Case Number: 1809290/2018

1807286/2019

EMPLOYMENT TRIBUNALS

Claimant:	**Dr Sarah Adomi**
Respondent:	**Sheffield Teaching Hospitals NHS Foundation Trust**
Heard at:	**Sheffield** **On: 25 September 2020**
	With deliberations on 29 September 2020
Before:	**Employment Judge T R Smith**

Representation

Claimant:	Mr Panton (representative)
Respondent:	Ms Kyte (of counsel)

RESERVED JUDGMENT

1. The alleged discriminatory acts numbered one, two, three, as defined herein, were not presented within the time limit specified in section 123 of the Equality Act 2010 and it is not just and equitable to extend time. They are struck out.
2. Act four was presented in time, or if it was not, it would be just and equitable to extend time.
3. Act five was presented within time.

REASONS

The Evidence

1. The Tribunal had before it a bundle consisting of 288 pages.
2. A reference to a number in brackets is a reference to a document in the agreed bundle.
3. The Claimant prepared a short statement dated 14 March 2020 and gave oral evidence.

4. The Respondent did not call any evidence.

5. The Tribunal considered all the evidence in the round, even if it is not specifically referred to every dispute or every document.

The Procedural Background.

6. The Claimant originally issued proceedings under case number 1809290/2018 ("the first claim"), which was presented on 10 August 2018.

7. The Claimant subsequently issued proceedings under case number 1807286/2019 ("the second claim") on 09 December 2019. There was no dispute between the parties that the second claim was issued in time, in respect of the Claimant's complaint of a discriminatory and unfair dismissal.

8. At a preliminary hearing held on the on 17 January 2020 the Claimant was ordered to provide further particulars of the first claim.

9. The Claimant did so (159 to 161).

10. The Claimant identified in the further particulars five acts of discrimination which were referred to by the parties throughout the evidence as acts one to five and the Tribunal has adopted the same nomenclature.

The Acts of Discrimination

11. Act one, the failure to uphold the Claimant's first grievance in August 2011.

12. Act two, the failure of the Respondent to uphold the Claimant's appeal in respect of her first grievance on or around November 2012 (there is an error in the further particulars which refers to November 2011 but this is a clear typographical error, see page 180).

13. Act three, the failure to provide the Claimant with a suitable role which was commensurate with her qualifications and experience.

14. Act four, the decision to refer the Claimant to what the Claimant described as a disciplinary hearing on or about September/October 2016

15. Act five, the failure to investigate in a timely, fair and reasonable manner the Claimant second and third grievances, the second being dated 15 March 2018 and the third dated 09 May 2018.

The Issues

16. As long ago as the 28 January 2020 the Tribunal directed there would be a public preliminary hearing to determine whether all or any of the allegations contained in the first claim were presented within time, and if not, whether it was just and equitable to extend time.

17. For a variety of reasons, the public preliminary hearing was adjourned on a number of occasions.

18. During the course of this hearing various concessions were made by both advocates.

19. Originally the Claimant contended acts one to five were continuing acts.

20. However, in submissions Mr Panton expressly conceded that acts one and two were not continuing acts and were out of time. Therefore, one issue for the Tribunal was whether it would be just and equitable to extend time in respect of acts one and two.

21. On the behalf of the Respondent it was expressly conceded by Ms Kyte that the second grievance was effectively incorporated into the third grievance and there was a continuing act in respect of the third grievance and thus the complaint in respect of act five was presented within time. It was therefore agreed that the Tribunal did not need to address the issue of time in respect of act 5.

The Time Line and Findings of Fact

22. The Tribunal considered it helpful to set out a brief timeline, based on the documentation presented to it, before moving on to specific findings of fact.

