CASE NO: 1300244/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs Michaela Bell

Respondents: R1) Chief Constable of West Midlands Police
R2) The Secretary of State for the Home Department

Record of a Preliminary Hearing heard by CVP at the Employment Tribunal

Heard at: Nottingham **On: 13-14 February 2023**

Before: Employment Judge M Butler (sitting alone)

Representation

Claimant: Mr J Feeny, Counsel
1st Respondent: Mr P Lockley, Counsel

2nd Respondent: Ms Hodgetts, Counsel

JUDGMENT

The Judgment of the Employment Judge is that:

1. The Claimant's claim of discrimination was presented out of time;

2. It is not just and equitable to extend time;

3. The Tribunal has no jurisdiction to hear the claim which is therefore dismissed.

REASONS

Judgment was given orally at the hearing and the parties did not request written reasons. The Claimant's Solicitors then requested written reasons by letter dated 14 March 2023.

This Hearing

1. This Open Preliminary Hearing was listed by Employment Judge Brewer at a Closed Preliminary Hearing on 6 April 2022. After a number of concessions by the parties, the remaining issues to be decided in this hearing are:

   (i) Was the claim under section 61 of the Equality 2010 ("EqA") for discrimination arising from disability and indirect disability discrimination presented outside the time limits set down in section 123 EqA; and

   (ii) If so, is it just and equitable to extend time so that the claim may continue.

   (iii) If the claim is allowed to proceed, I must determine the Respondent's application for a deposit order on the ground that the claim has little reasonable prospect of success.

The Evidence

2. I heard oral evidence from the Claimant who also provided a witness statement. There was also an agreed bundle of documents and references to page numbers in this judgment are to page numbers in that bundle.

Background

3. The factual background to the claim is largely not in dispute. The Claimant was a serving Police Officer working in the Anti-Corruption Unit ("ACU"). A number of issues, including, inter alia, breaches of confidentiality and a very significant workload, conspired to affect the Claimant's mental health which it seems from her Injury On Duty ("IOD") application crystalised in March 2016 when she approached her DCI. She explained to him that she was overworked, wondered whether this was a deliberate ploy to force her out of the ACU and said the workload was unsustainable and stressing her out (page 150). In essence, it seems little was done to alleviate the Claimant's stress and on 20 April 2016 she had a panic attack at work (page 151).

4. She subsequently saw her GP who initially signed her off as being unfit for work for two weeks. In fact, she never returned to work.

5. After taking medication, attending therapy sessions, examinations by occupational health and psychiatric examinations, the Force Medical Officer supported the

Claimant's application for ill health retirement which was deemed to be the best outcome for the Claimant (page 155). She retired from the Police Force on 9 December 2018.

6. The Claimant then made an IOD award application as a result of which Dr Charles Vivian, who was acting in his capacity of Selected Medical Practitioner, updated his previous report made after seeing the Claimant on 26 September 2018. Dr Vivian had sight of psychiatric reports by Dr Tehrani and earlier by Dr Brisco (page 161). He concluded that, *"it is reasonable to believe that her health will improve over time, and this will enable her to re-enter the workplace, albeit in a civilian capacity. This may occur within the next 3 to 5 years".* He recommended a review in 3 years.

7. On 24 June 2019, Mr Martin Keating, Occupational Health – Service Delivery Manager Health, Wellbeing and Case Management, wrote to the Claimant to confirm her application for an IOD award had been successful setting her loss of earning capacity at 100% (Band 4) (page 169). The letter set out what the Claimant should do if she disagreed with the decision of the Selected Medical Practitioner. It also set out that the Claimant needed to provide information on her DWP benefits before the amount of the award could be calculated. This proved to be a rather long winded process for the Claimant.

8. The award to the Claimant was assessed at a lump sum of £19,288.12 which was confirmed to her by Ms Andrea Tonks, Service Delivery Manager (Pensions) by email on 24 July 2019 (page 175). This award was made under Regulation 11 of the Police Injury (Benefit) Regulations 2006 ("the Regulations") and the Claimant does not dispute this assessment which was eventually paid in January 2020.

