EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Magidi**

Respondent: **Department for Work and Pensions**

Heard at: **London South** **On: 13/6/2022 to 17/6/2022**

Before: **Employment Judge Wright**
Mr P Adkins
Mr S Sheath

Representation:
Claimant: **In person**

Respondent: **Miss S Garner - counsel**

JUDGMENT having been given on 17/6/2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

It was the unanimous Judgment of the Tribunal that the claimant's claims under the Equality Act 2010 (EQA) fail and are dismissed.

REASONS

1. The claimant presented a claim form on 20/1/2020 following a period of early conciliation which started on 14/1/2020 and ended on 16/1/2020. The claimant's employment commenced on 15/4/2019 and terminated on 19/9/2019 by reason of capability. She was employed as a case manager at the respondent's Hastings Universal Credit Service Centre.

2. There was an agreed list of issues. The claimant's ET1 claim form contained three allegations of discrimination. She then provided further information and expanded upon her allegations. The respondent did not take issue with that. Those additional allegations were discussed at the preliminary hearing on 6/12/2021 and the respondent responded to them in its amended ET3 response on 17/1/2022. The respondent did not take issue that there was no formal application to amend the claim to include the additional allegations. This was discussed at the commencement of the hearing. The claimant indicated that she wished to rely upon the expanded allegations and ultimately, the respondent did not object. The Tribunal considered it proportionate to allow the application and to consider the expanded allegations.

3. The claimant's protected characteristic is her race (s.9 EQA), which is Black African. The prohibited conduct was identified as direct discrimination (s.13 EQA) and harassment (s.26 EQA). The complaint is of detriment and dismissal (s.39(2)(c) and (d) EQA).

4. The claimant relied upon actual and hypothetical comparators. The Tribunal found the correct comparator for the purposes of s. 23(1) EQA is a white/not black probationer, undergoing the same training programme as the claimant and who had the same performance issues.

5. The Tribunal heard evidence from the claimant and from Jonathan Hookey, who was her Trade Union representative at the relevant time.

6. For the respondent, it heard from Jane Badger, Kim Goodall and John Cosgrove.

7. There was a hard and electronic bundle of 601-pages. It contained redactions the reason for which was not apparent and in any event, the redactions were incomplete. Some pages were photocopies of photographs of documents, rather than copies of original documents. This resulted in the page having a 'sheen' on it, with the result that it was not possible to write in manuscript on the hard copy. The crucial Preliminary Hearing Order was not in the bundle. Finally, not enough copies were available at the start of the hearing and the Tribunal was never provided

with a copy of the documentation for inspection by the public (albeit that no members of the public attended the hearing).

8. Both parties provided written closing submissions, which were considered.

Findings of fact

9. The claimant pleaded three allegations of harassment. They took place on: 2/5/2019; 6/6/2019; and 3/9/2010 (list of issues 2a-c). She also pleaded 12 allegations of direct discrimination. The first eight took place on: 29/4/2019 (two allegations); 30/4/2019; 'in May 2019'; 1/7/2019; 'in July 2019'; 26/7/2019; and 2/8/2019 (list of issues 7a-h).

10. The respondent took issue that those claims, which predated 15/9/2019 (Acas early conciliation having taken place between 14/1/2020 and 16/1/2020), were out of time. The respondent had raised the time issue in its ET3 response dated 7/8/2020 (page 42). It was also discussed at the preliminary hearing on 25/8/2020, with the result that an open preliminary hearing was listed for 16/2/2021 to determine (page 44):

    Is the alleged conduct on which the Claimant seeks to rely, (the Conduct) time barred, either in whole or in part?

    If so:

    a. Which sections of the Conduct pleaded under the Equality Act are time barred?

    1.2 Does any time barred Conduct form part of a continuing act under section 123(3)(a) of the Equality Act 2010?

    1.3 Is it just and equitable for the Tribunal to exercise its discretion and allow the time barred Conduct to be included out of time under section 123(1)(b) of the Equality Act 2010?

11. The claimant was therefore aware from that point of the relevant legislation and she has been aware since 7/8/2020 that the respondent was taking issue with the time point.

12. The claimant had provided further information in respect of her claim on 15/2/2021 (page 52). The open preliminary hearing eventually took place on 6/12/2021 (the order was not in the bundle, however copies of it were provided at the hearing).

13. At the open preliminary hearing, it is recorded that:

> *This preliminary hearing had been listed to decide whether the claims had been brought in time. At the start of the hearing, Ms Ling [counsel for the respondent] explained that the respondent had now seen the further particulars provided by the claimant. Given that the last action complained about by the claimant related to the hearing of her appeal in December 2019, and that claim had been brought in time, the respondent no longer argued that the tribunal could not consider the claims because they were out of time.*

14. As such, the open preliminary hearing did not determine any time point, although clearly the position was discussed.

15. The respondent produced a list of issues on 6/2/2022 and it maintained that any allegation prior to 15/9/2019 was out of time, although it implicitly accepted any act after that was in time (page 57).