23. The Claimant commenced employment with Sheffield Primary Care Trust (" the PCT") on or about 02 February 2009 (4).

24. Whilst she was subsequently to be employed by the Respondent in April 2011, it was conceded the Claimant's employment was continuous from 02 February 2009 and the Respondent assumed all rights and responsibilities and obligations that existed between the Claimant and PCT. For this reason, unless the context otherwise requires, the Tribunal has referred to the Claimant's employer from February 2009 simply as the Respondent.

25. She was employed by the Respondent as a Senior Community Dentist (special needs)

26. Within four months of the start of her employment, in about June 2009 concerns were raised as to the Claimant's competence (26).

27. On 02 July 2009 the Claimant was excluded from clinical duties pending an investigation under the PCT's "conduct, capability and ill-health policies and procedures for doctors and dentists (the "CCH")

28. The Claimant took sick leave from 14 September 2009 and did not return to work until 07 July 2011. She was absent for what has been described as stress and depression. The Claimant's evidence before the Tribunal was that sometime in 2010, she was also diagnosed with a post-traumatic stress disorder condition.

29. In the interim the CCH investigation was completed on 20 September 2010 but without input from the Claimant.

30. On 02 August 2011 the Claimant raised her first grievance in which she made allegations of discrimination on the grounds of her race and disability. It would appear that much of that grievance related to her treatment by the PCT and the conduct and necessity of the CCH investigation.

31. Between February and July 2012, the Claimant had been placed on a back to work programme. Assessments were carried out by a variety of practitioners at the Charles Clifford Dental Hospital and the University of Sheffield School of

clinical dentistry. There is a dispute as to the result of those assessments. The Tribunal is not required to make a judgement upon them, at this stage. What can be said is that the Respondent considered the Claimant did not have the full capabilities required for the post to which she been appointed too.

32. The grievance outcome was dealt with by the Respondent's Deputy Medical Director, Dr Throssell, with some of the Claimant's concerns being upheld but not those relating to discrimination. This was what the parties referred to as act one. Dr Throssell's report was dated 25 July 2012 (165 to 179) but on the evidence before it the Tribunal could not be certain as to the exact date that the Claimant saw that report but it must have been by 02 August 2011 as she lodged an appeal against the first grievance outcome on that day (180).

33. There was no cogent evidence before the Tribunal that Dr Throssell had any further direct involvement in the Claimant's employment with the Respondent. The Claimant's case was she certainly wasn't aware of any such direct involvement

34. On 12 September 2012 Dr Massey considered there were no suitable clinical roles with supervision available for the Claimant and therefore directed that she be placed upon nonclinical duties, while investigations were undertaken into her capability. This was referred to the parties as act three.

35. The Claimant did not suggest that there were formal reviews of this decision. At its highest she said she approached her line manager on a number of occasions to ask whether she could return to full duties. She was not given a response, merely told it needed to be referred to HR. She never heard back from HR and she never pursued the matter any further. She hoped that she would be allocated some clinical duties

36. On 30 November 2012 the Claimant received a letter as to the outcome of her appeal against the first grievance. The appeal was not upheld in relation to the Claimant's allegations of discrimination but it was recommended that the CCH investigation should be reviewed with a new case investigator. This was referred to by the parties as act two. The decision was taken by the Respondents then chief executive, Sir Andrew Cash (180 to 183). Sir Andrew Cash was also to acknowledge receipt of the Claimants third grievance by letter dated 12 June 2018 and indicated that the investigation would be undertaken by a Ms Allred and that other aspects would be dealt with *by "relevant managers"* (184 to 186). His involvement was therefore limited to an acknowledgement.

37. Between 04 November 2012 and 15 December 2013, the Claimant was once again absent due to ill-health.

38. During this period of sickness, in January 2014 Dr Anderson, a retired consultant was appointed as a case investigator into the Claimant's alleged competency supported by an independent community dentist and a medical HR manager (the Anderson report).

39. In part there were delays in the Anderson report because the Claimant was absent ill-health from 19 August 2015 to 07 October 2015.

