



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102251/2023

Held in Glasgow on 13 December 2023

Employment Judge: M Sutherland

5 **Mr Haani Elseed**

**Claimant  
In Person**

**Common Services Agency**

**Respondent  
Represented by  
Ms L Ewart -  
Solicitor**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that -

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1. the Claimant was not disabled and his complaints of disability discrimination fall to be dismissed.
  2. the complaints of race discrimination (with the exception of his dismissal) were brought out with the statutory time limit and fall to be dismissed.

### REASONS

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1. The Claimant has presented complaints of unfair dismissal, disability discrimination and race discrimination. An open preliminary hearing was arranged to determine whether the Claimant was a disabled person at the relevant time and whether any of the complaints have been brought outside the statutory time limit. The Claimant appeared on his own behalf. The  
25 Respondent was represented by Ms Ewart, Solicitor.

2. In respect of his complaints of disability discrimination, the Claimant asserts that –

- a. he was disabled at the relevant time by reason of the mental impairment of anxiety and work related stress.

- 5 b. the Respondent required employees to work alongside a colleague who has made racially motivated allegations about them and this put others who shared his disability to the substantial disadvantage of being rendered unfit to work and ultimately dismissed and he was put to that disadvantage during the relevant time which amounted to indirect discrimination.
- c. the Respondent failed to make reasonable adjustments during the relevant time to prevent contact with that colleague which would have avoided that disadvantage.
- 10 d. The relevant time was from 8 November 2019 to 20 October 2022 (inclusive).
3. In respect of his complaints of direct race discrimination, and having provided further clarification at this hearing, the Claimant asserts that the following events amounted to less favourable treatment because of his race-
- 15 a. The criminal allegations made by Lesley Gray, Supervisor in 2014
- b. The decision to issue a disciplinary warning and change his work location made by Dave Hair, Manager and Darrell Thomson, Manager in 2016
- c. The permanent change of his work location made by Pat Grant, Facilities Manager in 2019
- 20 d. The decision to dismiss him made by Julie Critchley, Manager and Simon White, Manager on 20 October 2022
4. The Claimant was employed by the Respondent as a Domestic Assistant from 29 March 2010 to 20 October 2022. The Claimant participated in ACAS Early Conciliation from 16 January to 24 February 2023 and lodged his tribunal claim on 23 March 2023. It was accepted by the Respondent that all of the complaints were lodged within the statutory time limit apart from those of race discrimination arising prior to 2022 (namely complaints 3a, b and c above).
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5. An impact statement was provided by the Claimant which advised that his mental health affected the following activities: his sleep, his socialising, his fitness for work, and his studies. No medical records or medical report was provided.
- 5 6. Complaint d. (that he was dismissed because of his race) is not affected by the issue of time bar. It was noted that in his pleadings he appeared to accept that the reason for his dismissal was his absence (had the Respondents made the adjustments he would have worked and not have been dismissed). It was explained to the Claimant that he required to plead facts from which it could  
10 be inferred that the reason for his dismissal was his race. In response the Claimant stated that he was not aware of any white colleagues who had been dismissed and a white colleague Alistair (surname unknown), who was employed as a Domestic Assistant in the Gyle, was not dismissed despite 2 years sick absence. The Respondent will consider and respond to this  
15 assertion.
7. At today's hearing the Claimant gave evidence on his own behalf and no other witnesses were called. A bundle of documents was provided. It contained the pleadings and impact statement but no documentary evidence. The Claimant sought and was granted additional time after the hearing to lodge a copy of  
20 the disciplinary outcome letter from 2016. The Claimant then proceeded to provide correspondence pertaining to the disciplinary investigation undertaken in 2014/15. The Respondent provided a copy of the disciplinary outcome letter from 2016.
8. The parties made oral submissions.
- 25 9. The issues to be determined were –

*Disability status*

- a. At the relevant time, did the claimant have a mental impairment?
- b. If so, did that impairment have an adverse effect on his ability to carry out normal day to day activities?
- 30 c. If so, was that effect substantial (more than minor or trivial)?

- d. If so, was the substantial effect long term having lasted (or being likely to last or recur) for 12 months?

*Time bar*

- a. Was the complaint lodged within 3 months of the act?
- 5 b. If not, was it lodged within such other period as the tribunal thinks just and equitable?

