



EMPLOYMENT TRIBUNALS

Claimants: Mrs M Peel
Mr A Peel

Respondents: Royal Mail Group

HELD AT: Manchester

ON: 8 December 2016

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimants: Mr L Steward, Lay Representative
Respondent: Ms L Rogers, Paralegal

JUDGMENT ON PRELIMINARY HEARING TO CONSIDER TIME LIMITS AND DISABILITY

The judgment of the Tribunal is that:-

1. The claimants' claims in relation to their discrimination claims which are the subject of the respondent's application are out of time. Accordingly they are outside the Tribunal's jurisdiction and are dismissed.
2. The claimants are not disabled within the meaning of the Equality Act 2010.
3. The claimants' other claims of discrimination and of unfair dismissal are unaffected by this judgment.

REASONS

Pre-amble

1. The claimants are husband and wife and began working for Royal Mail on 30th September 2002, they undertook the same round together, the claimants worked at

Cleveleys Post Office. Today Mr Peel and his wife told me that they have always worked together for the whole of their married life.

2. It is the claimant's case that they complained about their "round" for a number of years stating that they had been allocated too much work. They felt that their complaints were ignored. The claimants' claim forms do not actually explain why the respondents dismissed them however in summary the claimants were angry over the amount of work allocated to them following what was called a "revision" (which is a re-assessment of the work allocated to individuals undertaken by the respondent with the agreement of the trade union with a view to improving efficiency where possible by adjusting levels of work). There is a process for disputing the changes.

3. On 12th October 2015 the revision was being implemented and involved a change in the claimants' delivery points. On 16th October a disagreement arose when a Cover Manager "SM" asked the second claimant why he (Mr Peel) was not working on Inward (Processing) Sorting (IPS). This resulted in a disagreement with both claimants who then left the premises. The respondents state the claimants were loud and aggressive and walked off the job despite being asked at least twice to return and discuss the matter. The claimants then commenced sick leave.

4. A fact finding investigation took place following which the claimants were invited to a disciplinary hearing, they were dismissed with effect from 22nd December 2015, a decision upheld on appeal, for misconduct arising out of the events of 16th October, i.e. leaving their work station without permission and other related offences.

5. The claimants by claim forms of 31st March 2016 issued claims of unfair dismissal, marriage discrimination, age discrimination and disability discrimination. They were requested to provide further and better particulars of their age, marriage and disability discrimination by the Tribunal. They produced a joint response which referred to ten marriage discrimination matters, seven disability matters and four age matters. They are not separately numbered and are contained on five pages.

6. The respondent requested further and better particulars and the claimant's medical evidence following a CMD on 24th June 2016. The requested information was received on 5th August.

7. The respondent applied for a Preliminary Hearing to determine whether the claimants were disabled or not within the meaning of the Equality Act 2010 and whether some of their claims were in time or not, in particular the respondents concentrated on certain allegations described as page one, paragraphs two and four, page two, paragraphs six to nine; page three; paragraph 10; page four; paragraph seven; and page five paragraph four.

8. These are therefore:-

"1" Marriage Discrimination

- (a) direct/indirect harassment/victimisation discrimination: On 19th October 2015 Sue Whittaker sent to both claimants a letter entitled "continued sick absence" which contained a threat to

remove them from their duty, the effect of which should mean they could no longer work together as a pair. Sue Whittaker made several attempts between November 2010 and October 2015 to separate the claimants as team work partners when there was no reasonable justification for it. The respondent discriminated on the protected characteristics of marriage by again trying to split up an efficient and competent husband and wife team. This further damaged the current state of the claimants' health.

- (b) Direct//indirect harassment victimisation. On 12th November 2015 Sue Whittaker sent a text message to the first claimant stating the second claimant's medical symptoms are more severe following receipt of a medical report she had requested. The respondent discriminated on the protected characteristic of marriage by continuing to treat them as a single entity because of their marriage to each other on the evidence suggested that the second claimant's medical condition at that point was more severe.
- (c) Direct/indirect victimisation/harassment. During November 2010 the claimant asserted to the respondent that it was apparent that incorrect data was being used by the respondent's management supporting their revision of the new work practice. In consequence the claimants suffered five years of bullying and harassment from Sue Whittaker causing them stress, anxiety, depression and concluded with their dismissal.
- (d) Direct/indirect harassment/victimisation. Events leading up to the implementation of the new working practice in 2010. The new work practice meant working in pairs. It was unreasonable to break up the efficient and existing arrangements for the claimants being a married couple. The respondent discriminated on the protected characteristic of the claimants' marriage because the practice Sue Whittaker used was based on an individual's seniority of length of service which meant married couples would no longer be able to have each other as work partners.
- (e) Direct/indirect harassment/victimisation. The first claimant was charged with endangering the mails integrity and when the second claimant was emptying the delivery van and returning to the Preston Mail Centre what he believed to be empty trays, it turned out they had two Special Delivery items in them, the items were returned back to Cleveleys two days later. The claimants were shocked when they were both charged with not safeguarding the mail and were both punished with two years serious warning. The punishment was reduced on appeal to a reprimand however the respondents had discriminated on the protected characteristic of marriage by treating both as a single entity where only one was liable for the error.

- (f) Direct/indirect harassment/victimisation. On 7th November 2012 the first claimant approached Sue Whittaker and asked why the claimants had not received a date for their appeal against the two years serious warning and disagreement occurred. On 8th November 2012 the second claimant went to a meeting about an incident he had not been involved in, Sue Whittaker asked both claimants into her office, no prior warning or written request or indication as to what the meeting was about was given. The claimants assumed it was regarding their appeal which would have alleviated the stress it was causing them. Sue Whittaker then spoke to the claimants about the first claimant's behaviour the previous day, the respondent discriminated on the protected characteristic of marriage by treating two people (a married couple) as a single entity by punishing them both when only one was involved.
- (g) Direct/indirect harassment/victimisation. From November 2010 to November 2015 the claimants had yearly holiday date issues with Sue Whittaker.
- i. following 8th November 2015 unbeknown to the claimants Sue Whittaker placed them in different leave groups which meant it was very difficult to get holiday leave at the same time, this was a deliberate act in retaliation to the events of the meeting. The respondent discriminated on the protected characteristic of marriage by separating them into different holiday leave groups.
 - ii. November 2013. Despite being the second of colleagues to hand in their holiday leave requests of the year 2014/15 which should have been dealt with on a first come first served basis Sue Whittaker refused all of their first choices stating the dates they had requested were full, the respondent discriminated on the protected characteristic of marriage by refusing their leave, the respondents bullying and harassment guidelines show that Sue Whittaker abused and misused her power over the claimants in this respect.
 - iii. March 2015. Sue Whittaker issued new annual leave cards showing the claimants outstanding entitlement eight days leave had disappeared. The respondents discriminated on the protected characteristic of marriage by deliberately trying to instigate a reaction from them by reducing their leave entitlement.
- (h) Direct/indirect harassment victimisation. During November 2014 whilst on holiday in Egypt the claimants received a text message from a colleague stating they had been transferred from the duty they had performed for the past four years. On 22nd November 2014 after arriving back in England they went to their Delivery

Office to discuss with Sue Whittaker and their line manager what duty would then be available to them. No alternative had been allocated in fact the managers had not even considered a new allocations or the implications of what had occurred and appreciated the importance for the claimants to continue working together as a team. The respondent discriminated on the protected characteristic of marriage in their efforts to separate the claimants and put each on different duties.

(2) Disability

- (a) Direct/indirect harassment/victimisation. From November 2010 to October 2015 the respondent did not provide assistance for or even acknowledge obvious signs of work related stress. The obvious signs shown and told to managers by the claimants as stated in the respondent's stress leaflets were all of the following during this five year period. Irritable, tense, anxious, worrying, tired and drained of energy, loss of confidence, not sleeping, low self esteem, feeling depressed and helpless, isolated, becoming less co-operative and finding it difficult to take advice and criticism. The respondents discriminated on the protected characteristic of disability by not recognising the signs of the impending disability that actually caused their depression through the actions of its manager.

(3) Age Discrimination

- (a) Direct/indirect harassment/victimisation. The second claimant had a slip accident while on delivery during 2013, Sue Whittaker refused to record the injury in the accident book stating it was age related wear and tear. Sue Whittaker does not recall the injury and there is no record as she refused to enter into the accident book. This discrimination act was carried out by the same perpetrator and is such as linked. The respondent discriminated on the protected characteristic of age declaring the accident was age related wear and tear.

The Law

Time Limits

9. The general rule is that a complaint of work related discrimination must be presented to the Employment Tribunal within a period of three months beginning with the date of the act complained of, Section 123(1)(a). This is three months less one day in view of the actual wording of the section however since the ACAS conciliation procedure was brought in the situation regarding time limits is slightly different in that time is extended as a result of the ACAS conciliation period as set out in paragraphs 207B of the Employment Rights Act 1996.

10. Further if a claim is out of time the tribunal has a discretion to allow a claim to proceed if it would be just and equitable to do so (section 123 (1)(b) Equality Act 2010).

11. The claimants went to ACAS on 16th February 2016 and their certificate was discharged on 15th March 2016. Accordingly in relation to their dismissal on 22nd December the claimants were in time due to the operation of 207B(3).

12. Section 207B of the Employment Rights Act 1996 states that:-

(1) This section applies where this act provides for it to apply for the purposes and provision of this Act but it does not apply to a dispute that is a relevant dispute for the purposes of 207A.

(2) In this section a day (A) is a day on which the complainant or applicant concerned complies with the requirement in sub-section one and Section 18A of the Employment Tribunals Act 1996 (Requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are bore and (B) Day B is a day on which the complainant or applicant concerned receives or if earlier is treated as receiving (by virtue of Regulations made under sub-section 11 of that section) the certificate issued under sub-section 4 of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after day A and ending with day B is not to be counted.

(4) If a time limit is set by a relevant provision would if not extended by this sub-section expire during the period beginning with day A and ending one month after day B the time limit expires it says at the end of that period.

(5) Where an Employment Tribunal has power under this act to extend the time limit set by a relevant provision the powers excisable in relation to time limit as extended by this section.

13. In respect of any out of time discrimination claims the claimants chose to rely on the acts being continuous discrimination and not on the tribunal exercising its discretion under section 123(1)(b) in respect of a just and equitable extension.

14. Accordingly before the claimant's gave evidence it was agreed that the claimants did not require to address the just and equitable evidence and that the respondents representative need not cross examine on that issue as only continuous discrimination was relied on.

15. The lead case in relation to continuing discrimination is Hendricks –v- The Metropolitan Police Commission 2002 Court of Appeal where it was stated that “the focus should be on the substance of the complaints, was there an ongoing situation or a continuous state of affairs in which officers were treated less favourably. The question is whether that is “an act extending over a period as distinct from a succession of unconnected or isolated specific acts”.

16. In addition the respondents referred to the case of Pugh –v- National Assembly for Wales EAT 2006 where it was said that “the claimant must show a good arguable case or prima facie case that the allegations made do constitute such an act extending over a period ... a lesser standard will not suffice. Of course at the stage of any preliminary investigation the ET will not be concerned so much with the substantive merits of the allegations but whether they can be seen at least prima facie to be part of an act extending over a period.

Disability

17. Section 56(1) of the Equality Act 2010 states that a person (P) has a disability if (a) P has a physical or mental impairment and (b) the impairment has a substantial and long term adverse effect on P’s ability to carry out normal day to day activities. In accordance with Schedule 1 Section 1(1) the effect of an impairment is long term if (a) it has lasted for at least twelve months, (b) it is likely to last at least twelve months or (c) it is likely to last for the rest of the life of the person affected.

18. Section 212(1) states that a substantial effect is one that is more than minor or trivial. Further, the Tribunal should assess whether a person is disabled at the date of the alleged discriminatory act, Cruickshank –v- VAW Motorcast Limited 2002 EAT and it is also a material time when determining whether the impairment has a long term effect.

19. In respect of how long an impairment is *likely* to last again this has to be considered as at the date of the discriminatory act(s), not at the date of the tribunal hearing (Richmond Adult Community College vs McDougall 2008 CA). In respect of the degree of likelihood of the impairment lasting 12 months the test is “it could well happen” (SCA Packaging Ltd v Boyle 2009 HL)

20. An Employment Tribunal is entitled to infer on the basis of evidence presented to it that an impairment if found to have existed by a medical expert at the date of the medical examination was also in existence at the time of the alleged act of discrimination.

21. In J –v- DLA Piper EAT 29 the EAT advised that Tribunals should look behind loose labels of mental illness such as stress or anxiety and should start by considering the adverse effect of the symptoms. The EAT also observed that while clinical depression will almost always be regarded as a disability reactive depression in the form of “anxiety, stress and low mood” which a person suffers as a reaction to adverse circumstances such as problems at work is less likely to be long term.

Evidence at the Hearing

(a) Continuous Discrimination

22. The claimant’s representative agreed that in relation to the out of time issues the claimants relied on continuous conduct. I therefore asked what connected the discrimination claims with the dismissal in relation to the claims involving Sue Whittaker. The claimants said they had evidence that she was connected to the

dismissal and I allowed them to leave the Tribunal to retrieve a document from their car which I had copied on which they relied to show a connection between the dismissal and Sue Whittaker. This was an email from Sue Whittaker on 29th October 2015 sent to D Ware (the Dismissing Officer) headed "general data regarding the claimants". It appears to be taken from a separate database and records their name and addresses and details of their job and location. There was nothing contained in it which Sue Whittaker had put in by herself and it was clear that it was an extract from something already in existence called "Employee Information". The decision to dismiss the claimants was made by the Dismissing Officer D Ware and by the Appeals Manager, no connection with the Appeals Manager was suggested.

23. In terms of the points which the respondent were disputing in relation to marriage discrimination the last one I could identify was 8th November 2015 regarding holidays (1)(g)(i) and the stand alone issue re ill health again involving Sue Whittaker on 12th November 1(b).

(b) Disability

24. The claimants gave evidence that they had visited their doctor in January 2013 in relation to stress but did not attend thereafter until the incident in October 2015. They said this did not mean they were not stressed between those dates or prior to it, they were just individuals who did not run to the doctor at every opportunity. They were diagnosed with depression in November 2015. The claimants were dismissed on 22nd December 2015.

25. Claimant number one (Mrs Peel) gave the following additional evidence via her disability impact statement and cross examination. That some time starting in November 2010 she had begun to lose weight reducing from 8 ½ stone to 7 stone, had no energy for a personal life and her sleep was affected. After an incident in September 2012 the claimant said she was more stressed, tearful, difficulty sleeping, irritable and did not want to socialise. It was at this point she went to the doctor in January 2013. Her symptoms were better following the visit to the doctor because Sue Whittaker was transferred to Manchester and so things were much better for them until SW returned.

26. The second claimant (Mr Peel) stated that he believed he had been stressed since November 2010. In November 2012 he had had a meeting where he had been crying with a manager, November 2012 to January 2013 he couldn't concentrate and suffered from insomnia and said he was persuaded by his family to visit the GP on 7th January 2013. Again he said Sue Whittaker was away from work until late 2013 and therefore his symptoms were alleviated. In November 2014 he was told by a friend via a text message while he was on holiday that his job had been removed and became worried and irritable.

27. The claimants agreed they had had no absences from work for stress or anxiety or depression, there was no mention in their medical records of anxiety or depression until November 2015 save for a visit to their GP in January 2013 where stress was mentioned but not anxiety or depression. The claimants had attended their GP on the date they walked out of the premises, the 16th October 2015 and the

first claimant was diagnosed with mild depressive episode on 4th November 2015 and the second claimant with a severe depressive episode. On 11th November 2015 they were both diagnosed as suffering from depression and anxiety.

28. There was no documented or corroborative evidence of any effect on day to day activities from January 2013 to November 2015.

29. Regarding the overall medical evidence which was documented the last item of documentation was 13th July 2016 which was a GAD test for anxiety and a PHQ test for depression which indicated that the second claimant and the first claimant were still suffering from severe anxiety and severe depression. There was medical evidence from fit notes but they ended in May. There was no evidence for the period July to November 2016.

Conclusions

(1) Continuous discrimination – out of time

30. Is there continuous discrimination? The claimants' incidents relied on broadly three different types of discrimination, marriage, disability and age. In respect of the nature of the events relied on these were: Sue Whittaker's attempt to split them up, Sue Whittaker treating the claimants as a single entity, complaints relating to a conduct penalty from 2012, complaints relating to the allocation of leave going back to 2010 and 2013, complaints regarding a text message sent to the claimant regarding a revision that took place in 2014, a slip accident taking place in 2013.

31. The claimants' claims in relation to marriage discrimination go back to some time however there is the one existing common factor which is that the matters they complain of they say were undertaken by Sue Whittaker. Accordingly there is the potential to have a prima facie case of continuing discrimination however the last marriage discrimination they refer to is 8th November 2015 in relation to annual leave and 12th November relating to the sickness absence. The disability claims have an end date of October 2015 and the age discrimination relates to 2013.