40. The Anderson report was not completed until October 2016 and in essence concluded there were issues as to the Claimants clinical competence, communication and working skills although the outcome was not immediately shared with the Claimant

41. At about the same time as the Anderson report was concluded the Claimant was again absent due to ill-health from 26 October 2016 to 02 May 2017.

42. On 18 July 2017 Dr Massey shared the Anderson report with the National Clinical Assessment Service (NCAS).

43. On 25 September 2017 NCAS determined that this was not a case where they were required to carry out their own independent assessment of the Claimants capability. The Claimant objected to the NCAS decision and asked for review, which was refused by NCAS.

44. On 14 December 2017 Dr Massey decided to refer the Claimant's capability concerns to a capability hearing. This was referred to by the parties as act four. For clarity, the Claimant referred to this as a disciplinary hearing in her evidence and in some of her documentation. They were one and the same thing. Thus, it was Dr Massey who had taken the Claimant off clinical duties and had taken the decision to refer the Claimant to a capability process.

45. On or about 16 March 2018 the Claimant lodged her second grievance. Much of the grievance related to the Claimant's treatment at Charles Clifford Dental Hospital

46. Before the second grievance was investigated the Claimant raised her third grievance on or about 09 May 2018 . The third grievance contained elements of the second grievance and additional information.

47. The Claimant did not produce any medical evidence in the bundle or give oral evidence in chief to explain the impact of her health challenges on her ability to lodge the first claim prior to 10 August 2018. In particular there was no specific evidence as to what the Claimant could or could not do in the appropriate time period for lodging a Tribunal claim following acts one two, three and four.

48. The following staff who featured in the pleadings and grievances are no longer employed by the Respondent namely Dr Vosa, Dr Throssell, Dr Hayes, Dr Massey, Ms Gornell, Mr Stocks, Mr Clauson, Sir Andrew Cash and Mr Rowe.

49. The Claimant did not content in her evidence that from the commencement of her employment with the PCT and her subsequent transfer to the Respondent she was unaware of the existence of Employment Tribunals.

50. The Claimant did refer the Tribunal to any specific document which she said suddenly led her to realise she had a potential discrimination claim which had not been disclosed in the normal course of events. As the Tribunal has already observed the Claimant was making allegations of discrimination in her first grievance.

51. At the time all the acts complained of occurred the Claimant accepted she regarded those acts as being wrong and discriminatory.

52. It would appear that under the Respondents policy any grievance would initially be referred to the Claimant's line manager. For the avoidance of doubt Dr Throssell, Dr Massey and Sir Andrew Cash were not the Claimant's line managers.

53. The Claimant had the benefit of assistance from her two defence organisations the BDU and the BDD up to and including the lodging of the first claim.

Submissions

54. Both advocates relied upon written submissions which they amplified orally.

55. The Tribunal means no disrespect to either advocate by failing to record, in detail, those submissions, given they are already contained on the Tribunal file.

56. Where appropriate, if a particular submission has been preferred, the Tribunal has explained the reasons why.

Discussion and Reasons.

57. Section 123 of the Equality Act 2010 (EQA10) sets out the statutory provisions in respect of time, which the Tribunal has reproduced below: –

"…Proceedings on a complaint … may not be brought after the end of –

the period of three months starting with the date of the act to which the complaint relates, or

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-

(c) when P does an act inconsistent with doing it, or

(d) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

58. The starting point for the Tribunal is that it should be slow to strike out all or part of a claim at a preliminary hearing, particularly when it involves discrimination, given the Tribunal has not heard all the evidence and discrimination cases are notoriously fact sensitive. That said there is no rule that there cannot be a strike out in a discrimination claim on time prior to the full hearing.

