1)
- e. 10 / 11 July 2019: Mr Al Mazmi telling Ms Hodzik that she could not use her new job title as events manager and making derogatory comments about her as a woman; at Mr Al Mazmi's instigation issuing a final written warning for not taking the job (harassment) demotion (6.1.20, 6.1.21, 8.1.1) (Ms Hodzik says she reverted to her old duties after the Ambassador's intervention.)
- f. 2 March 2020: someone telling the Ambassador that Ms Hodzik worked in the Bosnian embassy; the Ambassador asking Ms Hodzik why she worked in the Embassy when she was not Arab) (6.1.22; 6.1.23)
- g. Dismissal 30 June 2020 (harassment; direct race discrimination.(6.1.24, 7.1.2) Ms Hodzik says she was told Mr Al Mazmi had specifically preferred to retain a colleague because the latter spoke Arabic.

### **My conclusion on time-limits in respect of Ms Hodzik's claims**

#### Continuing discrimination

- 26. I am not now deciding whether in fact these events formed part of a continuing discriminatory state of affairs, but whether Ms Hodzik has shown that it is reasonably arguable that they did. If so, I would leave it to the tribunal at the full merits hearing to decide the matter finally after hearing all the evidence.
- 27. I think it is reasonably arguable that there was a continuing discriminatory state of affairs encompassing items (a) and (b) above by reason of Mr Alharbi's conduct towards Ms Hodzik. The detail in Ms Hodzik's witness statement provides contextual evidence supporting a reasonable argument that the specific pleaded incidents were linked. It is also reasonably arguable that item (c) also formed part of that discrimination extending over a period in so far as Ms Hodzik will say she was told Mr Alharbi had made the purported victim fabricate the allegation.

28. This is the end of the incidents directly involving Mr Alharbi as set out in Ms Hodzik's particulars of claim. Ms Hodzik's general argument is that she was harassed and treated badly for the remainder of her employment by various people as a result of having rejected Mr Alharbi's advances, and that this therefore constitutes a continuing discriminatory state of affairs.
29. There is at (d) the allegation of a decision to pay the claimant less because she is Bosnian, which was made, or at least confirmed, in August 2017. That is a decision about pay, which is quite different from sexual advances and false disciplinary accusations covered by (a) – (c), and it is based at least in the first instance on race. It is dated 8 months after item (c). Ms Hodzik says it was Mr Al Mazmi (not Mr Alharbi) who forced her to sign a contract with reduced salary after she complained. There is a vague suggestion that Mr Al Mazmi's approach was also a further example of retaliation for the claimant rejecting Mr Alharbi's advances, but this is not clearly put, and the concrete evidence is all about the decision being based on race. In any event, for all the other reasons I have set out, particularly because pay is a different kind of thing, Ms Hodzik has not shown a prima facie case that item (d) formed part of a continuing discriminatory state of affairs with items (a) – (c). It was something separate.
30. The next item set out as a specific claim is item (e). On the one hand, this took place nearly two years after item (d). On the other hand, Ms Hodzik may prove that it is another example of negative treatment by Mr Al Mazmi based on her race or sex. Even with a long gap between specific incidents, it is possible to imagine a situation whereby whenever an issue of pay or promotion might come up, it is blocked or made difficult by Mr Al Mazmi and others because the claimant is seen as an outsider, being Bosnian, or because she is taken less seriously as a woman. I think it is reasonably arguable that this was the environment in which she had to work, and it should be left to the full merits hearing.
31. The question then is whether it is reasonably arguable that such a discriminatory state of affairs continued at least until 21 May 2020 (three months before Ms Hodzik notified ACAS under the early conciliation procedure). I believe that it is. This is not something that I can conclusively decide at a preliminary hearing when I have not heard the full evidence. The claimant says she was told in relation to the redundancy decision that Mr Al Mazmi had specifically preferred to retain a colleague because the latter spoke Arabic. This is potentially a continuation of the alleged decision to pay her less as she was Bosnian, the alleged messing about with her new job title in July 2019 (albeit on that occasion on grounds that she was a woman), and the alleged questions and false rumours apparently spread on 2 March 2020.
32. In summary, Mr Hodzik has satisfied me that it is reasonably arguable that items (e) - (g) above, as pleaded in the claim form, were part of a continuing discriminatory state of affairs.



33. Finally I would like to say something about Ms Hodzik's extended witness statement. I read it carefully. I was concerned that it contained an enormous amount of detail that is simply not in her claim form. In many ways it is a whole additional case. Although I appreciate she had to write the claim form under time pressures, she did have legal advice. There were very obviously large time gaps in her pleaded case, which it would be very surprising if her legal advisers had not pressed her on. I am not suggesting that Ms Hodzik has made up any examples of treatment which she now feels was unfair and discriminatory. But I think it is possible that she is at this point looking back, setting out every single action which she can remember which she felt was unfair or mismanaged, and has convinced herself that such actions, taken by many different people, were because she had rejected Mr Alharbi's advances. These additional incidents were not set out in her claim form, she has not applied to amend, and there does not look like any evidential basis to support the suggestion that they are discrimination. I think it would be very sensible for her to focus her energies on those matters set out in her form and which I have said are in time.

