EMPLOYMENT TRIBUNALS

Claimants: (1) Dr S Lalitcumar
(2) Dr A Ghedri

Respondents: (1) Berkshire Healthcare NHS Foundation Trust
(2) Dr P Gamage
(3) Dr M Irani
(4) Dr A Nasim
(5) Ms J Reynolds
(6) Mr I Stephenson
(7) Ms C Williams
(8) Ms H Williamson

Heard at: **Watford by CVP** **On: 17-18 March 2022**

Before: **Employment Judge Reindorf (sitting alone)**

Representation

Claimant:	Miss A Chute (counsel)
Second Respondent:	Mr J Mitchell (counsel)
First and Third to Eighth Respondents:	Mr J Arnold (counsel)

WRITTEN REASONS (PRELIMINARY HEARING)

INTRODUCTION

1. The Claimants were both employed by the First Respondent as Speciality Doctors. The First Claimant, Dr Lalitcumar, was employed from 9 December 2012 and the Second Claimant, Dr Ghedri, was employed from 2 December 2013. Both were dismissed on the purported ground of capability after periods of long term sickness absence.

2. By ET1s lodged on 20 April 2019 the Claimants brought claims of public interest disclosure detriment and direct race discrimination. By ET1s lodged on 22 June 2020 they brought further claims of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, victimisation, automatically unfair dismissal (public interest disclosure) and ordinary unfair dismissal.

3. The matter came before me at an Open Preliminary Hearing to determine:

    3.1. whether Dr Ghedri became a disabled person by reason of PTSD before 24 September 2019, and if so from what date; and

    3.2. whether the claims against the Second Respondent, Dr Gamage, was presented out of time and if so whether time should be extended for the presentation of the claims.

THE HEARING

4. The hearing was conducted remotely by video (CVP) over two days. Judgment was given orally.

5. All the Respondents except Dr Gamage were collectively represented before me by Mr Arnold. I refer to these as the main Respondents.

6. Dr Gamage is the Second Respondent to the 2019 claims. She was represented before me by Mr Mitchell.

7. The Claimants have been represented throughout these proceedings, but changed their solicitors at the end of February 2022. Miss Chute was instructed by them a week before the current hearing.

8. I had a bundle for the strike out application of 347 pages, a separate bundle on the issue of disability of 311 pages and a 43 page draft list of issues for the final hearing. No witness statements were produced but I permitted them to give evidence orally.

9. All parties produced skeleton arguments and I also heard oral submissions, for which I am grateful.

THE LAW

Disability

10. By s.6 of the Equality Act 2010 ("EqA"):

    (1) A person (P) has a disability if—

    (a) P has a physical or mental impairment, and

    (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

11. By Sch 1, Part 1 EqA:

    (1) The effect of an impairment is long-term if—

    (a) it has lasted for at least 12 months,

    (b) it is likely to last for at least 12 months, or

    (c) it is likely to last for the rest of the life of the person affected.

12. The burden of proof is on the Claimant to show on the balance of probabilities that he was, at the material times, disabled within the meaning of s.6 EqA (*Morgan v Staffordshire University* [2002] IRLR 190, EAT).

13. The question of whether the effects of an impairment were, at the material time, likely to last 12 months is to be assessment by reference to the facts and circumstances existing at the date of the alleged discrimination (*Richmond Adult Community College V McDougall* [2008] IRLR 227 CA; *All Answers Ltd v W* [2021] IRLR 621 CA). The Tribunal should ask whether at the time it "could well happen" (see paragraph C3 of the statutory "Guidance on Matters to be Taken into Account in Determining Questions relating to the Definition of Disability" (2011)'; *Boyle v SCA Packaging Ltd* [2009] IRLR 746).

Time limits for presentation of complaints

<u>Public interest disclosure detriment claims</u>

14. The time limit for the presentation of a complaint of public interest disclosure detriment is three months from the date of the act complained

of, plus any relevant extension for ACAS Early Conciliation (s.48 of the Employment Rights Act 1996 ("ERA").

15. Time may be extended if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented by the end of the three month period and that the time then taken was in all the circumstances reasonable (s.48(3) ERA).