9. On 28 June 2019, the Claimant wrote to Ms Tonks by email saying, *"From what I have been advised and to what I understand I will be given the disablement gratuity due to being 100% disabled and that being Band 4. Can you please confirm this for me" ?*(page 168). Although not specifically referred to in her email, the Claimant had in mind Regulation 12 which Ms Tonks referred to in her email to the Claimant dated 24 July 2019 (page 175) in which she said,

   "I can confirm Regulation 12 applies to a person who –

   (a) Receives or received an injury without his own default in the execution of duty;

   (b) Ceases or has ceased to be a member of the Police Force; and

   (c) Within 12 months of so receiving that injury becomes or became totally and permanently disabled as a result of that injury.

   Occupational health have confirmed the injury for which the ill health and IOD application has been supported, commenced from 2013 to 2017 and therefore does not meet the criteria of Regulation 12 (c)".

10. Thereafter, the interpretation of correspondence between the Claimant and Ms

Tonks and the earlier correspondence with Ms Janet Pearce, Transactional Team Leader (Pensions) becomes a matter of dispute.

The Issues

11. It seems to me, the issues to be determined are:

(1) What was the date of the decision not to make an award under Regulation 12 which the Claimant claims is the discriminatory act which defines the date on which time begins to run?

(2) Was the subsequent claim presented to the Tribunal therefore prima facie out of time?

(3) If so, was the act relied on a continuing act for the purposes of section 123(3) EqA?

(4) If not, is it just and equitable to extend time under section 123(1)(b) EqA?

The Date of the Decision

12. There is a dispute as to the date of the decision but, in my view, the documents should be considered logically and literally. The application for an IOD award (page 147) does not differentiate between awards under Regulations 11 and 12. It covers both possibilities. Thus, Mr Keating's letter of 24 June 2019 (page 169) with the heading *"Subject: Application for Injury on Duty Award – Successful"* must be the date of the act complained off. The Claimant was somewhat vague as to when she received this letter but confirmed she received it by email and post. That this is the date of the alleged discriminatory act is supported by the Claimant's email to Ms Tonks dated 28 June 2019 (page 168) in which she asks for confirmation she will be given the "disablement gratuity" under Regulation 12. By this time, the Claimant is on notice that no award under Regulation 12 has been made.

13. Ms Tonks email to the Claimant of 24 July 2019 (page 175) is not, in my view, the date of the act of discrimination because, the application for an IOD award having already been determined, this email is merely explanatory.

14. In either case, the presentation of the claim on 21 July 2021 is well out of time.

15. The Claimant argues there was a continuing act on three alternative grounds:

(1) The failure to reconsider the decision not to make a Regulation 12 award before or after a request from her solicitors on 29 September 2020 (page 218); or

(2) The discrimination was a continuous application of a policy, rule, scheme, or practice thus amounting to conduct extending over time; or

(3) It is just and equitable to extend time.

The Continuing Act Ground

16. Mr Feeny argues, in terms, that the continuous act of discrimination subsists in the failure to reconsider the Regulation 12 decision as this amounts to a continuous application of a PCP which puts the Claimant at a disadvantage. I note, however, the distinction between a discriminatory act which has continuing consequences and one that is a continuing act of discrimination. In this regard, I am persuaded by the judgment in ***Parr v MSR Partners LLP [2022] EWCA Civ 24*** where The Court of Appeal held that an equity partner"s demotion to salaried partner was not a continuing act even if he suffered losses many years after the demotion since the demotion was the point at which limitation ran. In the case before me, I consider that the decision on the IOD award was a one-off act and time began to run from the date of that decision. Similarly, in ***Miller v Ministry of Justice (2019) UK SC 60*** the less favourable treatment occurred at the point at which fee paid Judges retired with no pension being payable.

17. Further in ***British Medical Association v Choudhary [2007] EWCA Civ 788***, the Court of Appeal made reference to the continuous application of a policy, rule, scheme or practice operated by an employer in respect of his employees throughout their employment and the Claimant was no longer employed. Mr Feeny argues that, as a continuing member of the pension scheme, the failure to pay the Regulation 12 gratuity to the Claimant is a continuing act of discrimination but I do not accept that submission. The Claimant's right to any award crystalised at the time it failed to be paid which on my finding was 24 June 2019 (following Miller). Accordingly, I find there was no continuing act.

The Just and Equitable Ground

18. I do, of course, have a discretion to grant an extension of time to allow the claim to proceed. Mr Feeny points out, correctly, that two important factors in determining whether to grant such an extension are the length and reason for the delay and prejudice to the Respondent caused by the delay.