59. It was accepted that acts one and two were out of time and act five was within time.

60. The first issue the Tribunal had to determine was whether acts three and four were continuing acts. If they were a series of one-off acts time ran from the end of each act. If there was a continuing act then time ran from the last act. The

Claimant contended that acts three and four were linked to act five and thus they were continuing acts (see paragraphs 2 and 3 of the Claimant's proof)

61. The Tribunal has reminded itself that the test at this stage is whether the Claimant has made out a prima face case of the incidents being treated collectively as an act continuing over a period – **Lyfar-v- Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548.**

62. The starting point is what is a continuing act? The mere assertion that there was a continuing act by the Claimant will not suffice. In **Barclays Bank PLC v Kapur 1991 ICR 208 HL** the Supreme Court distinguished between a continuing act and an act with continuing consequences. The Supreme Court held that where an employer operated a discriminatory regime, rule, practice or principle, then such a practice would amount to a discriminatory act extending over a period. This concept was further explained in **Hendricks v Commissioner of Police for the Metropolis 2003 IRLR 96 CA**. The Court of Appeal said that in determining whether there was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts, the focus should be on the substance of the complaints that the employer was responsible for and whether it was an ongoing situation or a continuing state of affairs

63. **Hendricks** addressed the point raised in previous authorities as to what was a practice, policy, rule or regime. There was no need for there to be a written practice, policy rule or regime. They were simply examples that pointed towards a continuing act.

64. Further authorities have established that the mere repetition of the request cannot convert a single managerial decision into a policy, practice or rule – **see Cast v Croydon College 1997 IRLR14** and a Tribunal might find it instructive to determine whether the acts complained of were linked and whether there was a continuing discriminatory state of affairs, (**Lyfar**) and whether the same person or persons were responsible for each of the acts, see **Aziz –v- FDA 2010 EWCA Civ 304.**

65. The Tribunal has concluded that act three was not a continuing act. The decision to place the Claimant on restricted duties was a one-off act with continuing consequences for the Claimant in terms of prestige and job satisfaction

66. The decision in respect of act three was taken by Dr Massey in September 2012. Whilst he was subsequently to recommend that the Claimant was referred to a capability hearing there was nothing in the evidence before the Tribunal to link Dr Massey to any involvement in act five.

67. The asserted belief of the Claimant that she would be allocated clinical duties at some stage was unreasonable, hence the reason for the delay until August 2018 was wholly unreasonable. It was unreasonable because she had been expressly told by her line manager that clinical duties could not be allocated to her whilst her capability was being investigated (57).

68. It was further unreasonable because the Claimant was aware of the Respondents concerns as to her capability and was then appraised of the Anderson report well

after she had been removed from her substantive duties which apparently was unavailable to her. In September 2017 she was seeking to persuade NCAS to carry out its own review of her capability because she did not accept the findings of the Anderson report.

69. The Claimant knew in the light of the investigations made by the Respondent she would not be returning to unrestricted duties, at the very latest, by September 2017.

70. There was no linkage between act three and act five other than the Claimant refers to act three in her third grievance along with a multitude of other assertions. The same people were not involved save Dr Massey is mentioned along with many others in grievance three. In any event act five is not about the contents of the third grievance but simply that the Respondent failed to address that grievance in a "timely fair and reasonable manner". Dr Massey had nothing to do with the progress of the grievance as is clear from the letter from Sir Andrew Cash, quoted above.

71. This is not a case where there was a policy, provision or practice applied. The reality was the Respondents believed there were concerns as to the Claimant's capability and would only review the same following the outcome of its investigations. On the Respondent's evidence the Claimant remained incapable hence why she was not returned to her full range of clinical duties and there was no need to review. Even if it was found that the Claimant made direct requests for a review and there was a policy to exclude the Claimant all the Respondent did was maintain that policy so act three is out of time, see **Cast.**

72. The position as regards act four is not so clear cut.

73. The Tribunal has not lost sight of the Claimant's proof. As the Tribunal has already observed the Claimant's case was that act four was a continuing act and she relied upon those various incidents in her further and better particulars in the first claim. There is no reference whatsoever to dismissal in that statement, written well after the second claim was lodged.