**Findings of Fact**

10. The tribunal makes the following findings in fact-
11. The Claimant was employed by the Respondent as a Domestic Assistant from  
10 29 March 2010 to 20 October 2022.
12. In 2014 Lesley Gray, Supervisor ('LG') made a complaint to the police regarding the Claimant's alleged behaviour towards her. This resulted in a criminal trial at which the Claimant was found not guilty. The Claimant was advised by his solicitors that the judge had noted that her allegations were  
15 greatly exaggerated and motivated by racial prejudice. The Claimant was deeply upset by the experience and was absent from work on sick leave for a period of time.
13. In June 2016, and following a conduct process which related to his alleged threatening and aggressive behaviour towards LG, managers Dave Hair and  
20 Darrell Thomson made the decision to issue the Claimant with a final written warning and to change his work location. Laura Russell / Comerford ('LR/C') provided HR support to the disciplinary investigation.
14. In late 2018 / early 2019 a permanent change was made to his work location which was communicated to him by Pat Grant, Facilities Manager. From  
25 around early 2019 onwards the Claimant worked in the Jack Copeland Centre (JCC).
15. On or about 8 November 2019 the Claimant saw LG for the first time in the JCC. This greatly upset him and he consulted with his GP. The incident temporarily affected his sleep and his socialising. He was absent from work

on sick leave from 8 November 2019 to 16 September 2020. During that time he was unfit to sit his exam for his degree which he deferred. He sought and was issued with fit notes about every 4 weeks which stated that he was suffering from work related stress. The Claimant advised that he could not return to work unless management guaranteed that LG was not in the same building. A phased return to work was agreed during which adjustments were put in place which prevented the Claimant from having contact with LG. The Claimant returned to work for about 9 months.

16. On or about 7 June 2021 the Claimant saw LG for a second time in the JCC. This upset him and he consulted with his GP. The incident temporarily affected his sleep and his socialising. He was absent from work on sick leave from 7 June 2021 until his dismissal on 20 October 2022. He sought and was issued with fit notes about every 4 weeks which stated that he was suffering from work related stress. The Respondent held numerous meetings with the Claimant about his absence and return to work. During those meetings the Claimant advised that he could not return to work unless management guaranteed that he would have no contact with LG. By June 2022 the Claimant advised he was willing to be redeployed to another site not visited by LG.

17. The Claimant was dismissed on 20 October 2022 by stated reason of long term absence. The decision to dismiss was made by Julie Critchley, Manager and Simon White, Manager on 20 October 2022. LR/C provided HR support to the dismissal hearing.

18. The Claimant unsuccessfully appealed the decision to dismiss which was upheld on 22 December 2022.

19. The Claimant had always understood that race discrimination is unlawful. He was also aware that you could make a complaint to an Employment Tribunal but he thought that this was only if you had been dismissed. The Claimant sought advice from Citizen's Advice during the last few years of his employment. He also had the benefit of legal advice and representation when he presented his claim, attended the first Case Management Hearing and presented further particulars.

**Observations on the evidence**

20. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.
- 5 21. The Claimant had been ordered to provide an impact statement, medical records and a medical report. The Claimant had a period of 4 months in which to do so. An impact statement was provided but no medical records or medical report was provided despite reminders. It was not in dispute that his periods of absence had been certified by his GP as “work related stress”.
- 10 22. The Claimant was not considered a wholly reliable witness because his evidence was materially inconsistent.
23. When asked if he was prescribed medication to relieve his stress he said he was but that he “tried not to take it”. He subsequently said he was offered but declined it. He did not give any evidence regarding anxiety until he was  
15 reminded that he had referenced this condition in his claim form. He initially stated he was unsure whether he had received a diagnosis of anxiety. He then subsequently stated that his GP said he had anxiety. His fit notes did not refer to a diagnosis of anxiety. It is considered more likely than not that the Claimant had not been given a diagnosis of anxiety.
- 20 24. The Claimant’s pleadings and impact statement indicated that his contact with the supervisor at JCC had been frequent: “Ms Gray started to visit the Claimant’s place of work at the JCC”; “he was required to work in the same location as Mrs Gray”; he was forced to work alongside a colleague that made racially motivated allegations to the police; “the issue started again when I  
25 started seeing my previous supervisor in my new work location.” When asked the Claimant admitted in evidence that he had seen Mrs Gray on only two occasions when he was working in the JCC (on 8 November 2019 and on 7 June 2021).
25. Despite being prepared with the benefit of professional advice, the Claimant’s  
30 impact statement was very high level and gave very little information regarding the timing, duration and effect on normal day to day activities. When

asked questions in chief about these issues the Claimant's evidence was that he could not sleep "when I encountered the supervisor"; that he was "sitting at home for days without going out"; that on one occasion he had "dizziness and difficulty controlling my body". He initially stated he was unable to  
5 continue his studies (a degree in business management) but he then subsequently stated that "I made some progress". The impression he gave was that the adverse effect on non-work related activities was acute but very short lived.