16. Despite the time point having been discussed and raised on numerous occasions, the claimant did not address it in her evidence. She did not attempt to persuade the Tribunal that either the events were conduct extending over a period (commonly called continuing conduct). Nor did she invite the Tribunal to exercise its discretion to extend the time limit on a just and equitable basis.

17. The claimant had the support of Mr Hookey throughout her employment as her Trade Union representative. When Mr Hookey became conflicted, the claimant was represented by another representative (CM). She also had his support during the Tribunal hearing, he appeared as a witness for her and observed the hearing. It would be expected that the claimant's Trade Union would not only inform her of the importance of the time limits in the Tribunal, but also advise her that the burden is upon her to persuade the Tribunal to extend time limits where an allegation is out of time.

18. In her evidence-in-chief, the claimant did address her three harassment allegations. In respect of the out of time direct discrimination allegations, the claimant advanced evidence-in-chief in respect of allegations: 7a; 7b; 7f; and 7h. There was therefore no direct evidence from the claimant in respect of allegations: 7c; 7d; 7e; and 7g. Irrespective of the fact the allegations were out of time, there is no prospect of the burden of proof being transferred to the respondent, if the claimant does not provide any facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent had contravened the provision concerned, in this case, s.13 EQA.

19. Of the allegations of direct discrimination which were in time, the claimant did not provide any evidence-in-chief in respect of the first one (7i). As stated above, the burden of proof cannot therefore transfer to the respondent. The claimant did provide evidence-in-chief in respect of the circumstances surrounding her dismissal (witness statement paragraph 10); she did not however address this specific allegation. The claimant did address this allegation in her closing submissions, however, submissions are not evidence-in-chief. In any event, it is difficult to see what the detriment is as the appeal(s) were considered after her dismissal. The outcome of the appeal(s) would have no bearing on a decision to dismiss for capability.

20. Allegation 7j is that the claimant was dismissed by Michele Atkins before being able to put forward all information to the decision maker. The dismissal was on 19/9/2019. The claimant gave some very limited evidence in this regard (witness statement paragraph 9). She said:

> 'She [Ms Atkins] made her decision to dismiss me 2 days after the day [Mr G-B] made his decision on a G1 of 6 June 2019 and never allowed for an appeal or wait for the appeal conclusion although [SD] from HR advised that the grievance and appeal process would have to be concluded before a decision was made and [Ms Atkins] disregarded that.'

21. This is no more than an allegation that Ms Atkins proceeded with the decision to dismiss prior to the conclusion of another process and nothing more. The claimant has not established how this was less favourable treatment because of her race. The Tribunal finds the burden did not transfer to the respondent.

22. In closing submissions, the respondent referred to the information which the claimant's Trade Union representative sent to her and she then sent onto Ms Atkins on 19/9/2019 (page 421). The respondent submitted this was no more than an accident of timing as the information had not been received by Ms Atkins within the time-frame she had adopted. Factually, Ms Atkins sent her dismissal letter to Ms Goodall on 19/9/2019 at 16:42 and asked her to issue it to the claimant (page 428). The claimant sent her email at 16:53. The claimant did not raise this issue in her appeal.

23. If, as per the respondent's interpretation, this was the allegation which the claimant intended to pursue, then again, she did not advance any evidence-in-chief in respect of it.

24. It did appear however, from the claimant's closing submission that she was referring to the additional information sent to Ms Atkins at 16:53. Due

to the lack of evidence-in-chief in this regard, the burden does not transfer to the respondent.

25. Allegation 7k was framed as:

> 'The letter of dismissal stated that the Claimant's mental health had no bearing on the dismissal decision as the Claimant's performance had been poor from the outset'

26. Not only did the claimant not advance any evidence-in-chief in respect of this allegation, it is factually inaccurate. No such reference could be found in the letter of dismissal, although the Tribunal and parties attempted to locate it during the claimant's evidence. That evidence concluded on day two and on the morning of day three, the claimant said she had located the relevant part of the letter and referred the Tribunal to (page 431):

> 'I have considered the environment you were working in whilst going through the grievance process, which you shared included being about your HEO Jane Badger, however your performance was not reaching the required standards soon after your joined DWP, so I do not consider this to be the sole reason for your performance being below that required and expected.'

27. The Tribunal finds the phrases referred to in the dismissal letter by the claimant do not correlate to her allegation. Furthermore, it is not clear how this statement, even if it were made, was less favourable treatment because of the claimant's race.

28. The final allegation of direct discrimination that was in time was that Ms Reed, the appeal officer, did not refer to notes, when making her decision not to uphold the appeal against the dismissal in the dismissal letter of 20/12/2019.