16. Whether a claim was presented within the primary time limit is a question of fact for the Tribunal.

17. In *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372 the CA said that Tribunals should:

    "read the word 'practicable' as the equivalent of "feasible" … and to ask … "was it reasonably feasible to present the complaint to the Tribunal within the relevant three months?"

18. As to extensions of time, each case must be considered on its facts in the light of the Claimant's explanation for the delay (*Marley (UK) Ltd v Anderson* [1996] IRLR 163 CA). The discretion must be exercised judicially (*Howlett Marine Services Ltd v Bolam* [2001] IRLR 201).

Discrimination complaints

19. A complaint of discrimination contrary to the EqA must be presented within three months of the act complained of, allowing for ACAS Early Conciliation (s.123 EqA).

20. The Tribunal may extend time for the presentation of the claim if it would be just and equitable to do so (s.123(3) EqA). This is a broad discretion and a matter of fact and judgment (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 CA).

21. The factors to take into account may include:

    21.1. the length of and reason for the delay;

    21.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

    21.3. whether the Claimant was aware of his right to claim, and/or of the time limit;

21.4. whether the Respondent cooperated with any requests for information;

21.5. the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action;

21.6. the steps taken by the Claimant to obtain professional advice once he knew of the possibility of taking action;

21.7. the prejudice that would be suffered by the employer if the claim was permitted to proceed (necessarily balanced against the prejudice to the claimant if he is refused the extension of time).

(See *British Coal Corpn v Keeble* [1997] IRLR 336)

22. A failure to provide a good excuse for the delay in bringing a relevant claim will not inevitably result in an extension being refused (*Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278).

23. Where ill health is relied on in an application for an extension of time, it is not necessary that the Claimant's ill health actually prevented him from presenting the claim (*Watkins v HSB Bank Plc* [2018] IRLR 1015).

THE DISABILITY ISSUE (DR GHEDRI)

<u>The parties' submissions and findings of fact</u>

24. The only aspect of the test for disability which was in issue was the long term condition in Sch 1 para 2(1)(a) EqA as regards Dr Ghedri. The main Respondents had already conceded that the rest of the test for disability was satisfied in respect of Dr Ghedri's PTSD.

25. Moreover the main Respondents had conceded that the long term condition was satisfied as from 24 September 2019, which I refer to as "the concession date". This date was identified because it was 12 months after an event which was referred to as the "threat event" which was said to have precipitated the PTSD. Prior to the concession date, Mr Arnold argued, there was no medical evidence to the effect that the PTSD was likely to last for 12 months.

26. Miss Chute for Dr Ghedri maintained that he was a disabled person from around January 2019 or earlier. She relied on a series of medical reports from which she said that it must have been obvious to the First

Respondent that the condition was likely to last 12 months. The thrust of her argument was that the medical reports said that Dr Ghedri's ill health would not be likely to resolve until his workplace issues were resolved.

27. I did not hear oral evidence on this issue.

28. I saw three Occupational Health reports predating the threat event which referred to Dr Ghedri experiencing anxiety and work related stress, for which he had various periods off work. They did not mention PTSD. The overall view was that Dr Ghedri's health would improve with resolution of the work issues.

29. Dr Ghedri's disability impact statement did not refer to events or medical reports predating the threat event.

30. The first mention of PTSD in the documentary evidence was in a report from Dr Hawthorne dated 28 February 2019. Dr Hawthorne's report made no comment as to the likely duration of Dr Ghedri's illness. The report said:

The overall picture is one of post-traumatic stress symptoms and indeed he scored highly on the PCL-C check list which is well above the threshold for clinical PTSD. On all his tests of the three key areas of re-experiencing etc, he scored above the threshold but I suppose the stressor test does not qualify him officially for this diagnosis. There certainly was not a life-threatening stressor.

31. I accepted Mr Arnold's interpretation of this conclusion, which was that Dr Ghedri satisfied the test for PTSD save that the stressor event was not itself life threatening. Mr Arnold accepted that this did not affect Dr Hawthorne's conclusion that the symptoms experienced by Dr Ghedri were such as to satisfy the test for disability other than the long term condition.

