



EMPLOYMENT TRIBUNALS

Claimant: Ms Sharon Jones

Respondent: Cwm Taf Morgannwg University Local Health Board

Heard at: Cardiff **On:** 12 December 2022

Before: Employment Judge R Brace

Representation:

Claimant: Mr D Steward (Counsel)

Respondent: Mr S Wyeth (Counsel)

JUDGMENT

1. The Claimant's claims of disability discrimination set out in the draft List of Issues at:
 - a. C1, C2,
 - b. D1, D2,
 - c. E1, E2, E3, E4, E5 and E6
 - d. F1, F2 and F3were presented out of time. It is not just and equitable to extend time.
2. The Tribunal does not have jurisdiction to hear such complaints and they are struck out.
3. I decline to make a deposit order at this stage in respect of the remaining claims (set out at C3, C4 and D3 List of Issues) pending consideration of amendment of such claims.
4. A further preliminary hearing on case management, including the amendment and consideration of a deposit order, will be listed for three hours by video (CVP) on 13 February 2023 to be confirmed by way of Notice of Hearing.

Reasons

1. This hearing was listed as a fully CVP hearing to consider the issues set out by Judge Moore in her case management order of 18 October 2022, namely:
 - a. Whether the Claimant's claim requires permission to amend and if so, whether to grant permission to amend;
 - b. Whether to order the Claimant to pay a deposit (not exceeding £1,000) as a condition of continuing to advance any specific allegation or argument in the claim set out on C3, C4 and D3 of the List of Issues if the Tribunal considers that allegation or argument has little reasonable prospect of success
 - c. Was any complaint presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including: whether there was "conduct extending over a period"; whether it would be "just and equitable" for the tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about occurred.
 - d. Case management and final listing.
2. The amendments which the Respondent considered the Claimant required were in relation to the PCPs referred to at C1-C4 and again at D1-D3 List of Issues and it was their position that the drafting of the PCPs within the List of Issues had been amended from the PCPs pleaded in the ET1.
3. A bundle for the preliminary hearing was provided, of some 127 pages ("Bundle"). References to pages in the Bundle are denoted by [] and references to the 'List of Issues' are references to the draft List of Issues prepared by the parties and set out at [96] of the Bundle.
4. Within the List of issues the complaints were listed as follows
 - a. C1-C4 - failure to comply with duty to make reasonable adjustments (s.20/21 EqA 2010);
 - b. D1-D4 - indirect discrimination (19 EqA 2010) ;
 - c. E1-E6 – Harassment (s.26 EqA); and
 - d. F1-F3 – discrimination arising from disability (s.15 EqA 2010).
5. The Claimant relied on a witness statement in relation to the jurisdiction issues and was questioned by the Respondent and the Tribunal. The Respondent also

relied on some written submissions that had been prepared by the Respondent's solicitor dated 17 November 2022 and are incorporated by reference into these written reasons.

6. It was agreed that the Tribunal would hear evidence from the Claimant, then submissions on the jurisdictional issues and deposit order and, after the judgment on those issues, the Tribunal would then deal with the amendment issue and further case management. Findings of fact were limited to matters relevant to a potential just and equitable extension.
7. In the circumstances of the hearing it was agreed that the judgment would be reserved and a further preliminary hearing on case management would be listed on 13 February 2022 to consider further case management including the issue of whether the Claimant needs permission to amend.

The Law

8. When considering whether the claims had been brought in time, by reason of s. 123(1) EqA 2010, a claim must be presented to the tribunal before the end of the period of three months starting with the date of the act to which the complaint relates and employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so (S.123(1)(b) EqA 2010). The above time limit is modified if there is a course of conduct extending of a period and the claim is brought within three months of that period: s. 123(3); or if the tribunal considers it just and equitable to extend time.
9. Where the act complained of is a failure to do something, it is taken as occurring when the Respondent made the decision not to act: s. 123(3)(b) EqA 2010. In the absence of evidence to the contrary, an employer is to be taken as deciding not to do something when it does an act inconsistent with doing it (or, if there is no inconsistent act, at the expiry of the period in which it might reasonably have been expected to do it: s. 123(4) EA 2010). In **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, the Court of Appeal held that where the employer's breach is a failure to act, time begins to run from the end of the period in which the employer might reasonably have been expected to comply with the relevant duty, and that period should be assessed from the employee's point of view.
10. The Respondent also relied on **Matuszowicz v Kingston-Upon-Hull City Council** [2009] EWCA Civ 22 which held that where an employer's alleged failure to make an adjustment is inadvertent, the three-month time limit for bringing a claim starts to run on the expiry of the period within which the employer might reasonably have been expected to make the adjustments.
11. In considering whether in this case there is a continuing discrimination extending over a period of time; when time only begins to run when the last act is completed, or a series of distinct acts; where the time limit begins to run when each act is completed, the Respondents also relied on the Court of Appeal decisions in:

- a. **Barclays Bank plc v Kapur and ors** 1991 ICR 208, HL, where their Lordships drew a distinction between a continuing act and an act that has continuing consequences and held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.
- b. **Commissioner of Police of the Metropolis v Hendricks** 2003 ICR 530 CA, subsequently followed by the Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust 2006** EWCA Civ 1548, CA where the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case and that the focus be on the substance of the claimant's allegations. The question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed
- c. **Aziz v FDA** 2010 EWCA Civ 304, CA where the Court noted that in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.

