Case Number: 2303422/2021
2303647/2021
2300917/2022

THE EMPLOYMENT TRIBUNAL

Sitting at: London South

Before: Employment Judge Morton

BETWEEN:

Claimant: Mr Kwasi-Tin Adjei

AND

First Respondent FedEx Express UK Transportation Limited
Second Respondent Ryan Bennett

On: 20 February 2023

Appearances:

For the Claimant: In person, with Ms N Whitfiled, Twi Interpreter
For the Respondents: Mr C Adjei, Counsel

Judgment

1. The Claimant's claims of:
    a. disability discrimination under ss13,15 and 20-21 Equality Act 2010 ("Equality Act"), harassment related to disability under s26 and victimisation related to the protected characteristic of race under s27; and
    b. whistleblowing detriment under s47B Employment Rights Act 1996 ("ERA") have potentially and in part been brought outside the relevant statutory time limits.
2. It is too soon to determine whether the matters complained of are capable of amounting to an act extending over a period within the meaning of s123(3) Equality Act or a series of similar acts or failures or act extending over a period within the meaning of s48(3) and (4) ERA.
3. The claims should therefore be considered at a full merits hearing.
4. The Claimant is permitted to amend his first and second claims to include a

complaint of disability discrimination.

Reasons

Introduction and background to the hearing

1. The claimant has been employed by the First Respondent (referred to from now on this judgment as 'the Respondent') since 2017 and remains in the Respondent's employment.

2. The Claimant has brought three separate claims against the Respondent on 16 August 2021 (2303422/2021), 6 September 2021 (2303647/2021) and 9th March 2022 (2300917/2022). I refer to these as Claims 1, 2 and 3.

3. There have now been four separate case management hearings in the case as a result of which some of the original claims have been withdrawn and the claims have been consolidated. I understand that the Claimant has now brought a fourth claim, but no order has been made for that claim to be consolidated and I do not refer to it again in these reasons. As a result of the previous management of the case by EJ Burge the claims and the issues in the case had been clarified. The claims being now brought by the Claimant are claims of disability discrimination under ss13,15 and 20-21 Equality Act, harassment related to disability under s26 and victimisation related to the protected characteristic of race under s27. He also brings a claim of whistleblowing detriment under s47B ERA.

4. This one day open preliminary hearing was listed by order of EJ Corrigan on 16 September 2022 for the purpose of determining whether any of the claims that the Claimant has brought are out of time and if so whether time should be extended under the relevant statutory tests.

5. The claimant had prepared a witness statement addressing the issues for the hearing and I was provided with a bundle of documents. Any page numbers in these reasons are references to page numbers in that bundle.

6. The hearing was conducted by CVP, and I was satisfied that both participants could see and hear clearly and were able to fully participate in the hearing. The Claimant was assisted by a Twi Interpreter, Ms N Whitfield. Her participation in the hearing was limited, but the Claimant did seek her assistance from time to time. He has a very good command of the English language, but I considered that it assisted him to participate effectively in the hearing to have Ms Whitfield's assistance.

7. The Claimant suffers from anxiety, and I provided the Claimant with breaks from time to time and arranged that the Respondent would make its submissions in sections so that the Claimant could address each part of the submissions in turn. The Respondent did not wish to cross examine the Claimant and I asked him questions in order to clarify what he wished to say in response to the Respondent's submissions.

8. For the avoidance of confusion, I refer to the Respondent's representative in these reasons as 'Counsel Adjei', as I did during the hearing.

The issues for the hearing

9. The sole issue I needed to deal with at the hearing was whether the claims had been brought within the relevant statutory time limits and if not whether time should be extended according to the relevant statutory test and applicable guidance from the case law. I set out those tests later in these reasons. The time issues had been set out in EJ Burge's case management orders (page 167D) as follows:

Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before may not have been brought in time.