32. A subsequent report from Dr Sawhney dated 6 August 2019 recorded that Dr Ghedri had been diagnosed with PTSD by reference to Dr Hawthorne's report. It went on to say:

Ahmed is unfit for work and unfortunately I cannot advise if and when he may be able to return … It is possible that Ahmed may remain long-term unfit even if another position is available, but I suggest this is explored … If temporary redeployment is not feasible, then Ahmed is likely to remain unfit for work for at least the next 2-3 months and his absence may be

prolonged. It is possible that the situation will be unchanged until the tribunal case is heard and beyond.

Conclusions

33. I find that the onset of Dr Ghedri's PTSD was the date of the threat event, 24 September 2018. The Occupational Health reports show that prior to that date he was experiencing anxiety and stress. Dr Ghedri's disability impact statement refers only to symptoms he experienced after the threat event. Accordingly there is no evidence before me that he was suffering from PTSD before 24 September 2018.

34. I find that the long term condition was satisfied on 6 August 2019 when Dr Sawhney reported. I have seen no evidence from which I could conclude that it was likely at an earlier date that the condition would last 12 months or more. The comments in the Occupational Health reports to the effect that Dr Ghedri's symptoms would only improve with resolution of the work issues relate to his anxiety and stress, and not his PTSD. They are therefore of no assistance in determining whether or not his PTSD was likely to last for 12 months. In any event, they do not amount to a prediction that Dr Ghedri's symptoms of anxiety and stress would last for 12 months, since there is no evidence that the work issues which were said to be the cause of those symptoms were thought likely to continue for that long.

35. Dr Sawhney's report of 6 August 2019 related specifically to Dr Ghedri's PTSD. Her prognosis was that he would be unfit for work for at least another two to three further months. By this time 10.5 months had passed since the threat event. Therefore it is clear that at this time the condition was likely to last for more than 12 months in total.

36. I therefore find that it was on 24 September 2018 that Dr Ghedri became a disabled person for the purposes of the Act.

THE TIME LIMIT ISSUE (CLAIMS AGAINST DR GAMAGE)

Findings of fact

37. The Claimants and Dr Gamage all worked for the First Respondent until Dr Gamage resigned and left the Trust in around December 2017, having gone off sick on 1 November 2017.

38. It is not disputed that in respect of the public interest disclosure detriment claims the last act complained of by Dr Lalitcumar against Dr Gamage took place on 8 June 2017, and the last act complained of by Dr Ghedri against Dr Gamage took place on 27 April 2017.

39. As to the discrimination claims against Dr Gamage, it was not clear to me when time was said to have started to run. It seems to be argued that Dr Gamage discriminated against the Claimants by setting their comparators' pay at a higher level than theirs, having had no involvement in the setting of their own pay several years earlier before she started work for the First Respondent. Taking the Claimants' case at the highest it could possibly be put, I assume for present purposes that time runs from 1 November 2017, after which date the Claimants had no further involvement with her.

40. In their examination-in-chief neither Claimant specifically addressed the period of their respective primary limitation periods. Rather, they gave evidence about when it was that they had learned that Dr Gamage had gone off sick and subsequently left the First Respondent's employment. Since this was long after the expiry of both primary limitation periods, I did not consider this evidence to be relevant to the question of why the claims were not presented within those primary limitation periods. Save for the misconceived argument made in the Claimants' letter of 21 October 2021 (as to which see below), no other arguments were made to me on behalf of the Claimants as to why the claims were brought in time.

41. In oral evidence both Claimants relied on their ill health as the broad explanation of why they had not brought their claims earlier. This had not been advanced as a reason prior to the current hearing.

42. I find that ill health was not the reason that the Claimants did not bring their claims earlier, whether within the primary limitation period or by any particular time thereafter. I take into account the following evidence:

    42.1. Under cross-examination Dr Lalitcumar accepted that he had been at work and not off sick throughout the primary limitation period. He said that he was very stressed during that period and was worried about a recurrence of a heart condition he had previously suffered from (which he attributed to Dr Gamage's treatment of him). He initially described this condition as a heart attack, but then accepted that it was not in fact a heart attack. His evidence on this point was not reliable and was unsupported by any medical evidence.

42.2. Dr Lalitcumar also accepted that he had had union support from the BMA throughout the relevant period and that he had brought a grievance against Dr Gamage on 15 June 2017, which was a week after the last act complained of by him. He was unable satisfactorily to explain why he had been able to bring a grievance but not lodge a claim.

