THE EMPLOYMENT TRIBUNALS

Claimant: **Mr L Humby**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre (by telephone)**

On: **2 June 2021**

Before: **Employment Judge Russell**

Representation
Claimant: **In Person**
Respondent: **Mr J Mitchell (Counsel)**

JUDGMENT

1. **The Claimant is given leave to amend his claim to include victimisation detriments about the move to Prescott Street and the restructure process, with the exception of the roles of Board Lead and/or Performance Analyst.**

2. **The detriments of removal of management duties in September 2018 and performance management process from January 2019 were presented out of time and it is not just and equitable for time to be extended.**

3. **The remaining detriments may be a course of conduct and the Tribunal will decide this issue at the final hearing.**

REASONS

1. By a claim form presented on 4 July 2020, the Claimant brings complaints of constructive dismissal and victimisation. The Respondent resists all claims. This Preliminary Hearing was listed to decide whether the victimisation claim should be dismissed as it was presented out of time and/or whether it should be struck out on grounds that it is res judicata or an abuse of process by reason of a final hearing in October 2018 of two earlier claim forms presented by the Claimant.

Identifying the Claims

2. On 25 March 2021, the Claimant expressed an intention to amend his claims. As the claims have not yet been clarified, the parties have not yet been able to agree a list of issues. The victimisation claims are listed at paragraph 6. The Claimant confirmed that he was not pursuing issue 6(a), being left at Whipps Cross. As for the other detriments, the date for issue 6(b) was August 2018 and for 6(c) it is 25 September 2018, for 6(d) it is 11 February 2019. For each, the Claimant relies on both alleged protected acts.

3. The Claimant confirmed that he relies upon issue 6(e), the move to Prescott Street on 11 February 2019, as an issue in its own right. He accepted that this was not particularised in the claim form as a separate detriment. Finally, issue 6(f), the restructure in March 2019, is said by the Claimant to be pleaded at paragraph 2 in box 8.2 of the ET1 in his assertion that the principal reason for dismissal was his previous claim and the reference to unfair dismissal. I note also that the final paragraph refers to victimisation and ends with a reference to the restructure. The Claimant sought leave to amend to include allegations that he had been wrongly and unfairly rejected for the ring-fenced Clinical Coding Board lead and/or Clinical Coding Performance Analyst roles during the restructure process.

4. Mr Mitchell on behalf of the Respondent pragmatically accepted that if read holistically the claim form had, broadly speaking, pleaded the move to Prescott Street in the context of the restructure process and to some extent issues arising out of the restructuring and in particular he referred to the combined effect of the first, second and third paragraphs. He objected to the inclusion of the rejection for the two new roles as being a material change which would require further evidence.

5. For reasons given orally, I gave the Claimant leave to amend to include the new detriments at paragraphs 6(e) and (f), but not for the two new roles. Neither were identified in the existing claim form, had not been previously relied upon and are now raised almost a year after the claim was first presented. Whilst the pandemic may have had some effect on the Claimant's ability to get legal advice, there is ample, reliable information available on-line and the Claimant was able to submit his claim in all other respects.

6. I had regard to the nature of the detriments now being advanced. The Claimant had missed the deadline for providing a required assessment for the Board Lead position, due to the competing demands upon his time of a Masters' degree and ongoing EAT proceedings relating to his first set of Tribunal proceedings. The detriment alleged is the failure further to extend the deadline beyond the short extension granted and/or failure to consider the Claimant when he had failed to comply with the deadline. The Claimant also accepts that in error, he had not accepted the proposed interview date for the Performance Analyst role. The detriment alleged is failure to extend the deadline and/or to reschedule the interview. These detriments are entirely distinct from those already pleaded in relation to the posts of Coding Auditor, Coding Analyst, Coding Officer and/or Coding Engagement lead where it is said that there should have been no external advertisement and/or requirement to be assessed against the person specification. The new detriments, if allowed, would require further evidence to be called and witnesses to be cross-examined.

7. The Board Lead and Performance Analysts were large scale competitive interview processes and the Tribunal would need to consider the way in which other candidates were treated. The proposed amendments enlarge the compass of the case and will expand it significantly.

8. In **Vaughan v Modality Partnership** [2020] UKEAT/0147/20/BA, the EAT made clear that the balance of injustice and hardship in allowing or refusing an application to amend is fundamental. The **Selkent** factors are relevant when conducting the required balancing exercise but the Tribunal must also take account of the practical importance and consequences of allowing or refusing and amendment.

9. For the reasons I have given, I am satisfied that these are substantial amendments proposed by the Claimant. They are both posts not otherwise referred to in the existing claim and involve the issue of granting the Claimant relief where he failed to comply with the requirements of the recruitment process rather than the question of advertisement and matching. The Claimant has provided no sufficient reason for their omission from the claim or the delay in applying for leave to amend when the facts were within his knowledge and did not require legal assistance.

10. Refusing leave to amend will cause little prejudice to the Claimant as he has other detriments arising out of the failure to find an alternative role in the restructuring process. Moreover, there is little prejudice to the Claimant of being deprived of claims which appear weak as both arise out of his failure to comply with essential requirements in a selection process. By contrast, allowing the amendment would cause the Respondent significant prejudice. The length of the hearing would be materially extended to deal with these entirely different allegations and the costs increased accordingly.

11. Balancing the injustice and hardship, I am satisfied that it is not appropriate to grant the Claimant leave to amend to include the specific posts of Board Lead and/or Performance Analyst.

Time

12. The detriments upon which the Claimant relies in his victimisation claim started in August 2018 with the removal of his management duties and, he avers, constituted a continuous state of affairs thereafter, persisting until the termination of his employment. He relies upon **Cast v Croydon College** [1998] EWCA Civ 498 in connection with the refusal of his April 2019 request for the reinstatement of the management duties. The Claimant's case is that the performance management process which started on 30 January 2019, led to his remaining at Prescott Street. Finally, the whole restructure process from 5 March 2019 and the decision to reject him for the roles of Coding Auditor and Engagement Lead in August and September 2019 were also part of a series of acts. The Claimant's case is that his decision to resign as a result of all of this was also an act of victimisation because of his previous Tribunal claims.

13. The Claimant commenced ACAS Early Conciliation on 20 May 2020, conciliation ended on 4 June 2020 and the third claim form was issued on 4 July 2020. Employment terminated on 1 May 2020 following notice given by the Claimant on 23 March 2020.

14. The Claimant's primary case is that as each of the detriments is part of a continuing course of conduct, applying the well-known authority of **Hendricks v Metropolitan Police Commissioner**, time runs from the termination of his employment and the claims are not out of time. In the alternative, if I were to find that they were out of time, the Claimant submits that it would be just and equitable to extend time on the basis that it was reasonable for him to wait and bring one claim at the end of the restructure process rather than multiple claims as detriments occurred. The Claimant submits that there will be no prejudice to the Respondent as the same witnesses would be called and all evidence is documented such that the passage of time does not harm the quality of that evidence.

15. On behalf of the Respondent, Mr Mitchell accepts that the constructive dismissal claim is in time but submits that the other detriments are discrete acts or omissions which are long out of time, even generously allowing until the end of the restructure process on 30 September 2019. The final alleged detriment leading to resignation, namely the decision to put the Claimant into the Band 5 role, was communicated to him on 11 February 2020. The burden is on the Claimant to show that it is just and equitable to extend time and he has failed to do so. The Claimant is not a stranger to the Tribunal process, is capable in engaging in complex legal argument, understands the claims that he has brought, has access to the internet and has adduced no evidence that consequences of the pandemic lockdown effectively prevented from bringing his claim within time.

