



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Ms A Lingham

Respondent: NHS Devon Integrated Care Board

Heard at: Exeter (remotely by VHS) **On:** 11 January 2023

Before: Employment Judge Halliday

Representation:

Claimant: In person

Respondent: Ms Chute, of counsel

RESERVED JUDGMENT

1. The judgment of the tribunal is that the claimant was not a disabled person at the material times under the Equality Act 2010 by reason of her anxiety from 22 June 2021 to 9 January 2022 and the claimant's claim for disability discrimination cannot proceed and is therefore dismissed.
2. The claimant's claim for sex discrimination (harassment) was issued outside the time limit (including early conciliation extension) for such claims under section 123 of the Equality Act 2010 but the judgment of the Tribunal is that it is just and equitable to extend time in all the circumstances and the claimant's claim for sex discrimination (harassment) can therefore proceed.

REASONS

Background, Issues and Proceedings to date

1. The respondent is the organisation responsible for planning, commissioning and developing healthcare services in Devon. The claimant was employed by the respondent from 22 June 2021, until she resigned from her employment with the respondent with effect from 9 January 2022.
2. By a claim form dated 8 February 2022, the claimant brought complaints of discrimination on the grounds of both sex and disability.
3. A case management hearing was held on 20 October 2022. At this hearing it was agreed that the disability relied on by the claimant is anxiety and the claimant's claim for disability discrimination was a claim for discrimination arising from disability under s15 Equality Act 2010 (EqA). It was further agreed that the claimant's claim for sex discrimination was a claim for harassment related to sex under s26 EqA and that the claimant was pursuing a claim for victimisation under s27 EqA.
4. The claim was listed for an open preliminary hearing to determine the following preliminary issues:
 - 4.1. Whether or not the claimant was disabled at the relevant time subject to section 6 of the Equality Act 2010 by reason of her anxiety. This requires the Tribunal to determine whether the claimant suffered from a physical or mental impairment which at that time had a substantial adverse effect on her ability to undertake day to day activities, which has lasted or was likely to last over 12 months or recur.
 - 4.2. Whether or not the harassment and victimisation complaints were made within the time limit in section 123 of the Equality Act 2010 and if not, was there conduct extending over a period of time, and if not, were the claims made within a further period that the tribunal thinks is just and equitable.
5. During the hearing, the respondent conceded that the claimant's claim for victimisation was made in time and that what was said to Marianna Brojevic-Gray on 27 October 2021 was a protected act.
6. The claimant contends that the respondent was aware that she suffered from anxiety from 20 October 2021 and ought to have been aware that she was unwell earlier due to her poor performance in her role, which was not in line with her references from previous employment. She asserts that this satisfies the statutory test under s6 EqA.
7. The respondent accepts that the claimant was increasingly feeling anxious and that it was expressly told this by the claimant on or around 20/21/22 October 2021 but contends that there is no medical evidence to support the

claimant's contention that this was a mental impairment that satisfies the statutory test, rather that the claimant experienced a short period of work-related stress potentially contributed to by menopausal symptoms and that at the relevant time the conditions did not have a "substantial and long-term" adverse effect on the claimant's ability to undertake normal day to day activities.

8. The respondent contends that the relevant time is the period from 25 October 2021 (in reliance on paragraph 89 of the claimant's witness statement in which she states: "*I believe this was the date that my mental health deteriorated to a point that I could not work and was a disability*") until 9 January 2022 when the claimant's employment with the respondent ended.
9. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Video Hearing Service. A face to face hearing was not held because all issues could be determined in a remote hearing.
10. The documents that I was referred to by the parties are in a bundle of 343 pages. At the start of the hearing the parties were informed that I would only look at those documents to which I was referred although I had reviewed the pleadings, the witness statements, the impact statements prepared by the claimant and the medical evidence prior to the commencement of the hearing. I heard evidence from the claimant and from Ms Tribble, Deputy HR Director at the respondent at the time of the claimant's employment, who had each submitted a witness statement. I also heard from and reviewed written submissions by counsel for the respondent, Ms Chute, and heard submissions from the claimant. The parties both focussed in their evidence on the disability issue. The Acas certificate was not included in the agreed bundle but was available to me on the court file and taken into account in reaching this decision.
11. The start of the hearing was significantly delayed due to connection issues on the part of the respondent's legal representatives and judgment was therefore reserved.
12. Having heard the oral evidence and reviewed the relevant documents to which I was referred by the parties, I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts/Chronology

13. The claimant started work with the respondent on 22 June 2020 as an Executive Assistant in the Corporate Office.

14. When she started work the claimant had no health issues.
15. The claimant's line manager was Mr Nicholas Pearson, Chief of Staff. It was expected by both parties that the claimant would require some additional support as she settled into her new role which was a demanding one in a busy office.
16. On 5 August 2021, the claimant attended an annual appraisal in which it was recorded that there were no changes to her health or personal circumstances and her performance was satisfactory.
17. On 6 August 2021 the claimant broke up with her partner and shortly afterwards she had a significant health concern.
18. On or around 18 August 2021, a comment was made by Mr Pearson on a Teams call referring to the temperature in the room in which the claimant was working. I make no findings as to the actual words said on that occasion or whether it constituted harassment, but the parties agree that a comment was made which the claimant felt was inappropriate and on which she relies in support of her claim that she was subjected to harassment related to sex or in the alternative that the comment was of a sexual nature.
19. She did not raise any concerns about the comment at that time.
20. In the list of issues, the claimant referred to another comment which she overheard her line manager making to a colleague. In this hearing she confirmed that she did not wish to rely on this comment as a further act of harassment.
21. By 8 September 2021, Mr Pearson felt that the claimant was not yet performing at the level required and prepared to address the perceived performance issues at the claimant's probationary review meeting.
22. The claimant alleges that her poor performance was at least in part due to the anxiety caused to her by having Mr Pearson as her line manager which arose both because of the comment made about the temperature in her room, (which the claimant alleges constitutes sexual harassment) and due to his management style. The claimant's personal issues were also on-going.
23. The claimant had requested compressed hours and it had been agreed that she could work 37.5 hours over 4 days. Colleagues working in the Corporate Office were then on overlapping periods of annual leave between 24 September 2021 and 15 October 2021, which left the claimant working on her own for one week, and with only one colleague on either side of that week. During this period, the claimant asserts that she worked extended hours.

24. The probationary review meeting was (after some delay) scheduled for 22 October 2022.
25. On 20 October 2022 following a distressing announcement about the suicide of a former colleague, the claimant spoke to Emma Hayes, a mental health aider, and then e-mailed Mr Pearson referring to the update and stating that she had *“spoken to someone because I have had a few alarm bells recently”*, and referring to the fact that *“she felt her confidence had gone down and down to a point where [she] barely [had] any”* and that it *“had started to affect her sleep”* and that she felt *“quite anxious”*.
26. This was the first time that the claimant had expressly raised the fact that she was feeling anxious with the respondent.
27. The probation review meeting was held on 22 October 2021 and the claimant was given feedback on her performance including some identified areas for improvement. The claimant was upset by the feedback and the meeting was adjourned. The claimant was off sick with anxiety on the 25 October 2021 and returned on the 26 October 2021 when the probationary review meeting was resumed and concluded.
28. The claimant’s evidence as set out in her witness statement is that it was at this point that her mental health deteriorated to a point where she could not work and was a disability.
29. As a consequence of the review meeting, the claimant was offered counselling support via the Employee Assistance Program, was referred to occupational health and as an alternative to remaining in the Executive Office was offered an alternative temporary role in the “Winter Room” initially as a loggist. I accept Ms Tribble’s evidence that the respondent made this offer on the basis that they understood the cause of the claimant’s stress to be her relationship with Mr Pearson and the unsatisfactory probationary review.
30. The claimant having referred to “sexist comments” in a confidential call to the advice line on 22 October 2021, then raised the comment made by Mr Pearson, in a conversation with Ms Borojevic-Gray (HR Manager) on or around the 27 October 2021. Ms Borojevic-Gray suggested that the claimant raised the issue with Ms Tribble which she did on 1 November 2021 when Ms Tribble returned from holiday. Ms Tribble asked the claimant if she wished to raise a grievance about the comment and the claimant confirmed she did not and that she was speaking to a Freedom to Speak Up Guardian.
31. The claimant started in the alternative role in the Winter Room on 1 November 2021, initially as a loggist and then as an administrator.

32. I find that initially there were no indications that the claimant continued to suffer from anxiety in her new role. This was confirmed in her email to Emma Hayes of 2 November 2021 in which she stated, " *I feel like a huge weight has been lifted almost instantly. I feel that I am starting to see my old self reappearing*". The claimant states that the role of administrator was more stressful than that of a loggist, but I accept Ms Tribble's evidence that the claimant made no reference to any on-going health issues linked to her anxiety when she spoke to her during this period on 16 November 2021 and 19 November 2021.
33. In an email dated 19 November 2021 Ms Tribble set out the claimant's options both in relation to remaining in the seconded position or returning to her role in the Corporate Office and also in relation to the options available to her to pursue her concerns about working culture/style in line with the Fair Treatment policy.
34. On 22 November 2021, the claimant attended an occupational health review meeting following the referral by Mr Pearson dated 22 October 2021 (but made on or around 26 October 2021). The report refers to the claimant's self-reported issues with her line manager which it states were impacting on her overall well-being and concluded that there were no underlying medical conditions; that she had no prior history of mental health issues and on the day of assessment that her mental health was stable. The report stated that applicability of the Equality Act 2010 was ultimately a legal not a medical one but in the opinion of the examining doctor, Dr Deen, the claimant did not have an underlying medical condition that affected her ability to undertake day to day activities at that time.
35. On 2 December 2021 the claimant formalised her concerns with regards to Mr Pearson via a Freedom to Speak Up Guardian, Alastair Harlow. On the same day the claimant was notified that her secondment to the Winter Room was ending due to performance concerns and due to the use of a third party provider, Prism. A meeting was scheduled to take place between the claimant and Mr Andrew Millward on 9 December 2021.
36. The claimant reverted to working in the Corporate Office in the week commencing 6 December 2022.
37. The claimant was then absent from work with tension headaches from Tuesday 7 December 2021 to Friday 10 December 2021. She returned to work on 14 December 2021. She attended a meeting to discuss her grievance on 21 December 2021 and the claimant states in her ET1 that it was agreed in that meeting that a formal investigation into her grievance would take place in line with the respondent's Fair Treatment Policy. No evidence was submitted by either party as to how the grievance was then progressed.

38. On 22 December 2021 the claimant spoke with her GP. The medical record records a conversation about menopausal symptoms. Relevant parts of the note state: "Low mood and anxiety. Very work related. Work very stressful and boss bullying her. Has new job starting on 10 Jan." The follow-up actions related to considering HRT.
39. The claimant was not on any medication for her anxiety whilst she worked for the respondent.
40. The claimant was then absent due to work related stress until her employment terminated on 9 January 2022 by reason of her resignation.
41. In or around late December 2021 the claimant concluded that her concerns could not be resolved internally, and she contacted the EHRC who advised her to speak to ACAS. The claimant was not able to recall the dates of these conversations.
42. On 7 January 2022, the claimant lodged her early conciliation notification, and the certificate was issued on 21 January 2021. The claimant presented her claim on 8 February 2022.

Relevant Law

43. Having established the above facts, I now apply the law.

Disability

44. The claimant alleges discrimination because of her disabilities under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant's claim for disability discrimination is a claim for discrimination arising from disability under s15 Equality Act 2010 (EqA).
45. Section 6 and schedule 1 of the EqA which provides that a person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial (section 212 EqA), and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.
46. Schedule 1 par 2(2) EqA provides that "*if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur*".

47. Likely should be interpreted as meaning “it could well happen” rather than it is more probable than not that it will happen (*SCA Packaging Limited v Boyle (2009) ICR 1056*).
48. The burden of proof is on the claimant to show that she is a disabled person in accordance with that definition.
49. I am also mindful of the “*Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (Guidance) and the Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2015) and specifically Appendix 1(Code)*.”
50. The meaning of “*normal Day-to-day activities*” is not set out in statute but helpful guidance is included in both the Guidance and the Code. Paragraph D3 of the Guidance states that: In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities,
51. The Code states that day to day activities include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one’s self. Normal day-to-day activities also encompass the activities which are relevant to working life.
52. The material time for considering whether the impairment had (or was likely to have) a long term effect is the date of the alleged discriminatory act (*All Answers Ltd v W [2021] EWCA Civ 606, CA*) and events occurring after the date of the alleged discriminatory act should not be taken into account in considering if the effect of the impairment was long term.

Out of Time

53. The claimant is also bringing a claim for harassment relating to sex under section 26 EqA. Section 120 of the EqA confers jurisdiction on such claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

54. A prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings and there are statutory provisions which provide that the three month time limit is extended to allow for early conciliation in relation to discrimination claims and allowing a claimant at least one month to submit a claim after the end of the early conciliation period.
55. I have considered the following cases, namely: *British Coal v Keeble* [1997] IRLR 336 EAT; *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640; *Robertson v Bexley Community Service* [2003] IRLR 434 CA; *Department of Constitutional Affairs v Jones* [2008] IRLR 128 EAT; *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 CA; *London Borough of Southwark v Afolabi* [2003] IRLR 220 CA; *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23;
56. I take the cases referred to above as guidance, and not in substitution for the provisions of the relevant statutes.

Decision

Disability

57. Applying the above principles, I consider whether the claimant's anxiety satisfies the statutory test of a disability.
58. The respondent accepts that the claimant suffered from a degree of anxiety but submits that there is no evidence from her medical or counselling notes that this constitutes a mental impairment. Conversely the respondent submits that there is evidence which suggests that it does not constitute an impairment and relies on: the claimant's OH assessment before she joined the respondent, the annual appraisal held on 5 August 2021; the statement by the claimant that her disability crystallised on 26 October 2021; the conversations with the claimant in November 2021 after she had moved to the Winter Room where no mention of an on-going health issue was made; the OH report of 22 November 2021; and the GP notes which refer to work related stress. The respondent further submits that the condition had not lasted for 12 months at the relevant time (between 26 October 2021 and 9 January 2022), nor was it reasonable to conclude that it was likely to last for 12 months, or to recur, given that it was linked to the claimant's specific concerns with Mr Pearson which were addressed firstly by her secondment to the Winter Room and then by her resignation.
59. The claimant states that her anxiety constitutes a disability and relies on the length of time it has continued and the impact it has had on her both in her

private and work life. However, much of the evidence she gave related to the period after she had left her employment and the “thrust” of her evidence in relation to the period she was employed by the respondent related to her contention that the respondent had failed in their duty of care to her in: (i) initially not concluding that her poor performance was potentially related to her health given her excellent performance in previous roles, and (ii) after her secondment ended, that she was returned at short notice to the Corporate Office and that this caused her anxiety. Her contention that her anxiety was caused by the respondent’s treatment of her is not relevant to the specific issue before the Tribunal today as to whether she was disabled at the time of her employment with the respondent.

60. I am mindful of the fact the burden of proof is on the claimant to show that she is disabled in accordance with the statutory definition and conclude that she does not satisfy the statutory definition of disability for the following reasons.
61. The claimant presented no medical evidence that supported her contention that she suffered from a mental impairment at the time of her employment with the respondent.
62. The evidence I have heard supports the fact that from on or around mid-August the claimant was struggling to cope with a new role and her line manager and that this together with some personal issues resulted in her beginning to feel anxious.
63. The claimant states herself that her symptoms developed gradually, and she did not believe they impacted on her significantly until after her probationary review meeting on 22 October 2021. This review identified a number of areas for improvement, and I conclude that this did cause the claimant some anxiety. This was recognised by the respondent who offered her the opportunity to move into a different role in the Winer Room.
64. There is no evidence of any further health concerns during November 2021 as evidenced by the claimant’s positive email to Ms Hayes, the claimant’s telephone conversations with Ms Tribble and her occupational health assessment on 22 November 2021.
65. The claimant became unwell again with tension headaches after she was required to return to her previous role in the Corporate Office in week commencing 6 December 2021. She resigned shortly afterwards and left the respondent’s employment on 9 January 2022 after having been absent from work from Tuesday 7 December 2021 to Friday 10 December 2021 and from 22 December 2021 until her employment terminated.

66. I therefore conclude that at this time, the claimant's anxiety arose because of her role in the Corporate Office working for Mr Pearson and there was no underlying condition that constituted a mental impairment.
67. Further and in any event, I conclude that at that time, the condition had not lasted for 12 months, nor was it likely to do so, nor was it likely to recur, (applying the test in *SCA Packaging* that this means "*it could well happen*") as it could reasonably be expected that once she was no longer in that role and working with Mr Pearson, the claimant would feel better, as she had in the Winter Room role during November 2021.
68. Further and in any event, I am not able to determine on the evidence before me that there was an adverse impact on the claimant's ability to undertake day to day activities during her employment with the respondent. The claimant's impact statement does not consistently differentiate between current and historic symptoms and the evidence presented at the hearing suggested that the claimant's symptoms worsened after she left the respondent's employment. Whilst relevant activities can include general work requirements as confirmed in both the Code and the Guidance, I conclude that her anxiety was caused at least in part by the identified performance issues and being line managed by Mr Pearson as well as the personal issues she was facing, and I do not find that her anxiety caused the performance issues identified. I therefore conclude that the claimant's anxiety did not in any event have an adverse impact on her ability to carry out normal day-to-day activities at the relevant time.
69. In summary, I conclude that the claimant was not disabled and her claim for disability discrimination is dismissed.