19. Unfortunately for the Claimant, I did not find her reasons for the delay to be compelling. Throughout her application for an IOD award, and subsequently, she had the benefit of advice and representation from her Police Federation representatives who, in turn, had access to legal advice. The Claimant's evidence in relation to her Federation representative was inconsistent and confused. She was unclear as to whether or when either of the two representatives referred to were actually representing her and there was little information as to when those representatives referred her Regulation 12 application to Solicitors.

20. The Claimant says she obtained much of her information from an online forum run by an organisation called the IOD Pensioners Association. She says her first Federation representative would have told her verbally about a Regulation 12 award but she could not remember when. She wrote to Ms Tonks as early 31 July

2019 (page 179) referring to her *"query"* about a *"disablement gratuity"* and saying *"my husband will be seeking legal advice (for reassurance that what I have received is the correct figure)…"* She then rightly refers to the provisions under Regulation 32 relating to a reconsideration of an award but took no steps to seek such reconsideration or appeal against the decision not to make one.

21. At paragraph 17 of her statement, the Claimant says she received her IOD gratuity but no Regulation 12 gratuity. But it was already clear she would not receive the Regulation 12 gratuity because she queried this within days of receiving the IOD award decision. At paragraph 18 she says she *"started"* to make enquiries with her Federation representative about the Regulation 12 gratuity and left the matter with him. Paragraph 19 notes in essence that nothing then happened for six months until Solicitors were instructed, notwithstanding the Claimant's evidence that legal advice was to be taken in July 2019 almost a year earlier.

22. I have considered the fact that Ms Tonks, for whatever reason, did not engage with the Claimant's request for *"clarity"* or information regarding a Regulation 12 award. I do not, however, consider this to be particularly relevant. Yes, it might show that the first Respondent cannot suffer any prejudice due to this failure but, more importantly, from August 2019 to January 2020, by her own admission the Claimant did nothing to progress her request; nor can she explain why she apparently did nothing for six months thereafter. This was despite having had all the relevant information to hand as to how to appeal or request a reconsideration. As Ms Hodgetts rightly points out, this is the Claimant's case and the burden rests with her. In failing to take these positive steps open to her, the Claimant has in effect also deprived herself of an argument that the refusal to reconsider or uphold an appeal amounts to a further act of discrimination which sets the time limit clock back to zero.

23. It is also clear that the Claimant failed to promptly take or act on professional advice after she became aware of the decision not to award a Regulation 12 gratuity. Her evidence on what action she personally took or was taken by others on her behalf was inconsistent and became a smoke screen which I could not see through. She had access to the Federation representatives, through them to legal advice and to the IOD Pensioners Association online forum yet still took no action for a year.

24. In deciding whether I should exercise my discretion to extend time in this case, I have considered the judgments in ***Robertson v Bexley Community Centre T/A Leisure Link [2003] IRLR 434 CA, British Coal v Keeble [1997] IRLR 336 and Southwark London Borough Council v Afolabi [2003] ICR 800, CA.*** These cases set out that the most relevant factors in determining whether to exercise a discretion to extend time are the length and reasons for the delay and prejudice to the Respondent (Robertson); it may be relevant to consider the factors set out in Section 33 of the Limitation Act 1980 (British Coal Corporation) and there is no need to follow the list of factors strictly which will only be problematic if the Tribunal does not consider a significant factor (Southwark London Borough Council). I have

already made reference to the fact that there was a significant delay in this case the cause of which rests with the Claimant who took no action for a significant period of time despite having the benefit of advice from her Police Federation representative, who in turn could access legal advice. I also note that she said she was taking legal advice soon after the decision not to make a Regulation 12 award and then failed to apply for a reconsideration or to appeal the decision. This latter failure on the part of the Claimant leaves the balance of prejudice with the Respondents who were entitled to rely on the failure to appeal or seek a reconsideration as there being no further action to be taken. The delay in bringing the claim would also prejudice the Respondents in terms of cost, time the fading recollections of witnesses and the issues which may arise in potentially having to reconsider medical evidence and obtain further evidence.

25. For the above reasons, I find the Tribunal has no jurisdiction to hear the claim which is dismissed. Consideration of the application for a deposit order by the Respondent is accordingly unnecessary.

Employment Judge M Butler

Date: 18 April 2023

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.