74. Mr Panton in his submissions took the Tribunal to the unreported case of **Hale - v- Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA.** He relied specifically on the judgement of His Honour Judge Choudhury at paragraphs 42 to 44 which read as follows: **–**

*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.*

43. In my judgment, the Tribunal erred in treating the first stage of the process as a one-off act. Mr Kibling submits that this is a clear finding of fact and notes that

the decision is not challenged on the basis of perversity. However, the Tribunal here, for reasons already set out, lost sight of the substance of the complaint as defined by the agreed issue. Having done so, it then incorrectly treated the subdivided issue as a one-off, when it undoubtedly formed part of an ongoing state of affairs created by the initial decision.

44. That outcome avoids a multiplicity of claims. If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts - including the medical profession - can take many months, if not years, to complete. In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they could rely upon the act extending over a period provision. It seems to me that that provision can encompass situations such as the one in question."

75. The decision has to be carefully analysed because **Hale** was a case whereby the doctor brought one claim and alleged one of the acts of discrimination which he was subjected to was the disciplinary proceedings and ultimately being dismissed.

76. Here the Claimant, in the first claim, has made no reference to dismissal, but she cannot be blamed for that, because she had not been dismissed, and dismissal only appears in the second claim.

77. Had the Claimant not been dismissed, for example a decision was subsequently taken by the Respondent to drop the allegations against her, then her complaint that she was referred to a capability hearing would have been well out of time. It might be argued why should the Claimant, because she has been dismissed, now be able to pursue an allegation that on its face is out of time.

78. In the Tribunal's judgement it is persuaded this was a continuing act because it formed part of a disciplinary process and there is much merit in the observations made at paragraph 44 of the decision in **Hale** which favours different steps in a disciplinary or capability process amounting to a continuing act. The process started with the decision to refer to a capability and proceeded up to and including her dismissal.

79. The Tribunal concluded that act four was a continuing act, but if the Tribunal was wrong on this point, for reasons set out below, it would have extended time in any event.

Extension of Time

80. A Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything it considers relevant. However, time limits are exercised strictly in employment cases. When considering the discretion, there is no presumption that the Tribunal should exercise its discretion unless it can justify a failure to exercise that discretion. On the contrary, a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time. The discretion is the

exception rather than the rule – see **Robertson –v- Bexley Community Centre 2003 IRLR 434 CA.**

81. In considering whether to exercise its discretion the Tribunal had regard to the checklist in Section 33 of the Limitation Act 1980 as modified by the EAT in **British Coal Corporation –v- Keeble 1997 IRLR 336.**

82. The Tribunal was not persuaded by the submission of Mr Panton, eloquent though it was, that it was just and equitable to extend time in respect of acts one, two or three

83. Act one, two and three occurred between 8 to 9 years ago. Whilst the passage of time in itself does not mean the Tribunal should not exercise its discretion, the Tribunal is required to look carefully at the impact delay would have on a fair trial see **Afolabi –v- Southwick London Borough Council 2003 EWCA Civ 15.**

84. It was submitted by Mr Panton that the Tribunal had to have regard to the Claimant's health in looking at an extension of time. The Tribunal concluded it could not equate the mere fact there were periods when the Claimant was absent due to ill-health as being equivalent to periods when the Claimant was totally unable to lodge a claim form, as it was clear the Claimant was able to function during periods of ill-health, for example when she drafted the third grievance while absent from work. The third grievance runs to the over 80 pages. That grievance on any objective reading was comprehensive and lucid. It is for the Claimant to persuade the Tribunal that her health was such that at the times she should have presented a Tribunal claim in time she was unable to do so. She has failed to lead cogent evidence on this point. It follows the Tribunal is not persuaded that general assertions as to the Claimant's health are such that it necessarily leads to an extension of time.

85. It is clear from reading the documentation that there is a significant evidential dispute between the parties as to what did or did not occur and the reasons for certain actions or omissions in respect of acts one, two and three.