26. The Claimant was certified as unfit for work for 10 months in 2019/2020 on  
10 account of work related stress and for 16 months in 2021/ 2022 on account of work related stress. Both absences had been initiated by him seeing LG. From at least June 2022 the Claimant made it clear that he was fit to return to work but only on condition that he had no contact with LG. That stipulation was at his insistence - there was no medical evidence to this effect.

15 27. The Claimant believed that the permanent change of his work location was made by Pat Grant, Facilities Manager in 2019. Whilst the Respondent accepted that this decision intimated to him by PG, the decision was made a matching panel (comprising individuals who were not named in the complaints of discrimination). The Claimant was not able to accept this without further  
20 information.

## The Law

### *Disability status*

28. Section 6 of the Equality Act provides that: (1) A person has a disability if: (a)  
25 that person has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

29. In determining disability status the Tribunal must take into account any aspect of the Guidance on the definition of Disability (2011) and the EHRC Code of Practice on Employment (2015) which appears to be relevant.

30 30. The burden of proof is upon the Claimant.

*Mental impairment*

31. The Equality Act does not define 'mental impairment'. Appendix 1 paragraph 6 to the EHRC Code states: 'The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities'.
32. Where there is no clear medical diagnosis it may be legitimate for a tribunal to first consider adverse effect and then to consider whether the existence of an impairment can reasonably be inferred from those adverse effects on a long term basis (*J v DLA Piper UK LLP 2010 ICR 1052, EAT*). *"If, ..., a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived"*.
33. However "a long period off work is not conclusive of the existence of a mental impairment" (*Herry v Dudley Metropolitan Borough Council UKEAT/0101/16/LA, EAT*). For example, a reaction to adverse circumstances at work may become so entrenched such that the person is certified as unfit for work yet suffers little or no adverse effect on other normal day-to-day activities.
34. The cause of the impairment does not require to be established (Guidance A3).
35. A distinction may be drawn between a mental impairment such as clinical depression and stress/ low mood (both of which may be a reaction to adverse life circumstances). In some cases tribunals may find that effects suffered by a single claimant were sometimes attributable to a mental impairment and sometimes to stress/ low mood which does not amount to a mental impairment (*Piper*).

*30 Normal day to day activities*



36. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2– D3).

*Substantial adverse effect*

37. The impairment must cause an adverse effect on normal day to day activities but it need not be a direct causal link.

38. The adverse effect must be substantial. Section 212(1) of the Equality Act provides that “substantial” means more than minor or trivial. The EHRC Code notes that a disability is “a limitation going beyond the normal difference in ability which might exist among people”.

39. It is important to consider the things that a person cannot do, or can only do with difficulty (Guidance B9). This is not offset by things that the person can do.

40. The time taken by a person with an impairment to carry out an activity should be considered when assessing whether an effect is substantial (Guidance B2).

41. Schedule 1 paragraph (5) of the Equality Act provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect. The tribunal should deduce the effect on activities if medication or treatment were to cease unless it has resulted in a permanent improvement.

42. The Guidance provides at para B7 “Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer

meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.”

#### *Long term effect*

- 5 43. Schedule 1 paragraph 2(1) of the Equality Act provides that the effect of an impairment is long term is it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.
- 10 44. Schedule 1 paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In *SCA Packaging Ltd v Boyle 2009 UKHL 37*, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not”.
- 15 45. Where a person has a mental impairment with recurring or fluctuating effects, the effects are to be treated as long term if they are likely to recur beyond 12 months (Guidance C6). If a person has separate episodes of a mental impairment (e.g. depression) each of which last less than 12 months the issue is whether these are discrete episodes which are not connected by an underlying condition or whether these short separate episodes are connected as part of a long term underlying condition the effects of which are likely to recur beyond the 12-month period.
- 20 46. Whether a person has an ongoing underlying condition and the likelihood of recurrence of its effects must be judged at the relevant time and not with the benefit of hindsight. An employment tribunal should disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing.
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#### *Time Limit*

- 30 47. Under Section 123 a complaint of discrimination may not be made after the end of the period of 3 months starting with the date of the act or such other period as the tribunal thinks just and equitable. The three-month time limit is subject to an extension of time to facilitate ACAS Early Conciliation.

