**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4107169/2019**

**Preliminary Hearing Held at Dundee on 10 December 2019**

10 **Employment Judge A Kemp**

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| **Miss G Smith** | **Claimant**<br>**Represented by**<br>**Mr A Matthew**<br>**Solicitor** |
| **Independent Vetcare Limited** | **Respondent**<br>**Represented by:**<br>**Mr N MacDougall**<br>**Advocate** |

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. **The claims made under the Equality Act 2010 are within the jurisdiction of the Tribunal.**

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2. **The claims shall proceed to a Final Hearing.**

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**REASONS**

**Introduction**

1. This case was called for a Preliminary Hearing to address issues of time bar that arose following the two earlier Preliminary Hearings held for case management. The issues relate to the claims made under sections 13,

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15, 20, 21 and 26 of the Equality Act 2010. The respondent has accepted that the claimant is a disabled person under section 6 of the Act.

**Evidence**

2. The parties had prepared a bundle of documents for the purposes of the hearing, to which one document was added without objection taken by the respondent.

3. Evidence was given orally by the claimant herself. No other witness was called for either party.

**Issues**

The issues before the Tribunal were:

1. Did any of the acts of discrimination alleged the Equality Act 2010 take place outside the statutory time limit for raising such claims,
2. Were the acts part of a continuing series, and
3. Was it just and equitable to permit any of those claims to proceed in the event that they were otherwise out of time?

**Facts**

4. The Tribunal found the following facts to have been established:

5. The claimant is Miss Gemma Smith.

6. She was employed by the respondent which operates veterinary practices, including one in Arbroath where the claimant worked.

7. Her manager was Mr Richard Matossian.

8. The claimant was at all times, and is, a disabled person under the Equality Act 2010. She suffers from depression. She is receiving treatment and medication for that, including a weekly meeting with her community psychiatric nurse.

9. The claimant was off on sick leave in the period March to May 2018. She alleges that during that period comments were made to her by telephone by her manager which amounted to harassment, and that that was because of her being a disabled person.

10. The claimant alleges that when she returned to work in June 2018, and for the period to July 2018, she was placed under pressure to carry out extra hours at work by her manager, and that that also amounted to harassment because of her being a disabled person.

11. She alleges that in the period from May to August 2018 she suffered further harassment by her manager making comments regarding her disability.

12. On 25 July 2018 the claimant sent an email to Ms Wendy Busby, a Business Support Manager of the respondent, regarding "a number of things that I am unhappy with, mainly some comments towards myself." She understood that Ms Busby was in human resources.

13. By that time she considered that the comments made to her by her manager had been discriminatory on the basis of her being a disabled person. She thought that she required to address that with the respondent internally first. She did not at that stage have legal advice.

14. The claimant met Ms Busby on or around 2 August 2018, and asked about the process to follow regarding her concerns. Ms Busby said that she would think about that and come back to her, but did not do so.

15. At or about the end of that meeting Ms Busby also raised issues regarding money that had gone missing from the Arbroath Practice that she had been asked to investigate by Mr Matossian.

16. On 9 August 2018 the claimant was informed that she was suspended on full pay in relation to the allegations relating to the misappropriation of cash funds from the Arbroath Practice. That was confirmed by letter dated 10 August 2018.

17. On 31 August 2018 the claimant was invited to attend a disciplinary hearing on 6 September 2018, which was re-arranged and took place on 2 October 2018. It was conducted by Ms Ali McIvor of the respondent as a form of investigatory meeting. After it, after suggestion to her by Ms McIvor, the claimant submitted a grievance dated 1 November 2018 [which was not before the Tribunal]. Pending resolution of that grievance the respondent adjourned any further action on the disciplinary allegation. The claimant remained suspended from work.

18. A meeting to discuss the claimant's grievance, which related to her manager's behaviour towards her, issues regarding the communication process and the process followed in the disciplinary investigations, was arranged for 29 November 2018.

