V Case Number: 2501043/2020

THE EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING

Claimant: **Mrs N Freeman**

Respondent: **Chief Constable of Durham Constabulary**

Heard at: **Newcastle upon Tyne Hearing Centre**

By: **CVP** **On:** **Tuesday 22nd June 2021**

Before: **Employment Judge Martin**

Representation:

Claimant: **Mr J Tinston (Solicitor)**
Respondent: **Ms C White (Counsel)**

This case was heard by way of Cloud Video Platform (CVP). The parties agreed to the case being heard by way of CVP, due to the ongoing Coronavirus pandemic.

JUDGMENT

1. The Tribunal has jurisdiction to hear the claimant's complaint of disability discrimination, which is not outside the time period as it is just and equitable to allow the claimant to pursue her complaint of disability discrimination.

REASONS

Introduction

1. The case came before me as a public preliminary hearing following a case management order on 15th March 2021 when Employment Judge Dempsey listed the case for a public preliminary hearing with a time estimate of one day to determine the following issues:-

    1.1 whether applying Section 123 of the Equality Act 2010, the acts complained of in the complaint took place outside the limitation period

(including any question or whether there is conduct extended over a period of time); and if so

1.2 in respect of such acts under Section 123 which are found to have taken place outside the limitation period, whether the complaint was presented within such further period as the tribunal considers just and equitable.

He made a number of orders relating to that hearing including disclosure of documents and provision of witness statements.

2. On 27th May 2021 Employment Judge Sweeney wrote to the parties as follows: - the hearing on 22nd June 2021 is converted to a public preliminary hearing to determine:-

(i) whether the claim or part of the claim should be struck out on the ground that there is no reasonable prospect of success in the tribunal concluding that the claim – of part of it – has been presented in time or in deciding to extend time (Rule 37 (a) of the Employment Tribunal Rules 2013) or;

(ii) that the argument that the claim or part of it has been brought in time and/or that time should be extended has little prospect of success, and if so whether it should make a deposit order under Rule 39 of the Employment Tribunal Rules 2013.

3. Before the hearing today the parties produced a large bundle of documents comprising over 600 pages. The vast majority of those documents were not referred to by either party at the hearing.

The claimant gave evidence at the hearing. Both parties gave oral submissions in accordance with their written submissions. In their submissions, both parties referred to the law as largely referred to below and their interpretation of the claimant's evidence. The respondent also submitted that DS Pescod had recently retired. Their representative also submitted that the Respondent's IT had indicated that emails were deleted after 2 years and could not be recovered, but she also said that they would make every effort to recover those documents with the specialist assistance of the respondent's IT department.

<u>The law</u>

4. The law which the tribunal considered was as follows:

Section 123 (1) of the Equality Act 2010 "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 considers just and equitable.

Section 123 (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."

Rule 37 Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that, any stage of the proceedings, either on its own initiative or in the application of a party, the tribunal may strike out all or part of a claim or response on any of the following grounds:-

(a) that…it has no reasonable prospect of success.

Rule 37 (2) a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing, or, if requested by the party, at a hearing.

Rule 39 (1) of Schedule 1 the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 "where at a preliminary hearing, the tribunal considers that any specific allegation or argument in a claim or a response has little prospect of success, it may make an order or requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."

*Rule 39 (2) "*the tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

The case of *Hendricks v Commissioner of Police 2002 EWCA CIV 1686* where it was observed that the burden is on the claimant to prove either by direct evidence or by inference from primary facts that the numerous alleged incidents of discrimination are linked to one another and that there is discriminatory state of affairs covered by the concept of an act of "an act extending over a period" and is regarded as more akin to a prevailing way of life or generalised policy or climate or culture of unlawful discrimination. At paragraph 49 the same court said that the claimant would have to prove that the alleged incident added up to more than isolated or unconnected acts of less favourable treatment by different people in different places over a long period to establish an act extending over a period for which the employer could be held legally responsible.

That case went on at paragraph 52 to talk about the concept of a policy, rule, practice, scheme, or regime as being examples of when an act extends over a period. It was made clear that that should not be treated as a complete and constricting statement of an act extending over a period. The court went on to say at paragraph 52 that the focus should be on the substance of the complaint. The respondent in that case was responsible for an ongoing situation or continuing state of affairs while the officer was treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts.

The case of *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 EWCA CIV 640,* Leggatt LJ said at paragraph 18 – 19 "…it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that parliament has chosen to give the employment tribunal the widest possible discretion. Unlike Section 33 of the Limitation Act 1980 Section 123 (1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in Section 33 (3) of the Limitation Act 180 (see British Coal Corporation v Keeble 1997 IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi 2003 EWCA CIV 15 2003 IRLR 220 paragraph 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under Section 7 (5) of the Human Rights Act 1998:- see Dunn v Parole Board 2008 EWCA CIV 374 2009 and Rabone v Pennine Care NHS Trust [2012 UKSC2]. That said factors which are almost always relevant to consider when exercising any discretion whether to extend time are (a) the length of and reasons for the delay and (b) whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh".

The case of *Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA CIV 23* where Lord Justice Underhill added "the best approach for a tribunal in considering the exercise of the discretion under Section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular as Holland J notes "the length of and reasons for the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking".

The case of *Hunwicks v Royal Mail 2007 IRLR 68* where it was held that the relevant factor must be responsible for causing the time limit to be missed. In that case it was incorrect legal advice which was received after the time limit had expired.

The case *of Bexley Community Centre v Robertson 2003 EWCA CIV 576* where the Court of Appeal indicated at paragraph 25 that it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.

The case of *Chief Constable of Lincolnshire Police v Caston 2009 EWCA CIV 1298* paragraph 25 where the Court of Appeal reiterated the wide discretion which

the tribunal has. The Court of Appeal held that there is no established principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised.

The case of *London Borough of Lambeth v Apelogun-Gabriels 2001 EWCA CIV 1853* at paragraph 16 Lord Justice Gibson referred to the decision in Aniagwu v London Borough of Hackney & Owens 1999 IRLR 303 "to the extent that Aniagwu… lays down some general principle that one should always await the outcome of internal grievance procedures before embarking on litigation, in my judgment Aniagwu is plainly wrong. It has long been known to those practising in not constitute a sufficient ground for delaying the presentation of an appeal…

The case of *Mills and & CPS v Marshall 1998 IRLR 494* established that the most significant factor is whether a fair trial will still be possible if time is extended. The onus is on that party to demonstrate that a fair trial will not be possible and should have to corroborate that assertion

The case of *British Coal Corporation v Keeble 1997 IRLR 337* cross referred to the extension period in personal injury action set out at Section 33 of the Limitation Act 1980. That case held that the determination is whether the prejudice caused to one party of extending time outweighs the prejudice to the other caused by refusing to do so should be considered by reference to those factors referred to in Section 33; albeit that the case of *Adenuji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA 23* held that a tribunal should not restrict itself to those factors but that the following factors might be helpful – namely the length of and reasons for the delay; and the promptness with which the claimant acted once she became aware of facts giving rise to the claim.

The case of *Caterham School v Rose UKEAT/0149/19/RN* which established that there is an error of law for an employment tribunal to make a definitive finding that there was conduct of extending over a period at a preliminary hearing in circumstances where it has considered no evidence concerning that conduct itself.

The case of *Serco v Wells UKEAT/0330/15* where the EAT held that an employment judge could not vary or revoke an order made by another judge unless there was a material change in circumstances.

The case of *E v X, L & Z and L v X, Z & E UKEAT/0079/20 and UKEAT/0080/20* where the EAT held that, without any material change in circumstances, the Judge at the open preliminary hearing could not take a different approach to that ordered at the earlier hearing, which ordered the open preliminary hearing in the first place.

Findings of Fact

5. The claimant contacted ACAS regarding this claim on 6th May 2020. The certificate was issued by ACAS on 13th May 2020. The claimant then issued proceedings before this tribunal on 4th June 2020. Her claim included a detailed grievance statement.

6. She was subsequently requested at the preliminary hearing to provide a schedule of incidents which is at page 61 – 66 of the bundle.

7. The claimant principally complains about the behaviour of a colleague Leanne Hogg (LH) which commenced in March 2017. She refers to various incidents leading through to March 2018. She also complains about an incident where she complained to DI Rooney about Ms Hogg's behaviour in April/May 2018. She then complains in May 2019 about DS Andrea Pescod's behaviour.