Is it just and equitable to extend time?

34. I will now consider whether to allow Ms Hodzik to bring claims in respect of items (a) – (c) which I have said are connected but are out of time.
35. The latest incident in that grouping is November 2016. Ms Hodzik submitted her tribunal claim on 30 October 2020, nearly four years out of time.
36. Ms Hodzik said she did not become aware of time-limits until after she was dismissed. She had not taken advice about the various employment problems before that, because she loved the job (though not how she was treated), and could not afford to lose it because she supports her mother and nephew as well as herself and has to pay a mortgage.
37. Following her dismissal, Ms Hodzik's mental health has broken down. It was clearly breaking down in the years leading up to the claimant's dismissal. However, the claimant has not suggested that is why she did not bring a claim earlier, particularly regarding the sexual harassment by Mr Alharbi.
38. I do not consider it would be just and equitable to allow an out of time claim in categories (a) – (c). It is a very long time ago. By the time of dismissal, the latest of the incidents was already four years old. By the time of any hearing, it is likely to be at least five and a half years old. The events from 2012 – 2015 go back at least another three years. Mr Alharbi was no longer based in London from some time around 2016 or 2017. Some other witnesses are also potentially involved, eg regarding the search incident and the warning on an allegedly fabricated ground. Memories of numerous verbal comments and interactions will not be fresh. Exactly what was said and the wider context will be important and

inevitably hard to remember so many years later. I cannot see how there can be a fair hearing about numerous private comments 8 or 9 years after they were said. Ms Hodzik could have taken advice at the time. She would then have found out about time-limits. Taking advice would not have committed her to going ahead and bringing a case.

39. I appreciate that Ms Hodzik will lose the opportunity of bringing a claim about a very serious matter. But she took a decision at the time not to go down a legal route. She had her reasons for that decision. She liked the job and feared losing it. Sadly that is a risk which employees who are still employed inevitably have to weigh up when considering discrimination claims. Ms Hodzik is not left entirely without claims against the respondent. Although I appreciate they are a different type of claim, she does still have claims concerning her treatment as a woman and/or as a Bosnian person regarding her pay, the approach to her job title and her dismissal.

### Summary

40. By reference to the claimant's list of issues (from page 233 of the preliminary hearing bundle), the harassment and discrimination claims which are allowed to proceed to hearing are at 6.1.17 – 6.1.24, 6.3, 6.4, 7 and 8. Whether these claims are in fact in time or should be allowed as late claims will be decided by the tribunal at the final hearing.

### **Law**

41. I set out here a brief summary of the law on which I have based my decision.
42. The relevant time-limit is at section 123(1)(a) Equality Act 2010. The tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, do not (without some assertion of link or connection), constitute conduct extending over a period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts.
43. Under section 123(1)(b), if the claim is presented outside the primary limitation period, ie the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable. This is essentially an exercise in assessing the balance of prejudice between the parties.
44. The burden of persuading the tribunal to exercise its discretion to extend time is on the claimant. There is no presumption that the discretion should

be exercised unless the tribunal can justify failure to exercise the discretion. (Robertson v Bexley Community Centre [2003] IRLR 434, CA.) It is not helpful to think in terms of taking a strict or liberal approach. These are subjective terms. It is simply a matter of whether it is just and equitable to exercise the discretion. (Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327, CA.)

45. The tribunal should take in to account anything which it considers relevant, including whether it is still possible to have a fair trial of the issues.
46. The length and reasons for the delay are relevant, including whether the claimant acted promptly once she knew a claim might be possible, and the steps taken by the claimant to obtain expert advice. These are not the only factors to be weighed in the balance. Other relevant factors would include the extent to which the evidence of either party might be less cogent because of the delay. A tribunal should be careful to consider whether there really is an evidential difficulty because of the lateness of the claim, as opposed to a mere assertion by the respondent.
47. A tribunal may also form and consider a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for respondents to be put to defending a late weak claim and less prejudicial for a claimant to be deprived of such a claim.
48. The existence of other claims which were presented in time may be relevant. On the one hand, it will mean that the claimant is not entirely unable to assert her rights. But on the other hand, the very facts which the claimant may seek to rely on for the late claim may already have to be explored for the timeous claims.

Employment Judge Lewis  
01/12/2021

Sent to the parties on:

.02/12/2021

For the Tribunals Office