16. Section 123 of the Equality Act 2010 provides that no complaint may 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. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

17. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, **Hendricks v Metropolitan Police Comr.** [2003] IRLR 96, CA at paras 51-52. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

18. In **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548, the Court of Appeal approved **Hendricks** and reminded the Tribunals that it is for the Claimant to show a prima facie case. In other words the Tribunal must ask itself whether the complaints were capable of being part of an act extending over a period. In **Lyfar,** the Court of Appeal accepted that it was permissible to divide a claimant's allegations into separate categories by reference to distinct periods of time.

19. If a claim is presented outside of the primary limitation period, the Tribunal may still have jurisdiction if in all the circumstances it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, applying the well-known principles which were recently considered by Underhill LJ in **Adjejei v University Hospitals Birmingham's NHS Foundation Trust** [2021] EWCA Civ 23. It is important for the Tribunal to bear in mind that it is a broad discretion; there is no requirement to go through the **Keeble** factors as some form of rigid checklist although they may be relevant in applying the language of the statute.

20. In deciding whether to extend time, I bear in mind that:

- The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;

- The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;

- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble** (length of delay; reason for delay; effect on cogency of evidence; cooperation by the Respondent; and steps taken by the Claimant once he knew he had a possible cause of action).

21. Applying the law to the facts of this case, I am not satisfied that the Claimant has shown a prima facie case that the removal of his management duties in September 2018 or the performance management process from January 2019 were capable of being part of a continuing course of conduct. In reaching this conclusion, I take into account in particular that the change of duties was effected by a different manager. This was a discrete act, albeit one which had continuing consequences for the Claimant. The same is true of the performance management process.

22. In considering whether it would be just and equitable to extend time, I took into account the need to hear evidence from different witnesses and the considerable expansion of the scope of the Tribunal's inquiry beyond the restructure and alternative roles. There is no good reason for the claims being brought out of time. I accept Mr Mitchell's submission that the Claimant is well familiar with the Tribunal process. Even if well intentioned, the Claimant made a deliberate decision not to bring the claims earlier even when he was aware of the possibility of a claim and the legal process. The Claimant has claims which have been presented in time and has access to an adequate remedy in the Employment Tribunal. Evidence that the removal of his

management duties affected the restructure slotting exercise may still be heard if relevant. Although I note that the Claimant does not rely upon it as part of his alleged breach of the implied term of trust and confidence.

23. If time were extended, the Tribunal would be required to revisit decisions taken in autumn 2018 and early 2019. As the final hearing in this case will be September 2021, the passage of three years will inevitably adversely affect the cogency of the evidence. Whilst I accept a large amount of the evidence will be documented, not all of it will be; in particular, the evidence of what was said by Ms McConnell at a meeting on 22 August 2018 and also at a meeting on 25 September 2018. The email evidence will need to be assessed in the context of oral evidence about meetings some three years earlier. For all of these reasons, I decline to extend time in respect of the detriments of removal of management duties or the performance management process.

24. By contrast, I am satisfied that the allegations of detriment arising out of the restructure and in particular the posts that were available in August and September 2019, the decision to move the Claimant to a Band 5 position and his ultimate resignation are all matters which are capable of forming a course of conduct. They arise out of the same ongoing restructuring exercise and, if the Claimant's final straw was a move to a post he regarded as a demotion, they are capable of being inextricably bound together. For those reasons therefore, I am satisfied that the restructure allegations and the alternative employment allegations are potentially in time and should not be dismissed.

Other matters

25. Having given judgment in the terms set out above, it was not necessary to consider the application to strike out because of res judicata and/or abuse of process.

26. I gave the Respondent leave to amend its Response by **23 June 2021** to reply to the claim as now understood.

27. The parties must agree a single, paginated bundle of relevant documents by **19 July 2021.** The Respondent is responsible for producing sufficient copies for use by the Tribunal at the final hearing.

28. The parties must exchange witness statements by **16 August 2021.**

29. The final hearing will be on **15 to 17 September 2021.**

Employment Judge Russell

12 July 2021