86. Dr Throssell, who dealt with the first grievance and was central to act one has left the Respondents employment.

87. Sir Andrew Cash who dealt with act two, the appeal, has also has left the Respondents employment. A number of those named in acts one and two are also no longer employed by the Respondent.

88. Dr Massey who was responsible for act three and four has also left the Respondent.

89. Whilst the Claimant contended, she had a good memory of events, that may well be because her concerns have been at the forefront of her mind for many years. Senior clinicians and a chief executive of an NHS trust would have a multitude of different difficult decisions to make at the times of acts one two and three. Whilst there is some contemporaneous documentation, the length of delay must seriously impact upon the quality of the evidence the Respondents can give, even assuming that their witnesses can be traced. On this latter point the Tribunal considered that it probably would be possible to trace them given they may well

be will be in receipt of NHS pensions. The passage of time will clearly affect the cogency of the evidence and this tells against the Claimant.

90. The Claimant has not produced cogent reasons for the delay. As the Tribunal has already observed there was no cogent medical evidence to suggest the Claimant could not have lodged a claim form promptly following the alleged commission of acts one two and three. Whilst it is proper to record that the Claimant did say that she hoped matters would improve which explained delay the Tribunal were unimpressed by that evidence. Whilst she might initially have thought there would have been an improvement, given the passage of time, waiting until August 2018 to then issue proceedings is not a valid explanation for the excessive delay. The Tribunal did not find the submission of Mr Panton that it was only in August 2018 the Claimant realised how serious matters were to be attractive and ran counter to the contents of her various grievances which painted a completely different picture.

91. There is no cogent evidence that the Respondents have hidden or concealed evidence in respect of acts one two and three.

92. The Claimant had the assistance of two professional associations, certainly up until, and just after she lodged the first claim. There was no reason therefore why she could not have taken advice at an early stage in respect of acts one two and three and issued promptly.

93. The Tribunal then went on to consider the balance of prejudice of extending or not extending time.

94. The Claimant will suffer some prejudice in that she will not be able to pursue acts one two and three. However, she has an in-time disability discrimination and unfair dismissal complaint. If she was to succeed it is that claim that is likely to be the most valuable. At his highest if acts one two and three were proven they would only merit an injury to feelings award as the Claimant did not content, she suffered a drop in salary whilst on restricted duties. Whilst the Tribunal accepted that the Claimant, if she succeeded, may obtain a smaller sum for injury to feelings if deprived of the right to proceed with acts one, two and three than if she was allowed to proceed, that prejudice is not outweighed by the prejudice to the Respondent. The Respondent would face trying to trace witnesses, some who already left the Respondent, to deal with a grievance and suspension from duty that is extremely lengthy and relates to events more than eight years ago. That will have very significant cost implications both of the Respondents in respect of preparation for trial and also in respect of the length of the trial itself. It may also find some witnesses are untraceable which will impact on its ability to fully defend its position.

95. When the Tribunal balances the prejudice to each side the weight of prejudice firmly falls on the side of the Respondent, being a substantial reason why would not be just and equitable to extend time.

96. It follows it is not just and equitable to extend time.

97. In respect of allegation four, if there was not a continuing act the Tribunal would have regarded it as just and equitable to extend time. In reaching this conclusion there is an in-time allegation of a discriminatory unfair dismissal. As a result, the Respondent will need to lead evidence as to the reason or principal reason for its dismissal. This will involve evidence from the decision maker. The decision-maker will need to satisfy the Tribunal why the decision was taken, which means evidence will need to be led as regards capability. Whilst the Respondent may not have the direct evidence of Dr Massey it will have various assessments and the Anderson report. It will also have various correspondence with NCAS. Thus, the prejudice will be limited.

98. In essence the Respondent will need to deal with act four when addressing the in-time discriminatory dismissal claim. It follows if the Tribunal was wrong to hold that act four was not a continuing act it would be just and equitable to extend time.

Employment Judge T R Smith

Date 1 October 2020