22.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

22.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

22.2.2 If not, was there conduct extending over a period?

22.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

22.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

22.2.4.1 Why were the complaints not made to the Tribunal in time?

22.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

22.3 Was the protected disclosure complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

22.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

22.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

22.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

22.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Findings relevant to the time issue

10. The remainder of the issues in the case as identified by EJ Burge on 22 June 2022 were set out on pages 167E-N in numbered paragraphs. I considered the time question as it applied to each of those issues.

11. The dates on which the Claimant commenced ACAS early conciliation were 14th June 2021, 21st July 2021 and 8 February 2022 respectively. Accordingly, any matters arising prior to 15 March 2021, 22 April 2021 and 29 November 2021 fall outside the relevant statutory time limits unless time is extended. The bundle did not contain a full set of ACAS certificates, but there was at least one certificate relevant to each of the three claims. As regards Claim 1, I have taken the date on which the Claimant approached ACAS to be 14 June 2021 (page 331) and consider that that should be the date on which I base my decision. As a result of a confusion over postcodes, there was a later ACAS certificate issued in respect of Claim 1, and the claim itself was presented after the second ACAS certificate was issued and in reliance on that certificate. For the purposes of his hearing however I treated the Claimant as having first engaged with ACAS on 14 June 2021.

12. The Claimant presented his case at the hearing primarily by means of a detailed witness statement. This was a coherent document that set his complaints out chronologically. There were some issues with his approach however because in at times it appeared that he was extending his case beyond the issues been agreed in the case management hearing with EJ Burge. I have confined this decision to the issues already identified and nothing in these reasons should be understood by the Claimant as a reason to expand his claim beyond those issues. The Claimant said that he had had some advice in preparing his statement, which seems clear from the references it contains to the legal principles that a tribunal will apply in dealing with the question of whether claims are out of time. Because of the way that the Claimant has put his claims forward it also became clear to me during the hearing that I might also need to deal with the question of whether the Claimant should be allowed to amend his claim. I come back to that later in these reasons.

13. By and large the Respondent's submissions on time were detailed and forensic – Counsel Adjei took me through the list of issues starting on page 167D item by item. His starting position was that the majority of the claims were out of time as they related to matters that occurred prior to the three dates I have identified in paragraph 2. The Claimant's case is that he is dealing with a state of affairs that is "ongoing" and that the matters he is relying on form part of a continuing act or state of affairs.

14. I considered the chronology of events as they had been presented to me, relying primarily on the witness statement the Claimant had provided for the hearing and conscious of the fact that any chronology I created would not be based on fully tested evidence and should not therefore be relied on in any future hearing of the merits of the case. The broad chronology suggested however was as follows:

    a. The Claimant was first employed as a loading bay operative but from September 2017 was deployed to an enhanced security programme (ESP) role in Dartford. From June 2018 he was sent on secondment to work for FedEx Express Central Europe. During that secondment he raised certain health and safety issues in July 2019 and in September 2019 he escalated these to management.

b. His secondment ended in June 2020 and he returned to the ESP role in Dartford. He complains that thereafter there was an "ongoing" failure to develop him allow his career to progress or to allocate work to him for which his skills and aptitudes made him suitable. He refers to a comment made to him by Matthew Walsom in May 2020 to the effect that "people like you drive fork-lift in the warehouse as personal development" as evidence that he was being held back by his manager's attitude towards him.
c. He says that the situation made him feel anxious and mentally unwell. He raised a grievance about the way in which he was being treated in September 2020. He says he delayed in raising the grievance because he was advised not to take steps that would exacerbate his anxiety. I will pause here to mention the medical information that the Claimant provided at the hearing. A copy of this was forwarded to me by Counsel Adjei as it was not in the bundle. There are two documents, dated May 2022 and 16 December 2022. The 16 December document, prepared by the Claimant's GP, makes a generalised reference to the Claimant having been counselled to avoid events that precipitate stress related symptoms. No date is specified however, and no further details are given.
d. There was a grievance meeting on 28 September 2020 at which the Claimant says he made public interest disclosures about the differential treatment of payments being made to black and white employees of the Respondent who were shielding during the pandemic. He also relies on this disclosure as a protected act for the purposes of s27 Equality Act.
e. He received the grievance outcome from Ed Clarke, MD Of Road Network Operations on 23 October 2020. The letter (page 468-477) was detailed and addressed a number of the concerns that the Claimant had raised at the time and continues to raise in these proceedings, about a failure to allow his career to develop. The letter contained various recommendations about his development in the future. He complains that these were not and still have not, at the date of the hearing, been followed up. The recommendations were:

   Facilitated Mediation by an impartial third party: I do think it is important that you seriously consider this option as I genuinely believe it will help rebuild your relationship with Matt. Matt is also very much open to this idea, and would very much like to see your relationship get back on track.