19. On 21 December 2018 the respondent wrote to the claimant to inform her that the grievance was not upheld.

20. The claimant appealed that decision by letter dated 6 January 2019. An appeal hearing was held on 31 January 2019. On 12 February 2019 the respondent wrote to the claimant to inform her that the appeal was not upheld.

21. On 14 February 2019 the claimant commenced Early Conciliation with ACAS.

22. The certificate in relation to that Early Conciliation was issued on 28 March 2019.

23. The claimant presented a Claim Form to the Tribunal on 31 May 2019, prepared by her solicitor, who she had by then instructed.

24. The disciplinary hearing into the allegations made against the claimant was then arranged, initially by letter dated 25 February 2019. By letter of 5 March 2019 the claimant sought a different venue, and documentation to assist her in the hearing. Some but not all of that documentation was provided to her thereafter.

25. The hearing was then rearranged by letter dated 12 June 2019 and took place on 11 July 2019.

26. On 29 July 2019 the respondent wrote to the claimant to confirm that no action was to be taken on the allegation. Her suspension was then lifted, but she has not returned to work.

27. The claimant remains an employee of the respondent.

28. During the period from the commencement of suspension the claimant's mental health deteriorated. Her community psychiatric nurse described the condition as severe and manifested with labile mood, self isolation, extreme anxiety, and panic attacks.

**Submissions for claimant**

29. Mr Matthew for the claimant provided a written submission, the following being a basic summary, and which was supplemented orally. He argued firstly that there was a continuing series of acts, with all of the matters part of that series, and that that continued up to the point of presenting the Claim Form. He argued that the disciplinary process was conducted out of spite, and a reaction to the problems that arose from the claimant. He referred to sections 231 and 123 of the Equality Act 2010. He argued that if that were not the case, the matters that arose in the period that covered May to August 2018 should be permitted to proceed as it would be just and equitable to do so. He referred to the recent case of ***Thomson v Ark Schools [2019] ICR 292.*** He referred to the claimant's mental health condition, and that she had not been aware of time limits. Her aim had

been to resolve matters internally. He referred to the lengthy suspension, and that the process to conclude the disciplinary hearing took a long time.

**Submissions for respondent**

30. The following is again a basic summary of the written submission, which was supplemented orally. Firstly the respondent accepted that the claim in relation to the disciplinary process, which did not conclude until after the Claim Form was presented, was not out of time. In relation to the other three categories of claim, which Mr MacDougall had put to the claimant in cross examination, which were (i) comments made when she was off sick (ii) comments about doing extra work on return and (iii) comments about her disability, covering the periods May to June, June to July and May to August respectively, he argued that she accepted that she was aware at the time that they were discriminatory. They were separate from the allegations made that were disciplinary. He referred to section 123 of the Equality Act 2010 and the case of ***Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548.*** The onus was on the claimant to prove a prima facie case that there has been an ongoing situation or continuing state of affairs in which she was treated less favourably. The tribunal should focus on the substance of the complaints themselves, and he argued that the substance of the complaints does not constitute a singular ongoing act. The suspension and disciplinary process did not have a clear connection to the earlier matters, which were completely distinct.

31. On the issue of the just and equitable extension, he referred to ***Robertson v Bexley Community Centre t/a Leisure Links [2003] IRLR 434*** and to the factors set out in ***British Coal Corporation v Keeble and ors [1997] IRLR 336.*** He argued that the cogency of the evidence would be affected by the delay, with the material events dating from May to August 2018. He argued that there was no evidence that the claimant's disability was the reason for delay in presenting the Claim Form. He invited me to hold that there was no jurisdiction save in relation to the claim as to the disciplinary process.

**Law**

32. The law relating to discrimination is complex. It is found in statute, case law, and from guidance in a statutory code.

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*(i) Statute*

33. Section 4 of the Equality Act 2010 ("the Act") provides that disability is a protected characteristic. The claims made by the claimant are for direct
10 discrimination under section 13, discrimination arising out of disability under section 15, the failure to make reasonable adjustments under sections 20 and 21, and harassment under section 26, all for that protected characteristic.

15 34. Section 123 provides as follows:

"**123 Time limits**

(1) [Subject to section 140A and 140B] proceedings on a complaint within section 120 may not be brought after the end of—

20 (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…….

…….

25 (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."

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*(ii) Case law*

*(a) Conduct extending over a period*

35 35. Guidance was given by the House of Lords in ***Barclays Bank plc v Kapur and ors [1991] ICR 208***. A distinction was drawn between a continuing

act and an act with continuing consequences. It was held that where an employer operated a discriminatory regime, rule, practice or principle that amounts to an act extending over a period.

5 36. The case of ***Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548,*** heard in the Court of Appeal, approved the wording used in ***Hendricks v Commissioner for Police for the Metropolis [2003] IRLR 96*** that:

10 "She [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her 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 15 affairs covered by the concept "an acting extending over a period."

37. In ***Aziz v FDA [2010] EWCA Civ 304*** it was held that one factor that was relevant, but not conclusive, was whether the same or different individuals were involved in the incidents.

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*(b) What is just and equitable*

38. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant 25 (***Robertson v Bexley Community Centre [2003] IRLR 434*** ). Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South*** 30 ***London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** Although the EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that is contrary to the line of authority culminating in ***Ratharkrishnan***.

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39. In that case there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factorial approach. No single factor is determinative."

40. The factors that might be relevant include the extent of the delay, the reasons for that, the balance of hardship including any prejudice to the respondent caused by the delay, and the prospects of success of the claim, although all the facts are considered. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT said that a litigant can hardly hope to satisfy that burden unless she provides an answer to two questions:

> "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

41. In ***Averns v Stagecoach in Warwickshire UKEAT/0065/08*** the issue of the lack of knowledge of the ability to claim is addressed, and it was held that the assertion must be genuine and the ignorance – whether of the right to make a claim at all, or the procedure for making it, or the time within which it must be made – must be reasonable.

**Observations on the evidence**

42. Miss Smith gave clear and candid evidence, and I accepted it as credible and reliable.

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**Discussion**

43. This has not been an easy matter to resolve. I have however concluded that the claimant's claims are within the jurisdiction of the tribunal.

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44. The first issue is whether or not there was a continuing series of acts under section 123. For that, there must be a sufficient link between the first three categories of claim which arose in periods during the months of May to August 2018, and the suspension and disciplinary process which also
15 started in August 2018 and continued until after the Claim was presented.

45. The claimant seeks to argue that the commencement of disciplinary proceedings against her was because she was a disabled person, and was harassment (as well as direct discrimination, and perhaps on other
20 grounds). That is not an easy case to pursue successfully, but I consider that there is sufficient to provide the link between that allegation, and the earlier allegations that are made, in a manner that meets the statutory provision as explained in authority as set out above. At this stage I accept that what the claimant says is both credible and reliable, and that what she
25 alleges will be proved in evidence later, when the respondent has the opportunity of calling its own evidence.

46. The matters that I consider are relevant are firstly the nature of the allegations made as to what Mr Matossian said, which if true could indicate
30 a mindset that was against the continued employment of someone who was disabled, secondly the close proximity in time between the claimant asking for information on how to address complaints about such comments (although her email of 25 July 2018 did not articulate that, she did confirm in evidence that that was what she referred to) and
35 Mr Matossian making an allegation that money had gone missing, on which she was questioned by Ms Busby on or around 2 August 2018 and

then suspended on 9 August 2018, and thirdly the lengthy process of grievance and then disciplinary hearings, not culminating until 29 July 2019 when the decision was that no action would be taken against her. That is, I consider just sufficient to amount to a prima facie case. The thread that runs through it is the allegation that there was harassment of the claimant by Mr Matossian on grounds of her disability.

47. I consider therefore that there was conduct extending over a period for the purposes of section 123 such that the claim is within the jurisdiction of the tribunal.

48. Lest I be wrong in that, I then considered whether, if there was not such conduct extending over a period, and each of the three categories of claim referred to above were therefore out of time, it was just and equitable to extend time under section 123(1)(b). I have concluded that it is. The reasons for that are as follows:

(i) The length of the delay was about six months. That was by no means insignificant. It was a factor that supported the respondent's submission.

(ii) The claimant sought to resolve her complaints internally, and thought that that was the appropriate step to take. Early Conciliation was commenced two days after her appeal was refused. She thought that the respondent would do so, and her belief was that she did require to exhaust the internal process first of all. That view was one that a reasonable person could hold, and tended to support the claimant's submission.

(iii) In addition, the claimant was suspended from work from 9 August 2018 in relation to disciplinary proceedings. Those proceedings were then adjourned whilst her grievance was considered, but there was then delay in arranging the hearing and addressing matters. Although there was some delay because of the claimant's position, the length of time taken to address both the grievance and disciplinary issues together, during which the claimant was suspended, was itself lengthy, although the period after presenting

the Claim Form is not relevant to this matter. Those facts tended to support the claimant's submission.

(iv) Whilst there was an argument that the cogency of evidence would be adversely affected by the delay, and to an extent the passage of time has the risk of that, the extent of delay at six months is not likely in my judgment to do so to a very substantial extent, and in any event that risk applies to both parties. The claimant has the initial burden of proof. In my judgment this factor does not materially advance the position of either party.

(v) A further factor is the extent to which the party sued had co-operated with requests for information. The claimant did seek information during the disciplinary process, and had some not all provided to her. That again is not a matter that I consider materially advances the position of either party.

(vi) The claimant acted reasonably promptly when aware of the facts, at least after her grievance appeal was granted by seeking to commence early conciliation. There was then a delay of about two months between the certificate being issued and the Claim being presented. The claimant could not recall when she first instructed her solicitor. The evidence on that is therefore limited. I consider that there was a measure of delay in the claimant commencing proceedings, and that is a factor that to an extent favours the respondent's submission, but the extent of that delay (between 28 March 2019 and 31 May 2019) was limited and unlikely to have a material impact on matters. That also covers the issue of the taking of professional advice.

(vii) There is a further factor that I consider to be relevant, and that is the degree of prejudice that may be suffered by either party. For the claimant, she wishes to pursue claims of discrimination in a variety of respects that may fall under the general description of harassment (and other claims under the Act potentially as well). The facts of course are disputed. If however the claimant's version of events is accepted, her claim may well succeed. Whilst the respondent is correct that the events during the summer months of 2018 can be led by way of evidence in the claim where jurisdiction is not an issue, the loss to the claimant of the ability to argue that

that was discrimination and to seek a remedy for that is a material matter. On the other hand, the prejudice to the respondent is firstly that it may be more difficult to give evidence on matters from that period, which is mitigated by the fact that such evidence may be relevant to the claim in respect of the disciplinary process where no time bar issue arises, and having to defend the claims for those three earlier periods. The consideration of the balance of prejudice favours the claimant in my judgment.

(viii) Finally, whilst it is not possible to express a concluded view on the relative strengths or weaknesses of the cases being put forward, there is at least the possibility of the claimant leading evidence which is sufficient to amount to a prima facie case, for the reasons set out above. Her claim is one where it is I consider just and equitable to permit an enquiry. Both sides can then present the evidence they wish to, and a determination made on the basis of those facts. As stated above, the same facts may be relevant to a claim in relation to the disciplinary process against the claimant, which resulted in there being no action taken against her, as for the earlier three groups of matters alleged.

49. Taking account of all of the matters before me, it appeared to me that the balance favoured a finding that the Claim Form had been presented within a period which was just and equitable, in the event that the claim was outwith the period of three months, within section 123(1) of the 2010 Act.

**Conclusion**

50. The Claimant's claims shall proceed to a Full Hearing.

51. A listing letter shall be issued to the parties to seek to identify dates for that hearing, after which a formal Notice of Hearing shall be issued separately. At that stage the Tribunal will also make case management orders in relation to that Final Hearing.

52. In the event that either party considers that a Preliminary Hearing to address case management would be appropriate, an application to hold that can be sent by email.

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**Employment Judge:** **Alexander Kemp**

**Date of Judgment:** **19 December 2019**

**Date sent to parties:** **20 December 2019**