EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr R McGlinchey	Secretary of State for Justice

Heard at: **Leeds** **On: 28 January 2020**

Before: **Employment Judge Davies**

Appearances
For the Claimant: **In person**
For the Respondent: **Mr Serr (counsel)**

JUDGMENT

1. The Claimant's complaint of direct discrimination because of sexual orientation is dismissed on withdrawal by him.

2. The Claimant's complaints of failure to make reasonable adjustments for disability were not brought within the time limit in s 123 Equality Act 2010 and they were not brought within such further period as is just and equitable. Therefore, the Tribunal does not have jurisdiction to determine them and they are dismissed.

REASONS

Introduction

1.1 This was a preliminary hearing in public to decide:

1.1.1 Were the Claimant's complaints of failure to make reasonable adjustments for disability brought within the time limit in s 123 Equality Act 2010 and, if not, should time be extended? The questions to be answered were:

1.1.1.1 Was there conduct extending over a period that included the alleged failures to make reasonable adjustments?

1.1.1.2 Were the Tribunal claims brought within three months (plus early conciliation extension) of the end of that period or within three months (plus early conciliation extension) of the failure to make adjustments?

1.1.1.3 If not, were they brought within such further period as the Tribunal considers just and equitable?

1.1.2 Do the Claimant's complaints of direct sexual orientation discrimination and unfavourable treatment because of something arising in consequence of disability have little reasonable prospect of success and, if so, should the claimant be ordered to pay a deposit as a condition of continuing with them?

1.1.3 If so, how much should he be ordered to pay?

1.2 At the hearing, the Claimant represented himself and the Respondent was represented by Mr Serr (counsel). I was provided with an agreed file of documents and I considered those to which the parties drew my attention. The Claimant gave evidence and had also produced a note of his income and outgoings. I encouraged the claimant to ask for a break or for more time if he needed it and he did so.

1.3 At the start of the hearing the claimant agreed that he had told the Respondent's legal representative that he did not want to pursue his sexual orientation discrimination complaint. He confirmed that he wanted to withdraw that complaint and I have dismissed it in this judgement. I have made a separate deposit order.

Legal Principles

Time limits

2.1 The time limits for bringing claims of discrimination in the Tribunal are governed by s 123 Equality Act 2010, which provides, so far as material, as follows:

> **123 Time limits**
> (1) Subject to section 140A, 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.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
> (a) when he does and act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

2.2 Under s 123(3)(a), conduct extending over a period is treated as being done at the end of the period. The focus of the inquiry is on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against, including the claimant, was treated less favourably: see *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530, CA. This is a question of fact for the tribunal. A relevant, but not determinative, factor is whether the same or different individuals were involved in the incidents: *Aziz v FDA 2010 EWCA Civ 304, CA*. If a Tribunal ais unable to establish the date of the discriminatory act and whether it is part of a continuing state of affairs without hearing evidence from the parties that would have to be presented at a full hearing, it is wrong for it to make a decision to strike out the claim on the basis that it is time-barred: see *Aziz*.

2.3 In the case of a failure to make reasonable adjustments, the Court of Appeal has made clear such a failure is to be regarded as an omission rather than an act: see *Matuszowicz v Kingston upon Hull City Council* [2009] IRLR 1170, CA. In cases

where the employer was not deliberately failing to comply with the duty, it is to be treated as having decided upon the omission at an "artificial" date. Under s 123(4)(b), the Tribunal must decide when, if the employer had been acting reasonably, it would have made the adjustments.

2.4 As regards extending time, the Tribunal has a wide discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances. The factors that are to be considered by the civil courts under s 33 of the Limitation Act 1980 in determining whether to extend time in personal injury actions may provide a helpful checklist: see *Southwark London Borough Council v Afolabi* [2003] IRLR 220, CA. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

2.5 In the case of failure to make reasonable adjustments, Tribunals are expected to have sympathetic regard to the difficulty that may arise by the application of s 123(4)(b): see *Matuszowicz*. The period in which the employer might reasonably have been expected to comply with its duty ought in principle to be assessed from the Claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the Claimant at the relevant time: see *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194.

The Facts and Reasons

3.1 The claimant makes three complaints of failure to make reasonable adjustments, all of which relate to his line manager Mr Hines. They are:

3.1.1 in 2016 Mr Hines should have engaged in dialogue with the claimant through Remploy;

3.1.2 in July 2018 Mr Hines should have given him a female line manager; and

3.1.3 in October 2018 Mr Hines should have moved him to a less pressured job.

3.2 For the purpose of deciding whether the reasonable adjustments complaint was brought in time I have taken the Claimant's case at its highest. I have assumed that he will succeed in establishing that there were those three failures to make reasonable adjustments and that he will succeed in establishing that his dismissal was unfavourable treatment because of something arising in consequence of disability. I set out below an outline chronology of the events behind those claims based on the documents before me.

