



EMPLOYMENT TRIBUNALS

Heard at: Exeter (by video) **On:** 3 August 2021

Claimant: Mrs Lilia Vickers

Respondent: Royal Mencap Society

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: Mr J Feeny instructed by Simons, Muirhead & Burton Solicitors

JUDGMENT ON A PRELIMINARY ISSUE

1. All allegations of discrimination from the date of the claimant's suspension in March 2019 were brought in time.
2. The complaint under Regulation 10 Working Time Regulations 1998 was presented out of time and is dismissed.
3. The remaining complaints are listed for hearing on 24 January 2022 over five days. Arrangements will be confirmed in a separate case management order.

REASONS

Introduction

1. Mrs Vickers worked for the respondent as a Support Worker until her dismissal in

July 2020. The respondent say that this was on grounds of gross misconduct, following allegations of rudeness and lateness which were raised in February 2020. Those allegations followed previous ones which resulted in a final written warning, issued in June 2019. Mrs Vickers says that these allegations were unfair and followed a campaign against her by her line manager, Mrs Shirley Burton, who was involved throughout.

2. The claim includes three complaints:
 - a. unfair dismissal under section 98 Employment Rights Act 1996;
 - b. direct discrimination (under section 13 Equality Act 2010) on grounds of race; and
 - c. breach of regulation 10 of the Working Time Regulations 1998 in relation to daily rest breaks.
3. There was a preliminary hearing on 1 June 2021 which listed this hearing to decide whether all of the complaints of discrimination were brought in time.
4. There is no issue about the first of these complaints. The complaint of unfair dismissal and was presented in time, i.e. within a month of the end of early conciliation on 13 September 2020.
5. As a preliminary point, the date of dismissal was given as 22 June 2020 in the claim form, and the response form agreed. The dismissal letter was not in the bundle for this hearing however, and on enquiry Mrs Vickers told me that it was dated 1 July 2020, a Wednesday. It referred back to the disciplinary hearing on 22 June and dismissed her, or purported to do so, from the date of the hearing. Such dismissals however take effect when read by the claimant, and in the usual course of posting would probably have been received on 3 July 2020. Without having seen the letter or heard any argument on the point it seems likely that that is in fact the effective date of termination.
6. The precise date may be academic however. It makes no difference to the time limit issue for this hearing as early conciliation was commenced within three months of dismissal on any view, and the dismissal was the last act of alleged discrimination.
7. Judge O'Rourke set out at paragraph 2 of his case management order the four main areas of complaint in the discrimination claim, as follows:
 - a. the events leading up to and the issue to her of a final written warning, on 6 June 2019;
 - b. the subsequent handling of her grievance and appeal against that decision;

- c. in September and November 2019, being allegedly unsupported by the respondent in dealing with complaints from service users and/or having such complaints encouraged against her; and
 - d. in August and November 2019, being moved to a different service, requiring her to use public transport, at additional expense and time.
8. The question therefore is whether these earlier events, broadly described, were in time. For discrimination claims, time begins to run from the last act of discrimination, or failure to act, as set out in s.123 EA:
 - “(1) proceedings ... 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.
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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; ...
9. The claim form was presented on 7 October 2020, within a month of the end of efforts at early conciliation through ACAS. That began on 13 August 2020 and so any act or omission which took place more than three months before that date, i.e. 14 May 2020, is potentially out of time.
10. The respondent accepts however that events in February 2020, when Mrs Vickers was suspended, are in time, on the basis that the dismissal was part of the same conduct extending over a period. Time limits are not matters for agreement between the parties, since they concern jurisdiction, but there is in my view a clear and obvious connection between the two and so I need say no more about the suspension. It is earlier events which the respondent says are out of time.
11. I therefore have to decide if those earlier acts, or any of them, was “conduct extending over a period”, and if not whether it would be just and equitable to extend time.
12. I remind myself that in assessing that question I have to take the claimant’s case at its highest. Nothing said below should be taken as a finding of fact which in any way binds the Tribunal at the final hearing. I heard evidence from Mrs Vickers this morning on these issues and submissions from each side.

Conclusions

13. It is agreed that Mrs Vickers started work for the respondent in January 2008 and so for the first ten years she had no concerns or disciplinary issues. The events of 2019 and 2020 are therefore in a fairly short period, seen in context.
14. The main events set out in the claim form are as follows. In the spring of 2018 Ms Burton used to put her on shifts she could not manage. Then in February 2019 Ms Burton refused her holiday request without good reason. A few weeks later, on 8 March 2019, Mrs Vickers was suspended by Ms Burton, pending a disciplinary investigation. Ms Burton conducted that investigation, and Mrs Vickers complains about the delay involved and the lack of information. The investigation meeting was not until 19 April and the investigation report was not provided until 24 May, after chasing on her part. That led to a disciplinary hearing with Ms Sonia Carr on 4 June 2019 which resulted in a final written warning. On that same day Mrs Vickers raised a long and detailed grievance against Ms Burton, opening "I am writing to complain about my manager Ms Burton who has been victimising and bullying me." That led to a grievance hearing, when the complaint was not upheld, and then an appeal to a Mr Stuart Whittaker on 31 August 2019. That process was also a very long one. The hearing was in October and his outcome letter is dated 9 December 2019. By then, two further disciplinary allegations had been raised against Mrs Vickers, one that in September 2019 she had touched a service user inappropriately, and one on 18 November 2019 that she had shouted at a service user. Neither were upheld, but Mrs Vickers says that Ms Burton instigated or encouraged these complaints, either of which could have led to her dismissal.
15. One outcome of the grievance process was a change of line manager to a Ms Morgan. I heard evidence today that Ms Morgan worked closely with Ms Burton and that their desks were nearby.
16. In early 2020, according to the claim form, Mrs Vickers was still chasing Mr Whittaker for a response to various points raised in her grievance. She felt that she was not being listened to and that other members of staff had done the things that she was accused of in the first disciplinary process, such as coming in later or going home earlier when the work was done. Mr Whittaker eventually sent her a short response in April, by which time she had been suspended again.
17. That suspension was for very similar matters to the first occasion – timekeeping and being rude to other members of staff or service users. Without in any way assessing the merits of that claim, it took place while her new line manager was away. According to Mrs Vickers' email at the time (page 82), it occurred within a day or two of Ms Morgan going on leave, and leaving Ms Burton in charge of her area.
18. That similarity of allegation, and the fact that both sets of allegations were instigated by or at least under the auspices of Ms Burton, seems to be sufficient to

show the necessary degree of connection.

19. Mr Feeny for the respondent submitted that different people were involved in the grievance process, and in the two sets of disciplinary processes, but that does not in my view obscure the involvement of Ms Burton. It is inevitable that other managers will be drawn in, particularly in handling a grievance against Ms Burton, but the key line management connection remains. I note too that according to the claim form Ms Burton was not the appointed investigating officer, but nevertheless took over the process.
20. The respondent also says that Mrs Vickers has not been consistent in her complaints about the reasons for all this, and suggested in her grievance that Mr Burton had taken against her because of her childcare responsibilities. That does not in my view affect the question of whether this was (or may be) a continuing act. It is for the Tribunal to decide in due course on whether there was a discriminatory motive, applying the burden of proof provisions. It follows that in my view the complaints of discrimination identified by Judge O'Rourke are all in time, since the first and last elements (the suspensions) form part of a potentially continuing act. The first element was "the events leading up to and the issue to her of a final written warning, on 6 June 2019" which I date from her suspension, on or about 8 March 2019. One or two earlier events are mentioned, but in my view are mentioned in the claim form simply as background, and in any event the refusal of her holiday request in 2018 is not connected to the disciplinary processes.
21. There is however the complaint under Working Time Regulations. Regulation 30(2) provides that a complaint must normally be presented to a tribunal before the end of the period of three months, beginning with the date on which it is alleged that the exercise of the right should have been permitted. For rest period periods, time starts to run on the date when the rest period or leave should have been permitted to begin. That was on 19 February 2020, about eight months before the claim was submitted.
22. I heard evidence that Mrs Vickers that she was in contact with ACAS (though not about early conciliation) throughout 2019 and also that she had access to telephone advice through her husband's legal expenses insurance. She was under the impression throughout this period that she needed to resign or be dismissed in order to bring a claim to an employment tribunal. It is unlikely that she was ever told this in terms, it seems more likely that no one gave any real thought to the matter, but the fact is that although the time limit is the same as for unfair dismissal, time starts to run much earlier.
23. It might be thought odd to expect her to submit two claims, one after her dismissal and an earlier one while she was waiting for her disciplinary hearing to take place, but the test I have to apply is whether it was reasonably practicable for her to do so. A person's ignorance of their right to bring such a claim may mean that it

is not reasonably practicable to present a claim in time, but the ignorance must itself be reasonable. In **Porter v Bandridge Ltd** 1978 ICR 943, CA, the Court of Appeal held that the correct test is not whether the claimant in that case knew of his rights but *whether he ought to have known of them*. On the facts of this case, given that Mrs Vickers was in receipt of legal advice and on some guidance from ACAS, I find that she ought to have known that she did not need to wait until dismissed. Accordingly, I have to conclude that the rest break complaint was presented out of time and must be dismissed. It remains however as a potential act of discrimination.

Employment Judge Fowell

Date: 03 August 2021

Judgment and Reasons sent to the parties: 13 August 2021

FOR THE TRIBUNAL OFFICE