Out of Time

70. In this case there is one act of harassment relied on by the claimant, which is the comment made on or around 18 August 2021 by Mr Pearson to the claimant. The three month time limit therefore expired at midnight on 17 November 2021. The claimant contacted ACAS on 7 January 2022, the certificate was issued on 21 January 2022 and the claim issued on 8 February 2022.
71. The claimant having failed to contact ACAS within three months of the discriminatory act relied on, I need to decide if it would be just and equitable to extend the time limit for bringing these claims. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that she raised the issues internally on 27 October 2021 shortly before she moved to the alternative role in the Winter Room and that she hoped to resolve the situation internally. She therefore did not explore a legal remedy and did not know that there was a three month time limit to bring a

harassment claim. She went to ACAS on the advice of the EHRC once she felt the matters could not be resolved internally.

72. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the *Keeble* decision. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
73. I note however, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion (*Aedejl* and *Abertawe*). I have therefore assessed all the factors which I consider relevant in reaching my decision as to whether it is just and equitable to extend time including, in particular, the length and reason for the delay and whether the delay has prejudiced the respondent.
74. *Robertson v Bexley Community Service* is authority for the principle that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard. See also *Department of Constitutional Affairs v Jones and Chief Constable of Lincolnshire Police v Caston* and *Abertawe* sets out the expectation that a claimant is required to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
75. However, As Sedley LJ stated in *Chief Constable of Lincolnshire Police v Caston* at paragraphs 31 and 32: “*In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.*”
76. In this case the claimant is unrepresented, and I have concluded that she suffered from anxiety (albeit that her anxiety did not satisfy the statutory test for disability). The incident of harassment relied on was a discrete incident that is not related to her disability claim but was very much intertwined with

her more general concerns about Mr Pearson's line management and the impact she alleges this was having on her performance which ultimately led to her resignation. I am also mindful of the fact that the victimisation claim, which is proceeding, concerns the same incident. The claimant did raise her concerns about the incident via the Freedom to Speak Up Guardian on 2 December 2021 following a series of conversations which started on 22 October 2021. She says that the reason why she did not establish the correct position in relation to time limits for her harassment claim was that she wanted to resolve the matter internally. I was provided with no further evidence about this process. The claimant indicated that she took advice from the EHRC, and it was only at this stage that she contacted ACAS on 7 January 2022 on their advice, at the point that she was leaving her employment with the respondent and just before she started her new role.

77. In relation to the delay in issuing proceedings once the ACAS certificate was issued on 21 January 2022, the claimant stated that she had started a new job, was still not sleeping and couldn't remember if she knew at that time that there was a relevant time limit for a specific incident of harassment. I note that the scope of her harassment claim had not been narrowed to the one incident at this time and that both her victimisation and disability claims were issued in time.
78. I have accepted that the claimant complied with the relevant time limits in relation to her other claims and that the reason why she did not establish the correct position in relation to her harassment claim sooner was that she wanted to resolve the matter internally. I conclude that she acted promptly to contact ACAS once she received advice from the EHRC to do so. In relation to the period after the certificate was issued, she issued her claim within 18 days of the certificate, and I do not find this to be an unreasonable delay given that she did not recall being aware of a separate time limit for the harassment claim and the fact that she had started a new role whilst still suffering from anxiety. I am satisfied that the respondent is not prejudiced in this case as ACAS was contacted whilst the claimant was still employed, and the incident of 18 August 2021 was the subject of the complaint of 2 December 2021 and was therefore either still being investigated or had only just been investigated. There was no delay such as would prejudice a fair trial of this one-off issue which is further linked to the on-going victimisation claim. I therefore conclude that it would be just and equitable to extend the time for submission of her claim until 8 February 2021. I therefore conclude that the claimant's claim for harassment is in time and should be allowed to proceed to final hearing.

Case Number: 1400540/2022

Employment Judge K Halliday
Dated 5 February 2023

Judgment sent to Parties on
20 February 2023 By Mr J McCormick

For the Tribunal Office