42.3. Dr Ghedri said under cross-examination that during the primary limitation period his priority was patient safety and his own safety, that he was stressed and that he had other issues to deal with. No medical evidence was brought to my attention to support his evidence. In my judgment his evidence did not show that his health was such as to impede his ability to bring a claim.

43. The Claimants accepted in cross-examination that by January 2019 they were represented by solicitors and notified ACAS of their claims against Dr Gamage.

44. The ET1s were lodged on 20 April 2019.

Conclusions: public interest disclosure detriment claims

45. In respect of the public interest disclosure detriment claims against Dr Gamage, Dr Lalitcumar's primary limitation period expired on 7 September 2017 and Dr Ghedri's on 26 July 2017.

46. It was stated in a letter written in the course of this litigation on 21 October 2021 by the Claimants' previous solicitors that the ET1s were lodged in time against Dr Gamage on the basis that the claims had been accepted by the Tribunal. Miss Chute sensibly did not take up any time in expanding on this argument, which is plainly misconceived. Whilst a claim might be rejected by the Tribunal if it appears that there is no jurisdiction to hear it, acceptance of a claim does not indicate the reverse.

47. I find that the complaints of public interest disclosure detriment against Dr Gamage were presented more than a year and a half outside the primary limitation period.

48. Applying the relevant principle, and in particular the test in *Palmer and Saunders*, I find that neither Claimant gave evidence adequate to show that it was not reasonably practicable for them to present their claims within the primary limitation periods. If ill health is to be relied upon as an explanation for not lodging a claim in time, medical evidence in support of

that contention is to be expected. None was produced in this case, and nor was any positive evidence advanced on the issue in oral evidence. Moreover it had not been raised before the hearing. Dr Lalitcumar was assisted by his union and able to bring a grievance during the period. I do not find the reason now advanced to be adequate in either case to show that it was not reasonably feasible to present the claims.

49. That being the case, I do not need to determine whether the claims were brought within a reasonable period after the expiry of time. For the avoidance of doubt I would have found that they were not, principally because both Claimants were represented by solicitors by January 2019 and notified ACAS of their claims against Dr Gamage at that time, and yet did not present their claims until April 2019.

Conclusions: discrimination claims

50. The discrimination claims against Dr Gamage were clearly substantially out of time, given that neither Claimant had any dealings with Dr Gamage after November 2017. As stated above, I have assumed for present purposes that 1 November 2017 was the date of the last act complained of. On that basis the primary limitation period expired for both Claimants on 31 January 2018 and the claims were over 14 months out of time.

51. It was suggested to me that the discrimination claims against Dr Gamage might be said to form a continuing act when considered in the context of the complaints against other Respondents. I did not consider this to be a relevant consideration. It is a point for the Claimants to argue in the claims against the First Respondent.

52. I take account of the fact that the discretion to grant an extension of time is broader under the just and equitable test than it is under the reasonably practicable test. Nonetheless I see no basis upon which I should exercise the discretion. The delay was extremely long, and the reasons given for it were wholly inadequate. There was no suggestion that the Claimants had been in ignorance of the facts giving rise to the cause of action or of their legal rights. Dr Lalitcumar had union support from an early stage. The Claimants were represented by solicitors and had contacted ACAS by January 2019 and yet still waited until 20 April 2019 to lodge their claims.

53. As to prejudice, the Claimants will be able to pursue the complaints about Dr Gamage's treatment as against the First Respondent, which is not relying on the statutory defence. The prejudice against Dr Gamage if an extension were awarded would be considerable, in that she would have

to defend herself in legal proceedings relating to matters which occurred some five years ago, and would be liable to pay compensation.

54. I therefore find that the claims against Dr Gamage were presented out of time and the Tribunal does not have jurisdiction to determine them. As a result, Dr Gamage is no longer a party to these proceedings.

55. In any event, the discrimination complaints have no discernible basis. I do not see how it can sensibly be argued that the matter complained of amounted to a detriment against the Claimants by reason of which they were less favourably treated. If I had not found that the claims were out of time, I would have struck them out.

Employment Judge Reindorf
Date: 7 June 2022

Sent to the parties on:

8 June 2022

For the Tribunal: