

# EMPLOYMENT TRIBUNALS



**Claimant**  
Mrs. J. Hally

V

**Respondent**  
Ministry of Defence

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL OPEN PRELIMINARY HEARING (RESERVED JUDGMENT)

HELD AT: London Central

ON: 1 October 2019

BEFORE: Employment Judge Mason

**Representation**  
For the Claimant: In person  
For the Respondent: Ms. Ling, counsel

### The judgment of the Tribunal is that:

The Claimant's claims of discrimination may proceed; it will be for the Tribunal at the full hearing to determine whether all her claims were in time depending on whether or not it concludes that there was a course of conduct.

## REASONS

### **Background**

1. The Claimant commenced employment with the Respondent as a Civil Servant on 7 February 2000 and remains employed by the Respondent.
2. On 9 October 2018, the Claimant first contacted ACAS and on 18 October 2018 ACAS issued an Early Conciliation Certificate by email.
3. The Claimant presented this Tribunal claim on 16 November 2018.

4. The Claimant brings claims of sex discrimination, harassment and victimisation. She says she has been victimised since 11 April 2015 for making a complaint against a male naval officer and that she has been the victim of harassment on the grounds of sex in the manner in which two Service Complaints made against her were administered by male Naval Officers.
5. The Respondent has lodged a response (ET3) denying the claims and says that claims prior to 10 July 2018 are out of time and it is not just and equitable to extend time.

### **Issues considered**

6. On 30 May 2019 EJ Glennie conducted by telephone a closed Preliminary Hearing (case management) and listed this case for an open Preliminary Hearing to take place today (1 October 2019) to determine the following preliminary issues:
  - 6.1 Whether any of the complaints were presented out of time including determination of any issues as to whether there is no reasonable prospect of the Tribunal finding that there was conduct extending over a period (s123(3) Equality Act 2010); and
  - 6.2 If any of the complaints were presented out of time, whether it would be just and equitable to extend time (s123(1)(b) EqA).

### **Evidence and procedure at the Hearing**

7. The allegations in this case include “... *adverse conduct related to sex*” (s11(2) ETA 1996) and the majority of the people who play a part in this case are Crown employees and serving personnel in the Navy. Having discussed this with the parties and given full weight to the important principle of open justice and to the Convention right to freedom of expression, of my own initiative and with the parties consent, I made an order under Rule 50(3)(b) of the 2013 Rules that the identity of the various people referred to in this decision (other than the Claimant) are referred to in this decision only by letter [A – I] and their identities should not be disclosed to the public. This order is to be continued until the next (closed) preliminary hearing when the Employment Judge will consider whether or not to continue or vary this order (at his or her discretion and subject to any representations by the parties).
8. The Respondent provided a bundle of documents [216 pages] and Ms. Ling (for the Respondent) provided a written Skeleton Argument, Submissions.
9. The Claimant provided a witness statement which she adopted as her evidence-in-chief; she was cross-examined by Ms. Ling. There were no other witnesses.
10. Both Ms. Ling and the Claimant made verbal submissions. At the conclusion of the Hearing, I reserved judgment which I now give with reasons.
11. I listed this case for a full merits hearing and, in the interim, a closed case management Preliminary Hearing as there was insufficient time on the day to

consider some complex case management issues including an application by the Claimant for further disclosure of legal advice received by the Respondent which is potentially privileged. I then made some case management orders which are set out in separate Orders.

### **Relevant law**

12. Complaints of unlawful discrimination must be presented to an Employment Tribunal before the end of the three months beginning with the date of the act complained of (§123(1)(a) Equality Act 2010).
13. Conduct extending over a period is to be treated as done at the end of the period (§123(3)(a) EqA):
  - 13.1 In ***Hendricks v Commissioner of Police for the Metropolis*** [2003] IRLR 96, Court of Appeal (para.52): the question is whether there is an act extending over a period, as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.
  - 13.2 ***Hale v Brighton and Sussex Health Authority*** UKEAT/0342/16/LA, per Choudhary J (paragraph 42):

*“By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise “a succession of unconnected or isolated specific acts” as per the decision in **Hendricks**, paragraph 52” [para. 42]*
  - 13.3 ***Tarn v Hughes & Ors*** UKEAT/0064/18/DM 7 June 2018 per HHJ Eady (paragraph 25):

*“...of its nature, a discrimination claim is likely to require an ET to draw inferences from the evidence and from its primary findings of fact; to adopt a fragmented approach to the issues to be determined may “have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have [on the determination of causation]” (see per Mummery J (as he then was) in **Qureshi** at page 875H). Moreover, to limit the potential impact of the complete picture provided by the full complaint made might well be “both unreal and unfair” (see per His Honour Judge McMullen QC at paragraph 11, **Franco v Bowling & Co Solicitors** UKEAT/0280/09).”*
14. The Tribunal has discretion to extend time if it is just and equitable to do so (§123(1)(b) EqA 2010).

### **Findings of Fact**

15. Having considered the pleadings and the (limited) evidence before me and reminded myself that the standard of proof is the balance of probabilities, I make the following findings of fact relevant to the issues before me.
16. As Ms. Ling acknowledges in her submissions, the “*factual history of this matter is more complicated than most and requires some explanation*”. It is not appropriate at this preliminary stage to make detailed findings of fact and therefore my findings below reflect a summary of the key facts which are not in dispute.

17. In July 2012, a Service Complaint was made against the Claimant by a third party. On 17 December 2013, Cdr. B was interviewed as a witness in connection with that Service Complaint. That Service Complaint was not upheld; the Claimant did not appeal.
18. On 29 September 2014, the Claimant submitted a grievance against Cdr. B alleging that he had given false witness evidence to the investigation and that he had sexually harassed and intimidated her. On 7 May 2015, the Claimant's grievance was rejected by A (the Claimant's Line Manager) [151]. The Claimant says A's assessment was that she had made the complaints against Cdr. B in good faith.
19. On 11 April 2015, prior to resolution of the Claimant's grievance, Cdr. B submitted a Service Complaint [95-101]:
  - 19.1 He complained that:
    - (i) there had been maladministration by the Respondent in relation to delays in dealing with the Claimant's grievance; and
    - (ii) the Claimant's grievance was vexatious as it was retaliatory and without substance.
  - 19.2 At this point, the Claimant's grievance had not yet been concluded and the Respondent only allowed (i) to proceed.
  - 19.3 In May and June 2015, an investigation was conducted by Cdr. C. The Claimant was not informed of this Service complaint at the time
  - 19.4 On 6 July 2015, Cdr. C completed an investigation report [117-151].
  - 19.5 The Claimant raised grievances in relation to the handling of this complaint which were not upheld.
20. On 31 May 2015, Cdr. B submitted a second Service Complaint [102-107] raising again his complaint against the Claimant (para. 19.1(ii) above):
  - 20.1 Captain D was appointed to investigate:
    - (i) On 5 June 2015, legal advice was given to Captain D (which the Respondent has chosen to disclose [108-116]).
    - (ii) Captain D conducted interviews and interviewed Cdr. B on 11 May 2015 [130-136] and on 25 May 2015 [137-140]. He did not speak to the Claimant or A as part of his investigation.
    - (iii) Captain D provided an investigation report on 6 July 2015 [117-129].
  - 20.2 On 29 March 2017, Admiral I took the decision not to uphold this second Service Complaint.
  - 20.3 The Claimant says the Respondent acted unfairly and contrary to policy (JSP763) in a number of respects including:
    - (i) allowing this complaint to proceed given that her grievance had been concluded back in May 2015 and whilst A had not upheld her grievance, A had accepted that she had made her complaints against Cdr. B in good faith;
    - (ii) Captain D should have spoken to her and also to A as part of the investigation.
21. On 6 May 2017, Cdr. B appealed against Admiral I's decision not to uphold his second Service Complaint:
  - 21.1 An Appeal Body was appointed to consider the appeal.
  - 21.2 On 7 August 2017, the Claimant wrote a letter in response to the appeal [154-165]; she attached copies of various documents including letters from her

complaining about the handling of Cdr. B's first Service Complaint (11 April 2015).

- 21.3 Extracts of internal legal advice provided to the Appeal Board are in the bundle [195-196]. This has been disclosed by the Respondent of its own volition.
- 21.4 On 22 May 2018, the Appeal Body met and considered the appeal without an oral hearing. There is an index to papers considered by the Appeal Body in the bundle [199-204] which includes documents relating to:
- (i) the Claimant's Service Complaint against Cdr. B culminating in the decision letter dated 7 May 2015;
  - (ii) Cdr. B's Service Complaint against the Claimant dated 31 May 2015.
- 21.5 The Appeal Board's Decision dated 18 July 2018 [205-210]:
- (i) The background is set out and includes events in 2012, 2013, 2014 and 2015.
  - (ii) The role of the Appeal Body is identified as "*to make a decision on [Cdr B's] complaint that the allegations made against him in [the Claimant's] CG were vexatious, rather than to re-open closed complaints*" [para. 8 p 206].
  - (iii) Cdr. B's witness statement given in 2013 was considered (para. 13 p 206).
  - (iv) The Appeal Body concluded that the Claimant's allegations of sexual harassment were without foundation and that there was no discrimination on the basis of sex.
  - (v) The Appeal Body concluded that the Claimant's conduct "bordered on vexatious":  
*"We considered there was an element of vexatiousness from [the Claimant] throughout the period of this complaint and we considered her use of language throughout as aggressive. We were very disappointed that [the Claimant] expressed her views using such ill judged and non temperate language. We observed that this was a repeated pattern of behaviour...."* [para. 27 p 208]

## **Submissions**

### Respondent

22. Ms Ling on behalf of the Respondent submits as follows:
- 22.1 The Claimant's complaints fall into two groups:
- (i) The handling of Cdr. B's first Service Complaint against her (11 April 2015) and the Respondent's decision to investigate Cdr. B's second Service Complaint against her (31 May 2015); and
  - (ii) The Appeal Body's handling of Cdr. B's appeal in relation to the second Service Complaint.
- 22.2 It is acknowledged that all matters relating to the decision of the Appeal Body are within time. However, none of the earlier allegations form part of a continuing act. In verbal submissions, Ms. Ling accepted that the Appeal Board looked at information provided by the Claimant but says this was not a sufficient link.
- 22.3 This case can be distinguished from **Hale** on the following grounds:
- (i) These were not disciplinary proceedings but a complaint against the Claimant by Cdr. B. The steps taken by the Respondent were not steps to which the Respondent subjected the Claimant but steps taken in order to properly determine Cdr. B's complaint.
  - (ii) Once the process was initiated, it was not inevitable that further steps would follow. The decision to investigate the complaint was "severed" from the

decision of the Appeal Body by the fact that, in the interim, Cdr. B appealed the initial decision.

- (iii) The Claimant must show a prima facie basis for a continuing act. The Respondent has disclosed the legal advice given to Captain D which shows that advice was given as to whether the allegation should be investigated and Captain D accepted this advice. There is nothing in that advice to suggest that there was any element of sex discrimination or victimisation in it such as to create a “continuing state of affairs”.
- 22.4 The Respondent will not be able to call the legal advisor nor Captain D (now Commodore and due to leave shortly) to give evidence at the final hearing.
- 22.5 The Claimant’s claims relating to the investigation of the first Service Complaint against her (11 April 2015) relate to the process adopted by the Respondent “*in investigating her previous complaint*”. It was therefore a complaint against the Respondent and the thrust of her complaint is therefore misconceived.
- 22.6 The investigation into Cdr. B’s first Service Complaint (11 April 2015) was concluded in July 2015 and this was not taken forward after this date. The personnel involved did not overlap with any of the personnel involved in the Appeal Body.
- 22.7 It is not just and equitable to extend time:
- (i) By 2015, the Claimant had the benefit of legal advice.
  - (ii) The Claimant says she failed to present a complaint earlier because she received internal advice that she should wait until the end of the process and then submit a grievance. However, she was not advised that she could not pursue a tribunal claim before the conclusion of any appeal.
  - (iii) The balance of prejudice is plainly against “*permitting these very stale allegations to proceed*”.

#### Claimant

23. The Claimant made verbal submissions which can be summarised as follows:
- 23.1 Events in 2015 onwards and the decision of the Appeal Board are part of a continuing discriminatory act or course of conduct and therefore none of her claims are out of time.
- 23.2 She relies on various factors to show an underlying thread including the following:
- (i) The Appeal Board relied on disparaging legal advice [195-196] which included 12 references to the April 2015 Service Complaint.
  - (ii) Whilst the personnel who handled the various complaints changed, it was the same protagonists throughout and there was an unethical relationship between the Respondent and its legal advisors who were clearly not independent or impartial.
  - (iii) The procedural failings extended to handling all the various complaints and were to some extent deliberate to “*protect their own*”; the procedures followed were biased towards Cdr. B and against her.
- 23.3 It is in the interests of justice that the Tribunal consider all the evidence and the full history of this case before concluding whether or not there was a course of conduct.

## **Conclusions**

24. I cannot conclude on the evidence before me that the Claimant's contention that there was a course of conduct has "no reasonable prospect of success" as it is certainly arguable that there was a course of conduct from April 2015 culminating in the decision of the Appeal Body on 18 July 2018.
25. It is arguable that the Appeal Body took into account matters relating to Cdr. B's first Service Complaint in 11 April 2015:
  - 25.1 The Appeal Body was in receipt of the documents the Claimant enclosed with her letter dated 7 August 2017 which included copies of her letters complaining about the handling of Cdr. B's first Service Complaint (11 April 2015).
  - 25.2 The internal legal advice provided to the Appeal Board makes reference to Cdr B's first Service Complaint.
  - 25.3 The Appeal Body Decision dated 18 July 2018 [205-210] refers under the heading "Background" to events in 2012, 2013, 2014 and 2015.
  - 25.4 The contents of Cdr. B's witness statement given in 2013 was considered and adjudged (para. 13 p 206). It was this witness statement that led to the Claimant's grievance (29 September 2014); it was the Claimant's grievance which led to Cdr. B's first Service Complaint (11 April 2015) and his second Service Complaint (31 May 2015) and ultimately to Cdr. B's appeal against the outcome of his second Service Complaint.
  - 25.5 The Appeal Body concluded that the Claimant's conduct "*bordered on vexatious*" and significantly observed "*that was a repeated pattern of behaviour....*" [para. 27 p 208]. This indicates that the Appeal Body may have considered and taken into account the Claimant's previous conduct in relation to the earlier Service Complaints and grievances.
26. These were arguably not a succession of unconnected or isolated specific acts. In any event, I cannot identify any benefit in striking out these matters as stand-alone claims as the Tribunal at the full merits hearing would still be required to hear the same evidence and would inevitably have to make findings in respect of the whole picture.
27. In conclusion, whether or not there was a course of conduct falls to be determined by the full Tribunal at the full merits hearing. In the meantime, the Claimant is given the benefit of the doubt and all her claims may continue.
28. Case management orders and notification of the full hearing and an interim case management Preliminary Hearing will be sent to the parties separately.

Employment Judge Mason  
2 October 2019

Judgment sent to Parties on

08/10/2019

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