8. The claimant gave extensive and cogent evidence at this hearing. She is still clearly struggling with her mental health, but also feels very strongly about pursuing these claims. She complains of suffering from poor mental health and suffering from depression following Ms Hogg's bullying. She had various periods of absence from work and went on long-term sickness leave from May 2018. She has been seeing various health professionals. She was seen by her local mental health trust in June 2018. She was described as having severe depression and several mental health problems (pages 343/344). She also was under the care of an advanced nurse practitioner from June 2018 to September 2019. She describes suffering from very poor mental health problems with various different symptoms which impacted on her daily life. She also complains of suffering from chronic fatigue syndrome. By September 2018, she was diagnosed as suffering from PTSD and Emotionally Unstable Personality Disorder (EUPD). She felt her symptoms were akin to symptoms of ADHD. She describes having nightmares and talks of the significant impact these conditions had on her day to day life.

9. Over that period, she has had substantial personal issues which have also contributed to her anxiety and depression, most significantly she separated from her husband in August 2019. Her husband had been assisting her with this case.

10. There was an indication from her GP in July 2019 that she was suffering fatigue attacks. She also had an attendance at A&E in September 2019 and was referred back to the mental health team, due to concerns about suicidal thoughts. These problems of suicidal thoughts were noted as continuing in November 2019 by her GP (page 117). She said she commenced talking therapies in December 2019. She was thrown even more by some physical problems as she thought she might have breast cancer in December 2019. She said she attempted a reconciliation with her husband in early 2020, but that was not successful.

11. The claimant then gave evidence about the advice which she had received from Unison, her trade union. She said that when she was off sick, she was moved onto half pay and then had to bring an appeal against her reduction to half pay. She drafted that appeal with assistance from Unison, having received some advice from them on that matter - page 375. She said that, at the same time, she had complained through them and effectively to the respondent about her concerns with regard to Ms Hogg whom she said had caused her periods of absence in the first place. She was in essence raising those concerns with both of them at that stage and indeed refers to those issues in the appeal at page 375.

12. She said that she put off pursing a formal grievance, although she had raised the matter on several occasions with both Unison and the respondent in respect of her various concerns about Ms Hogg on several occasions. She said she had put off submitting a formal grievance for some time because she wanted to try and recover her mental health.

13. She then put in her formal grievance in September 2019. The document attached to her ET1 is that grievance. She said that she received no response from Unison and had to chase them. She raised this with the complaints team.

14. The claimant took early medical retirement in November 2019

15. The Claimant said that in December 2019, Unison responded to her grievance and told her that they had not progressed with her grievance and could not do so now because her employment had ended. They then told her that they could not assist her either. The claimant said she continued to try and obtain assistance from Unison into the early months of the following year.

16. Initially in September 2019, the claimant was told by Unison that any employment claim was likely to be out of time. Unison did not indicate at that stage that the claimant might be able to submit that it was just and equitable to extend time. Unison did not give her any advice about time periods specifically other than to indicate that the claim was out of time. Unison suggested that the claimant might want to pursue a personal injury claim and referred to the time limit for such a claim.

17. The claimant said that when she was told in December 2019 by Unison that they could not progress with her grievance, she then put it in directly to the respondent in December 2019. The claimant gave evidence that both her and her husband both believed that she had to go through the grievance process first before making any claim. This mistaken belief was conveyed to Unison, but Unison never dispelled her or her husband of this misconception although that they referred to it in writing, as is noted in her husband's email at page 444. Unison subsequently informed the claimant after investigating her complaint that any claim to the employment tribunal was likely to be out of time, but they never disabused the claimant or her husband of their mistaken view that they had to pursue the internal grievance first.

18. The respondent apparently reviewed the claimant's grievance and gave her an outcome on 6th May 2020, at which time she then immediately contacted ACAS.

Conclusions

18. This tribunal accepts the claimant's evidence having heard from her in detail about her mental health problems, which substantially affected her ability over a continuing period for her to be able to issue these proceedings.

19. This tribunal, in taking account of the case of Caterham School v Rose, is not going to make any definitive finding about whether conduct extended over a period of time, albeit that it does seem that the last act in May 2019 is unlikely on

the face of it to amount to a continuing course of conduct, bearing in mind that the discrimination relates to a different individual; there was a time period of over one year; and the last allegation appears to be different to the previous allegations of discrimination.