48. Acts include omissions. A failure to do something is treated as occurring when the person in question decides upon it (in the absence of evidence to the contrary, when they do an inconsistent act, failing which, on the expiry of the period in which they might reasonably have been expected to act).

5 *Continuing conduct*

49. A distinction is made between a series of discrete acts and conduct extending over a period (continuing conduct). Conduct extending over a period is to be treated as done at the end of the period. The burden is upon 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 they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'.” (*Hendricks v Metropolitan Police Comr [2003] IRLR 96, CA*). The concepts of a policy, rule, scheme, regime or practice are merely examples of continuing conduct.

15 50. A distinction is made between continuing conduct (e.g. the application of a discriminatory rule) and a discrete act with continuing consequences (e.g. the exercise of discretion under a policy) (*Parr v MSR Partners LLP and ors 2022 ICR 672, CA*).

20 51. In deciding whether a particular situation gives rise to conduct extending over time it will also be appropriate to have regard to the nature of the discriminatory conduct of which complaint is made, and the status or position of the person responsible for it. Whether the same or different individuals were involved is relevant but not conclusive (*Aziz v FDA 2010 EWCA Civ 304, CA*).

25 52. At a preliminary hearing the issue is whether the Claimant has established a *prima facie* case (on the face of it) that the complaints were capable of being part of an act extending over a period (*Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, Court of Appeal*). There must be a reasonably arguable basis from which a continuing conduct could be inferred.

*Just and equitable extension*

53. A complaint of discrimination may not be made after the end of the period of 3 months or such other period as the tribunal thinks just and equitable. The tribunal has a broad discretion to consider all factors it considers relevant including in particular the length and reasons for the delay (*Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*). Factors which may also be relevant, but neither exhaustive nor determinative, include: the Claimant's knowledge of the act and the promptness of seeking advice and raising proceedings; whether the cogency of evidence will be materially affected; prejudice to the Respondent; medical conditions preventing or inhibiting the claim; and whether there are little or no reasonable prospects (*Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132*).

### Submissions

54. The Claimant's brief oral submissions were in summary as follows –

#### 15 *Disability status*

- a. He was unfit for work for a long time and there was accordingly a long term adverse effect on him
- b. It was not just his work that was affected – other activities were affected too.

#### 20 *Time limit*

- a. This was continuing conduct – the 2016 disciplinary warning related to the criminal allegations made by LG in 2014; the same HR advisor (LR/C) advised on the disciplinary investigation in 2014 and advised on the decision to dismiss in 2022; Pat Grant is a close friend of LG (this was introduced in submissions and no evidence was led); management and HR all supported each other and worked together to act against him (again this was introduced in submissions). There was accordingly an act extending over a period.
- b. He has not unreasonably delayed – he has been raising the same issue since 2014 and nothing has been done about it. He did not know

he could make a complaint of discrimination whilst he was still in employment.

55. The Respondent's brief oral submissions were in summary as follows –

*Disability status*

- 5 a. There was no substantial adverse effect on normal day to day activities at the relevant time; and any such effects were not long term;
- b. There was no medical evidence of an impairment or an adverse effect;
- c. The Claimant was suffering from stress and not a mental impairment.

*Time limit*

- 10 c. There was no course of conduct: there was a significant time gap between the alleged acts of race discrimination, and entirely different individuals were engaged in the alleged acts which were largely different. The alleged acts were discrete and unconnected. There was no reasonable basis to infer a discriminatory state of affairs.
- 15 d. There were no pleadings in support of a just and equitable extension of time. The Claimant was aware that that race discrimination was unlawful and was in receipt of legal advice at the time. The delays are very substantial at 9, 6 and 4 years respectively which will have materially affected the cogency of the evidence. The exercise of
- 20 discretion is the exception not the rule.