29. Firstly, the claimant has not established what 'notes' Ms Reed failed to refer to.

30. Secondly, the Tribunal was told that Ms Reed was independent, did not know the claimant and was based in Newcastle. The appeal meeting took place via telephone on 23/10/2019 due to the claimant's and Ms Reed's locations. The Tribunal finds that the claimant simply cannot have known what notes Ms Reed did or did not refer to when making her decision. It is clear there were no notes or minutes of the telephone meeting provided. Ms Reed did however produce an appeal outcome letter that was just over three pages long. The claimant's Trade Union representative confirmed that all six points of appeal had been addressed by Ms Reed.

31. It is not clear what the detriment is. Clearly, Ms Reed upheld the decision to dismiss, however, the claimant has not identified which notes she says Ms Reed did not refer to and how that is detrimental to her.

32. In the claimant's closing summary (but not in her evidence-in-chief) the claimant referred to the 'notes' and submitted:

> '[Ms Reed] has confirmed that she did not refer to any notes before making her decision that my employment should remain terminated (pages 483-486). This implies that she did not take any account of the points raised or information provided in the interview she conducted with me.'

33. If Ms Reed did not make any notes of the meeting, then she cannot have failed to refer to them. It is pure conjecture on the part of the claimant that Ms Reed did not take any account of the points raised during the meeting and the Tribunal finds she clearly did so.

34. The Tribunal makes some observations of the claimant's attitude/approach to her short period of employment by the respondent and to this litigation. The claimant insisted on numerous occasions that there was nothing wrong with her performance. This was simply not the case. There was overwhelming evidence that she had struggled throughout the time she worked in the Service Centre. The mere fact that she may have grasped some areas of her role and indeed had improved in some areas, does not override the respondent's overall dissatisfaction with her performance and its view that she was not capable of performing in the role. The claimant repeated the consolidation part of the training (working on 'live' cases under supervision) however the view was formed that she was still struggling and eventually the decision was taken that she was never going to perform at an acceptable standard and she was dismissed. This is the purpose of a probationary period.

35. Despite the fact the claimant's insistence that there was no performance issues, she also maintained that she should have been placed on a PAL[1]. The claimant's performance was being managed under the respondent's probation policy as the claimant was a new starter. It was the respondent's case, which the Tribunal accepts, that the process under either policy was much the same. The claimant would not accept that *at the relevant time*, the policy did not provide that a PAL *must or should* be used. When the policy changed after it had been applied to the claimant (and it was not a retrospective change) it provided that a PAL *may* be used, it was therefore at the line manager's discretion and not compulsory.

[1] PAL = Performance and Action Learning Plan

36. The Tribunal finds this shows the claimant's interpretation of matters was misguided and that she (possibly not intentionally) repeatedly misinterpreted events. Rather than stepping back and analysing the situation, she immediately linked every aspect of the management of her, which she perceived as negative, to be associated to her race. Even if that was the case, to be successful in bringing a claim of direct discrimination under the EQA, the claimant still has to show that that was less favourable treatment (a comparative exercise) *and* that the less favourable treatment was because of her race.

37. On the fifth day, while the panel were deliberating and after the claimant had provided her written submissions, she sent two further emails to the Tribunal. One timed at 8:56 and one at 9:48. In the first email, the claimant attempted to give further evidence in respect of allegation 7l, referencing the note taking at the appeal meeting. The claimant's evidence concluded on day two and at the outset and prior to her being cross-examined, she was asked if she had anything further to add to her written evidence/evidence-in-chief; she said no. Besides that, the allegation is not whether or not notes were taken or whether the respondent somehow misled the claimant. The allegation was that Ms Reed did not refer to the notes, which the claimant said, or assumed, were taken.

38. The claimant's email also complained that Miss Garner had said she would forward a copy of her written closing submission to Mr Hookey and did not do so. Besides the fact that Miss Garner is under no obligation to copy a witness into her correspondence, this perhaps demonstrates the claimant's mindset. Miss Garner had been co-operative throughout this hearing and has complied with her duty to the Tribunal under the Overriding Objective. If the claimant wanted Mr Hookey to review the closing submissions, then put quite simply, she should take responsibility and forward the covering email and attachment to him[2].

39. In respect of the respondent's conduct of the hearing, besides the issues with the bundles and the amendment to the claim; there were incorrect spelling of names in witness statements and typographical errors which were not insubstantial. The Tribunal does not expect the witness statements to be error free, but a cursory read through would have highlighted the mistakes.

40. The witness statements did not set out the training programme which the respondent followed. From the evidence which it heard, the Tribunal had grasped the process, by the time Miss Garner asked the second respondent's witness on the fourth day to set it out. Explanatory information such as this, which assists the Tribunal, should have been

[2] Indeed Miss Garner subsequently confirmed this was an oversight on her part and apologised.

provided in the witness statements which the Tribunal read on the first day.

