EMPLOYMENT TRIBUNALS

Claimant: **Miss S Harvey**

Respondent: **Iceland Foods Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **5 October 2021**

Before: **Employment Judge Russell**

Representation:

For the Claimant: **In Person**
For the Respondent: **Mr R Hignett (Counsel)**

JUDGMENT

1. **The claim of failure to make reasonable adjustments contrary to Sections 20 and 21 of the Equality Act 2010 is out of time. It is not just and equitable to extend time.**

2. **The claims of harassment related to disability contrary to Section 26 of the Equality Act 2010 in respect of the conduct on 5 April 2020 and the 16 April 2020 are not struck out for being out of time as they may form part of a continuing course of conduct. This issue will be decided at the final hearing.**

3. **The claim of direct discrimination contrary to Section 13 of the Equality Act 2010 on 26 August 2020 is in time.**

4. **The application for leave to amend to include a claim of race discrimination is refused.**

5. **The Respondent's application to strike out the claims of direct disability discrimination and/or harassment as having no reasonable prospect of success is refused.**

6. **The application for a Deposit Order for the discrimination claims on grounds that they have little reasonable prospect of success is refused.**

REASONS

1. By a claim form presented to the Employment Tribunal on 21 October 2020, the Claimant brought claims of disability discrimination. She did not tick the box for race discrimination. ACAS early conciliation took place between 17 and 20 October 2020.

2. The details of the complaint are not entirely clearly set out in the attachment to the claim form. In essence, the Claimant complained that by reason of her disability of Crohn's Disease, she was directly discriminated against and was not given reasonable adjustments in respect of shift patterns and the nature of work to be undertaken during her working shifts, particularly as the effect of the Covid-19 pandemic became pronounced. The Claimant also complained that she had been harassed by Senior Supervisors, Zara and Ragini, on a number of occasions on 5 April 2020 and again on 16 April 2020 when she had attended the shop to carry out some shopping.

3. The Claimant was absent from work due to ill health for a significant period from 7 April 2020 until her return to work in August 2020. The Claimant says that upon her return to work on 26 August 2020, a Duty Manager named Mona asked her about her health, a surgical procedure and post-operative recovery in front of a more junior colleague. This was a breach of her right to confidentiality and indicated that there must have been gossip about her health as the information included on her medical certificate would not have made clear that she had had surgery.

4. At a Preliminary Hearing on 4 March 2021, Employment Judge Tobin ordered that the Claimant provide a disability impact statement. Having received the same, the Respondent now concedes disability but not knowledge. This is an issue to be decided at the final hearing on 27 – 29 July 2022. Judge Tobin also required the Claimant to provide further and better particulars of her disability claim which she did on 1 April 2021, along with an application to amend to include a claim of race discrimination. The claim is that her former manager, Nafraz, treated her less favourably because of race as follows:

> November 2019: about the clothes which she wore to work
> December 2019: training
> December 2019 to March 2020: hours allocated to her which then reduced the amount of sick pay to which she was entitled when subsequently off sick.

5. The Claimant submitted a short statement explaining why some of her claims had been presented out of time. In short, the Claimant relies upon the effects of the Covid-19 pandemic, her health and a lack of knowledge of her rights. In her claim form, the Claimant has described respiratory problems where she struggled to breathe, went to her local hospital and after blood tests showed irregularities was put on an NHS waiting list for surgery to assist in managing her disability. The Claimant was discharged from hospital on 2 July 2020 and then had a period of recovery and convalescence.

6. In her submissions today, the Claimant relied upon what she says was incorrect advice from ACAS from which she believed that she could not submit claims for different types of discrimination (race and disability) on the same claim form but was advised to choose disability. The Claimant also told me that before late summer 2020, she was unaware of her legal rights to bring a complaint of discrimination. The Claimant is clearly an educated young woman, she is a University Graduate, she has access to the Internet

and is familiar with the use of search engines such as Google. As a result, I find both submissions to be inherently implausible.

Time

7. Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

8. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, **Hendricks v Metropolitan Police Comr.** [2003] IRLR 96, CA at paras 51-52. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

9. The absence of an employee on sick leave does not necessarily rule out the possibility of continuing discrimination. A continuing act may occur where the complaints were not confined to less favourable treatment in the working environment but, for example, extended complaints about lack of contact during sickness absence.