**Discussion and decision**

*Disability status*

*At the relevant time, did the claimant have a mental impairment?*

56. The Claimant did not attend work for 10 months from 8 November 2019 to 16  
25 September 2020, and for 16 months from 7 June 2021 until his dismissal on 20 October 2022, each time on account of work related stress. A distinction may be drawn between a mental impairment such as clinical depression/ anxiety and stress/ low mood (*DLA Piper*). There was no medical diagnosis

of a clinical condition such as depression or anxiety but that it is not determinative. A tribunal may be able to infer the existence of a mental impairment from a long term and substantial adverse effect on normal day to day activities (*DLA Piper*).

5 *Did that impairment have a long term substantial adverse effect on his ability to carry out normal day to day activities?*

57. The Claimant's sleep, socialising and studies were affected. These are all normal day to day activities. The effect on these activities was substantial but brief and centred around his reaction to seeing LG at work on 8 November  
10 2019 and on 7 June 2021.

58. The Claimant's ability to attend work was also affected. Attendance at work is a normal day to day activity. The affect on this activity was substantial and long term in that he did not attend work for more than 12 months. The issue is whether this substantial adverse effect was caused by a mental impairment.

15 59. An absence from work of that duration with stated work related stress, and one which was a recurrence of a previous absence, might well provide a reasonable basis upon which to infer that the absence was caused by a mental impairment (*Piper*) but it is not conclusive (*Herry*). There was no long term adverse effect on any non-work related activities, the Claimant was not  
20 in receipt of any medication or other treatment, the Claimant was fit to work but on condition he not come into contact with LG, that stipulation was at his own insistence and there was no medical evidence to this effect. In these circumstances, and notwithstanding his lengthy recurrent absences, it could not reasonably be inferred that his absence was caused by a mental  
25 impairment rather than his own stipulation in the context of work related stress.

60. Accordingly at no time during the relevant period did the Claimant have a mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The Claimant was not  
30 therefore disabled under Section 6 of the Equality Act 2010 during the relevant

period. The claim of disability discrimination cannot proceed and is therefore dismissed.

### **Time bar**

*Was the complaint lodged within 3 months of the act?*

5 61. A distinction falls to be made between a series of discrete acts and conduct extending over a period (continuing conduct).

62. Each complaint related to acts on the part of different individuals and occurred 2 to 3 years apart: the criminal allegations made by Lesley Gray, Supervisor in 2014; the decision to issue a disciplinary warning and change his work location made by Dave Hair and Darrell Thomson, Managers in 2016; the permanent change of his work location made by Pat Grant, Facilities Manager in 2019; and the decision to dismiss him made by Julie Critchley, Manager and Simon White, Manager on 20 October 2022.

63. There was a limited connection between some of the acts: the decision to issue a warning in 2016 was based upon the criminal allegations made in 2014; and the conduct in 2016 and in 2019 both entailed a change in his work location. However there was no material connection between these acts and the decision to dismiss by stated reason of absence made in 2022. The fact that the same HR advisor (LR/C) advised on the disciplinary investigation in 2014 and advised on the decision to dismiss in 2022 did not indicate a discriminatory state of affairs. There was no reasonably arguable basis upon which to infer that the complaints were capable of being part of an act extending over a period.

*Was the complaint lodged within such other just and equitable period?*

25 64. The claim was lodged around 9 years after the 2014 complaint, 6 years after the 2016 complaint, and 4 years after the 2019 complaint. The Claimant's explanation for the delay was the acts amounted to continuing conduct and he did not know he could make a complaint of discrimination whilst still in employment. The Claimant was aware of his right not to be discriminated against and he could readily have ascertained how to enforce that right given

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that he was already in receipt of legal advice. Although the Claimant did not seek to rely upon his work related stress it is noted that the Claimant was off sick for 10 months in 2019/20 and 16 months in 2021/23. However, he attended work for 9 months in 2020/21 and was fit to return to work by mid-2022 subject to the LG stipulation. In these circumstances it is not considered just and equitable to extend the time limit to the date of lodging.

65. Accordingly the complaints of race discrimination (with the exception of his dismissal) were brought out with the statutory time limit and fall to be dismissed.

#### 10 **Further procedure**

66. This claim should now proceed to the final hearing already listed for 8 to 12 April 2024 to determine the complaint of unfair dismissal and the complaint of race discrimination but only in respect of the decision to dismiss.

15 **Employment Judge: M Sutherland**  
**Date of Judgment: 20 December 2023**  
**Entered in register: 20 December 2023**  
**and copied to parties**

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