   Alignment of Hub priorities: Although you are currently not in a role in which you are expected to review processes, I understand that this is an area you are interested in and will also support you with QDM. Therefore, I do believe there needs to be some alignment in regards to the importance of the Hub's overall priorities and to ensure that you are aligned to the location priorities working in with the Management team to utilize your skill set and experience. This will not be the main focus of your employment in your current role but will be part of your ongoing development.

   Individual Development Plan: I advise that you facilitate a meeting with your line manager to discuss your development and identify key objectives that you wish to focus on that are also aligned to the Hub's priorities.

f. The Claimant also says that there was a role mapping issue that it was agreed would not form part of his grievance and that he was told by HR: "If

you disagree with the mapping of your role to a Handler that will need to be raised at the time to the appropriate Manager, this will not be factored into the grievance and the investigation that Ed carries out". He maintains that that part of the grievance remains unanswered although he has chased it up several times since the meeting in September 2020.

g. The Claimant did not appeal against the grievance outcome.
h. The Claimant asserts that from December 2020 the Second Respondent, Ryan Bennett, began to treat him badly. The agreed issues identify two specific incidents that occurred on 15 and 17 February 2021 respectively. The first involved some boxes that had been delivered to him at work and the second involved an incident which caused him to be given a letter of a disciplinary nature, after an incident in which it was alleged that he fell asleep at work. He also alleges that in the course of the meeting on 17 February 2021 that resulted in the letter, he was told that he was being held back at work because he had spoken up against Mr Walsom. This revelation caused him to believe that he was being victimised and/or subjected to a detriment or detriments for making a public interest disclosure.
i. He sent a letter of appeal against the disciplinary letter on 25 February 2021. He then says that he became unwell because of what he was experiencing at work. He did however continue to attend work. He raised the question of his role development ("role-mapping") on 5 May 2021 (and continued to do so at intervals) and on 12 May 2021 he made a data subject access request as he wanted to ascertain whether a disciplinary appeal letter that he had written after the incident on 17 February 2021 had been placed on his file.
j. He received the results of the DSAR in two parts, on 10 June and 21 July 2021.
k. He began early conciliation with ACAS on 14 June 2021.
l. He raised a second grievance on 28 June 2021, this time against Mr Bennett. A response to the grievance was delayed by the Respondent and it was not heard until September 2021.
m. He submitted Claim 1 on 16 August 2021. His claims were age and race discrimination and victimisation (age is no longer pursued). There is no reference to disability discrimination. The narrative to the claim included a number of matters that are outside the Tribunal's jurisdiction and which are no longer pursued. The principal complaint relates to the Claimant's personnel file and the fact that he says it had been altered and did not accurately reflect his work history, and that it included an unwarranted disciplinary letter (the letter issued after the meeting on 17 February 2021. He also refers to the failure to develop his career. He says that this conduct amounted to harassment (presumably related to race) and direct race discrimination (although it would appear from the list of issues that the direct race discrimination claim and race harassment claims have not been pursued). He also alleges that it was an act of victimisation, and he refers to the protected act described above in paragraph (d). He states that he had become aware of the possibility of victimisation at the meeting on 17 February 2021 (paragraph (h) above). There is also a reference to whistleblowing and whistleblowing detriment, relating to the same meeting, at paragraph 28 of the claim.

n. He says that on receiving the second part of the DSAR on 21 July 2021, he discovered that his disciplinary appeal letter was not on file and that his personnel file appeared not to contain his whole work history, having omitted his ESP role. The chronology is somewhat unclear about what the Claimant discovered at each stage of the DSAR outcome, but I do not think that matters for the purposes of this judgment.
o. On 21 July 2021 he commenced early conciliation with ACAS for the second time.
p. He presented Claim 2 on 6 September 2021, complaining of race discrimination, harassment, victimisation, and detriment for making a public interest disclosure. There was no reference to disability in the claim form. The grounds relied on in the discrimination claims were race and religion or belief, but the claim of religion or belief discrimination was later withdrawn. The facts asserted in the narrative to this claim largely replicate those in Claim 1, but the Claimant also complains of a delay in dealing with the grievance raised on 28 June 2021. He repeats his concern that his personnel file was not complete, adding a complaint that the letter of appeal he had written was missing (which he said had discovered when he obtained the full DSAR result on 21 July 2021). He asserts that the delay in the grievance was direct race discrimination (that claim is not pursued). He raises the issue of the incident on 15 February when he says that packages addressed to him were opened and otherwise incorrectly dealt with. He says that the Second Respondent acted aggressively towards him on that date. He then gives more detail of the events leading to the disciplinary letter on 17 April.
q. On 20 September 2021 the grievance meeting took place in relation to his grievance against the Second Respondent.
r. On 15 December 2021 the Second Respondent tried to present the Claimant with an employee award. The Claimant was upset and distressed by this because at that point his claim against the Second Respondent was still unresolved.
s. I was shown no ACAS certificate in relation to Claim 3 although numbers were cited on the claim form and the parties were in agreement that the Claimant had approached ACAS on 28 February 2022.
t. On 9 March 2022 the Claimant presented Claim 3 against both Respondents. He complains of disability discrimination and relies on a workplace stress related problem as the disability, which he attributes to the treatment he has received at work. The narrative to the claim refers to the incident on 15 December 2021, but otherwise the facts he asserts are the same as those he had set out in his two previous claims, though in some instances he adds further detail. He also asserts in the narrative to the claim that he has been discriminated against under various provisions of the Equality Act and treated detrimentally as a whistleblower. He continues to maintain that there is a course of conduct or continuing act, that means that all the claims are in time or that it would be just and equitable to extend time.
u. The Claimant was still awaiting the outcome of his grievance of 28 June 2021, when Claim 3 was presented.

15. The Claimant has therefore pleaded his claim in a somewhat chaotic and overlapping way, which has greatly complicated the task of identifying the issues in the case and deciding whether any of his claims are out of time. The remaining claims, as identified by EJ Burge, are of disability discrimination under ss13,15 and 20-21 Equality Act, harassment related to disability under s26 and victimisation related to the protected characteristic of race under s27. He also brings a claim of whistleblowing detriment under s47B ERA. The disability discrimination claim, which forms the bulk of what now remains, was not in fact put forward at all until 9 March 2022 (ACAS having been contacted on 8 February 2022) and it is therefore very considerably out of time in relation to the matters that had been pleaded in Claims 1 and 2. I return to that point below.

The law

16. I set out below the law relating to the relevant statutory time limits and the associated case law.

17. The law on time limits in whistleblowing detriment case is set out in s48(3) and (4) ERA as follows:

> **(3) A tribunal shall not consider a complaint under this section unless it is presented—**
>
> **(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
>
> **(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**
>
> **(4) For the purposes of subsection (3)—**
>
> **(a)where an act extends over a period, the "date of the act" means the last day of that period, and**
>
> **(b)a deliberate failure to act shall be treated as done when it was decided on;**
>
> **and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.**

18. The law on time limits in discrimination cases is set out in s123 Equality Act as follows:

> **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….**

(2) …..

(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.

(c) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

19. In relation to the discrimination claims I considered that two cases were particularly relevant. The first is Owusu v London Fire and Civil Defence Authority [1995] EAT 334, which concerns a situation in which the claimant was continually unsuccessful in gaining promotion. Mr Justice Mummery (as he then was) said:

"The position is that an act does not extend over a period simply because the doing of the act has continuing consequences. A specific decision not to up-grade may be a specific act with continuing consequences. The continuing consequences do not make it continuing act. On the other hand, an act does extend over a period of time if it takes the form of some policy, rule or practice, in accordance with which decisions are taken from time to time. What is continuing is alleged in this case to be a practice which results in consistent decisions, discriminatory of Mr Owusu."