41. Of the four in time allegations, the Tribunal was concerned that there was no direct evidence from those witnesses (the dismissal officer and the appeal officer). As it happened, the burden did not shift to the respondent to provide a non-discriminatory explanation for the acts complaint of. Had the burden shifted, the respondent may have found itself in difficulty.

42. After closing submissions, Miss Garner made some reference to not having witnesses available (she did not say why or who) and that as a result Ms Goodall was 'filling in the gaps'. There is some sympathy with the respondent that these events (the majority of which were out of time) took place between April 2019 and December 2019. The claim however, was presented on 20/1/2020 and therefore the respondent was on notice then, particularly in respect of the earlier allegations, that it would need to take and preserve evidence. If personnel have moved on and will not attend the final hearing voluntarily, then there is always the option of a witness order. That again is a matter which should have been made clear earlier and by Ms Goodall herself in her witness statement. The statement should have set out which 'gaps' she was filling in and for whom.

The Law

43. The respondent takes issue with the time limit under s.123 EQA, that the claims have been presented out of time.

> 123 Time Limits
>
> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 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.
>
> …
>
> (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.

44. Section 123(1)(a) of the EQA therefore provides that a discrimination complaint must be presented after the end of 3 months starting with the act complained of or such other period as the tribunal considers just and equitable.

45. Section 123(3) EQA provides that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

46. The case of Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA makes clear that the discretion of the Tribunal to extend time on just and equitable grounds should be exercised exceptionally and that the burden is on the claimant to satisfy the Tribunal that there are reasons why the Tribunal should exercise its discretion to extend time. Also, in O'Brien v Department for Constitutional Affairs [2009] IRLR 294, the Court of Appeal held that the burden of proof is on the claimant to convince the Tribunal that it is just and equitable to extend time. In most cases there are strong reasons for a strict approach to time limits.

47. S.13(1) of the EQA states:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

48. To succeed with a claim for direct discrimination, a claimant must show:

    a. that she has suffered a detriment;

    b. that in suffering that detriment she has been treated less favourably than a real or hypothetical comparator; and

    c. that she has suffered that less favourable treatment because of a protected characteristic.

49. If it is found that a claimant has been treated less favourably than a comparator, the Tribunal must determine whether that was because of the claimant's protected characteristic or for an unrelated reason.

50. To establish that the treatment was because of a protected characteristic it must be shown that a named individual (or a number of individuals) who subjected the claimant to a detriment was consciously or subconsciously

influenced by the protected characteristic. Unless the claimant identifies the alleged discriminator(s), that exercise cannot be conducted and the claim will fail Reynolds v CLFIS (UK) Ltd [2015] IRLR 562.

51. S.23 EQA provides:

> Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

52. The burden of proof in s.136 EQA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred.

53. In Igen Ltd v Wong [2005] ICR 931, the Court of Appeal gave practical guidance to Tribunals on applying the shifting burden of proof.

54. The burden of proof does not shift to the respondent unless the claimant has raised facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal made clear that:

> The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference of status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

55. It has been stated repeatedly in the authorities, including Commissioner of the Police of the Metropolis v Osinaike (UKEAT/0373/09), para.47, that ‘simply showing that conduct is unreasonable or unfair is not, by itself, enough to trigger the transfer of the burden of proof’.

Conclusions

56. In respect of time limits/limitation, any allegation which took place prior to 15/9/2019 is out of time. The claimant did not seek to persuade the Tribunal to exercise its discretion to extend the time limit or in the alternative, that these were continuing acts.

57. In the absence of an express invitation to exercise its discretion or to consider the allegations were a continuing act, the Tribunal finds they were out of time.

58. The Tribunal finds this was a classic Madarassy case, there was a complete absence of the 'something more'. The claimant made allegations about matters which she was unhappy about or aggrieved about. That was the extent of the claim. She attempted to bring her allegations within the EQA by referring to her race; however, there was nothing in her allegations and her evidence, to transfer the burden to the respondent.

59. Of the four allegations of direct discrimination that were in time, they are dismissed as:

    7i the claimant did not advance any evidence;

    7j this allegation 'morphed' into it relating to the email which the claimant sent at 16:53, she did not advance any evidence and there was nothing to link this to any less favourable treatment because of her race;

    7k the letter of dismissal did not contain the statement as per the allegation and commenting upon the claimant's mental health (as per the allegation not as per the letter) has no link to her race; and

    7l this is pure conjecture on the claimant's part, she cannot have know whether or not Ms Reed referred to any notes and Ms Reed's appeal outcome letter was detailed and considered; and this was accepted.

60. For those reasons, the claimant's claim fails in its entirety and is dismissed.

22/6/2022

Employment Judge Wright