10. I accept Mr Hignett's submissions that the complaints of failure to make reasonable adjustments are discrete and limited in time by, at the latest, the start of the Claimant's sickness absence. They were complaints confined to treatment in the workplace and were not raised again by the Claimant as part of a subsequent return to work. They are not part of a continuing course of conduct or a series of similar acts to the entirely separate enquiry by Mona about the Claimant's health on 26 August 2020. The reasonable adjustments claim is out of time in its entirety.

11. If a claim is presented outside the primary limitation period (that is, after the relevant three months), the Tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- The Claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;

- The Tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a Respondent to be put to defending a late, weak claim and less prejudicial for a Claimant to be deprived of such a claim;

- This is the exercise of a wide, general discretion and may include the date from which a Claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the Claimant is not entirely unable to assert her rights and, on the other, that the very facts upon which she seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble** (length and reason for delay, cogency of evidence, cooperation, steps taken once knew about the possibility of bringing a claim).

12. I am not satisfied that it would be just and equitable to extend time in respect of the reasonable adjustments claims. The Claimant should have started ACAS early conciliation by 7 July 2020; she did not do so until 17 October 2020, over three months late. Whilst I accept that the Claimant was unwell, there is insufficient evidence for me safely to conclude that she was incapable of submitting an on-line document to ACAS or the Tribunal within the required time limits. Nor do I accept that the Claimant can reasonably rely upon lack of knowledge. With reasonable endeavour, the Claimant should have been aware of the ability to bring a disability discrimination claim as it is information that is readily known and available on the Internet with only the most limited of searches required for it. Finally, it would not be just to extend time where the effect would be to require evidence from Nafraz and detailed consideration of the staffing, shift patterns and work available in the shop to decide whether or not there was a substantial disadvantage caused to the Claimant by reason of disability and, if so, whether any proposed adjustment would have been a reasonable step. For all of those reasons I am not satisfied that time should be extended for the reasonable adjustment claims.

13. The direct discrimination claim arising from conduct on 26 August 2020 is in time. The alleged harassment by the supervisors on 5 April 2020 and 16 April 2020 is also on the face of it, presented out of time. During the course of today's hearing, the Claimant applied to amend her complaint to re-label the incident on 26 August 2020 as an act of harassment as an alternative to direct discrimination. Mr Hignett did not concede the amendment. I decided that this was very minor amendment, essentially relabelling facts already pleaded and made at an early stage in proceedings. The balance of hardship comes down in favour of permitting the amendment. Having granted leave to amend, there are three potential acts of harassment before the Tribunal: 5 April 2020 and 16 April 2020 by Supervisors Zara and Ragini; and 26 August 2020 by a Duty Manager, Mona.

14. Mr Hignett submitted that the alleged conduct is by different individuals and that there is a gap of about four months between the April allegations and the single, in-time allegation on 26 August 2020. However, at the heart of the Claimant's case is an assertion that there was a culture of gossip amongst the management team with regard to her health. If this is correct, then there may be conduct which is either a course of conduct or a series of similar acts which would enable the Tribunal to find that the April matters were in time too. This is best decided by the Tribunal at the final hearing and I have declined to strike out any of the harassment claims on time grounds.

Amendment

15. In deciding the amendment application, I applied the guidelines and approach set out in **Vaughan v Modality Partnership** UKEAT/0147/20/BA. HHJ Tayler considers the well-known authorities on amendment (**Cocking, Selkent, Abercrombie** and **Safeway**) but makes clear that the **Selkent** factors should not be taken as a checklist to be ticked off but rather are facts to be taken into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment.

16. The starting point will be to consider the real practical consequences of allowing or refusing the amendment. This requires a focus on reality rather than assumptions and needs representatives to take instructions where possible (paragraph 21). The Tribunal must consider the practical importance of the amendment – the real question is not whether refusal prevents the party from getting what they want, rather will they be prevented from getting what they need (paragraph 22). HHJ Tayler suggests that the balancing exercise requires consideration of the injustice to both sides (allowing or refusing) but quantitively and qualitatively, looking at the relative and cumulative significance of the relevant factors (paragraph 26). Maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations but the key factor remains the balance of justice (paragraph 28). A lengthy delay will inevitably result in some fading of memory, although specific details are better than supposition.

17. The following factors are likely to be relevant when exercising my discretion and in assessing the balance of injustice:

(1) whether or not the application proposed is minor or substantial; if it is substantial and it significantly expands the factual and legal line of enquiry for a Tribunal, it will cause additional cost and lengthen the final hearing, whereas if it is minor, the practical effect will be limited.

(2) the application of time limits and whether there should be any extensions; where the claimant proposes to include a new claim by way of amendment, the tribunal must have regard to the relevant time limits and, if the claim is out of time, to consider whether the time should be extended under the appropriate statutory provision (reasonable practicability or on the just and equitable ground, as the case may be).

(3) the timing and manner of the application, including why an application was not made earlier and why it is being made at this stage. However, delay in itself should not be the sole reason for refusing an application.

18. The race discrimination claim is considerably out of time, dating back to November 2019 with the final detriment said to have been in March 2020. The author of the alleged less favourable treatment (Nafraz) is entirely different to those concerned in the existing claims. The amendment would significantly expand the scope of the factual and legal enquiry before the Employment Tribunal and, consequently, the length of the hearing and cost of resisting the claim. It would require the Respondent to call additional witnesses, the Respondent would suffer significant real forensic prejudice as Nafraz is no longer available to give evidence despite attempts to locate him having been made.

19. I am satisfied that the prejudice to the Respondent in allowing the amendment significantly outweighs that to the Claimant in refusing it. The Claimant has disability discrimination claims before the Tribunal which will provide an adequate remedy if successful. I do not accept her explanations for the delay in bringing the claims for reasons set out in refusing to extend time on the reasonable adjustments claim. Leave to amend is refused.

Strike Out and Deposit Orders

20. An Employment Judge has power to strike out a claim on the ground it has *no* reasonable prospect of success under Employment Tribunal Rules of Procedure 2013 rule 37. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances. It is a draconian sanction and imposes a very high threshold, **Teesside Public Transport Company Limited (T/a Travel Dundee) v Riley [2012] CSIH 46** at 30 and **Balls v Downham Market High School & College [2011] IRLR 217 EAT**.

21. A case should not be struck out where there are relevant issues of fact to be determined **A v B [2011] EWCA Civ 1378.** Discrimination claims are particularly fact-sensitive and there is a public interest in the evidence being test at a final hearing.

22. Rule 39 of the Employment Tribunal Rules of Procedure 2013 provides that if, at a Preliminary Hearing, an Employment Judge considers that any specific allegation or argument has little reasonable prospects of success, he or she may order that party to pay a deposit of an amount not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Before making the Order a Judge must take reasonable steps to ascertain the ability of the party to comply with it.

23. In **Arthur v Hertfordshire Partnership University NHS Foundation Trust** UKEAT/0121/19 confirmed that the test for deposit order differs from strike out; matters to be determined are not just legal but also the likelihood of the party being able to establish the facts essential to their case and, in doing so, may reach a provisional view as to the credibility of the assertions being put forward.

24. I am not satisfied that it is appropriate to order a strike out in this case. There is a dispute of fact as to whether the alleged comments on 5 and 16 April 2020 were made. Taking the Claimant's case at its highest, they are clearly capable of amounting to unwanted conduct having the proscribed effect and conduct which is related to her disability.

25. I carefully considered the conduct alleged on 26 August 2020. Mr Hignett submits that as a matter of law and common sense it cannot be an act of harassment for a manager in charge to ask a member of staff returning from sickness absence about their health. He may well be right but the Claimant's case is somewhat different: this was not a return to work discussion properly carried out in a confidential setting by an appropriate manager but instead an inappropriate and informal discussion in front of a more junior and unknown colleague. That it seems to me is capable of being unwanted conduct related to disability and which could subjectively and objectively have the prescribed effect. Equally, if the Claimant is right that the manager's question could not have come from her medical certificate but was a product of gossip or speculation amongst managers, she may be able to establish unwanted conduct related to disability having the proscribed

effect both subjectively and objectively. These are matters to be tested in evidence and I decline to strike out the claims.

26. Whilst the threshold for a deposit order is lower, for the same reasons I am not satisfied that there is *little* reasonable prospect of success without the evidence being tested. The Tribunal will need to hear evidence about the conversation on 26 August 2020 and the reason why the Duty Manager conducted the conversation in the way that she did. This does not necessarily mean that the claim will succeed but it make it inappropriate to make a deposit order.

List of Issues and Case Management

27. Having decided the applications as set out above, Mr Hignett agreed to update the draft List of Issues and send a copy to the Tribunal. A copy must also be included in the bundle for the final hearing. The attached case management orders were effectively made by consent.

Employment Judge Russell
Dated: 20 December 2021