Case Number: 2206345/21

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EMPLOYMENT TRIBUNALS

Claimant Mr. M. Alexander

Respondent **v** Imperial College Healthcare NHS Trust

PRELIMINARY HEARING

Heard at: **London Central (CVP)** **On: 13 December 2022**

Before: Employment Judge Goodman

Appearances For the Claimant: in person
For the Respondent: Katya Hosking, counsel

JUDGMENT

1. Claims for acts and omissions before 6 April 2021 are out of time.
2. It is not just and equitable to extend time.
3. They are therefore dismissed for want of jurisdiction. The remaining claims are those listed as 4h. and 5d, and 27, on the attached list of issues, namely discrimination or harassment in handling the April 2021 grievance. They will be decided at a final hearing on **3-5 July 2023**.

REASONS

1. This open preliminary hearing has been listed to decide:

   (1) whether on the claimant's pleaded case there was a continuing act in the period July 2020 to 6 April 2021

   (2) for any act that is out of time, whether it is just and equitable to extend time for all or any of the claimant's claims for discrimination and conduct extending over a period.

2. Claims of disability discrimination have been brought under sections 13,15, 20 and 26 of the Equality Act 2010, that is, direct discrimination because of disability, discrimination because of something arising from disability, failure to make reasonable adjustments for disability, and harassment related to disability. The respondent concedes that the claimant was at the material times disabled by reason of recurrent depressive disorder and anxiety.

3. The issues in this case have been discussed at a number of cases case management hearings. The list of issues has seen a number of iterations. At the last hearing, on 28 September 2022, Employment Judge Adkin allowed an amendment in respect of some matters, but did not allow amendment in respect of others. The claimant has made two applications for reconsideration of this decision. The first on 15 November 2022 has been refused, on the basis that reconsideration has no reasonable prospect of success. A further application made on 22 November 2022 has been referred to Employment Judge Adkin but not yet decided. The relevance of this is that one of the matters where reconsideration is outstanding is the refusal of an amendment to add a claim of breach of contract. As things stand, there is no breach of contract claim, and I therefore altered the most recent list of issues, prepared by the claimant for this hearing so as to incorporate the particulars of substantial disadvantage which E J Adkin had asked for, by deleting refence to breach of contract and merging the remaining elements of 27 and 28 on that list. I explained to the claimant that if his application to reconsider the addition of a breach of contract claim succeeds, the list can be altered again. The list is appended to this judgment.
4. As this a preliminary hearing, without oral evidence or all documents, I have to consider whether the claimant establishes a prima facie case of conduct extending over a period, that is, assuming that he will prove what is pleaded, whether that establishes a continuing course of conduct.
5. For this hearing I worked from the respondent's indexed bundle of 1,109 pages, a claimant's of 273 pages, the claimant's 10 page skeleton argument prepared early this morning, and a four page submission entitled "claimant's guidance of evidence to all parties for the preliminary hearing, on 13.12. 2022". Within these bundles I have particularly read the claim form and response, the claimant's witness statement of April 2022 (with a more recent copy annotated in red to refer to documents in the bundle), which the claimant says forms part of his pleaded case, the grievance and the grievance outcome, the medical report of consultant psychiatrist Dr R Sachdev following clinic review on 17 June 2020, and the claimant's submissions, dated 28 June 2022, for the hearing of the respondent's application to strike out his claim, which was decided by Employment Judge Adkin at September 2022 hearing. In today's hearing the claimant took me through the sequence of emails he received in May 2021 as part of a subject access request, as annotated by him, so that he could explain what he learned from the disclosure that he did not already know.

6. I heard oral submission from both parties. At the conclusion, judgment was reserved, and we moved on to case management, with alternative final hearing date set contingent on the outcome.

Summary of Events

7. The following summary is drawn from the pleadings and list of issues and supplemented from the documents.

8. The claimant was employed by the respondent as a trainee doctor F1 (foundation year one) on a one year fixed term contract from 7 August 2019. The term was

later extended to 6 April 2021, when he completed F1. He then left the Respondent Trust. For the F2 stage of his training he had a contract with Hillingdon Hospital, a different Trust within the North West London Deanery which was supervising his training.

9. The claimant had already experienced mental ill-health. It had taken him eight years to complete a six year medical degree at the University of Cambridge. Before he started at Imperial, he had an occupational health assessment with Dr B. Assoufi and some adjustments were agreed, namely regular meetings with his supervisor, and clinical placements near home so that he could continue to receive treatment and family support. The claimant was further assessed by Dr Assoufi on 13 September 2019, 14 January 2020 and 12 March 2020.

