



EMPLOYMENT TRIBUNALS

Claimant: Ms A Webber

Respondent: Barking Havering & Redbridge University Hospitals NHS Trust

Heard at: East London Hearing Centre

On: 23 November 2023

Before: Employment Judge Jones

Representation

Claimant: Ms S Pankowski, Paralegal

Respondent: Mr Rix, Counsel

RESERVED JUDGMENT

The complaint of constructive unfair dismissal was presented within the applicable time limit. It has reasonable prospects of success.

The complaints of disability discrimination, race discrimination, harassment, detriment for making public interest disclosures and victimisation are all part of a continuing act. The Claimant can proceed with these complaints.

REASONS

This was an open preliminary hearing arranged by EJ Massarella at the last case management hearing. The matters to be considered were set out in his case management orders from the hearing on 18 September 2023. This Tribunal today has to do the following: -

- (1) identify which claims are clearly in time or *prima facie* out of time;
- (2) consider whether the Claimant has reasonable prospects of showing that any claims which are out of time form conduct extending over a period, linked to in-time claims;
- (3) consider whether to extend time/not to extend time in relation to any claims or whether to leave that decision to the Tribunal which deals with the final hearing;

- (4) make a deposit order in respect of those claims in respect of which the judge considers the Claimant has little reasonable prospects of establishing conduct extending over a period, or persuading the Tribunal to extend time;
- (5) make a deposit order in respect of any acts or omissions, which the judge considers the Claimant has little reasonable prospects of showing contributed to a breach of the implied term of trust and confidence;
- (6) strike out those claims in respect of which the judge considers that there are no reasonable prospects of establishing conduct extending over a period or persuading the Tribunal to extend time;
- (7) strike out any acts or omissions, which the judge considers the Claimant has reasonable prospects of showing contributed to a breach of the implied term of trust and confidence.
- (8) EJ also stated that at the end of the open preliminary hearing, the judge would: -
 - 8.1 review the listing for the final hearing and consider whether it is still appropriate or should be reduced;
 - 8.2 give directions for preparation for the hearing, which may include setting limits on the length of the bundle/witness statements;
 - 8.3 consider whether judicial meditation should be offered;
 - 8.4 decide whether the case should be referred to the Regional Employment Judge to consider whether the parties should be offered mediation or be required to engage in compulsory alternative dispute resolution (ADR).

At this hearing, the Tribunal heard submissions from both parties on the issues listed above. The Claimant did not attend the hearing as she was unwell. There was no medical evidence which related to today's absence. The Tribunal did not have live evidence from her on these issues. The Claimant did produce a signed witness statement addressing some of these matters. The hearing finished at 5pm that day, which meant there was insufficient time to consider the issues listed at paragraph (8) above.

The Tribunal apologises to the parties for the delay in the production of these minutes of the hearing and the decision on the issues. This due to the volume of issues in this matter and the pressure of work on the judge.

The Claimant brings the following complaints: -

- failure to make reasonable adjustments
- direct discrimination on grounds of race and disability

- harassment – on grounds of race and disability
- victimisation
- protected disclosure detriment
- constructive unfair dismissal, and
- automatic constructive unfair dismissal because of protected disclosure

At the hearing, we worked from the agreed list of issues which begins at page 139 of the bundle prepared for this hearing.

The Claimant submitted her claim form on 12 May 2023, after contacting ACAS on 11 April 2023. Her ACAS certificate is dated 13 April 2023. The Claimant's employment terminated on 14 March 2023. She had been off sick from November 2022. It is this Tribunal's judgment that unless there are acts and/or omissions that can be considered a continuing act or form part of a course of conduct, any act or omission that occurred before 12 January 2023, is prima facie out of time.

The Respondent's application set out in its letter dated 9 November is that most of the Claimant's complaints are out of time, not part of a continuing act and should be struck out. The Claimant's case today was that she had been seriously unwell from November 2022, having had multiple surgeries and ill-health and that if her allegations are not part of a continuing act, then time should be extended on a just and equitable basis to allow her to continue with them.

At the start of the hearing, we spent some time identifying the dates, as near as possible, of some of the allegations. That was required in order to assist the Tribunal in addressing some of the issues in this hearing such as, which allegations are out of time, and which are part of a continuing act.

The Claimant did not give live evidence today, but she sent the Tribunal an unsworn witness statement and there were submissions made by her representatives as well as the bundle of documents. From those the Tribunal makes the following findings.

The Respondent accepts that the Claimant was disabled at the relevant time by reason of her anxiety and depression. The Respondent denies that the Claimant was disabled by reason of PTSD. The Respondent denies that it knew or could reasonably have been expected to know that the Claimant was disabled.

Law

Time limits for discrimination claims

Section 123 of the Equality Act state as follows:

- (1) Proceedings on a complaint within section 120 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 thinks just and equitable.
- (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.

