THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH (by CVP)**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mrs Nkechi Leeks **Claimant**

AND

The Royal Marsden NHS Foundation Trust **Respondent**

ON: **16 November 2022**

Appearances:

For the Claimant: **In person**
For the Respondent: **Mr S Nicholls, Counsel**

CORRECTED JUDGMENT

1. The Claimant's claims under the Equality Act 2010 ('Equality Act') of direct perceived disability discrimination, direct disability discrimination and direct discrimination because of religion or belief were brought outside the statutory time limit in s123(1)(a) Equality Act 2010 and it would not be just and equitable to extend the time limit.
2. The Claimant's claim of detriment for making a protected disclosure was submitted outside the statutory time limit in Regulation 5 of The Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations 2018 ('The Regulations'). It was reasonably practicable for the Claimant to have submitted her claim within that time limit.
3. Accordingly, the Tribunal does not have jurisdiction to hear the Claimant's claims, all of which are hereby dismissed.

Written reasons produced in response to a request from the Claimant at the hearing

Introduction

1. By a claim form presented on 8 February 2021 the Claimant presented claims of disability and religion or belief discrimination and detriment for making a protected disclosure arising out of an application she made for employment with the Respondent in March 2020. All of the claims were resisted by the Respondent.

2. The claims were the subject of a previous preliminary hearing for case management on 2 August 2022 before EJ Self who listed today's open preliminary hearing to consider:

    a. whether any of the heads of claim are time-barred;
    b. whether any of the heads of claim should be struck out; or
    c. whether a deposit order should be granted.

3. As I determined at the hearing that all of the claims were out of time, I did not go on to decide whether any of the claims should be struck out or be made the subject of a deposit order.

4. The hearing was conducted by CVP. The Claimant had significant difficulties establishing a connection at the start of the hearing, but eventually a stable connection was achieved and I was satisfied after that point that the Claimant could see and hear clearly and was fully able to participate in the hearing. I had been made aware that the Claimant has various disabilities and I made it clear to her that if she needed breaks for any reason or required other adjustments these would be accommodated as far as reasonably possible.

5. I heard submissions from both parties at the hearing but the Claimant had not prepared a witness statement and Mr Nicholls did not wish to cross examine her. I was referred to a bundle of documents containing 203 pages, to which I make reference as necessary in these reasons using the page numbers in that bundle.

6. I gave an oral decision at the end of the hearing and the Claimant asked for written reasons.

The issues

7. The issues arising in this case as regards time had originally been identified as follows:
    a. Were the discrimination and whistleblowing complaint made within the time limit in the respective statutes, that is was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
    b. If not, was there conduct extending over a period?

c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable as regards the discrimination claims and in the case of the whistleblowing complaint, was it reasonably practicable for the claim to be brought within the statutory time limit and if not, was it then brought within such further period as was reasonable?

8. It emerged that there was an additional issue arising from the fact that what the Claimant was really complaining about was the Respondent's omission to do something. It therefore became necessary to consider how the time limit should be calculated when the claim relates to an omission rather than a positive act.

The law

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

> **123Time limits**
>
> **(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> (b) **such other period as the employment tribunal thinks just and equitable.**
> ….
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is taken to decide on a 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 within which P might reasonably be expected to do it.**

10. I also note that as a job applicant in the NHS, the Claimant was protected from detriment for making a protected disclosure by virtue of s49B Employment Rights Act 1996 and The Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations 2018 (the "Regulations").

11. There is a similar provision in relation to claims of detriment brought under the Regulations, where Regulation 5(3) provides:

> **3. In the cases specified in paragraphs (a) to (e), the date of the conduct to which a**

complaint under regulation 4 relates is—

(a) in the case of a decision by an NHS employer not to employ or appoint an applicant, the date that decision was communicated to the applicant;

(b) in the case of a deliberate omission—
(i) to entertain and process an applicant's application or enquiry, or
(ii) to offer a contract of employment, a contract to do work personally, or an appointment to an office or post, the end of the period within which it was reasonable to expect the NHS employer to act;

Background to the presentation of the claim

12. I make limited findings of fact in this case given the nature of the applications to be dealt with at the hearing. I make it clear below where the facts presented to me were disputed, but some matters were not in dispute.

13. The Respondent is an NHS Foundation Trust and specialist cancer hospital. It effectively outsources its recruitment processes, using a system called 'TRAC' that is operated by a third-party provider.

14. The Claimant is not and never has been an employee of the Respondent. She did however apply for three catering assistant roles in or around March 7 2020. On 9 June 2020 she attended a virtual interview for two of those roles, both of them part time fixed term roles as a Band 2 Catering Assistant but with different hours. She then attended a 'taster session' for the roles on 10 July 2020. It was the Respondent's case that all applicants who were shortlisted and interviewed were offered a taster session and attendance at the session did not necessarily mean that the job had been offered or would be offered.

15. The Claimant's case was that she was offered the role on 30 June 2020 and that the taster day was a form of induction. In her claim form she says that on the day she was given to believe by two of the Respondent's employees that the Respondent would be in touch with her shortly, implicitly with details of her start date. The Respondent disputes all of these points.

16. The Claimant's essential complaint is that having attended the taster day she was not given a start date in a role, or indeed any further communication about her application. She did not hear anything from the Respondent, so according to her claim form she followed up by telephoning the catering department, she says at roughly two-week intervals. She was always told, she said, that her message would be passed to the recruiting manager. The Respondent accepted that following the interviews and taster day the Claimant had made contact with the Respondent to request an update on the process and that she had done so in or around late August 2020 when the relevant manager was on annual leave. The Respondent did not concede that the Claimant had been in contact at two-week intervals.

17. There was however evidence at page 173 in support of the Respondent's case that in or around the end of July 2020 it had put a freeze on recruitment to these positions in order to redeploy staff who had been affected by an internal process. The evidence was not detailed, but there was an email dated 29 July 2020 from

Veronica Forson, Senior Catering Services Manager at the Respondent at the time to various recipients at the Respondent stating:

> **'At this present moment unfortunately I have had to put all catering job vacancies on hold until I am given further notice'**.

18. The Claimant says that this was not communicated to her. The Respondent's explanation was that the TRAC system ought to have alerted the Claimant to the fact that the recruitment process was not going forward. The Claimant said that eventually, on 29 September 2020, she noticed on the TRAC system that the Respondent had electronically appended the word 'unsuccessful' to her electronic application form for one of the other roles for which she had applied but not been offered an interview. The Respondent did not challenge that evidence. The Claimant said that she made a mental note on the same date that she had still not heard anything about the other two roles. There is no evidence that she did anything else in response to this discovery until 26 December 2020, when she wrote an email to the Respondent (page 177-8) asking for information and an update about the roles.

19. She submitted an application to ACAS for early conciliation on the same day, more than five months after the taster day itself. The ACAS early conciliation certificate was issued on 6 February 2021. The Claimant submitted her claim on 8 February 2021.

20. The Claimant claims, and the Respondent denies, that the failure to follow up with a start date was a decision made by the Respondent because of her race, her disability, her perceived disability and the fact that she had made a protected disclosure during the course of her employment with another NHS Trust in 2010.

Submissions

21. Mr Nicholls had made helpful written submissions in support of all of the applications the Respondent was pursuing at the hearing. On the time point he submitted that s123(4) Equality Act and Regulation 5 of the Regulations were the relevant provisions and that applying those provisions, the end of July 2020 was the date on which the Respondent might reasonably have been expected to provide the Claimant with a start date. In his submission time therefore ran from the end of July 2020. He also pointed to the evidence supporting the Respondent's case that the Respondent decided on a recruitment freeze in or around the end of July 2020. This, he said, was evidence that the decision not to contact the Claimant with a start date was taken for internal purposes because of a recruitment freeze and not because of any protected characteristic or other protected feature of the Claimant's circumstances. He submitted that the claims, for that reason and a number of others, had little or no reasonable prospect of success. I have not engaged in detail with those submissions however because I have reached my decision solely on the basis that the claims are out of time.

22. The Claimant made brief written submissions. On the time points she stated that she clearly understood that there was a question about time limits to be decided at the hearing. She stated 'The Claimant clearly understand that the Main issue to be

determined at this PHR is that of Jurisdiction i.e. whether or not the Tribunal has the Jurisdiction to hear this claim and or whether or not the claim was lodged out of time, and if so the Tribunal would have no Jurisdiction to hear the Claim unless an extension of time is granted'. In her oral submissions she explained that in her view the failure to contact her after the taster day was an ongoing omission that amounted to a continuing act. She pointed out that she had actively pursued the Respondent for an outcome and was not given a clear answer. She submitted that time did not begin to run until 29 September 2020, when she uncovered some information that indicated that a decision may have been made about recruiting her. Prior to that date, she said, she was phoning the department but did not know what was happening. She submitted that she should already have been told of the outcome by that date, but was effectively fobbed off by being told that the relevant manager was not there.

Conclusions

23. The conduct of which the Claimant complains and which she regards as discriminatory and detrimental was in my judgment not an individual 'act' on the Respondent's part. Given the Claimant's submission that it was an 'ongoing omission' I considered carefully whether it was a continuing act, but ultimately rejected the idea that that was the right way to characterise it. It seems to me to be clear that what the Claimant was complaining about was an omission on the part of the Respondent, not an act, continuing or otherwise. It was the Respondent's failure to do something – to follow up the taster day with confirmation of when the job would start - that is the subject matter of the complaint. There is no concept of an 'ongoing omission' in the legislation.

24. In order to determine whether the Claimant began the early conciliation process and submitted her claim within the statutory time limit it is therefore necessary to identify the point at which the omission concerned is deemed to have taken place by applying s123(4) Equality Act. Once that point is identified, it is possible to calculate when time began to run.

25. S 123(4) requires me to consider three different things. The first is whether there was any evidence to the contrary about when the Respondent decided not to offer the role. In fact, I think there was some evidence in the form of the email at page 173 in support of the Respondent's case that it had put a freeze on recruitment to these positions in order to redeploy staff who had been affected by an internal process. This evidence suggested that a decision to freeze catering recruitment and thus not to take the Claimant's application any further, had been taken on or before 29 July 2020. Neither party put forward any other evidence that a decision had been made on any other specific date and nor did the Claimant suggest in her written submissions that a decision had been made on a particular date. She only complained that no decision had been communicated to her.

26. The second matter I need to consider under the legislation is whether the Respondent did anything that was inconsistent with the thing it omitted to do. It is clear that that did not happen in this case. The only thing that would have been inconsistent with its omission to follow up the taster day with clarity about the role, would have been to send the Claimant a communication about the role. It is the

lack of such a communication that caused the Claimant to bring a complaint.

27. The third aspect I need to consider is the deeming provision in s123(4)(b) Equality Act and Regulation 5 of the Regulations. Under those provisions the decision which was omitted is deemed to have been taken on the expiry of the period within which the Respondent might reasonably be expected to do it. As noted above, there is no concept of a 'continuing omission' in either statute. Instead s123(4) Equality Act and Regulation 5 of the Regulations provide a mechanism for fixing a point in time at which the matter complained about took place if there is no clear evidence establishing that a decision was taken on a particular date.

28. It seems to me that in a case like this concerning recruitment to the role of catering assistant there would be no need for a decision to be delayed by more than a few weeks at most. There had been a job interview and, on the Claimant's own case a decision to offer her a role had already been made. Hence a decision would be likely to made within one to four weeks after the taster day. On the Respondent's case, which was that the recruitment decision had not been made before the taster day, it would still not be necessary for much time to elapse before a final choice of candidate could be made. The Respondent's submission was that the decision ought reasonably to have been made by the end of July 2020, making the last day for starting early conciliation 30 October 2020, some two months before the Claimant actually started the process. That is consistent with the date that would apply – 29 July 2020 - if I took the approach that there was 'evidence to the contrary' in the form of the email about the recruitment freeze at page 173.

29. There are therefore two possibilities. Either the email at page 173 was evidence that in fact there had been a decision about recruitment towards the end of July 2020 (which was, according to the Claimant not communicated to her) or the Respondent could be expected to have made up its mind at around that time. Applying the statutory provisions, time therefore began to run either on or around 29 July 2020 or on 31 July 2020 and taking the later date for these purposes, the last date for contacting ACAS was therefore 30 October. As the Claimant did not contact ACAS within the primary time limit she loses the benefit of the stop the clock and extension of time provisions altogether, with the effect that when her claim was presented it was over three months out of time.

30. Should time be extended in this case? I have focused my decision on the test in s123(1) Equality Act because the test in the Regulations is THE SAME, [OMITTED TEXT] and if my decision is that it would not be just and equitable to extend the time limit in relation to the discrimination complaints, it WILL ALSO be the case that would not be possible to extend time in relation to the whistleblowing complaint under the test in Regulation 5.

31. The Claimant's case was that she was in the dark until 29 September 2020. It would not therefore have been reasonable to expect her to contact ACAS before that date. It is clear that in deciding when to present her claim, the Claimant was operating on the assumption that the Respondent's silence was an ongoing failure to act that crystallised on 29 September when she became aware that some sort of decision seems to have been made about her. She assumed that she could rely on that in deciding to wait until December 2020, three months later, to contact

ACAS. That was the only explanation that the Claimant put forward and she did not address the point any further in her claim form or what she said during the hearing.

32. The authorities make it clear that a Claimant cannot assume that an extension will be granted and that an extension of time is the exception rather than the rule (*Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*). I have also considered the guidance in *Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA* on the approach to the factors to be taken into consideration in deciding whether or not it would be just and equitable to extend time and note that whilst the factors set out in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT* may be wholly or partly relevant, they should not automatically be used as a checklist in every case.

33. Nevertheless, I have considered the length of the delay in this case and the reasons for it - two of the Keeble factors. On the facts and given the loss of the ACAS extension, the delay in approaching ACAS was in excess of three months - a not insignificant delay. In my judgment however it seems to me that it is a neutral factor in this case – it is not a long enough delay to affect the cogency of the evidence or operate in a way that would tip the balance of prejudice either way.

34. As for the reason for that delay, this was the Claimant's assumption about the time limit, which that it would run from when she made the discovery that a decision had in fact been made about the recruitment exercise. I accept that the statutory provisions that apply in the circumstances of this case are complex and ordinarily it would not be reasonable to expect an unrepresented Claimant to be aware of them or their effect on time limits, particularly when applying the just and equitable test in s 123(1)(b) Equality Act. But although the calculation of the time limits in this case is complex, the fact is that the Claimant became aware at the end of September that a decision may have been made about her job application, but she took no steps at all either to ascertain the legal position or to contact ACAS for another three months.

35. It seems to me that once she had made a discovery that something appeared to have happened that affected her this particular Claimant could have been expected to be aware that she should at least find out what the legal position was. In some instances, it would be understandable that a Claimant would have little or no insight into the importance of understanding the rules about time limits and of the need to take advice or research the position. I consider that in this case the Claimant had considerably more knowledge than may be usual as a result of her previous experience of employment tribunal proceedings. Even if she had not had this experience, it was in my judgment remiss of her to make an assumption about the law and act accordingly without taking advice. The Claimant is an intelligent person who could be expected to research her rights once she had concluded that something was not as it should be. She became aware of an important fact at the end of September and it was rash of her to assume that time would not have started to run at an earlier date. I note at this point that the factors in *Keeble* also include the promptness with which a claimant acts once that claimant becomes aware of the facts giving rise to the claim and the steps taken by the claimant to obtain appropriate advice. In that respect the claimant was neither prompt nor took advice.

In my judgment, on all the facts and circumstances of this case that factor weighs heavily against granting an extension of time. I also note for completeness that it seems to me for all of these reasons that it was quite clearly reasonably practicable for the Claimant to have brought her claim in relation to whistleblowing detriment within the statutory time limit. Had she acted at the end of September all of her claims under both statutes could have been brought without difficulty within the primary time limit.

36. The final factor that I have weighed in the balance is the merit of the Claimant's claim (an approach recently endorsed by the EAT in *Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132)*. Although there was limited evidence in the bundle, and the decision in *Kumari* cautions against making an assessment of the merits of a case at a preliminary hearing where not all of the evidence is available, it seemed to me that the email at page 173 showed quite clearly that there had been a recruitment freeze at the relevant time and that that was the most likely explanation for the Claimant not hearing anything further after the taster day rather than anything to do with any protected characteristic or protected disclosure. I considered that this made it unlikely that she would succeed at trial in establishing that the decision not to go ahead with her appointment had been taken against her personally because of one or more protected characteristics, or whistleblowing. On the whistleblowing claim furthermore her claim that the Respondent did not recruit her because she had allegedly made protected disclosures at a different Trust in 2010 also seemed to me to be highly improbable and unlikely to succeed. In my judgment the weakness of the Claimant's claims can in this case legitimately be weighed in the balance in deciding whether or not it would be just and equitable to extend time and weighs against doing so.

37. I conclude that the factors pointing away from allowing an extension outweigh the prejudice to the Claimant in not allowing her claims to proceed. For all these reasons I conclude that it would not be just and equitable to extend the statutory three-month time limit in this case.

38. Accordingly the Tribunal does not have jurisdiction to hear any of the Claimants' claims, applying either of the relevant statutory tests and all of her claims are therefore dismissed.

Employment Judge Morton
Date:16 December 2022 (Original judgment)
15 February 2023 (Corrected judgment)

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