10. For training purposes, doctors rotate on four-month assignments to different specialties. The claimant's first rotation was in acute medicine. At the start of the first rotation, (under Dr Mitchell), he was to be supernumerary, before dealing with on calls. In the September report Dr Assoufi recommended extending this by at least three weeks. In fact it continued to the end of this rotation. Some concern was expressed about his time management of tasks assigned to him. In December 2019 at the start of his second rotation an incident involving a presumed MI caused concern and at a meeting the claimant was told there was a risk that he may have to restart F1 the following year.

11. By the end of his second rotation (under Dr Fertleman), in April 2020, he was told by the assessment committee that he had acquired insufficient experience to move on to F2 with the rest of his cohort in June 2020, when they completed their third rotation. The formal decision was made by the ARCP (Annual Review of Competency Progression) on 10 June 2020. The claimant wrote on 19 June explaining he had not signed off the ARCP form because he did not want it to be thought he agreed with it: he disputed the accuracy of Dr Fertleman's report on which the decision was largely based.

12. The claimant had a consultation with his treating psychiatrist, Dr R Sachdev, on 17 June 2020, because in recent weeks his medical state had been deteriorating. This deterioration was explicitly related to the bad news of April 2020, and reported his dissatisfaction with the level of supervision while he was F1, and "overt and subtle bullying". His depression had remained about level but his level of anxiety was heightened, and recommendations were made to his GP to adjust the medicines he was taking. The claimant was advised to continue seeing his psychotherapist.

13. He then did two more rotations, from August to November 2020, and from December 2020 to April 2021, when he completed F1, and as noted, moved on to F2 at a different Trust. The effect of being held back in April 2020 was to delay progression to the next stage, F2, by eight months.

14. In January 2021 the claimant wrote at length to Dr Parry, in charge of training, asking not to be given an orthopaedic placement, but also asking for Dr Fertleman's report to be edited or rewritten as it would prejudice future training if it remained on the file. In February 2021 he wrote again about his next placement.

This included a further critique of Dr Fertleman's report and asked for the June ARCP report to be edited.

15. On the day that he finished, 6 April 2021, he filed a 16 page written grievance about his training from August 2019 to April 2020. He expressed "concerns about Dr Colin Mitchell, Dr Susannah Long and Dr Michael Fertleman regarding heavily collectively written misleading reports, deviating from guidelines from the foundation curriculum along with occupational health reports and the guidance on supporting disabled learners". As an outcome he wanted an acknowledgement of wrongdoing, and for Dr Fertleman's April 2020 report to be rewritten. He accused Dr Fertleman of dishonesty in underreporting his progress. He referred to the incident in November 2019 of a presumed MI, that this had been deliberately engineered. Another F1 trainee who had made a mistake was treated more favourably. His clinical supervisors, Dr Long and Dr Mitchell, had misinformed (dishonestly, he said) Dr Parry, the foundation school director, that he was performing at the level of the "first year clinical medical student", when they had only told him that they didn't feel he was safe to work as an independent F1. There were other complaints about an SHO restricting him to discharge summaries and documenting ward rounds, and an extended section on insufficient feedback from supervisors. There was a section setting out the occupational health advice received during his F1 rotations, and how recommended adjustments to assist him to take on more responsible tasks were not made.

16. There was a grievance meeting on 7 May 2021 to discuss these concerns in detail. The claimant was told that the investigator would need to interview the other doctors and it might take a month.

17. The claimant had made a data subject access request. He saw these documents on 20 May 2021. They included reports gathered from those working with him, and they show concern that the claimant may not have been getting adequate feedback on the level of his performance because of sensitivity to criticism given his depression, and that as a consequence he had a "rose tinted" view. The claimant submits that these show there was evidence gathering to build a case against him.

18. The grievance outcome was delivered on 24 August 2021. It covers six pages. The claimant was given explanations of some of the matters causing concern about his safety with patients. He was also told that while occupational health doctors were concerned about his health, the training supervisors were concerned about patient safety when deciding the level of responsibility he should assume in his initial rotations. The claimant asked if he could appeal, but on 2 September 2021 was told an appeal was not available to those who are no longer employed by the Trust.

19. On 20 September 2021 he contacted ACAS, who issued a prompt early conciliation certificate, and later that day he presented this claim to the employment tribunal.

First Issue: Are Parts of the Claim Out of Time?

Relevant Law

20. The Equality Act provides at section 123(1) that proceedings must be brought within the period of 3 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.

21. Establishing "the date of the act to which the complaint relates" is not always straightforward. Section 123(3) provides:

    (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.