20. The second case is Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530. I was not in a position to make detailed findings of fact in the absence of any witness evidence from the Respondent and a limited bundle of documents. I had to consider whether the existence of a continuing state of affairs, or the question of whether particular acts and detriments were capable of being linked together, could be decided in the absence of detailed findings in respect of the facts of the case and whether the Claimant had a reasonable basis for suggesting that there had been a continuing act or series of linked acts. That enquiry is consistent with the approach endorsed by the Court of Appeal in Hendricks [2003] ICR 530 where Lord Justice Mummery said of the claimant in that case:

"48.She is, in my view, 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 a continuing discriminatory state of affairs covered by the concept of "an act extending over a period". I regard this as a legally more precise way of characterising her case than the use of expressions such as "institutionalised racism", "a prevailing way of life", a "generalised policy of discrimination", or "climate" or "culture" of unlawful discrimination.

49. At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no "act extending over a period" for which the commissioner

can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late."

Decisions on time and jurisdiction

21. The three-month time limit applicable to the Claimant's claims means that the last dates on which matters he wished to rely on would be in time were 15 March 2021, 21 April 2021 and 28 November 2021 unless I decide to extend time under the relevant statutory test, taking into account the case law I have referred to.

Whistleblowing detriment

22. I find that the following matters, that the Claimant relies on as whistleblowing detriment, on the face of it fall outside the three-month time limit in s 48 ERA:

    a. All aspects of the incidents on 15 and 17 February 2021, namely the incident involving the packages delivered to the Claimant, the meeting on 17 February and the issuing of the letter after the meeting. That includes the following paragraphs of the list of issues: 24.1.1, 24.1.2, 24.1.4.
    b. The failure to maintain the Claimant's personnel file (24.1.3).
    c. The decision by Ryan Bennett to give the Claimant a demotion letter (paragraph 24.1.5).
    d. The failure to implement the recommendations made on 30 October 2020 described at paragraph 14 (e) (paragraph 24.1.8).
    e. The role mapping allegation (paragraph 24.1.9).

23. Two matters were in time:
    a. The delay in dealing with the 28 June 2021 grievance, which was raised in Claim 2, presented on 6 September 2021;
    b. The incident on 15 December 2021 was complained about in Claim 3 presented on 9 March 2022.

Whistleblowing detriment – when does time start to run?

24. The Claimant asserts that all of these complaints form part of a series of similar acts or failures or an act extending over a period, such that time starts to run only from the last incident or failure relied upon. So there are a number of questions to be answered – are the complaints linked so as to make them part of a series of similar acts or failures or an act extending over a period and if they are, when did the last in the series occur? I have thought very carefully about this and in my judgment it is doubtful that all the complaints the Claimant makes can be linked in the way the Claimant suggests, although as *Hendricks* says, albeit in the context of a discrimination claim, that is a difficult question to answer one way or another in the absence of a full set of findings of fact in a case. I have therefore considered when, if all the allegations the Claimant relies on are linked or are part of an act extending over a period, the last of them occurred?

25. This raises a further question about how the alleged failure of the Respondent to

implement the recommendations made in October 2020 or to deal with the separate question of "role mapping" should be characterised as the Claimant says that these are "ongoing" even at the date of the hearing. In my judgment these failures on the part of the Respondent were clearly omissions or failures to act with continuing consequences rather than ongoing states of affairs in the sense described in *Hendricks* or matters involving a "policy, rule or practice, in accordance with which decisions are taken from time to time" in the sense referred to in *Owusu* (and I accept that *Owusu* is also a case involving discrimination and not whistleblowing, but the analysis is still helpful). Those two particular issues seemed to be running in parallel rather than being part of a series of failures. The relevant time limit in relation to a failure to act is set out in s48(3) and (4) ERA and the important words are: "*an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done*". So the question is when the Respondent could reasonably have been expected to take some steps in relation to the October 2020 recommendations or the role mapping issue. In my judgment it would have been reasonable for the Respondent to have taken action in relation to both matters within three months of the October meeting, that is, by 20 January 2021. That means that time in relation to that detriment would start to run in January and ACAS would need to have been contacted by 19 April. This reasoning applies equally later in these reasons where I am considering the discrimination claims, because s 123 (3) operates in the same way as s48(3) and (4) ERA.

26. There is also a slight complication, which is that the Claimant says that it was at the meeting on 17 February 2021 that he was alerted to the possibility that his career development was being obstructed because he had spoken out about Mr Walsom. But even if that meant that it was not reasonably practicable for him to take action before he became aware of that possibility, in my judgment he still left it very late and it is on the face of it out of time. If he became aware on 17 February that his career development – which had been "not happening" since October 2020 - was being held back because he had blown the whistle about Matt Walsom, he should have complained about that issue straight away. But for reasons I will come to I do not think that makes any difference to my conclusions.

27. There are two claims that are clearly in time in relation to whistleblowing detriment – the delay in dealing with the grievance, which was not in fact resolved until March 2022, after Claim 3 had been presented, and the matter of the award on 15 December 2021. Leaving aside the question of when it could be said that the 28 June 2021 grievance ought to have been responded to, if it were the case that all the complaints the Claimant makes are part of a series of similar acts or failures, then there is at least one of them – the complaint about the award in December 2021 - that is in time.

28. I have concluded, not without some hesitation, that it is premature to say that the Claimant's claims were not part of a series, or an act extending over a period and were therefore brought outside the statutory time limit in s48 ERA. Although it might

be doubted that the reasoning in *Hendricks* applies to a whistleblowing complaint, because it was a case about discrimination, the analysis does seem to me to be equally applicable to a claim of whistleblowing detriment that is said to be ongoing. At the preliminary hearing stage, in the absence of a proper understanding of the facts of the case, for the reasons articulated in *Hendricks*, it is too soon to make a decision about whether particular incidents are part of a series of similar acts or failures or part of an act extending over a period or have in fact been brought too late. I have had some considerable doubts about it in this case, but have concluded that it would not be just to the Claimant to make that decision now.

29. Accordingly I find that the tribunal should consider the whistleblowing detriment claims at a full merits hearing and the jurisdiction question should be considered in the light of the findings of fact at that hearing.

Direct disability discrimination, discrimination arising from disability and harassment related to disability

30. I find the following in relation to whether the matters fall outside the three-month time limit in s 123 Equality Act:

    a. I am in some difficulty with paragraph 27.1.1 and 30.1.1 and 30.1.2 because I think it is likely that that should in fact be a reference to the incident on 15 February 2021, not 10 February 2022 (this is also the Respondent's view and is also consistent with page 186 of the bundle where the Claimant refers to 2022, but must, in my judgment, actually mean 2021)). If I am right that incident is out of time. If not, it would be in time, except that there is no mention of it in Claim 3. There is a reference to "10 February 2022" in the narrative to Claim 3, but the Claimant does not say what incident occurred on that date. I consider it most likely that he is really referring to 10 February 2021 and that this incident is therefore ostensibly out of time. As regards 30.1.4, this incident is not dated in this list of issues but again relying on paragraph 30 on page 186 of the bundle, it appears to me that this paragraph contains a reference to an incident that in fact occurred on 10 February 2021, not 2022 and is accordingly ostensibly out of time.
    b. All aspects of the incidents on 15 and 17 February 2021, namely the incident on 15th, the searching of the Claimant in the car park by Aidan Dolan, the meeting on 17th and the issuing of the letter after the meeting (paragraphs 27.1.2, 28.1, 30.1.5, 30.1.7, 30.1.8, 30.1.9, 30.1.16, 30.1.19 and 30.1.20 of the list of issues) are ostensibly out of time.
    c. The role mapping allegation (paragraphs 27.1.3, 30.1.6, 30.1.14, 30.1.15) is ostensibly out of time (applying the same analysis to when it should have been deemed to have been acted upon as I have applied in relation to the claim of whistleblowing detriment in paragraph 25).
    d. The failure to maintain the Claimant's personnel file (27.1.4 and 30.1.12, 30.1.13) is on the face of it out of time. I consider in principle however that it would be just and equitable to extend time, because the Claimant did not know about the state of his personnel file until he saw the results of the

DSAR.

31. Hence neither the s13 claim or the s15 claim are on the face of it in time and only some of the disability harassment claims are in time as follows:

    a. The incident related to the award (paragraph 30.1.3).
    b. The delay in responding to the grievance raised in June 2021 (paragraph 30.1.10 and 30.1.11.
    c. The two complaints related to the outcome of the DSAR (30.1.17 and 30.1.18, although I consider that there are real difficulties with the way those particular complaints have been put).

Reasonable adjustments

32. The claim of failure to make reasonable adjustments (which relate to the award issue in December 2021) was brought in time.

Victimisation (race)

33. For the same reasons as those given in relation to the whistleblowing detriment claim at paragraph 26 this claim is potentially out of time, but given my overall conclusions, that does not matter in this case.

Equality Act claims – when does time start to run?

34. Having set out the position in principle, and given that some of the matters complained about are in time, I have gone on to consider the position if the claims are in fact "conduct extending over a period" within the meaning if s123(3) Equality Act. In paragraph 28 I concluded that it is too soon at a preliminary hearing, without a full set of findings of fact, to decide the question of whether the incidents relied on are part of a series of similar acts or failures for the purposes of a whistleblowing detriment claim. I reach the same conclusion about the claims of discrimination. Whether or not they represent conduct extending over a period cannot be fairly decided now and it would not be just to decide the jurisdiction question in advance of the findings of fact in the claim. I say that with some doubt in my mind as to whether the Claimant will succeed in establishing that there was conduct extending over a period, but that is as far as I can go at this stage of the case.

35. One further issue arises however, which is that the claim of disability discrimination was not put at all until Claim 3, although the facts relied upon overlap substantially with those in Claims 1 and 2. One option available to me would be to rule out of time any disability discrimination complaint that was not made in Claim 3. The other option would be to permit the Claimant to amend Claims 1 and 2 to include complaints of disability discrimination, applying the principles set out in *Selkent Bus Company v Moore [1996] ICR 836* and the factors set out there - the nature of the amendments sought, the timing of the application and the applicability of time limits, and the overall balance of injustice and hardship in allowing or not allowing any of the amendments.

36. I have also thought carefully about this point. The question of why the Claimant did not pursue a claim of disability discrimination earlier than he did was discussed at the hearing. This was not in response to a specific application to amend, but the point was aired and both parties had the chance to address the issues. The Claimant said that he did not have any legal advice until he received the grievance outcome report in March 2022, and it was at that point that he realised that he had a potential disability discrimination claim. Judging by paragraph 4 of the particulars of claim attached to Claim 2, that cannot be right. The Claimant seems to me to have had advice at a much earlier stage, which calls into question the timing of the application and potentially the Claimant's conduct in making that submission, though I make no definite finding on that. But I have concluded that the balance of prejudice requires the amendment to be allowed. The question of whether or not the Claimant is a disabled person will have to be considered in any event because some of the disability discrimination complaints are in time. I have also concluded that the entirety of the whistleblowing detriment claim will need to be considered, which means that there will need to be findings of fact about the whole period to which the claim relates. Accordingly, the prejudice to the Respondent in allowing those facts to be considered by the Tribunal as potential acts of disability discrimination is in my judgment limited and is outweighed by the prejudice to the Claimant in not allowing that complaint to be considered at all.

37. I therefore conclude that the Claimant should be permitted to plead his claim as both disability discrimination and whistleblowing detriment and that the jurisdictional question of whether the claims are out of time should be determined at the full merits hearing.

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Employment Judge Morton
Date: 17 March 2023