



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101470/2020 (V)

Held by Cloud Based Video Platform (CVP) on 31st March 2021

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Employment Judge R King

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Mr D Wilson

**Claimant
In Person**

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Sky Subscriber Services Limited

**Respondent
Represented by:-
Mr Noblet, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that all of the allegations of disability discrimination made by the claimant relating to the period on or after 30 December 2018 relate to the respondent's conduct extending over a period in terms of section 123(3)(a) of the Equality Act 2010 and that they should be allowed to proceed.

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REASONS

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1. The claimant made contact with Acas to commence the early conciliation process on 2 February 2020 and was issued with his Early Conciliation Certificate on 2 March 2020. He subsequently presented his claim to the Employment Tribunal on 16 March 2020.

2. Amongst several claims raised by the claimant in this case, he alleges that the respondent discriminated against him on grounds of his association with his disabled mother, contrary to sections 13 (direct discrimination), 26 (harassment) and 27 (victimisation) of the Equality Act 2010.

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3. The respondent resists these claims on their merits and also on the ground that any claim arising from alleged incidents occurring more than 3 months prior to the claimant commencing Acas early conciliation on 2 February 2020 are time barred. The respondent asserts that any such allegations do not form part of a continuing act in terms of section 123(3)(a) of the Equality Act 2010 and that it would not be just and equitable for the Tribunal to extend time and allow them to proceed.

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4. In the circumstances this preliminary hearing to determine the issue of time bar was fixed. As had been agreed at an earlier preliminary hearing the tribunal heard evidence from the claimant about the timeline of events upon which he relies and about the nature of the allegations of discrimination.

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5. During his evidence the claimant referred to his ET1, his amended particulars of claim dated 11 January 2021 and an e-mail dated 31 March 2021, which clarified the timeline of events upon which his discrimination claims are based.

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The claimant's allegations

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Incident on 7 January 2019 - the respondent's alleged treatment of the claimant's 30 December 2018 absence

6. The claimant took a day off work on 30 December 2018 in order to care for his disabled mother who lives 20 miles away from him. On his return to work

he informed his line manager, Andrea Sim, about the reason for his absence. Having offered this explanation, he expected his sick record to show that he had taken unpaid time off to care for a dependant. However instead this absence was recorded as a personal sickness absence for the purpose of the respondent's absence management policy. As a result, it was taken into account for the purpose of a written warning he received on 15 October 2019, which also carried additional sanctions of his being banned from overtime and losing his employee Sky TV benefits.

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- 10 7. The claimant also alleges that the respondent's treatment of him at a meeting on 7 January 2019 at a meeting to discuss this absence was discriminatory. He alleges that he was told that such absences were unacceptable, that the respondent's treatment of this absence was contrary to its own policies and that it was simply unwilling to allow him time off to care for his disabled
- 15 mother and intended to "*push him out the job*" if he continued to take time off for that reason.

Incident on 1 April 2019

- 20 8. The claimant alleges that on this day his line manager Andrea Sim called him into a meeting and informed him he was subject to "*a conduct issue*" because he had taken time off to care for his mother. She made it clear that she doubted he was being truthful about his caring responsibilities. He explained to her that treating such an absence as a conduct issue would be unfair in
- 25 circumstances where the respondent had insisted he work a particular shift pattern even though it knew it was unsuitable for him relative to his caring responsibilities.
9. The claimant believes that Andrea Sim fully intended to deal with his taking absences related to his caring responsibilities as a conduct issue. Ultimately that did not happen, but that is only because HR intervened. He claims to
- 30 have documents to support this allegation, albeit he did not produce them.

Flexible working request

10. On 1 April 2019 the claimant submitted a flexible working request in order that he could finish work at 6.30 p.m. instead of 9 p.m. and thus have time
5 after work to visit and care for his mother. He was not informed until June 2019 that his request had been declined. However, he claims to have subsequently discovered that the respondent had made its decision as early as 4 April but deliberately delayed in informing him, thus depriving him of the chance to lodge an appeal against refusal while he continued to struggle to
10 care for his mother and fulfil his obligations to the respondent.

Incident on 8 April 2019

11. The claimant alleges that following a further day off work to care for his
15 disabled mother, Andrea Sim called him into a meeting and informed that as a result he was banned from applying for overtime until July 2019. He believes this was unfair in circumstances where his flexible working request was still outstanding.