3.3 The Claimant was diagnosed with Emotionally Unstable Personality Disorder in 2013/2014. The Respondent accepts that he was disabled at all material times.

3.4 The claimant was receiving support from Access to Work between May and November 2017.

3.5 On 6 December 2017 an Occupational Health report referred to the Claimant's diagnosis. The advisor recommended a reduced workload for 2 to 3 months, reviewing the claimant's stress action plan regularly, spacing out cases he might be allocated, and supporting time off work for medical appointments and time out of the office as necessary.

3.6 On 13 August 2018 a further Occupational Health report was obtained. The claimant had talked about stress-related problems at work. The advisor said that it might be easier for the claimant if he did not have a male manager. The claimant perceived that he had experienced less volatility of emotion in the past when managed by a female. The claimant was also referred for service funded CBT therapy.

3.7 The claimant was off work in September and October 2018 as a result of emotionally unstable personality disorder.

3.8 A Reasonable Adjustment Action Plan was completed on 16 October 2018. It recorded that there were reasonable adjustments in place: limited workload, no induction slots, napping in the office, and some stress-inducing cases being reallocated. It also listed reasonable adjustments that were to be put in place. They related to a phased return to work and to exploration of the possibility of the claimant moving to the Crown Court. That was the less stressful job the Claimant referred to.

3.9 There were some emails in November 2018 discussing the possibility of a move to the Crown Court.

3.10 The claimant's line manager completed a supervision record on 8 November 2018. He recorded that the claimant felt that it was good to be back at work. The medication he was taking, quetiapine, seemed to be working. His drowsiness had diminished, his thinking, mood and behaviour had all improved. His manager recorded that the Claimant could not drink much on the tablets. The note records that they discussed the possibility of a female line manager and records the claimant as saying that he was fine to remain with his existing line manager at the moment. They went through the reasonable adjustments plan and agreed it. They discussed the possibility of the claimant moving to the Crown Court but the line manager expressed concerns about deadlines, pressure of reports, behaviour and presentation under pressure. The notes record him saying that he would like to see a period of stability, good behaviour and meeting deadlines, but that a move to the Crown Court could be considered in the future. The notes record that the claimant was okay with that.

3.11 On 1 December 2018 the claimant and a number of colleagues attended a colleague's birthday party. On 4 December 2018 the claimant was suspended from work because of allegations that he had committed misconduct of a sexual nature towards a number of colleagues and their partners at the party. The claimant was suspended by Mr Lanfranchi, head of NPS in Leeds. An investigation was carried out by Ms Hutchings. She interviewed a number of people, including the claimant. The claimant was supported by his Trade Union representative. On 25 January 2019 the claimant prepared a detailed written statement responding to the allegations that had been made against him. Ms Hutchings produced a written investigation report recommending that the allegations be considered at a disciplinary hearing.

3.12 The claimant produced a further written statement. In that, he acknowledged that his recollection of the details of the event was quite limited. He explained that prior to and during the party he had drunk a substantial amount of alcohol. This, in combination with his medication, must have impaired his mental functioning significantly at the time. Whilst he did not recall behaving in some of the ways the witnesses had described, his very partial recollection of all the circumstances of the party meant that he could not contradict the statements of the witnesses with any confidence or readily defend himself against the allegations.

3.13 The disciplinary hearing took place on 11 April 2019. It was conducted by Mr Lanfranchi. The claimant attended with his Trade Union representative. At the end of the hearing the claimant was dismissed for gross misconduct.

3.14 The claimant appealed against his dismissal and an appeal hearing was conducted by Ms Marginson on 22 May 2019. The claimant again attended with his Trade Union representative. Ms Marginson wrote to the claimant on 30 May 2019 to inform him that his appeal had not been upheld.

3.15 The claimant's case is that the misconduct for which he was dismissed was something that arose in consequence of his disability. He says that the medication he was taking, in combination with alcohol, led him to behave as he did.

3.16 I make the following findings fact based on the claimant's oral evidence today. He had an advocate from the Disability Advice and Wellbeing Network from 2018 onwards. He was a member of a Trade Union throughout his employment by the Respondent. He talked about disability discrimination and the duty to make reasonable adjustments with his Trade Union adviser although his adviser did not tell him of the time limits for bringing a Tribunal claim. At no stage did he lodge a grievance about failure to make adjustments.

3.17 The claimant's condition of Emotionally Unstable Personality Disorder has led to periods of sickness absence during his employment and the need for reasonable adjustments. He says he was signed off sick during his suspension. I did not see the relevant sick notes but for present purposes I accept his evidence.

3.18 The claimant accepted that he engaged with the disciplinary process both in writing and by attending all the meetings and hearings. He did say that he was not particularly well. The claimant has now taken legal advice, but only since the last preliminary hearing. The claimant did not clearly articulate why it had taken so long to complain of failure to make reasonable adjustments. He talked about trying to resolve matters informally and about his mental ill-health.

Was there conduct over a period?

3.19 As indicated above, for present purposes I have assumed that the claimant will succeed in establishing that his line manager failed to make reasonable adjustments on three occasions as he alleges. Further, I assume that he will succeed in establishing that his dismissal was unfavourable treatment because of something arising in consequence of his disability, on the basis that the misconduct which he was dismissed was caused by the medication he takes for his disability.

3.20 On the basis of those assumptions, and the undisputed factual background set out above, I have found that the (assumed) failures to make reasonable adjustments did not form part of a course of conduct extending over a period that also included the claimant's (assumed) discriminatory dismissal. These were separate and distinct matters. One concerned the actions of Mr Hines as line manager, considering occupational health advice and making or failing to make adjustments to the claimant's duties. The other concerned actions taken under the Respondent's disciplinary process by entirely different individuals as a result of serious allegations made about the claimant's conduct towards colleagues at a social event. The type of complaint is different, the individuals involved are different and the underlying factual basis is different. The fact that both relate to the Claimant's disability is not enough to mean that this was conduct of the Respondent extending over a period. That remains the case even if the failure to make adjustments contributed to the Claimant's ill health. Fundamentally, these were different and unconnected events involving different people. There was no ongoing situation or continuing state of affairs. The assumed failure to make adjustments and the assumed discriminatory dismissal for misconduct were not part of an ongoing course of conduct in which the claimant as a disabled person was discriminated against.

Was the claim brought within three months (plus early conciliation extension) of the failure to make adjustments?

3.21 The starting point is to consider when time started to run for the purposes of s 123 Equality Act 2010, i.e. when did the failure to make adjustments happen. I have focussed on the two complaints relating to 2018 and sought to identify the latest date on which the failure to make those adjustments might be said to have taken place. Under s 123(4), in the absence of evidence to the contrary, it took place when Mr Hines did something inconsistent with making the suggested adjustments, or, if he did not do anything inconsistent with that, at the end of the period in which he might reasonably have been expected to make the adjustments.

3.22 On the face of the documents, Mr Hines did something inconsistent with making those two adjustments at the supervision meeting in November 2018. He recorded that the claimant was happy to continue with him as line manager and he recorded that he was unwilling to consider a move to the Crown Court at that stage until he had seen a period of stability. It is likely that time started to run from that date. However, even if that were wrong, the claimant was suspended from work on 4 December 2018 and never returned. The duty to make adjustments for disability did not apply at a time when the claimant was required not to attend work. The last date on which the duty applied was therefore 4 December 2018 and time started to run on that date in any event.

3.23 That means the complaint of failure to make reasonable adjustments should have been presented by 3 March 2019 (plus any Early Conciliation extension) at the latest. The claimant did not contact ACAS until June 2019, so he does not benefit from an Early Conciliation extension. He did not present his claim until 16 August 2019. It was therefore presented at least five months outside the three-month time limit.

Is it just and equitable to extend time?

3.24 I therefore turn to the question whether it is just and equitable to extend time by five months. I find that it is not. I acknowledge that the claimant was suffering from mental ill-health throughout the period and I have carefully weighed that in the balance.

However, the evidence does not suggest that his mental ill-health was so severe that he was unable to bring a Tribunal claim. He did not say so. He evidently played a full and active part in the disciplinary process, during the whole of which he was in receipt of advice and assistance from his Trade Union. He has not articulated any clear reason for the delay in bringing these complaints. Although he suggested that he was trying to resolve this issue informally, it was clear by November 2018 that there was not going to be a change of line manager or a move to the Crown Court at that stage. He did not attend work after 4 December 2018. Attempting to resolve the matter informally does not explain why the claimant did not bring a Tribunal claim until the following August. The claimant was clearly aware of the concept of disability discrimination and the duty to make reasonable adjustments. He discussed them with his Trade Union. It may be that his Union did not advise him of the Tribunal time limits. He also had access to advice from the Disability Advice and Wellbeing Network.

3.25 Allowing the extension of time, will cause very significant prejudice to the respondent. It will face these claims brought very substantially outside the time limit, which it would not otherwise have to face. They would add to the length of the hearing and the preparation for it. Further, there would inevitably be an impact on the cogency of the evidence, given that the most recent matters were nine months old by the time the claim was presented and the earliest complaints were two years older than that. On the other hand, clearly there will be prejudice to the claimant if time is not extended, because he will not be able to advance these reasonable adjustment claims. However, he will still be able to advance his complaints relating to his dismissal. Weighing all the relevant factors I find that the balance lies in favour of refusing to extend time. The prejudice to the Claimant is less, in circumstances where his ill-health was not such as to prevent him from bringing a Tribunal claim and he had access to advice from his union and DAWN.

Employment Judge Davies
28 January 2020