20. The tribunal accepts the claimant's evidence that she believed that she had to await the outcome of the grievance hearing before she could issue these proceedings. Her belief in that regard appears to have been supported by her husband albeit that it was misconceived. It was clear that Unison who were advising them did not indicate at any stage that was not the case. Therefore she appears to have continued down this misguided route and delayed issuing these proceedings. Her delay in issuing these proceedings was clearly exacerbated by her continuing problems with her mental health and her various personal problems which did impact on her ability to be able to really do anything much since these problems surfaced in 2018 and which problems have continued over the last couple of years.

21. Furthermore, the tribunal notes that Unison did not advise her at any stage that she might be able to issue proceedings out of time. The actions of Unison appear to have frustrated her at a time when she was suffering seriously from mental health problems and Unison's approach would, in part, have contributed to her ongoing stress and frustration at a time when she continued to suffer from mental health problems.

22. The tribunal has taken account of the length of the delay which is considerable, at least nine months to a year and more likely to be over two years. However the reasons given for that delay are quite clear: Over this period, the claimant was given incorrect or insufficient advice from Unison. They appear to have rather thwarted her trying to progress matters rather than assisted her. Indeed, their lack of assistance in that regard appears to have exacerbated her already fragile mental state. Furthermore, it is quite clear that, over this extensive period she was suffering from serious mental health problems, which would have impacted on her ability to be able to progress with this case on her own.

23. The reasons for the delay given by the claimant are consistent with the way she acted immediately after the grievance outcome. It is quite clear she did then immediately contacted ACAS. That is entirely consistent with what she says was the reason for the delay in the first place. Taking account of her mental state at this time, the tribunal accepts that explanation.

24. Although the tribunal has largely limited itself to considering the length of and reasons for the delay, it has and must also take into account any prejudice to the parties and consider whether a fair trial is still possible. Those must be factors which the Tribunal has to consider when exercising its discretion.

25. The respondent has not provided any real evidence about prejudice. The only evidence led on the point was that DS Andrea Prescott has now retired from the police force. The respondent have also raised concerns about document recovery, but at the same time they have also indicated that they anticipate that those documents could in fact be recovered. One would have thought that they

almost certainly would be able to be recovered through the IT facilities available to an organisation like the respondent. Furthermore it is not clear how much documentation is involved in that regard.

26. However of more significance, the respondent cannot assert that they are prejudiced because of time. It is quite clear that they were aware of the allegations at the very latest when the grievance was sent to them in December 2019. It seems likely that they were made aware of concerns at various times before that when the claimant raised concerns about LH and, in particular ,when she appealed against the reduction to half pay, even if a formal grievance was not raised. It is surprising if no investigations were made at that stage, but one would certainly have expected investigations would have been made when the claimant did submit her very detailed grievance in December 2019. It is noted that the respondent took over 4 months to respond to that grievance. Accordingly, some investigation must, if not, could/should have been undertaken at that stage. It is therefore incorrect to say that they are now having to defend proceedings which are substantially out of time, when in fact they were fully aware of the issues in these proceedings by, at least December 2019, and presumably gathered and collated evidence to dismiss the grievance at that stage.

25. For those reasons, this tribunal is minded to exercise its discretion on just and equitable grounds, in these particular circumstances, and extend time to allow the claimant to pursue her complaint of disability discrimination.

26. At the outset of the hearing, Employment Judge Martin referred to the subsequent order of Employment Judge Sweeney in May 2021 as to whether the case could proceed on the basis indicated by Employment Judge Sweeney in that order; namely for the question of time to be dealt with as a strike out / deposit order because the case of *E v X, L & Z* also suggests that issues around time in discrimination cases may sometimes more properly be dealt with at the substantive hearing. However, neither party addressed this matter in their submissions. Both of them indicated throughout that they were proceeding on the basis of the original order made by Employment Judge Dempsey. Both made it clear that that was the basis of the application which they were dealing with. Employment Judge Martin did ask questions of the claimant about her financial means but neither party asked any questions about the claimant's means or referred to that subsequent order at all. Therefore the tribunal was left in the position that, taking account of the cases of *Serco* and *E v X, L & Z,* it had to deal with the hearing on the basis of the original order made by Employment Judge Dempsey and proceed with exercising its discretion in this case. Accordingly, on balance, the tribunal has exercised its discretion in favour of the claimant and allowed her to proceed with her claim of disability discrimination for the reasons given.

EMPLOYMENT JUDGE MARTIN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 16 July 2021

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