20 12. He also alleges that at this meeting Miss Sim again informed him that any further absence to care for his disabled mother would be managed in terms of the respondent's conduct policy. As a result of his treatment on 16 April 2019 he raised a written grievance against Miss Sim and against the operational manager, Paul Lynch, alleging discrimination and harassment.
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Incident on 26 August 2019

30 13. By 26 August 2019 the claimant had appealed against the refusal of his flexible working request but still awaited a decision. In the meantime, on occasion, he still had to take time off to care for his disabled mother during his contracted hours.

14. On 26 August 2019, the claimant arrived late for work and was called into a meeting by his line manager, Andrea Sim, to discuss the reason. He explained to her that he was late because he had gone to his mother's home the previous evening after his 9 p.m. finish and had stayed overnight in order to care for her in the morning, which had made him late for work that day. He explained to her that a 9 p.m. finishing time meant it was not feasible for him to care for his mother after work.

15. He alleges that Miss Sim told him that such absences and lateness needed to stop and that she asked him -
*“Are you sure you hadn’t just slept in?” “
Can you not just get someone else to be her carer or leave it until you’re off work?”*

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16. The claimant believes that Miss Sim’s treatment of him on 26 August 2019 was a result of his having raised a grievance against her.

15 October 2019

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17. On this date a manager named Scott Hooper called the claimant into an absence meeting, which resulted in a written warning with associated sanctions of loss of sick pay and loss of his employee Sky TV benefits for nine months. This warning was issued because of absences that included occasions on which the respondent was aware the claimant had taken time off to care for his disabled mother and occasions when he had been off sick with work related stress because of his treatment at the hands of the respondent.

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18. The claimant believes that no action should have been taken in relation to such absences. Had they been discounted the respondent would not have been entitled to issue him with a warning under the policy. Andrea Sim had also previously informed him that some of those absences, which related to his caring responsibilities, would not be held against him for these purposes.

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He believes that they were subsequently held against him because he had raised a grievance about discrimination.

Incident on 24 October 2019

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19. While taking calls on 24 October 2019, the claimant was taken into a room by a manager, Maria Urquhart, and told that a conduct issue was being raised against him, further to an allegation that he had been rude in a meeting. He believes this was a fabrication, intended to result in a further warning and therefore leave him one warning short of dismissal. This is his belief because the allegation was ultimately held to be unfounded after his colleagues supported his version of events and because he claims the respondent failed to follow its discipline policy. He believes that this shows the respondent only took this action because of the absences he had taken to care for his disabled mother and because of the grievance he had previously raised about his treatment. A grievance he raised about his treatment in relation to this particular incident was subsequently partially upheld.

Incident on 3 December 2019

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20. On this day the claimant arrived late for work because of a serious dental issue in respect of which NHS 24 had told him to go to hospital because of the swelling that he was suffering on his face. When he eventually arrived at work Andrea Sim spoke to him and made him sit in a general seated area within the building. This was humiliating for him because his colleagues did not know why he had been told to sit there. They would not have known there was an innocent reason. They would have wondered why he was being made to sit on his own away from his work area rather than being told to join his colleagues. He believes he should have been allowed to go home in terms of the respondent's dental policy. Once again the claimant believes his treatment was because of the time off work he had taken to care for his disabled mother and because he had raised a grievance about his treatment.

Incident on 10 December 2019

21. On 10 December, 2019, Andrea Sim called the claimant into a meeting and told him that a conduct issue was being raised against him because he had been rude about a member of staff in an email. The email in question was dated July 2019 and part of a feedback process in which he and other colleagues had been encouraged to give truthful answers. There was no legitimate reason for any conduct issue to be raised in relation to this genuine feedback. Ultimately no action was taken in relation to this e-mail.

22. Because of the timing of the conduct allegation relative to the alleged incident and the fact that there was no evidence to support any such allegation the claimant once again believes that the respondent's treatment in this respect was motivated by his taking time off work to care for his mother and because of the grievance he had raised.

Removal of flexible working pattern on 24 January 2020

23. The claimant's flexible working request had eventually been allowed in September 2019. However on 24 January 2020 he was informed that he would have to revert to his original pattern with its 9 p.m. finish time, unless he worked an extra day each week. Although he was told that this reversion was because of business need he rejects that because when he subsequently checked the "Sky Jobs" website the respondent was recruiting for people doing the same role as him to work during the day and not in the evening. He believes that was inconsistent with their insisting that he had to work in the evening until 9 pm. It was evident that he could have continued to work until 6.30 p.m. and met business requirements.

24. The claimant also alleges that removing his flexible working plan was inconsistent with the respondent's 'Carers' Policy and with its Absence Policy. He believes that the true reason his flexible working pattern was removed was because of his taking time off work to care for his mother and because of the grievance he had raised.

Incident on 25 February 2020

25. On this date the claimant was once again questioned by Andrea Sim about the time he was taking off work to look after his disabled mother. He claims that she accused him of failing to help himself. He felt that was unfair criticism in circumstances where he *had* followed the flexible working process and had tried to get as much information as possible from the respondent's health and wellbeing website. He made his feelings clear to her. Yet when he was issued with the meeting notes he claims that they had been altered to indicate that he had admitted he had not done enough to help himself. He believes that that was just another example of the hostile environment that the respondent had created for him.

Incident on 6 March 2020

26. On 6 March 2020 the claimant's previous absence warning was extended by 6 months, which also meant he remained banned from overtime and continued to lose his employee Sky TV benefits. This decision was taken in his absence. All of these sanctions were applied because of absences associated with his disabled mother's care or the work related stress he had suffered because of the respondent's treatment of him as a result of those absences. Once again he claims that the respondent should have followed its carers' policy instead of issuing a warning under its absence policy.

The claimant's reason for his delay in bringing his claim

27. The claimant explained that he had been advised by ACAS and had also read on the YouGov website that he should exhaust any internal grievance and appeal before raising a Tribunal claim. Since the first incident on 7 January 2019 he had raised a grievance and had also gone through the grievance appeal process. The appeal hearing had not taken place until 23 November 2019.

28. Furthermore, in order to consider his position fully the claimant had sought to recover documents from the respondent through a subject access request made on 28 August 2019 to which had not received a response until 3 February 2020. That response had not included copies of emails between
5 Andrea Sim and Paul Lynch, which he had specifically requested on 11 October 2019. The respondent's delay in responding to the request generally and its failure to produce specific emails requested had also contributed to his delay in raising proceedings.

10 **Submissions**

29. The claimant confirmed that he did not wish to make a submission and that he relied on the evidence that he had given.

15 30. On the respondent's behalf Mr Noblet submitted that there had been no *prima facie* case made out alleging an ongoing course of conduct. The claimant had identified certain dates when the respondent had been legitimately entitled to challenge the claimant's persistent lateness even if it was associated with his disabled mother.

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31. The claimant had only been issued with a first written warning on 15 October 2019, which was after the claimant's flexible working request had already been turned down.

25 32. The incident alleged on 24 October 2019 relating to an investigation of misconduct was admitted but entirely unrelated to the claimant's association with his disabled mother. In any event no action had been taken arising from that allegation.

30 33. The incident on 3 December 2019 when the claimant had a dental issue was also unrelated to the claimant's association with his disabled mother.

34. While it was accepted that the claimant's flexible working plan had been removed on 24 January 2020 that was also unrelated to the claimant's association with his disabled mother.

5 35. Mr Noblet accepted that the 15 October 2019 and 24 January 2020 allegations involved incidents from which a *prima facie* discrimination case could be shown but that the length of time between the incidents was such that it was plain that there was no ongoing course of conduct against the claimant because of his association with his disabled mother.

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36. Mr Noblet therefore submitted that any pre 3 November 2019 allegations were out of time because there was no evidence of an ongoing course of conduct and, furthermore, that it would not be just and equitable to extend time in relation to any incidents before that date.

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Relevant Law

37. The law relating to time limits in respect of discrimination claims is contained in the Equality Act 2010. Section 123, so far as relevant for present purposes provides as follows:-

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"Time Limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of -

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(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

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...

(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*".

5 38. In ***Commissioner of Police of the Metropolis v Hendricks [2003] ICR***
530, the Court of Appeal made it clear that it is not appropriate for
Employment Tribunals to take too literal an approach to the question of
what amounts to "continuing acts" by focusing on whether the concepts of
"policy, rule, scheme, regime or practice", fit the facts of a particular case.
10 Instead the focus should be on the substance of the claimant's allegations
as to whether a respondent is responsible for an ongoing situation or a
continuing state of affairs in which he had been treated less favourably.
Thus a Tribunal should look at the substance of the complaints in question,
as opposed to the existence of a policy or regime, and determine whether
15 they can be said to be part of one continuing act by the employer.

39. In ***Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548***, the Court of Appeal held that the test to be applied at a
Preliminary Hearing was to consider whether the claimant had established a
20 *prima facie* case, or, to put it another way, a reasonably arguable basis for
the contention that their various complaints are so linked as to be capable of
being part of an act extending over a period.

40. Even if there is no continuing act for the purpose of section 123(3)(a) the
25 Tribunal still has the discretion to extend the time limit for a discrimination
claim to be presented by such period as it considers just and equitable. In
deciding whether it is just and equitable to extend time the Tribunal is entitled
to take into account anything that it deems to be relevant – ***Hutchinson v***
Westford Television Limited [1977] IRLR 69

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41. The Tribunal is therefore required to consider factors relevant to the prejudice
each party would suffer if the extension was refused, including –

- the length of and reasons for the delay,

- the extent to which the cogency of the evidence is likely to be affected by the delay,
- 5 • the extent to which the respondent had cooperated with any requests for information,
- the promptness with which the claimant acted once they knew of the possibility of taking any action,
- 10 • the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

42. A Tribunal has a wide discretion when considering whether it is just and
15 equitable to extend time limits and there is no presumption in favour of extending time. A Tribunal should not extend time unless the claimant convinces them that it is just and equitable to do so.

Discussion and Decision

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43. The continuing state of affairs that the claimant relies on is the respondent's allegedly unfair and inappropriate treatment of his absences or lateness associated with his disabled mother. His allegations include that the respondent failed to follow its own carers' policies; imposed a warning and
25 related sanctions that took account of absences that should have been discounted; extended that warning and sanctions in his absence; harassed him in meetings and unfairly threatened him with conduct proceedings. He also claims to have faced further mistreatment for having raised a grievance against the managers who had dealt with his absences and lateness.

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44. The claimant alleges that the respondent was reluctant to accept his mother is disabled and unwilling to show him the flexibility he needed in order to balance his caring responsibility for her with his work responsibilities. A key feature of that alleged unwillingness is his assertion that his flexible working

request was declined more than two months before he was told the decision, thus depriving him during that period of the opportunity to appeal, while he continued to struggle to find a balance between caring for his mother and his work.

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45. A further feature of that alleged unwillingness was the respondent's decision on 24 January 2020 to remove his flexible working pattern and force him to revert to a working pattern that it knew would be problematic for him because of his responsibility towards his disabled mother. The claimant disputes that this decision was justified by business need.

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46. In respect of the allegations that do not relate to his absences but to his alleged misconduct he argues that these are also related to his association with his mother or because of the grievance he raised. He makes that assertion because of their timing relative to the ongoing issues related to his absence; because that treatment was meted out by the same management team involved in his absence management; because the conduct allegations were ultimately proved to be unfounded and because as far as he is aware the respondent did not follow its own procedural requirements. The respondent's alleged failure to follow procedure is a common theme in his treatment, including this incident on 3 December 2020 when he had a dental issue. It cannot therefore be ruled out that the respondent acted in a discriminatory fashion in respect of the conduct allegations and the dental issue.

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47. In all the circumstances the Tribunal is satisfied that the claimant has a reasonably arguable basis that his complaints relating to incidents on or after 30 December 2018 are so linked as to be continuing acts or to constitute an ongoing state of affairs.

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48. Ultimately, the claimant may not succeed in proving that the alleged incidents actually occurred or that they were connected. However, he should be entitled to pursue his claim on the basis that the burden is on him to prove by evidence, or by inference from primary facts, that the alleged acts of

discrimination occurred, that they are linked to one another and that there is evidence of a continuing discriminatory state of affairs.

Just and equitable

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49. Even if there was no continuing act the Tribunal was also satisfied that it would be just and equitable to allow time to be extended in respect of all the allegations set out in the claimant's claim.

10 50. The Tribunal accepts that the claimant had delayed in raising his claim because he was anxious to try to resolve his claim internally under the grievance procedure in line with generally available advice.

15 51. The Tribunal also took into account that the claimant had made a subject access request in August 2019, which had only been partially complied with by February 2020. The respondent did not dispute those dates. It is significant that the subject access request included a specific request for exchanges of emails between Andrea Sim and Paul Lynch, against whom he had made complaints, and that this was not complied with. It was clear that
20 the claimant would suffer prejudice if he was unable, in these circumstances, to pursue all of his claims against the respondent about his treatment.

25 52. The respondent advanced no argument that the claimant's assertions in relation to the reason for his delay were not well founded. Nor did it assert that the cogency of evidence was likely to be affected by the delay. While the Tribunal accepted that the respondent would suffer a degree of prejudice if time was extended if finds on balance the claimant would suffer more prejudice if time was not extended.

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Employment Judge: Robert King
Date of Judgment: 04 May 2021
Entered in register: 10 May 2021
35 and copied to parties