In relation to the discrimination complaints, the Tribunal has to firstly decide whether there was a continuing act?

Subsection (3) above refers to what is commonly known as a continuing act. The Tribunal has to decide whether any of the discrimination complaints are out of time. If they are, we have to determine whether the allegations are part of a continuing act as they Claimant submits or decisions each of which could be described as a 'one-off'. If the Tribunal decides that they are 'one-offs' then time would run from each separate allegation.

The leading case for a tribunal to consider when analysing whether there was a continuing act or an act extending over a period is the Court of Appeal case of *Hendricks v Metropolitan Police Comr* [2003] IRLR 96. This case made clear that the focus of inquiry must be on whether there was an ongoing situation or continuing state of affairs in relation to the alleged discrimination as opposed to a 'succession of unconnected or isolated specific acts. In deciding whether a particular situation gives rise to an act extending over time it will also be appropriate to have regard to (a) the nature of the discriminatory conduct about which complaint is made, and (b) the status or position of the person said to be responsible for it. The tribunal is also to be careful to distinguish between the ongoing effects of a one-off discriminatory act as opposed to an act that extends over a period of time.

In the case of *Aziz v FDA* [2010] EWCA Civ 304, the Court of Appeal held that the test to be applied at the preliminary stage is to consider whether the claimant has established a "*prima facie case*", and also that "*the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs*". The Court also stated that in considering whether separate incidents form part of an act extending over a period, a relevant but not conclusive factor is whether the same or different individuals were involved.

The claimant cannot rely on some "*floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time*". (See *South Western Ambulance Service NHS Foundation Trust v King* [2020] IRLR 168).

A continuing act can fall under different headings. (see HHJ Eady in *Robinson v Royal Surrey County Hospital NHS Foundation Trust* [2015] All ER (D) 409 (Jul)).

Where there is no continuing act and the discrimination claim is prima facie out of time, as stated above, section 123(1)(b) of the Equality Act allows a tribunal to extend time to '*such other periods as the employment tribunal thinks just and equitable*'.

The tribunal would have to consider whether it is just and equitable to extend time so that it has jurisdiction to consider the discrimination complaints.

The Claimant's case was that the Tribunal should exercise its discretion to extend time on a just and equitable basis because she has been suffering from ill health, has had extensive surgery, required a long period of recovery and issued her claim as soon as she was able to do so.

The Tribunal is aware that time limits are strictly imposed in employment cases and that there is no presumption that a tribunal would exercise its discretion to extend time. The onus is always on the claimant to convince the tribunal that it is just and equitable to do so; the exercise of the discretion being the exception rather than the rule.

In the case of *Adedeji v University Hospitals Birmingham NHS Foundation* [2021] EWCA Civ 23, the Court of Appeal repeated a caution against tribunals relying on the checklist of factors found in s 33 of the Limitation Act 1980 (a checklist which applies to extensions of time for late personal injury claims in the civil courts). The Court of Appeal described that '*The best approach for a tribunal in considering the exercise of the discretion under s 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 the reasons for, the delay"*'.

The tribunal must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other. (*Pathan v South London Islamic Centre* EAT 0312/13).

The Claimant's circumstances:

The Claimant relies on Anxiety, Depression and PTSD as the impairments that bring her within the ambit of the Equality Act 2010. The Respondent has accepted that she is a disabled person by reason of her anxiety and depression. The issue of the PTSD will be determined at the final hearing.

In the Claimant's witness statement, she states that her health was of concern to her from 2021 and that she was so unwell in July 2022 that she did not eat for 7 days. She says that she was in such extreme physical pain that she ended up being taken to the emergency department of the Whittington Hospital. It was during this hospital visit that she was told after a CT scan, that she had a large abscess on her fallopian tube and needed surgical treatment. The Claimant was in hospital for a week while she was being treated with antibiotics, after which a decision was made to operate. The Claimant had a surgical procedure done in October.

In November it became clear that there was another abscess in the same place. The Claimant was on antibiotics which she says was making her ill. She was also suffering from mental ill-health after her father's death.

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The Claimant was admitted to hospital in November 2022 with an ovarian abscess. The Claimant spent three weeks in hospital having three emergency surgeries, one after another. She sent sick certificates to the Respondent from then up to February 2023, related to gynaecological matters and the Tribunal has seen sick certificates sent to the Respondent which confirm that the Claimant was not fit to work due to gynaecological related ill-health up to 16 March 2023. The Claimant's last surgery was on 21 February and the rest of the time on the sick certificate was to allow for her recovery.

On her discharge from hospital the Claimant lived with her mother so she could care for her and spent most of the time in bed recovering from all the surgical procedures she had undergone over the past 6 months. It is also her case that she suffered from anxiety and depression following her last surgery.

