



EMPLOYMENT TRIBUNALS

Claimant: Ms Bilikisu Oluwa

Respondent: King's College Hospital NHS Foundation Trust

Heard at: Croydon by Cloud Video Platform

On: Friday 5 February 2021

Before: Employment Judge P Britton (sitting alone)

Representatives

Claimant: In person

Respondent: Mr S Sudra, Barrister at law

JUDGMENT AT A PRELIMINARY HEARING

1. The Claim based upon race discrimination is dismissed it having been presented out of time and it not being just and equitable to extend time.
2. The Claimant was a disabled person at the time of material events.
3. The Claim of disability discrimination will proceed based upon unfavourable treat pursuant to s.15 and failure to make reasonable adjustments pursuant to s.20 -22 of the Equality Act 2010, and focussing primarily on the qualification issues in 2019.
4. The Claim of unfair dismissal will proceed.

5. Orders for Directions are hereinafter set out.

REASONS

1. This case comes before me at the direction of Employment Judge Mason following the preliminary hearing (private) held by her on the 15 January 2021. That hearing was detailed and the published record runs to 6 pages. As per Order 2.1 the first issue for me to determine is whether the Claimant, who describes herself as being of black Nigerian ethnicity but British born, was at the time of material events a disabled person pursuant to section 1 and Schedule 6 of the Equality Act 2010 (the EqA).
2. The material events span the period from 11 September 2017, when she commenced her employment with the Respondent as a trainee dental nurse, until her dismissal following the expiry of what was a fixed term contract on 13 October 2019, which is the Effective Date of Termination (EDT).
3. In reaching my decision on this first issue I have particularly considered the medical notes for the Claimant, albeit she had made extensive redactions. Also, the occupational health reports. The additional evidence which came in in the last 24 hours from the Claimant and also her impact statement as directed by Employment Judge Mason. I have inter alia considered the pleadings and in that respect the Claimant's letter to the Respondent dated the 31 December 2019 and which accompanied her clam (ET1) which was presented to the Tribunal on 12 January 2020. She has been extensively questioned by me and Mr Sudra. I am grateful for his written submissions. Finally I have ensured that the Claimant has had breaks when she needed them and ensured that she has been fully able to explain herself on all the issues which I have addressed, and not just the disability issue.

The Disability issue

The essential legal framework

4. S.6 of EqA states :

A person (P) has a disability if-

(a) *P has a physical impairment and*

the impairment has a substantial and long term adverse impact on P's ability to carry out normal day to day activities."

5. In relation to that definition the words substantial and long term adverse impact mean more than minor or trivial.

6. Schedule 1 (2) (1) states: The effect of impairment is long term if –
 - (a) *it has lasted for at least 12 months,*
 - (b) *it is likely to last for at least 12 months, or*
 - (c) *it is likely to last for the rest of the life of the person affected.*
7. In this case it is clear that this would be the span of events culminating with the EDT.
8. For reasons that will become clear also possibly engaged is what is known as recurring conditions and thus Sch. 1 para.2

“ If an impairment ceases to have an effect on a persons ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”

Findings of fact

10. The employment was specifically focussed on training and thus being able to pass the four examinations during the two year period in order to qualify as a dental nurse. The Claimant failed. Part of her claims is that she failed because she was and indeed still is a disabled person. If she was so disabled, then subject to labelling in terms of the EQA, the core point would be, did the Respondent fail to make sufficient reasonable adjustment thus meaning she would not have failed, and second in that context did it treat her unfavourably because of something arising in consequence of her disability. Hence the need to determine if she was disabled at the material time.
11. A combination of physical and mental conditions, together can constitute a disability.
12. The first condition relied upon by the Claimant, is Endometriosis (Endo). This is gynaecological condition, and clearly long standing with the Claimant. as referenced in the medical notes. An example being her certified absence from work because of that condition on 8th November 2017. The point being that Endo can actually be a serious condition as referenced on the NHS web site on said topic. Quoted therein is that can have a “significant impact on your life”. This can include severe pain when it flares up : hence the need for painkillers and which in 2017 the Claimant was prescribed. It can be difficult to deal with both physically and emotionally. It may cause with such as periods heavy bleeding. Also back pain. Depending on the severity, the description on the web site

refers to “makes it hard to concentrate and sleep, wash and dress” and moving up the scale – “hard to move”. Suffice it to say, looking at medical notes this was a condition which potentially meets the definition of disability. This is encapsulated in the “To whom it may concern” letter of her GP dated 13th April 2018.

13. Next relied upon is essentially severe anxiety and depression. Significant in that respect, is that by October 2018 she had already received private counselling and attended the Wellbeing clinic, and also attended her GP who had noted inter alia “low mood”.. On 12 October 2018 she was prescribed Sertaline, which is an anti-depressant, initially at 25mg daily. However, it was increased to what I understand to be the maximum dose of 50mg per day on 2 November. She was given a repeat prescription in December at that high dosage which would see her through in to early January 2019. The diagnosis was by now depression. I start therefore from the standpoint that GPs are often best placed to make that diagnosis¹. The relevance then is that the beneficial effects off in this case the Sertraline must to be gnored in terms of determining disability. In other words what would the Claimant be like in terms of functioning without the Sertraline.
14. Although the medical notes are heavily redacted, only as an observation, I cannot but take note that this Claimant was diagnosed in the consultant psychiatrists report of 3 April 2020 as “...*primary psychotic state and some chronic paranoid feelings with a persecutory element.. appears to have been present over at least the last 6 months or so*”.² Well of course that prima facie would cover the final chapter of the material events and the dismissal. On 16 November 2020 she was diagnosed as paranoid and moving into 2021, she was additionally diagnosed as psychotic.
15. But of course I must make my decision on whether she was disabled in terms of a mental impairment namely severe anxiety and depression at the time of material events.
16. This brings me to whether the impact of the impairments, both physical (Endo) and mental (depression and anxiety) were substantially impacting upon her ability to undertake normal day to day activities.

¹ J v DLA Piper UK LLP (2010) 936 EAT.

² In coming to fair up these reasons which were given extempore I have added this, albeit it was part of the questing and my observations prior to my giving my judgement.

17. The OH report of 23 July 2018, which the Respondent commissioned following a series of absences, doesn't refer to mental health conditions. It does refer to Endo. I can read from it that the Claimant was presenting with work place issues. The Claimant explained to me that she was reluctant to disclose her mental state because of fear it might go against her. That is not relevant at this stage other than that perfectly properly Mr Sudra has therefore raised as to whether she did not raise it because she was not as mentally unwell as she alleged.³
18. I take the following into account. During this period the Claimant had been referred to Wellbeing. I also know that by October 2018 she had a private counsellor to help her. I can establish from the questioning, and I found her an honest witness albeit obsessed with matters⁴, that prior to starting this training contract she was an outgoing person. She was a qualified beautician and helped in her community. She liked to visit her family who lived down the road from her and she was devoted to her brother. She enjoyed social relationships. Today she was well presented. This was also the case when she was undertaking the training with the Respondent. She presented neat and tidy. She attended to matters of hygiene. But this increasingly became a veneer as her mental health worsened in terms of what was happening in her personal life. She managed to cook from time to time but neighbours helped. Her maintaining of her home and such as cleaning was not as it had been. Her increasing obsession with the work place issues adversely affected her relationship with her boyfriend. She was no longer seeing her brother or helping in the community.
19. Into 2019, she tried to wean herself off the Sertraline being concerned with the side effects. For a while she also stopped seeing her GP. She still presented as being a functioning individual at work but this was continuing as a veneer. Also, she was forgetful, an example being her presentation for a class as part of her training and which she had downloaded but forgot to bring. She had not been forgetful in the past. Finally, I get to the examinations. She failed 4 times despite help towards the end, by way of 1 to 1 mentoring. She is an intelligent and articulate young lady.
20. I conclude from the totality of the evidence and my observation of her during this lengthy hearing, that a reason for why she failed was because of this obsession and which in itself was now so acute as to be part of the

³ He cross examined with sensitivity.

⁴ That is not a criticism but an observation.

mental impairment. And as to the impact, the ability to take exams is part and parcel of normal day to day activities in this day and age.⁵

21. Finally I repeat that mental health impairments such as depression or irrational obsession are invariably recurring conditions. The fact is that the mental health impairment came back, if it ever went away, with a vengeance in 2020.

Conclusion

22. The Claimant was a disabled person at the material time for the purposes of the Equality Act 2010.

Out of time issues

23. I preface my decision with that before me the hearing lasted all day and not the three hours originally allocated. I gave the Claimant every assistance to explain her case and carefully considered the extensive bundle before me. This is important because post my extempore judgement the Claimant asked for a review of my decision, which I will inter alia set out below, to strike out her race discrimination claim as being out of time.
24. The tapes of my extensive extempore judgement which I sent for typing to the tribunal secretariat appear to have been lost and maybe in transit. Thus, in order to provide these reasons. I asked both parties for a note of my adjudication. That of the Claimant is limited. I do not criticise her in that respect. But that provided by the Respondent is an entire transcript of the hearing. It shows just how fully the Claimant's case was explored with her. Thus it reinforces my decision already provided to the Claimant not to review my judgment, it not being in the interests of justice to do so.
25. Having so observed, I now give my decision in respect of which I have by an large used the transcript cross referenced to my notes in fairing up my reasons.
26. Thus the second issue on the agenda today is to deal to deal with whether parts of the claim are out of time. I propose to first deal with the race discrimination claim. I have spent a great deal of time today, in accordance with the overriding objective, allowing the Claimant to explain her case to me in detail. In doing so I have looked closely at the schedules running to 38 pages prepared by her in accordance with the Order of Employment

⁵ Paterson v Commissioner of Police of the Metropolis (2007) IRLR 763 EAT.

Judge Mason. These set out chronologically the material events and her attempts to label her claims in accordance with the EqA.

The race discrimination claim

27. Focussing on the issues relating to race discrimination, prima facie from early on in the employment what she is alleging seems to first be harassment. In terms of the Tribunal's jurisdiction it would have to come within s26 of the EqA. In other words it has to relate to a protected characteristic: in this case as has become clear: that she is Black Nigerian. The second claim would appear to be one of direct discrimination pursuant to s13 of the EqA. Namely that she has been treated less favourably than others because she is Black Nigerian
28. Thus the scenario begins with conversations at the start of her employment with another trainee, Sandy, about whether she knew a lady called Joyce. Then comes into play the lead role taken by Tina, another trainee, and following through with her being the leader of the bullying pack against the Claimant. The latter has told me that although Sandy is herself a black African and Tina is of Afro-Caribbean ethnicity, the two of them personified a prejudice historically and culturally against Nigerian persons. In the case of Sandy first because she is of French speaking Congolese ethnicity and resents the perceived loudness of English speaking Black Nigerians, and second as to Tina because she has an historical prejudice against Nigerians in particular because of their alleged complicities with slavery and also their arrogance.
29. I have come across in my extensive experience as an Employment Judge these kind of sophisticated prejudices and which can of course manifest in racism.
30. But the problem I have, taking the Claimant's account of events at its highest, is that she raised a grievance on these issues with the Respondent in early summer 2018. There was a counter complaint of alleged rudeness from Charlotte, who it appears is White Caucasian. The Claimant's grievance was investigated and dealt with by the 26th July 2018 and it was found not proven. The Claimant received an informal warning as she had covertly recorded the Grievance investigation hearing. This

was on the 9th August. She had been represented at that stage by a trade union representative. She did not appeal the outcome.

31. The Claimant has provided no evidence of any alleged incident relating to race thereafter. Her focus has been on problems qualifying and the interface to her disability.
32. There is a time limit for bringing claims such as direct discrimination and harassment to the Tribunal pursuant to the EqA. It is three months from the date of the last act complained of. This is extended for any period of ACAS early conciliation. Allowing for that, and even so the claims based upon race discrimination are 15 months out of time. Engaged then is whether or not it would be just and equitable for me to extend time so as to allow the claims to continue. This is pursuant to s123 of the EqA.
33. The approach a Judge takes in terms of that exercise has been helpfully re-affirmed in **Abedeji v University Hospitals of Birmingham NHS Foundation Trust (2021) EWCA Civ 23** per Underhill LJ. In a context where time limits are intended to be applied strictly and thus with the burden of proof on the Claimant to persuade me that it is just and equitable to extend time, I focus on in terms of the scenario as to out of time “all the circumstances of the case”. In doing so, as re-affirmed by Underhill LJ at paragraph 38 of the judgement is the following passage from the judgement of Leggatt LJ in **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) EWCA civ 640**:

“19...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 investigating the claim while matters were fresh.”
34. The Claimant says that as at July 26th 2018 in her words did not wish to press the matter as she did not want to be seen as jumping on the band wagon and also fear of being further targeted or not being allowed to continue on training. But, she had trade union representation. And I have no doubt from the documentation, and bearing in mind the considerable help she was given including latterly mentoring in 2019 to try and enable her to succeed, that she objectively was not justified in her fears. I accept that this is how she felt. But it is not objectively supported by the evidence.

35. She did know of the existence of the employment tribunal. She has told me that “it didn’t cross my mind to go there at that time. “But she then told me that she did talk to a lady from ACAS at the time and “also tried to get help from BAME”. She did not pursue the matter with the trade union, Unison; albeit she seems to have become disaffected with it post the disciplinary hearing. I repeat that she is intelligent and indeed from her submissions has made herself to some extent knowledgeable on such as the legal framework⁶. She has not said that her disability was so disabling as to prevent her from doing any of this. Indeed, she continued of course to by and large attend at work and for her training. It follows that she could have been expected as a potential litigant to make enquiries as to how to take matters further forward, and by so doing to have found out about the time limit.
36. Second the Respondent is now prejudiced. It has waited for proper particulars from the Claimant for some months and which she has only recently completed as per the schedules. Material witnesses are no longer in the employ. It will have to try and track them down. Even so, memories may have faded.
37. Furthermore the Claimant is not shut out of the justice seat at this stage and because her unfair dismissal and disability claims are not out of time, albeit the Respondent may in due course renew its submission that earlier aspects of the disability based claim may be out of time as not being part of a continuing act.⁷

Conclusion on this issue

38. Thus having taking all these factors into account, I have concluded that it is not just and equitable to extend time.

The way forward on the unfair dismissal and disability discrimination claims

Labelling and issues and observations

39. It is clear to me, looking at particularisation and starting again with September 2018, that the following applies. In September 2018 the

⁶ In her review submissions and thence her note of the hearing to assist me viz the missing tapes she has recited jurisprudence.

⁷ See: *Henricks v Commissioner of Police for the Metropolis* (2003) IRLR 96 CA. I have made the preliminary observation to Mr Sudra that this is a continuing act scenario and thus the determination of whether parts are out of time is a matter for findings of fact for the tribunal at the main hearing.

Respondent changed the rules for the purposes of qualification so that all those still to get the qualification would henceforth only be allowed a maximum of four attempts at any examination needing to be passed to obtain qualification. It is clear from the Claimant that within her training cohort, which was ethnically diverse, she was not the only one who was unhappy and anxious about the change. Thus, this cannot be direct discrimination pursuant to s.13 - others in the cohort were treated no more favourably.

40. Up until 2019 she was doing reasonably on the course. Left was the need to pass the final exam unit 315. She failed the first time. She re sat the exam on 8th May 2019 and again failed: albeit by a narrow margin. The Respondent made efforts to assist her although she may not see it like that. Thus the informal capability meeting with her on 15th May; the creation of the action plan; and 1 to 1 mentoring. She re sat the exam again on 5 June 2019 and unfortunately failed. This was by a wider margin than previously. The Respondent incepted formal capability management. Again, it appears to me that this was part of trying to get her through. An example being that she was assisted by taking mock exams so that her shortcomings could be worked on. She failed twice. She re sat the exam on 16th August. This was thus the fourth and final attempt which was permitted. She failed scoring only 56%.
41. Thus she had to be dismissed and because this was a fixed term contract with the only aim of getting through to qualification.
42. This issue then becomes that the Claimant having pleaded with the Respondent to persuade the qualifying body to let her have a fifth attempt, albeit this was not as per the policy to which I have referred, the Respondent was able to persuade it to allow the Claimant to have a further go. This appears to have been November 2019. But it would not be in the context of her being an employee as of course the employment had ended.
43. What it boils down to is this: –
 - 1) Was the Claimant dismissed pursuant s.15 EA 2010. That is to say was she treated unfavourably because of something arising in consequence of her disabilities? For the purpose of today, and thus it does not bind the tribunal at the main hearing, prima facie a reason why the Claimant was failing was because of worsening mental health. Thus, in being failed she was treated unfavourably.

But, of course, the Respondent can fall back on the justification argument, namely that there has to be an integrity to the examination and thus qualification process, given a dental nurse must of course be competent. Thus, it will argue that it did its utmost to assist the Claimant up to the ending of the employment. As to whether it actually knew of depression at that time, can be left to the main hearing.

- 2) The next limb of disability claim is obvious, namely whether there was a failure to make reasonable adjustments. This claim invariably interlinks with the justification limb of a s15 claim. This engages s.20-22 of the EqA essentially that in this case where:

“ ...where, a provision, criterion or practice of (the Respondent) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, (a duty on the Respondent) to take such steps as is reasonable to avoid the disadvantage.” .

What is the PCP? - it is requirement to pass the exam and complete qualification as a trainee Dental Nurse. Prima facie that put the Claimant at a substantial disadvantage, particularly in 2019, due to worsening mental health.

44. Given all the efforts the Respondent made to assist the Claimant prior to the dismissal, it seems to me that the only issue becomes that as the Respondent persuaded the qualifying body to let her have a 5th attempt at the final exam after the end of employment, why could it not have done more to achieve that before the end of the employment and if so, then extend the employment for a further period, say not more than 6 months to let her have a final attempt? If despite it continuing to such as mentor, she still failed, then that would have been an end of it. There is no obligation to extend the contract of employment of a disabled person indefinitely if the Employer has made a reasonable a adjustment and even so the employee cannot perform. But prior thereto the well-known authority of Archibald⁸ makes plain the employer must be proactive. There is in that sense the duty to positively discriminate in favour of the disabled person. That becomes the issue.

⁸ Archibald v Fife Council (2004) IRLR 651 HL.

45. But the Claimant never sat the fifth attempt at the examination. She told me it was because she was too ill and otherwise preoccupied with going about pursuing matters to the employment Tribunal. Thus, the employment would still have ended. Thus, the dismissal would have been fair, even if the employment had been extended. And the duty to make reasonable adjustments would have ended and furthermore any unfavourable treatment.
46. Thus as to her expectations, as per her schedule of loss taking her case at its highest, the measure of compensation is likely to be very limited even if she were to win.
47. Therefore given this case is likely to last several days at a main hearing before a Tribunal, I observe that if what I have observed is an accurate assessment of the issues, then this case is clearly suited to judicial mediation. The Claimant has today indicated her willingness to engage. The Respondent will in due course consider whether it is so willing.

Orders

1. The remaining claims having now been particularised, and with my assistance correctly labelled, the Respondent will provide essentially an amended response. It will do this by **Thursday 1st April 2021**.
2. I hereby list this case for Further Case Management before me to ensure continuity of case management. This will be by CVP at **2pm Thursday 15th April 2021**.
3. If Judicial Mediation is on the agenda, then I will list the same there and then. If it is not to be on the agenda, the Respondent will provide a proposed agenda including as to directions for the main hearing and a time estimate for the same. It should also provide dates to avoid on the premise that the main hearing will not be until 2022. This will be copied to the Claimant.

NOTES

- (i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.
- (ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
- (iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
- (iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:
<https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf>
- (iv) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*” If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge P Britton

Date: 13 March 2021