22. In **Hendricks v Metropolitan Police Commissioner (2003) IRLR 96**, it was held that the 'conduct' could concern the substance of the complaints that the respondent "was responsible for an ongoing situation or a continuing state of affairs" involving less favourable treatment, as distinct from "a succession of unconnected or isolated specific acts". This appeal arose from a hearing of a preliminary issue, without hearing evidence. The appeal court concluded she was "entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of the continuing discriminatory state of affairs covered by the concept of "an act extending over a period"."

23. The claimant submits that the grievance decision maker Dr Souriere supported Drs Mitchell, Long and Fertleman in their discriminatory conduct without giving evidence to justify this, and that this constitutes a continuing state of affairs.

24. The Court of Appeal considered how to approach a case on conduct extending over a period, where there were 17 complaints of race discrimination, in **Lyfar v Brighton and Sussex University Hospitals Trust (2006) EWCA Civ 1548**. The tribunal had grouped these complaints into four categories: an investigation of bullying and harassment, a disciplinary process, the actions of the general manager, and the hearing of the grievance. It was held admissible on a preliminary hearing to consider them separately when reasons were given for doing so.

25. The respondent submitted (in their response to the grounds of claim) that the conduct complained of splits into three categories: the actions of Dr Fertleman, from August 2019 to May 2020, the actions of Drs Long and Mitchell from August 2019 to May 2020, and the grievance process, which concluded on 23 August 2021. They added two more categories in their application letter of 28 June 2022, supporting an application to strike out the claim as having no reasonable prospect of success, namely the decisions of the ARCP panel in May/June 2020, and the provisions criteria or practices identified in the claim of failing to make reasonable adjustments. The surviving provision on the current list of issues is E: not allowing trainees to move to another firm (i.e. a different rotation).

Discussion and Conclusion

26. Working back three months from the claimant's approach to ACAS, acts occurring before 21 June 2021 are potentially out of time.

27. The respondent concedes that the grievance process can be treated as a course of conduct That process ended on a date within time, so in effect complaints that the grievance process which began on 6 April 2021 was discriminatory are all in time.

28. Of the earlier acts complained of, the complaints about Drs Long, Mitchell and Fertleman are of a state of affairs that ended in April 2020, when he was told he would not pass F1 with the rest of his cohort, or at the latest June 2020, when they completed their third rotation and passed F1 and he was formally assessed as not passing F1. There are no complaints about his treatment in the remaining rotations, from May 2020 to April 2021. There is no complaint about not editing Dr Fertleman's report before he lodged his grievance.

29. The claimant submits that these acts continue as a course of conduct because they delayed his completion of F1 from June 2020 to April 2021. Of this argument, the tribunal observes that an action must be distinguished from its continuing consequences. Dr Fertleman's report and the ARCP decision in June 2020 were decisions which had continuing consequences, but they were not continuing decisions.

30. In his argument for today the claimant also argues that failing to remediate the damage by rewriting Dr Fertlemans report establishes continuity of discriminatory conduct. Of the requests for the report to be rewritten, as noted this does not feature on the list of issues, but at this hearing the claimant has argued they are part of his claim relating to the grievance handling. This tribunal is sceptical that this can be the case, when the claimant has known from the filing of the employer's response that there was a dispute about time limits, and has had the opportunity to elaborate (and has elaborated) on the detail of his case in successive preliminary hearings. Nevertheless, the argument has been made, and the tribunal considers whether this establishes, if it were the pleaded case, a course of conduct on the part of the employer. His June 2020 protest and request for rewriting was not followed up. If the respondent's conduct in not acting on it is complained of, it is not reasonable to think that they did not make a decision not to respond until a date after April 2021. They might reasonably have been expected to decide not to reply within weeks, if not days, of the protest being made. The claimant had prompt replies on other matters he raised.

31. As for his January and February 2021 requests for rewriting, he did not try to turn the clock back, nor (as he stated explicitly in his letter) was he was asking for an investigation, and he said he was looking ahead to the F2 stage and whether the report might prejudice his future career. The respondent submits that decisions about the contents of the claimant's ARCP file were not being made by the same people as had written the reports he complains of as discriminatory, but by Dr Parry, Dr Lewis and Mr Kinross, to whom the January and February 2021 correspondence was addressed. This is a compelling point. There is no complaint

about them. It is not the same course of conduct as the unfairness that led to him not progressing to F2 in June 2020. If not rewriting at that stage was an action complained of as a discriminatory act, it was decided on in August 2021 when the grievance outcome letter was written, but it is not conduct which began before January 2021. The claimant may well have continued to resent the unfairness he perceived in Dr Fertleman's actions and the ARCP review based on it, but it cannot be said there was a continuing course of conduct on the part of the employer.

32. Finally on course of conduct the claimant submits that the unfair (as alleged) handling of his grievance is part of a single course of conduct, because the grievance investigator's decision was based on what she was told by the same doctors as he was complaining about, preferring that to the claimant's account, which she had explored in some detail. The respondent complains that this is raised for the first time today, but in any case submits this must be a different course of conduct, involving different people (Dr Soubiere, the investigator, Dr Brown, Assistant Medical Director who approved the report), to whom the claimant made no objection at the time, concerning events that occurred at least nine months earlier, and is a distinction of a kind permitted in **Lyfar.**

33. Reviewing these arguments the tribunal finds that the grievance handling process from April to August 2021, if discriminatory, is not part of the course of conduct that involved his first and second rotation supervisors and ended with the ARCP decision in June 2020. The alleged discriminators were different people. The decision had been made. It had been made 9-12 months earlier. Even if the correspondence of January and February 2021 was relevant factual background to the grievance handling complaint, it does not show links between the people responsible for the June 2020 decision and those being asked to get the report rewritten.

34. The outstanding complaint, of failing to make reasonable adjustments, is about not moving the claimant to another firm for rotation. This act (or failure to act) relates to the second training rotations from December 2019 to March 2020. It is very hard to see how that was part of a continuing course of conduct that ended with rejection of his grievance. It is not mentioned in his otherwise detailed grievance.

35. The tribunal concludes that complaints on the list of issues about matters occurring before 6 April 2020 are out of time.

Issue Two – Is it Just and Equitable to Extend Time? Relevant Law

36. On whether it is just and equitable to extend time, in **British Coal Corporation v Keeble (1997) IRLR 336**, it was suggested that employment tribunals would find the list of relevant factors in the Limitation Act 1980 illuminating. The list in section 33 of the Act is long. It includes the length of and reason for delay, the effect of delay on the cogency of the evidence, whether the defendant was uncooperative with reasonable requests for information, disability, any steps taken by a claimant

to get legal advice, and how promptly he acted when he knew the facts on which an action could be based. But in **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) EWCA Civ 640**, tribunals were told not to use **Keeble** as a comprehensive checklist but to focus on the length of delay and the reason for it, and any other factor that might be relevant to why the claim was late. **Ahmed v Ministry of Justice UKEAT/0390/14** explains: "It is for the Claimant to satisfy the Employment Tribunal that time should be extended. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be extended. The Employment Tribunal is required to consider all relevant circumstances including in particular the prejudice which each party will suffer as a result of granting or refusing an extension. Relevant matters will generally include what are known as the "Keeble" factors." In this, it restates the position enunciated in **Bexley Community Centre v Robertson (2003) EWCA Civ 576**, that there was no presumption in favour of extending time, and it was for the claimant to convince tribunals it is just and equitable to extend, and **Department of Constitutional Affairs v Jones (2008) IRLR 128.**

37. There are authorities discussing the weight to be given to the claimant following a grievance process when deciding whether it was just and equitable to extend time. In **Vodafone Ltd v Winfield UKEAT/0016/16/J0J**, it was held that it was not an error of law to take into account the grievance, and that "the weight to be given to the fact that a grievance process is being followed will vary from case to case". In **Wells Cathedral v Souter and Leishman EA – 2020 – 000801 – JOJ**, where the claimant delaying so as to pursue a grievance process was one of a number of factors which led the tribunal to decide that time should be extended, it was noted that she had explicitly said that she preferred to explore this in order to avoid legal action, and also that the grievances served to crystallise the allegations and put the respondents on notice that the claimants considered that the treatment had been discriminatory, that they had received advice, had contemplated proceedings and were pursuing internal procedures first. It gave respondents "the opportunity to take steps to investigate and preserve evidence around the allegations". It was held that the weight the tribunal had attached to this factor, ranged along with the others was part of "a fact sensitive appraisal of the particular facts of this case".

Discussion and Conclusion

38. The claimant submits that the tribunal should take account of a number of factors and conclude it is just to extend time. These are discussed in turn.

39. His mental health suffered a relapse in May and June 2020. The medical evidence indicates a downturn, met by increasing his medication. He was able to work his remaining rotations from August 2020 to April 2021 however. This is a factor, but it was temporary, not long lasting.

40. There was a further relapse at the end of May 2021, when he saw the documents in the subject access request. The medical reports are referred to in the submissions but are not in the bundles. This is probably of little weight in deciding whether time should be extended from September 2020 (three months after he got the ARCP report).

41. He (and all other doctors) were very busy during the pandemic, which began in March 2020, eased a little in autumn 2020, increased in December 2020 and into early 2021, and so on. Against this, as a measure of available time and energy during this period, he was able to write long and detailed letters in January and February 2021. So it may well have been a factor, but not disabling. It does not indicate he could not have submitted a claim in September or August 2020, when case numbers seemed to be coming down.

42. He did not want to pursue a claim because it would occupy the time of busy doctors and might cause them to be suspended when there was a national need for their services. He was asked if he meant he was contemplating a claim but decided to hold off for this reason. He answered that he had consulted the BMA, his trade union, about a claim, around May 2021.

43. The case should be allowed to proceed because it was an important case about doctor training. (This does not explain the delay in bringing it).

44. He wanted to settle the matter internally, because if he brought a claim at a time when he still needed the respondent to write him references, he would come across as aggressive and jeopardise his ongoing training. For that reason he wanted to conclude the grievance before presenting a claim. There was no explanation why he delayed presenting the grievance.

45. The respondent had concealed the extent of the discrimination, which was revealed to him only when he saw the emails on May 2021. It is however noted that he already considered there was discrimination when he protested about the ARCP report in June 2020, and had articulated detailed concerns, including discrimination, in the April 2021 grievance. There was no indication that when he prepared this he had any more material or facts available than he did in June 2020. Having read and heard the claimant on these emails, the tribunal concludes they were additional evidence supporting his preliminary view that his treatment was unfair and discriminatory, but did not tell him much more about why he had not passed.

46. The respondent had concealed from or misled him as to the fact that he could not appeal the grievance outcome – he had believed that as he was still an employee when he sent it, he was entitled to an appeal as an employee. Further, by saying an outcome was expected in a month (i.e. mid-June) he had been induced to delay his tribunal claim until he had an outcome. This does not help explain why he did not present a claim before April 2021. It was not suggested he was unaware there was a grievance procedure or that this had been concealed from him.

47. The respondent submits that they are prejudiced by having to defend old claims in that four of the junior doctors who wrote reports on the claimant's progress during rotations (Danishmend, Radia, Elhan and Phillips) are no longer employed by them and so it could be difficult to obtain statements and call them as witnesses. The principal witnesses are available. The tribunal notes that the issues were discussed a year to eighteen months after they happened, in the course of the grievance investigation, although the claimant suggests in his written submission that the

notes of these meetings have not been disclosed and may no longer be available. The respondent was thus already having to deal with matters that happened over a year earlier so the evidence was stale. On a different point, the grievance process (whatever documents are now available) may not help the respondent in defending the detail if the claimant is able to prove his assertion that the grievance was not properly investigated at all, and simply accepted his supervisors' views, so it could not be said that the prejudice of delay is mitigated by having crystallised the issues closer to the time.

48. More generally the tribunal notes that the claimant is intelligent and literate and at least from the start of his employment had some knowledge of adjustments for disability, which suggests he knew where to start any research on making claims As a BMA member he had access to advice apart from his own research. Many of his points do not explain the delay from June 2020 to April 2021. The weight to be attached to wanting to pursue a grievance first to avoid litigation is less because he did not even pursue a grievance for 9 months. It does not explain why he delayed internal resolution. He knew all the relevant facts – and was protesting the unfairness - in June 2020, and has not shown what else occurred in the interval to reinforce his view that he should lodge a grievance as an alternative to making a claim.

49. Some weight has to be attached to the conditions of the pandemic. By all accounts junior hospital doctors were very busy because of patient numbers or staff illness, and that will have reduced the time and energy available to write a grievance or a claim form. Against that, conditions fluctuated over the relevant period, and he was able to prepare long and complex letters on the subject.

50. A reason he has not advanced is that he did not want to lodge a grievance until he knew he had passed F1. Of course many employees hesitate to pursue grievances if they think it make the workplace more unpleasant or jeopardise goodwill, but if this were a reason worthy of weight when considering whether to extend time, very many discrimination claims would be brought out of time, when the statute and case law are clear that claims are to be resolved sooner rather than later, hence the short time limit.

51. Gathering these factors together, the tribunal concludes that they are of insufficient weight, given the length of delay, and particularly that the delay between June 2020 and April 2021 is largely unexplained, to displace the prejudice caused to the respondent in defending old claims, or the principle that claims should be brought within the times set by statute. It is not just and equitable to extend time.

Employment Judge Goodman

Case Number: 2206345/21

Date: 14 December 2022

JUDGMENT and REASONS SENT to the PARTIES ON

14/12/2022

FOR THE TRIBUNAL OFFICE