



EMPLOYMENT TRIBUNALS

Claimant: Miss J Brown

Respondent: East Lancashire Hospitals NHS Trust

Heard at: Manchester Employment Tribunal

On: 27 May 2022 (by CVP; in public)

Before: Employment Judge Mark Butler

Representation

Claimant: Mr T Wood (of Counsel)

Respondent: Ms R Kight (of Counsel)

OPEN PRELIMINARY HEARING JUDGMENT

1. The claimant's disability discrimination claims were part of a continuing act but brought outside of the statutory time limit. However, in the circumstances, it is just and equitable to extend time to allow the disability discrimination complaints to be heard.
2. The disability discrimination claims proceed to final hearing.
3. The claimant's age discrimination claims were part of a second continuing act, and again were brought outside of the statutory time limit. It was not just and equitable to extend time in relation to the age discrimination complaints.
4. The age discrimination complaints are dismissed.

Below are the written reasons as requested on behalf of the claimant by email on 06 June 2022, following oral reasons having been handed down at the hearing.

REASONS

Introduction

1. The claimant presented her claim to the tribunal on 08 December 2021, having undertaken ACAS early conciliation between 03 December 2021 and 06 December 2021. The claims brought concerned disability discrimination and age discrimination (there was a claim for unlawful deductions from wages; however this was withdrawn by the claimant). Given the dates for presenting of the claim form and those during which early conciliation took place, any acts of discrimination that took place before 09 September 2021 were potentially out of time.
2. The final act of discrimination pleaded in the claim form was that of dismissal. This took effect on 07 July 2021.
3. Having considered this case at a Case Management Preliminary Hearing on 10 February 2022, Employment Judge Peck decided to list this case for a public preliminary hearing to determine whether the tribunal had jurisdiction to hear this case. In short, the tribunal was asked to determine:
 - a. Whether the acts as pleaded were part of conduct extending over a period of time;
 - b. Whether they were brought outside of the primary limitation period, and
 - c. Where they were brought outside of the primary limitation period, whether it would be just and equitable to extend time to give the employment tribunal jurisdiction to hear the claims.
4. It was confirmed at the beginning of the hearing that this would be the focus of the hearing, with case management directions for final hearing to follow on conclusion of these preliminary points.
5. In advance of this hearing, I received a number of different electronic files. These included a file of relevant documents that ran to some 135 electronic documents, and a witness statement produced by the claimant. The claimant was cross-examined on this written evidence.

The Acts of discrimination

6. Given that there are a series of acts of discrimination on which this claim is brought, and given that a key question for me to determine today is whether these acts are part of a continuing act, I consider it prudent to include them in this document.
7. Helpfully, a list of issues has been produced on behalf of the claimant. Although this is not an agreed list of issues, it acts a useful list for these purposes.
8. For the discrimination arising from disability, the following actions/inactions were recorded:

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- (1) On or around 08.05.2020, Andrea Cottam invited the claimant to a long-term sickness review meeting;
- (2) On 13.05.2020, the respondent held a long-term sickness review meeting;
- (3) On 20.08.2020, in a letter following a formal sickness absence review meeting of the same date, Andrea Cottam set a date for a capability hearing, despite having advised in the review meeting that further absence “may” result in a capability hearing being set;
- (4) On 28.09.2020, Andrea Cottam affirmed the decision to progress to a capability hearing, referring to the “last” occupational health opinion that the claimant “will not be able to return to your role as a nurse”, which was not in fact the most recent ;
- (5) On 07.10.2020, the respondent ceased to pay the claimant sick pay;
- (6) On 27.10.2020, Andrea Cottam notified the claimant of the first capability hearing to take place on 12.11.2020, despite not having received answers to further questions posed by Ms Cottam to Dr. Prasad on 12.10.2020;
- (7) On 02.11.2020, Andrea Cottam sent to the claimant the capability hearing statement of case, which:
 - (a) Documented the claimant’s sickness albeit which did not refer to any disability-related sickness, although the respondent’s sickness absence policy notes that “the manager will discuss whether it would be appropriate to discount the absence for staging purposes”, and although the claimant had requested on 30.03.2020 that her sickness be recorded as disability-related;
 - (b) Failed to include Dr. Prasad’s reports of 17.08.2020 or 02.11.2020;
 - (c) Stated that occupational health did not support ill-health retirement, despite the respondent having previously acknowledged the receipt of Sr. Mills report in July 2020 supporting ill-health retirement;
- (8) On 12.11.2020:
 - (a) Susan Elliston held a capability hearing;
 - (b) Susan Elliston refused to reinstate half sick pay for the period 08.10.2020 to 06.11.2020 on the basis that the claimant had received paid annual leave;
- (9) On 14.12.2020, Susan Elliston held a capability hearing and warned the claimant that her employment may be terminated despite the claimant’s request via her representative on 19.11.2020 that, should a second hearing go ahead, it be heard by an independent employee, and despite the claimant’s notification via

9. For the harassment related to disability, the following actions/inactions were

recorded:

- (1) On 09.10.2019, Andrea Cottam, in response to the claimant stated that she required weekly physiotherapy appointments, said “why now”;
- (2) In or about September 2019, during a conversation between Andrea Cottam and Susan Howarth, Ms Cottam stated that she couldn’t understand why the claimant had been given a blue badge;
- (3) During the period September and December 2019, Andrea Cottam stated following a telephone call she had had with another colleague regarding a query on a disability issue, “we could all say we are disabled, where does it end”;
- (4) On a few occasions during the period September and December 2019, when colleagues of the claimant asked her how she was feeling or managing, Andrea Cottam rolled her eyes and jokingly said “don’t encourage her”;
- (5) On 16.03.2020, when the claimant advised that she could not work on a ward because she couldn’t physically manage and that it would increase the risk of coronavirus infection at home, Andrea Cottam told her that she could live in a caravan at Royal Blackburn Hospital;
- (6) On 22.03.2020, Andrea Cottam gave a limited response to the claimant informing her that she had requested to work from home;
- (7) On 23.03.2020:
 - (a) Andrea Cottam disclosed the claimant’s confidential information (request to work from home) to her colleague;
 - (b) When the claimant attended Royal Blackburn Hospital for a scan, Andrea Cottam spoke to her with her back turned, was not friendly, and offered no pleasantries;
- (8) On 24.03.2020:
 - (a) Andrea Cottam forwarded the minutes of the Directorate meeting (which stated that, in relation to homeworking, that it would need to be done equitably, that management needed to be sensible in order to show leadership, and that it would not be fair to staff working on the ground if working from home) to the claimant and others with the claimant as the first addressee;
 - (b) Andrea Cottam later telephoned the claimant to ask if she had seen the email;
- (9) Around the end of July 2020, Andrea Cottam asked the claimant whether she wanted trade union representation at a capability hearing, and when the claimant advised that she did, Ms Cottam stated that she was pleased about it because the business manager (Susan Elliston) was going to “finish” the claimant the following

10. And, for the harassment related to age, the following actions/inactions were

recorded:

- (1) On 17.08.2020, at the outset of an occupational health consultation, the occupational health doctor, Dr. Prasad, informed the claimant that she was “too young to retire”;
- (2) On 23.02.2021, Jonathan Williams (physio) stated to the claimant that she was “too young to retire”

Closing Submissions

11. I was provided with written submissions from Counsel on behalf of the claimant, along with a bundle of authorities. I was also assisted by closing oral submissions made on behalf of both the Claimant and the Respondent. I do not repeat them here, but considered them carefully in reaching this decision.

Law

12. Section 123 of the Equality Act 2010 provides:

“(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.”

13. I was also taken to, and considered the following:

- a. Commissioner of Police of the Metropolis v. Hendricks [2003] ICR 530
- b. E v. X UKEAT/0080/20
- c. Pathan v. South London Islamic Centre UKEAT/0312/13
- d. British Coal Corporation v. Keeble [1997] IRLR 336
- e. Adedeji v. University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23
- f. Abertawe Bro Morgannwg University Local Health Board v. Morgan [2018] EWCA Civ 640

- g. Wells Cathedral School Ltd. v. Souter UKEAT/0836/20
 - h. Bowden v. Ministry of Justice UKEAT/0018/17
14. In addition to those case above, I also took into consideration the principles contained within:
- a. Osajie v London Borough of Camden EAT 0317/96
 - b. Vodafone Ltd v Winfield EAT 0016/16
 - c. Department of Constitutional Affairs v Jones 2008 IRLR 128

Discussion and Conclusions

15. On the face of it, and looking at the content of the claims, and taking the claimant's case at its height, it is, at the very least, arguable that the acts of disability discrimination form part of conduct extending over a period of time. Taking the claimant's case at its highest, the acts brought as part of the disability discrimination complaint involved a closed group of actors, was across a short period of time, and appear to be closely linked in substance in that it involves perceptions of the claimant's disability, how the respondent was addressing the claimant's needs because of her disability including when she requested to work from home, through to taking formal steps concerning capability and finally dismissal. These, on the face of them, are all part of a conduct that are interlinked. I am grateful that Ms Kight adopted a sensible position in respect of this, given the substance of the disability discrimination complaints.
16. The age discrimination complaint is somewhat different in substance to the disability discrimination complaint. I consider this to not form part of the continuing act found above. It is not arguable that the age discrimination complaints form part of the same conduct extending over a period of time, as that found for the disability discrimination complaints. These, even taking the claimant's case at its highest, are entirely different acts, made in a different context to those brought under the broad umbrella of disability discrimination. Whilst the disability discrimination complaints concern the managing of the claimant's disability (if I can put it in that broad term) and treatments of the claimant through the capability process, whilst the age discrimination complaints are brought in the context of an ill-health pension application. Further, and although not conclusive, this involves entirely different players from an entirely separate organisation, who are not said to have been tainted by those involved in the complaints of disability discrimination. There does not appear to be any link between these two different types of discrimination. Although, given the substance of the two acts of age discrimination, it is arguable that these two separate acts are similar enough in nature to be a separate continuing act from that above. And that is how I proceed.
17. In consequence, this leads to me to have to consider the disability discrimination complaints and the age discrimination complaints separately.
- a. In respect of the disability discrimination complaints, the final act in the conduct extending over a period of time is the act of dismissal on 07 July 2021. The primary time limit for these claims expired on 06 October 2021. As the claimant had not commenced ACAS early conciliation by this time, nor had she presented her claim form to the tribunal, then her disability discrimination complaints are outside of the primary time limit. Therefore the question for me is whether it would be just and equitable to extend time

to give the tribunal jurisdiction to hear these complaints.

- b. In respect of the age discrimination complaints, the final act in the conduct extending over a period of time was the comment made by Mr Williams on 23 February 2021. The primary time limit for these claims expired on 22 May 2021. Similar to that noted above, as the claimant had not commenced ACAS early conciliation by this time, nor had she presented her claim form to the tribunal, then her age discrimination complaints are also outside of the primary time limit. This brings me to the same question, whether it would be just and equitable to extend time to give the tribunal jurisdiction to hear the age discrimination complaints.

Disability discrimination complaints- just and equitable to extend time?

18. The presentation of the disability discrimination complaints is some 2 months out of time. Although Mr Wood submitted that this was a short delay in presenting her claim, I have to disagree. In the context of 3 months to bring a claim, this is not a short delay. And is a factor that needed to be taken into account.
19. In essence, three reasons were submitted on behalf of the claimant as to why it was just and equitable to extend time to give the tribunal jurisdiction to hear the disability discrimination complaints: (i) that the claimant was trying to address matters internally, (ii) due to the pain/impact of pain the claimant was in due to her disability, and (iii) the claimant's lack of knowledge of tribunal process.
20. It is clear from the documents before me, and from the claimant's evidence that she was seeking to address her disputes internally. There were a series of emails in the bundle that ran from 08 July 2021, this being the day after her dismissal through until 20 August 2021. This emails can be seen on pages 99-111.
21. The claimant ultimately raised a grievance with the respondent on 22 October 2021. And although there is a delay between the 20 August 2021 email and the raising of a grievance, I saw and heard evidence that the claimant had attended at an appointment at the pain management clinic due to the pain that she was suffering. The claimant attended at the clinic on 10 September 2021 (see p.128). I accept that there was some delay in writing her grievance following this appointment. However, accept the evidence that this was, at least in part, due to the pain she was in.
22. The claimant was clearly suffering from pain, which was as a result of her disability. This is seen through the pain management that she was undertaking. None more so than through the medical interventions she was encountering: the medication that she was being prescribed (tramadol was prescribed from 10 September 2021), that the claimant paid for pain relief injections privately in May 2021, with further pain relief injections (not privately paid for) given in July 2021, which on both occasions only gave temporary pain relief, that in January 2022 the claimant had treatment in the form of a branch nerve block with further facet injections. I accept that the claimant had quite serious medical needs during the period in question. That pain, I accept, had an impact on the claimant's ability to commence proceedings. And this is significant factor, alongside the efforts made by the claimant to try to resolve her dispute internally.
23. The third factor, is probably the weaker of the three factors submitted on behalf of the claimant. This focusing on the claimant's knowledge of tribunal procedure. The claimant accepted in evidence that she was able to undertake research. She had access to her laptop at all time. She had access to her Trade Union Representative. She had a general understanding of discrimination protection and

of the right to take matters to tribunal. And these are understandings she has had for some time before her dispute. The claimant may well have misunderstood her position. I have no reason to doubt that, as it is easy to do if relying on general internet searches. However, a reasonable person with knowledge of a right not to be discriminated against, of the right to invoke tribunal proceedings, of the key incidents which give rise to potential complaints of discrimination and where they considered themselves to have been discriminated against, would be expected to go and find out about what they would need to do to invoke their rights. And it would be reasonable for the claimant to have done this from around 08 July 2021, given that on this date she herself identifies that she believes that she had been discriminated against (see p.100).

24. Given that the respondent knew of these issues through the internal process raised by the claimant. And there are written records of these matters. The cogency of the evidence is unlikely to have been effected by this delay.
25. The claimant acted relatively promptly in presenting her claim once she had contacted ACAS and was informed that limitation had passed, presenting her claim within 5 days of contacting ACAS.
26. A further factor considered is the balance of prejudice to the parties. There is nothing significant in terms of prejudice other than the standard prejudice to the respondent if time is extended in that they would have to defend a claim that was brought out of time, and that to the claimant in that they would not have their dispute determined if time was not extended.
27. Considering all the relevant circumstances, I consider that it would be just and equitable to extend time in respect of the disability discrimination complaints, which form part of a prima facie continuing act.

Age discrimination complaints- just and equitable to extend time?

28. Mr Wood's 3 reasons as to why it was just and equitable to extend time in respect of the disability discrimination complaints were equally made in respect of the age discrimination complaints. However, this has been separated out as my analysis differs in respect of this part of the claim.
29. The age discrimination differs from the disability discrimination claim above in three key respects. First, this part of the claim is brought some 6 and a half months out of date. Second, the claimant was not seeking to resolve this matter internally as she was doing with the disability discrimination complaint. And third, the medical interventions were not present to the same extent as that outlined above in respect of the disability discrimination complaint.
30. Although the claimant was going through a form of process, that being the capability process. She was not trying to resolve the age discrimination complaint internally during the primary limitation period for her age discrimination complaint, or in the period immediately after, and therefore this does not explain the reason why the claimant waited before bringing her age discrimination complaint.
31. The claimant, at paragraph 7 of her witness statement, and in her evidence before the tribunal, explained that the pain she was suffering reached the level of being so severe as to be debilitating from around July 2021. Although the claimant was diagnosed on 19 March 2021 with chronic regional pain syndrome affecting her left ankle, foot, and lower leg, bilateral sacroiliitis, lumbar muscle spasms, loss of lumbar lordosis, as well as "moderate psychological effects" (anxiety, frustration, sometimes depression) (see pages 117-123), there was no evidence brought to

suggest that this was such as to hinder or prevent her from submitting a claim with the tribunal. At its height, in May 2021, she did pay privately for a course of pain injections, there is nothing more after that. The evidence on pain during the primary limitation period for the age discrimination complaint and the short-term period after is somewhat limited. On balance, I therefore conclude that the pain she suffered or the side effects of pain would not explain the reason for delaying submitting her age discrimination complaint, at least for the period up until July 2021, when medical interventions appeared to increase to reflect the pain that the claimant was in.

32. The same observations are made as that above in respect of knowledge of tribunal process. She knew generally of discrimination protection and of her rights being protected before tribunals, had access to her Trade Union Representative, and was able to undertake internet research, it would be reasonable to expect the claimant to have looked into how to bring a claim much sooner, in circumstances where she considered herself to have been subjected to two ageist comments.
33. This is a longer delay, with no clear explanation to explain why bringing a claim was delayed. The cogency of the evidence is more likely to be impacted in respect of this claim, given that there was some delay in raising this issue.
34. The balance of prejudice in respect of the age discrimination complaint would weight against extending time.
35. The burden of proof in respect of establishing that it is just and equitable to extend time rests with the claimant. And the claimant has failed to satisfy that burden in respect of the age discrimination complaints. There was a significant delay in presenting the age discrimination claim. Attempts to resolve matters internally were not present at the time when the claim should have been presented, or a reasonable period after. Pain become a significant issue for the claimant, on her own evidence, some time after the expiration of the primary time limit. And the balance of prejudice weighs against extending time. In those circumstances it would not be just and equitable to extend time in respect of the age discrimination complaints. The tribunal does not have jurisdiction to hear it. And those parts of the claim are dismissed.

Employment Judge **Mark Butler**
Date __04 July 2022__

JUDGMENT SENT TO THE PARTIES ON

5 July 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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