12. The Respondent finally reminded me of:

- a. **Caterham School Ltd v Rose** EAT 0149/19 where the EAT determined that it was an error of law for the tribunal to reach a definitive determination that there was 'conduct extending over a period' without hearing evidence on the point as definitive determination of an issue that is factually disputed requires preparation and presentation of evidence, findings of fact and, as necessary, the application of the law to those facts, so as to reach a decision that cannot then be revisited at the full merits hearing; and
- b. The judgment of Ellenbogen J in **E v A, L and Z** UKEAT/0079/20 where the EAT indicated that in the context of striking out in an argument where issue is whether or not the conduct complained of constituted 'conduct extending over a period', the test at summary stage is whether or not that contention is reasonably arguable:
 - i. If it is not, the relevant allegations can be struck out.
 - ii. If it is, the question of time limits and continuing acts is not definitively resolved but is deferred to the final hearing.

13. The burden is on the Claimant to show that it is just and equitable to extend time and in that regard **ABMU v Morgan and Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] ICR D5 was relevant, the latter indicating that the best approach for the tribunal when considering exercise of discretion was to assess all the factors in the particular case which it considers relevant

Respondent Submissions

14. The Respondent submits that the Claimant must show a prima facie case that anything prior to 13 September 2021 was a continuing act and reminded me of the dates of each act or omission relied on, asserting that each was a distinct act on the dates given, and not a continuing act on the basis of the following, that on:
- a. 10 March 2015, the Claimant was dismissed by Rosemarie Hazzard, (now retired) - D1, E1 and F1; that the action crystallised at date of dismissal, at best by date of re-engagement;
 - b. 10-25 March 2015, the Claimant asserts that (unnamed) colleagues were told (by persons unnamed) not to speak to her - E2;
 - c. 6 June 2015, the Claimant was re-engaged, and not in-instated as ward nurse, by Jason Roberts (now left the Respondent). (C1, D1, F1). It was submitted that the decision to re-engage, not reinstate as ward manager, was a distinct act, albeit that it had continuing consequences (**Kapur**). In relation to the failure to implement reasonable adjustments claim (C1), and applying **Matuszowicz**, it is submitted 7 years having passed since the re-engagement, the reasonable adjustments claim was substantially out of time.
 - d. The claim that Chris England (now retired) was intimidating towards her (F2), was a distinct act;
 - e. 26 July 2019, the Claimant failed the OSCE assessment – (C2, F2). In relation to the reasonable adjustment claim relating to adjustments required for the OSCE assessment (C2), it is submitted that this claim crystallised on date the Claimant did the OSCE assessment and that it was not possible to see how the Claimant could argue time would run beyond a reasonable period after 26 July 2019; that the person responsible for the decision-making on the OSCE assessment was Debbie Harris, Head of Nursing who also retired.
 - f. 11 December 2019, the Claimant asserts that during the Claimant's Informatics Nurse Specialist Trial, her new line manager, Christian Smith made comments that amounted to harassment (E4), that this was a distinct act;
 - g. 7 January 2021, whilst on the Informatics Nurse Specialist trial, Becky Garmen (now retired from the Respondent) switched off a presentation

(E5, F3) and the Claimant was questioned by David Edwards, HR Manager why she wanted to be accompanied as a companion (E6).

15. In relation to the additional failure to make reasonable adjustments and indirect discrimination complaints, the Claimant indicates these commenced in July 2019 and continued up to and including April 2022, and relate to the following PCPs:
 - a. Dismissing possible suitable alternative roles as unsuitable for the Claimant (C3, D3), the Respondent says that even on the Claimant's own case, the last of those roles was the Informatics Nurse Specialist role, where the trial period ended on 7 January 2021, a failure to make an adjustment over 10 months prior to the limitation period; and
 - b. Not providing the Claimant with adequate training whilst on the Redeployment Register (C4, D3); the Respondent says that this again must be an omission as the Claimant has not referred to specific roles whilst on the Redeployment Register save for the Informatics Nurse Specialist role which itself ended on 7 January 2021.
 16. In relation to whether time should be extended, he submitted that whilst the Claimant said she was fearful of putting in any grievance prior to 2020, that:
 - a. this did not prevent her seeking advice and assistance with her union; and
 - b. the Claimant did in fact receive advice and assistance from her union representatives;
 - c. that the Claimant had managed to submit grievances in both April 2020 and June 2021; and
 - d. that this had not prevented the Claimant also submitting her first tribunal claim whilst still in employment.
 17. The Respondent argues that these matters, together with the fact that the Claimant had in fact been re-engaged following dismissal after she had appealed, was inconsistent with the Claimant's evidence that she was fearful of complaining and also demonstrated that the Respondent was willing to treat complaints seriously.
 18. With regard to the deposit order, it was contended that there were no real prospects of success for the Claimant on claims C3, C4 and/or D3 as the PCPs relied on were not PCPs at all but allegations of failures to make reasonable adjustments. The submissions on the time points were in essence repeated
- Claimant's Submissions**
19. The Claimant's representative encouraged the Tribunal to view the complaints more holistically, on the basis that the Claimant has suffered from a continuing act from 2015 right up to her dismissal.