32. In accordance with Section 207B any claim arising on 8th November which was the latest incident of marriage discrimination cited by the claimants would have had to have been filed with the Tribunal by the 7th February subject to any extension under Section 207B. The claimants however went to ACAS on 16th February outside the primary time limit in respect of this claim and therefore are out of time in respect of any matters arising on or before the 8th November. In respect of the 12th November they would also be required to have consulted ACAS by the 11th February.

33. The claimants now put their case that the dismissal was linked to the previous regime under Sue Whittaker where they were discriminated against in respect of numerous matters and that when they were dismissed on 22nd December this was the last act which is in time. I cannot accept this as the evidence produced to show a link between Sue Whittaker and the dismissal was wholly inadequate and established no such thing.

34. Accordingly if there was a continuous course of conduct in that there was a campaign against them by Sue Whittaker, that ended on 12th November at the very latest if the matters are viewed as all relating to Sue Whittaker's conduct rather than as separate matters. Therefore as the claimants cannot point to anything which would enable their reference to ACAS to be in time consequently they are out of time in respect of all their discrimination claims. Accordingly these claims are dismissed.

(2) Disability

35. I find that the claimants were not disabled .

36. I considered the evidence regarding clinical interventions, doctors visits, the claimants impact statements as follows:-

The claimants attended their GP on 7th January 2013. They did not attend their GP again until 16th October 2015 when they were provided with fit notes for work related stress for two weeks. On 4th November 2015 the first claimant was diagnosed with a mild depressive episode and the second claimant with a severe depressive episode, a Mental Health Practitioner confirmed they were both suffering from depression and anxiety on 11th November 2015.

The first claimant

37. The first claimant states that she was suffering from stress before and during this period but the evidence regarding that there was a substantial adverse effect on her ability to carry out normal day to day activities only really starts on 4th November.

38. Her medical notes state that she is suffering from a loss of confidence, poor self esteem, loss of interest, loss of concentration and guilty ideas and in May 2016 which confirmed she finds it difficult to deal with anything out of routine, struggles to deal with her daily living skill, easily agitated and motivation is poor and lacks confidence, sleep and appetite are erratic.

The second claimant

39. In relation to the second claimant the matters are similar although he has the additional, he cries easily and has morbid thoughts.

Substantial adverse effect for 12 months or likely to last for 12 months

40. The question is whether or not the claimant's evidence by itself is sufficient to establish substantial adverse effect for twelve months or more by the 22nd February when the appeal took place. While I accept that from time to time the claimants felt stressed because of their job and this caused them some sleepless nights, there was not sufficient evidence in the claimants own witness statements of substantial adverse effect on a regular basis. I could not accept the evidence in its entirety in any event as there was no supportive medical evidence. Whilst this is not determinative I would have expected during the period the claimants claimed they were ill (which was from early 2010) further visits to the doctor than were evident. It

is also instructive that when they did go and see the doctor nothing arose out of this and whilst the claimants argued this was because Sue Whittaker left the respondents premises to work in Manchester for a while. However I find if they were seriously ill at that point in time the doctor would have recommended similar things as were recommended in November 2015 and the fact that Miss Whittaker left the office would not be a complete answer to a disabling illness.

41. I find that following the incident on 16th October the claimant's mental health deteriorated as a result of the consequences of that incident being suspended, being put through a disciplinary process ultimately resolved against them and there was from that date substantial adverse effects on their day to day activities.

42. Accordingly I find that the claimants' illness was not long term by 22nd February. Any substantial adverse effect I find began in November 2015 and therefore had only lasted by February for three months.

43. Was the condition likely to last 12 months? At the time of the appeal on 22nd February 2016 there was no evidence to suggest that the claimants' illnesses were likely to last for at least a further nine months. The claimants were receiving medical treatment which would have been expected to improve their condition. In addition although the claimants have provided evidence that they were still significantly ill in July 2016 they have not produced evidence to show that they continued to be ill up to November 2016.

44. In any event as the question is not have the claimants been ill for twelve months but whether on 22nd February it could have been foreseen that their impairment 'could well' continue for a total of twelve months at least and I have found that it could not.

45. Accordingly I find that the claimants were not disabled for the purposes of the Equality Act 2010 at the relevant time, 22nd February 2016.

Employment Judge Feeney
27th March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
28 March 2017

FOR THE SECRETARY OF THE TRIBUNALS