The Claimant's witness statement did not cover the reasons why she was unable to attend today's hearing.

The allegations

It is the Claimant's case that she had difficulties in getting time off to attend hospital appointments since 2021. She was told that she had to agree her annual leave dates with her whole team before even requesting it, which meant that there were times when she could not get leave.

A number of the Claimant's complaints relate to the discussions and the decisions made at a meeting held on 4 April 2022.

It is her case that most of the allegations concern her relationship with her manager, Ms V Miles-Gale - the decisions she made about the Claimant's work and the adjustments that she requested, what the Claimant considers are the detriments she suffered because she blew the whistle about her treatment and that of her other black colleagues, being given a verbal warning and being told various things by Ms Miles-Gale at various dates in April 2022.

At the hearing the Claimant's representative was able to provide details of most of the allegations in the claim. The parties have since sent an agreed list of issues with the additions and clarifications included.

What claims are clearly out of time?

Part of my task in this hearing is to determine which complaints are out of time.

Taking each legal complaint in order (from the revised list of issues sent to the Tribunal on 5 December 2023: -

Failure to make reasonable adjustments

It is the Claimant's case that the Respondent failed to make reasonable adjustments, when it should have, to PCPs applied to her in the period 2016 – November 2022, when alleged PCPs were applied to her.

Discrimination Arising from Disability

The allegations in the complaint of discrimination arising from disability all allegedly occurred in April, May and August 2022.

It is also apparent that they are all allegations of discriminatory conduct of Ms Miles-Gale's towards the Claimant, due to something arising from her disability.

Direct Discrimination – race and disability

Under this heading, the Claimant's allegations all relate to the actions or omissions of Ms Miles-Gale apart from 23(g), which is an allegation against Ms Lease. The allegations relate to the following dates October 2021, February 2022, and April 2022.

Harassment

All allegations of harassment are against Ms Miles-Gale and relate to March – May 2022. The request to work from home was repeated in February 2023.

Victimisation

The protected acts the Claimant relies on date from July 2019 to January 2023. The contents of the text message sent in January 2023 is repeated in texts messages to others in March and May 2023, which are unlikely to be new protected acts but repetitions. The detriments she complains of begin March 2022 and continue to March 2023. All of the detriments were allegedly done by Ms Miles-Gale, apart from 29 (j), which was allegedly done by Ms Mellow.

Whistleblowing

The alleged detriments relied on range from October 2021 to 14 March 2023. Once again, they all relate to Ms Miles-Gales' alleged actions or omissions.

Constructive Unfair Dismissal and Constructive protected disclosure dismissal

The Claimant alleges that the Respondent's treatment described above, together with the email of 8 March 2023, all amounted to fundamental breach of contract entitling her to resign and claim unfair dismissal. As the claim was issued on 12 May 2023, the dismissal complaints are within time.

It is therefore this Tribunal's decision that the dismissal complaints are in time, although this Tribunal also has to consider the prospects of the Claimant being able to show that the acts or omissions she relies on, contributed to a breach of the implied term of trust and confidence. This is addressed below.

In relation to the discrimination complaints, this Tribunal considers the following: -

There is a likelihood that the Claimant will be able to show that there is a continuing act as far as the alleged perpetrator of the discriminatory acts is concerned. All allegations of discrimination in this case are allegations of actions or failures to act, which the Claimant makes against her manager, Ms Miles-Gale.

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Also, although they come under different headings such as victimisation, discrimination arising from disability and direct discrimination, they all involve the Respondent's (Ms Miles-Gale's) response to the Claimant's request to work from home, her workload and how she was supported to manage it, her requests for time off to attend counselling, her admin support, Ms Miles-Gale's treatment of the Claimant and other black staff, and the Respondent's response to the Claimant's complaints about these things.

The latest date of all these complaints: is November 2022 for the reasonable adjustments claim, August 2022 for the discrimination arising complaint, April 2022 for the direct discrimination complaint, March 2023 for the victimisation complaint, and lastly, March 2023 for the whistleblowing detriment.

In this Tribunal's judgment, there is a strong possibility that the Claimant will be able to prove at the final hearing that the allegations in her case are all part of a continuing act, linked to in-time complaints, which the Claimant alleges led to her resignation. The Claimant was on sick leave for some of the time but she was in contact with the Respondent in January and March 2023 and there are complaints here about the adjustments that the Claimant requested on those occasions. It was also stated in *Hendricks* that sick leave does not of itself rule out there being a continuing act.

Taking into account all the circumstances and taking the Claimant's case at its highest, it is likely that these complaints come within the Tribunal's jurisdiction. The latest allegation of victimisation is what the Claimant describes as being locked out of her work account on 14 March, following her resignation. The decision to lock her out of her work account is also alleged to be an act of detriment following the Claimant making public interest disclosures. All of the allegations in this case relate to Ms Miles-Gale's treatment of the Claimant.

In this Tribunal's judgment, there is a clear connection between the complaints of victimisation and whistleblowing detriment. It would be for the Claimant prove that all the other allegations are part of a continuing act.

The claim was issued on 12 May, after three days of early conciliation between 11 – 13 April. If the last act is taken as 14 March 2023 and the Claimant issued her claim on 12 May 2023, this is well within the three-month time limit from the last act. The Respondent may submit that the complaint of a failure to make reasonable adjustments relates to an earlier part of the Claimant's employment and therefore separate from the rest of the claim. However, this Tribunal notes that the issues of being able to work from home, her admin support and her workload remained issues between the parties for most of 2022 and into the beginning of 2023, as requests to work from home are all relied on as part of the reason for her resignation.

Applying the principle in *Aziz*, the Claimant has a reasonably arguable case that these complaints are linked to make a continuing act.

Therefore, it is Tribunal's judgment that it is likely that these complaints are in time for the reasons set out above.

The Tribunal does not make a deposit order against the Claimant.

Given that judgment, the Tribunal does not need to consider whether to make a just and equitable extension of time. If that were necessary, I would grant the extension because of the Claimant's particular circumstances. She had three surgeries at the end of 2022. It is likely that she felt aggrieved about the matters that occurred in that meeting in April 2022, but she started to feel ill in the summer of 2022 and made efforts to deal with the issues with the Respondent internally. The Claimant was also dealing with grief around that time and there is her request for time off to attend counselling, which seems to confirm her mental health issues. She was clearly not in the best mental state. Towards the end of 2022 she developed serious gynaecological issues, which she says was present from the summer, which caused her to have three surgeries. The Claimant's severe medical issues were not resolved until February 2023 when she had the final surgery and was discharged from hospital. Her witness statement suggests that once discharged from hospital, she suffered from anxiety and depression and was not back on her feet for a few more months. She moved into her mother's house to be cared for while she healed. She provided the Respondent with medical certificates.

The Respondent submitted that as the Claimant was part of a group of black staff who raised issues internally, she ought to have known about her right to come to the employment tribunal and should have done so on time. The Claimant raised a grievance internally and it is part of her case that she made complaints about Ms Miles-Gale's treatment of black staff in 2021, April, June and July 2022 and March 2023. Some of those issues were not personal to her. It is the issues that led the Claimant to resign in March 2023 which prompted her to seek legal advice and move to issue proceedings in May. In this Tribunal's judgment there is no need to extend time on a just and equitable basis as the complaints are part of a continuing act linked to in-time complaints. If there was a need to consider a just and equitable extension of time, it would be this Tribunal's judgment that the Claimant had persuaded me to grant that extension.

Constructive Unfair Dismissal

The last matter the Tribunal has to consider is whether the Claimant has little or no prospects of showing that the acts she complains of contributed to a breach of the implied term of trust and confidence.

The Claimant's complaints are of discrimination. Discrimination can be a breach of contract. The Claimant firstly relies on the failure to make reasonable adjustments as amounting to a fundamental breach of contract. The dates of the allegations in the complaint of a failure to make reasonable adjustments is between 2016 – November 2022. That is some distance away from March 2023.

The Claimant may have difficulty in proving that the failure to make reasonable adjustments led to her resignation.

However, she also relies on the alleged discriminatory acts listed under the headings of discrimination arising from disability, direct discrimination, harassment and victimisation.

The Claimant makes serious allegations of discrimination in this case against a senior manager within the Respondent. She also raised a grievance. These are historical but they also come up to March 2023, when the Claimant alleges that she was told that she could not access her work account to complete work. The Claimant may have some difficulty proving that was a fundamental breach of

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contract, especially as this happened after her resignation. However, the other allegations that she also relies on as amounting to a repudiation of the contract, are serious and if she meets the burden of proof, then it would be constructive unfair dismissal.

In the circumstances, the Tribunal makes no order to the Claimant to pay a deposit.

Case Management

The parties have cooperated to create a new list of issues, following the clarification given on the Claimant's behalf at this hearing.

The parties should confirm that this is an agreed list of issues. They must do so by **2 September 2024**.

The parties should now write to the Tribunal to give a time estimate for the final hearing. They should also propose dates to avoid for the next 12 months.

In the meantime, the parties are to conduct disclosure by the preparation of lists of documents with copies and send it to the other party, by **30 September 2024**.

The parties are to agree an index to the hearing bundle by **7 October 2024** and to prepare and exchange witness statements by **25 November 2024**.

This matter will be listed for hearing as soon as possible.

Employment Judge Jones
Dated: 22 August 2024