20. Whilst it was accepted by the Claimant that different personnel in the Respondent had involvement in the various complaints brought, it was also submitted that the Claimant's claim was that each individual would have been working towards a unified purpose; that there must have been an ongoing and continuous decision not to implement reasonable adjustments which would require an assessment of the evidence to understand such a regime.
21. He reminded me that the Claimant had a cancer diagnosis in 2017 and that naturally she had not addressed why she had not brought a claim then, as she was focusing on recovery and dealing with the consequences of that disease. He argued that the position, pre the Claimant's absence following her cancer diagnosis in February 2017, was not remedied when she returned to work in February 2018 and the new head of nursing took over management of the Claimant.
22. He did not accept that there was a bona fide attempt by the Respondent to return the Claimant to her substantive post as ward nurse because of the OSCE assessment the Claimant had been required to undertake, a matter which the Claimant had brought grievances in respect of in April 2020.
23. The Claimant's representative submitted that all matters were connected by a policy of depriving the Claimant of returning to her substantive role albeit that he agreed that this was not in the substantive pleading. He asked that I consider the totality of the Respondent's behaviour and that the key issue was the purposeful approach to the treatment of the Claimant, that could only be tested in a final merits hearing.

Discussion

24. The Claimant contacted ACAS on 14 December 2021 and an EC Certificate was issued on 24 January 2022 [2]. The ET1 was issued on 23 March 2022. Working on the dates of the ACAS certificate, any act or omission occurring before 13 November 2021 is prima facie out of time.
25. I deal with the complaints listed in C3, C4 and D4 separately to the remaining complaints brought by the Claimant.
Complaints up to February 2017
26. The initial complaints date back to 10 March 2015, when the Claimant was first dismissed from her role as Ward Nurse by Rosemarie Hazard, Senior Nurse for Directorate of Medicine (now retired) (E1). She complains that:
 - a. she was not re-instated by Jason Roberts on 6 June 2015 following her appeal against dismissal (10 March 2015,) but was instead re-engaged; that the dismissal and re-engagement were acts of indirect discrimination (D1), harassment (E1) and discrimination arising from disability (F1).
 - b. that there was a failure to comply with the duty to make reasonable adjustments to enable her to be re-instated in June 2015 (C1);

- c. in the period 10-15 March 2015, the Claimant also asserts that colleagues were told not to speak to her (E2).
 - d. She also complains that Chris England was intimidating and aggressive towards her at a meeting following her re-engagement in June 2015 (E3).
27. Despite having appealed against her dismissal, the Claimant did not bring any complaint at that time and, from February 2017 to February 2018, was absent from work following a breast cancer diagnosis. She did not complain on her return to work. Indeed she did not bring any formal complaint regarding such matters despite lodging a grievance in April 2020 regarding, amongst other issues an OSCE assessment in June 2019.
28. I concluded that these acts, including the decision to re-engage as opposed to re-instate the Claimant as ward manager in June 2015, whilst having continuing consequences for the Claimant, were distinct acts that crystallised at date of dismissal/ the dates that they were said to arise and, at the latest by the date of the Claimant's re-engagement on 6 June 2015.
29. Specifically in relation to the claims regarding the actual dismissal in March 2015 and the comments made to the Claimant, I took into account **Hendricks** and considered that these were unconnected to the complaint related to the failure to reinstate the Claimant in June 2015. On that basis, I concluded that the complaints regarding the March 2015 dismissal and comments made (E2, E3), were discrete acts and were out of time.
30. I also considered whether the complaints regarding re-engagement/failure to re-instate in May 2015 (C1, D1, E1 and F1) were capable of being a continuing act with the later acts, which post-dated the Claimant's absence from work following her cancer diagnosis from February 2018.
31. I was not persuaded that they were.
32. I took into account that the Claimant had named a variety of individuals who had at some point managed the Claimant and/or who had been named by her as the perpetrator of an act of discrimination. Taking some guidance from **Aziz** and that the individuals involved in the earlier complaints (Rosemary Hazzard and Jason Roberts) were no longer managing the Claimant, that the Claimant had been off work for a year and when she returned to work February 2018 had reported to a new Head of Nursing, Debbie Harris. I was not persuaded that the Claimant had demonstrated a prima facie case of a continuing act with matters which post-dated the Claimant's return to work (even if it could be argued that some form of policy against the Claimant existed in 2015).
33. I concluded that the Claimant had not demonstrated a prima facie continuing state of affairs and on that basis the complaints, as set out in C1, D1, E1 and F1 were also substantially out of time.
34. When considering whether it was just and equitable to extend time, the Claimant gave evidence that she did not pursue complaints about her dismissal

and re-engagement in 2015 at any point up to February 2018 as she was concerned that this would jeopardise her position and lead to the Respondent dismissing her again. She tells me that she had been unfairly treated, had what she had felt was an unfair dismissal in March 2015 and did not have confidence that raising concerns about her re-engagement to alternative roles, as opposed to re-instatement to ward manager, would have lead to a different outcome and in fact could have lead to her being dismissed again¹.

35. I did not consider that this was credible. Whilst I had little doubt that the Claimant would have been very poorly with her breast cancer treatment over the course of 2017/2018 and that this would have changed her focus away from work-related issues, she did return to work in February 2018, yet did not bring a complaint at that time.
36. Having been successful in her appeal against dismissal and taking into account that she did in fact complain, albeit not until April 2020 by bringing a grievance, having sought advice and assistance from her trade union throughout, I was not persuaded by the Claimant's arguments that it would be just and equitable to extend time.

Complaints following February 2018

37. The Claimant accepts that Debbie Harris attempted to enable her to return as ward manager, but brings complaints in relation to the OSCE assessment carried out in June 2019; that there had been no reasonable adjustments to the OSCE assessment (C2), that the OSCE assessment disadvantaged her as a disabled person (D2) and her failing the OSCE assessment amount to unfavourable treatment (E2)
38. I was not persuaded that the Claimant had demonstrated that this was capable of forming part of any prima facie continuing act of depriving the Claimant of returning to her substantive role. Again, I considered that this was a distinct act undertaken by Debbie Harris, Head of Nursing and concluded that time for bringing such a claim run from 26 July 2019 when the Claimant failed the assessment.
39. In terms of just and equitable extensions, by this time the Claimant had completed her breast cancer treatment and had returned to work. The Claimant had also included a complaint in respect of this OSCE assessment in her April 2020. Despite not achieving an outcome that was wholly acceptable to her, she did not claim at that time.
40. On that basis I did not consider that it was just and equitable to extend time.
41. The Claimant was successful in obtaining a role as Informatics Nurse Specialist in around November 2020. She brings complaints that her new line manager, Christian Smith, made comments that amounted to harassment (E4), and that in January 2021, whilst on trial, Becky Garmen switched off a presentation (E5,

¹ CWS §6 and §8

F3). She also complains that she was questioned by David Edwards, HR Manager why she wanted to be accompanied as a companion (E6).

42. Again, I was not persuaded that there was a prima facie case that these formed part of any continuing act amounting to a regime to deprive the Claimant of the ability of returning to her substantive role.
43. They were distinct acts carried out by different individuals to Debbie Harris and were acts that were substantially out of time. Again, for reasons already given, time is not extended. I concluded that as the Claimant was capable of putting in a second grievance, that it could not be said that it was reasonable to have perceived concerns of the impact of bringing a complaint on her job prospects. Again, I took into account that the Claimant was represented throughout.
44. When considering extension of time in each case, I also took into account the prejudice to the Respondent in having to deal with historic claims, where the relevant witnesses have largely left the Respondent's employment through retirement or alternative employment. If these complaints were permitted, such witnesses would have to recall matters dating back from now over 7 years ago.

Complaints C3, C4 and D3 List of Issues

45. On the face of the pleadings, I accept that the complaints set out at C3, C4 and D3 List of Issues point towards a prima facie case of a continuing act up to and including 26 April 2021.
46. At this point I decline to make a deposit order in respect of any specific allegation or argument in the claim set out in C3, C4 or D3 of the List of Issues however pending any decision on the amendment.
47. I do not consider that I can decide whether the claims have a reasonable prospect of success if I don't yet know what they are and that before considering whether to make a deposit order, reasonable steps should be taken to identify the claims and issues in the claims (**Cox v Adecco and others UKEAT/0339/19/AT**).
48. This will be determined following submissions on amendment in respect of these outstanding claims at the preliminary hearing which has been listed for 13 February 2022.

Employment Judge Brace
Dated: 19 December 2022

Judgment and REASONS SENT TO THE PARTIES ON 21 December 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche