



## EMPLOYMENT TRIBUNALS

### Claimant

Mrs Catherine McAreyve

v

### Respondents

1. The Hertfordshire Community NHS Trust
2. Ms Joanne Preston
3. Ms Kay Gilmour
4. Ms Ruth Griffin

## RECORD OF A PUBLIC PRELIMINARY HEARING

**Heard at:** Watford by CVP  
**On:** 29 June 2023  
**Before:** Employment Judge Alliot sitting alone

### Appearances:

**For the Claimant:** Mr Gwynn Price Rowlands (counsel)  
**For the Respondents:** Mr Adam Ohringer (counsel)

## JUDGMENT

The judgment of the tribunal is that:

1. The claimant is granted permission to amend her claim to add Ms Ruth Griffin as the Fourth Respondent and in terms of the draft amended particulars of claims submitted to the tribunal on 3 February 2023
2. The claimant's claims of direct disability discrimination are out of time and it is not just and equitable to extend time. Consequently the claimant's direct disability discrimination claims are struck out as there is no jurisdiction to hear them.

## REASONS

1. This preliminary hearing in public was ordered by myself on 30 March 2023 to determine the following matters:
  - 1.1 The claimant's application to amend her claim.

- 1.2 Whether the direct disability discrimination claims arising out of events in May-July 2020 were submitted out of time and, if so, whether time should be extended on a just and equitable basis.
- 1.3 Whether the claims against the Second and Third Respondents were submitted out of time and, if so, whether time should be extended on a just and equitable basis.
- 1.4 The respondent's application for a strike out order and/or deposit order in relation to the alleged disclosures and/or protected acts in September 2018 and January 2019.
- 1.5 Further case management orders may be made.

### **Amendment**

- 2 In an email dated 3 February 2023 the claimant applied to amend her claim to include Ms Ruth Griffin as a respondent and in the terms of the draft amended particulars of claim then submitted.
- 3 The respondents do not oppose the claimant's application to amend. Consequently, I grant permission to the claimant to amend her claim in the form of the draft amended claim submitted to the tribunal.

### **The claimant's direct disability discrimination claims**

- 4 The direct disability discrimination claims are made against the First Respondent.
- 5 The claim form was presented on 19 August 2022. The period of early conciliation was from 20 May to 30 June 2022. Consequently, the 41 days covered by the early conciliation certificates are not to be counted. Three months prior to 19 August 2022 would be 20 May 2022 and, less the 41 days of early conciliation, any event prior to 9 April 2022 is prima facie out of time.
- 6 In April 2020 the claimant was redeployed from Watford to the Overnight Team. The less favourable treatment she relies upon was being told in May 2020 that when she returned from redeployment in July 2020 she would be transferred to the Hertsmere Team and being deployed to the Hertsmere Team in July 2020. Hence the events that the claimant seeks to litigate are one year and nine months out of time.

### **The law**

- 7 I have taken into account the extract from the IDS Employment Law Handbook Discrimination at Work at 35.37:-

“The Court of Appeal’s decision in Aziz v FDA [2010] EWCA Civ 304, CA also dealt with a procedural issue of “considerable practical importance”: on what basis should employment tribunals approach the question whether a claim is time-barred at a preliminary hearing? The Court approved the approach laid down in Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA that the test to be applied at the preliminary stage is to consider whether the claimant had established a prima facie case, or , to put it another way, “the claimant must have a reasonably

arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.”

8 In his skeleton argument Mr Ohringer has cited to me various cases which I record I have read and taken into account.

9 As regards the just and equitable extension, as per the Employment Tribunal Practice and Procedure IDS Employment Law Handbook at 5.103:-

“While employment tribunals have a wide discretion to allow an extension of time under the “just and equitable” test in Section 123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisurelink [2003] IRLR 434, CA, that when employment tribunals consider exercising the discretion under what is now s.123(1)(b) Equality Act, “There is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.” The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.”

10 It is for myself to take into account all the circumstances and undertake a balancing exercise.

11 The length of the delay is very considerable in the context of employment tribunal cases being one year and nine months.

12 The claimant lodged a grievance concerning the transfer of teams and was notified of the outcome in November 2020. The claimant resigned her employment on 6 January 2021 and the effective date of termination of her employment was 9 February 2021. In my judgment, it might have been reasonable for the claimant to argue that awaiting the outcome of her grievance was reasonable before launching employment tribunal proceedings. Further, in my judgment, the termination of her employment in February 2021 could also have been argued as a reasonable starting point for the three months for bringing her claim. At the very latest that would put the claimant’s claim eleven months out of time.

13 I have considered the reason why the claimant said she did not bring a claim sooner. The claimant said that her mental health did not leave her in a position to do so. I do not accept this. Obviously the claimant does have mental health issues. However, during this entire period the claimant brought no less than three grievances. She clearly was capable of doing that. In addition, the claimant was working full time and had the capacity to hold down her job. The claimant had the support of her union “Unite” during the grievances. The claimant not only had access to legal advice but told me she had been given advice by her union to bring an employment tribunal claim. One of the reasons the claimant told me that she did not was that she wanted to maintain cordial relations with the First Respondent.

14 I take into account the fact that the events relied upon were already two years old by the time the claim was issued. Further, it involves allegations against a Ms Sharkey who has left the First Respondent’s employment. Any delay will obviously adversely affect the evidence in that memories fade.

- 15 I find that the events of May-July 2020 are out of time.
- 16 Mr Rowlands has argued that they are in time by virtue of the fact that they constitute a continuing course of conduct. He links them with the complaints about the interview in April 2022.
- 17 I first consider whether or not it is appropriate for me to deal with the time issue at this stage. I take into account that normally when considering whether there has been a course of continuous conduct or a series of connected events the best forum for deciding the issue is the full merits hearing once all the evidence has been heard. Nevertheless, in this case, I find that the claimant has not established a prima facie case that there was a continuous course of conduct. The disability related acts complained about concern changing teams in May-July 2020 and an unfair interview in April 2022. Complaints about disability related discrimination are not made between those two sets of dates. The acts differ and involve different individuals.
- 18 Having found that the alleged less favourable treatment is out of time and that there is no prima facie case that they constituted a course of continuous conduct, that brings them within time, I go on to consider whether the claimant has brought her claim in such time as I consider just and equitable thereafter.
- 19 As indicated any delay up to about April 2021 might well have been reasonable. However, in my judgment, the further delay of about a year is just too long and no good reason has been advanced for it. Consequently, in my judgment, it would not be just and equitable to extend time and so the direct disability discrimination claims must be struck out as there is no jurisdiction to hear them.

### **The claims against the Second Respondent**

- 20 Mr Ohringer for the respondent limits his application in relation to the Second Respondent alone. He asserts that the last act complained about is as set out in paragraph 44 of the amended particulars of claim on the 22 April 2022.
- 21 Taking into account the two days of early conciliation any claim based on events prior to 18 May 2022 are prima facie out of time. If the 22 April 2022 is the last act in a course of conduct or chain of linked events then the claim is 26 days late.
- 22 Mr Rowlands points to the pleaded outcome letter dated 19 May 2022 rejecting the claimant's grievance and points to other letters in July 2022 as being the last events in a course of conduct.
- 23 Relying on the case of Aziz v FDA as set out above, in my judgment, the claimant has shown a prima facie case that there are events pleaded in the amended particulars of claim that postdate 18 May 2022 and that are in time. Further, in my judgment, the best forum for deciding whether it would be just and equitable to extend time would be the full merits hearing. Consequently, I decline to deal with this issue at a preliminary hearing and leave it to the full merits hearing.

### **Strike out and/or deposit orders in relation to the alleged disclosures and/or protected acts in September 2018 and January 2019**

- 24 I have a discretion to make a striking out order and/or a deposit order in relation to parts of the claimant's claim if I conclude that they have no or little reasonable prospect of success. It is a two-stage process. First, I have to consider the prospects of success. If I find no or little reasonable prospect of success I have to go on to consider whether to make an order taking into account all the circumstances and the overriding objective. In exercising this jurisdiction I take the claimant's claim at its highest. I take into account that the appellate courts have repeatedly ruled that it is only in the clearest of cases that a strike out order would be appropriate in a discrimination and/or whistleblowing claim due to the fact sensitive nature of such claims and the importance of a claimant being allowed to test the evidence.

### **Protected disclosure (whistleblowing)**

- 25 The protected disclosures relied upon took place in September 2018 and January 2019. The further information concerning these disclosures is set out in paragraphs 12-18 of her witness statement. The claimant's evidence is that the September 2018 disclosures were made verbally to Ms Nikki Sharkey. The disclosures in January 2019 were made in an email which included not only Ms Nikki Sharkey but Ms C E Ward (Team Leader). Further reference is made to Ms Gill Hill, another Health Visitor, and also a meeting with Ms Kay Gilmour. Consequently, in my judgment, the claimant's alleged protected disclosures were known about by more than Ms Sharkey. It is the claimant's case that between September 2018 and May 2022 the claimant made a number of protected disclosure and that either individually or cumulatively they led to her treatment during the interview for a job in April 2022.
- 26 I do not find that the claimant has no or little reasonable prospect of success. Consequently, I do not make a strike out and/or deposit order in relation to the whistleblowing claims.

### **Protected acts**

- 27 By reference to paragraphs 12-18 of the claimant's witness statement and taking the claimant's evidence at its highest I can find not a scintilla of a suggestion that any of the conduct is in any way linked to the Equality Act. Consequently, I find that the claimant stands no reasonable prospect of successfully establishing that the disclosures made in September 2018, and January 2019 constituted protected acts and consequently there is no reasonable prospect of establishing that they were acts of victimisation. In my judgment, it is in the interests of justice for those claims to be struck out.

## **ORDERS**

### **Made pursuant to the Employment Tribunal Rules 2013**

#### **1. Complaints and issues**

- 1.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set

out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

2. **The Second Respondent**

2.1 By **4pm, 13 July 2023**, the claimant is to inform the respondents and the tribunal in writing if the claim against the Second Respondent is withdrawn or not.

1. **Statement of remedy / schedule of loss**

1.1 The claimant must provide to the respondent by **4pm, 27 July 2023** a document – a “Schedule of Loss” – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant’s complaints and how the amount(s) have been calculated.

1.2 As the claimant’s claim includes a claim for earnings lost because of the alleged conduct, the Schedule of Loss must include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.

3. **Finalised list of issues**

3.1 The parties are to send to the tribunal the finalised list of issues (with any points not agreed highlighted) by **4pm, 10 August 2023**.

4. **Documents**

4.1 On or before **14 June 2024** the claimant and the respondents shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so within **7 days** of any such request.

2. **Final hearing bundle**

2.1 By **4pm, 9 August 2024**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files (“bundle”), and provide the claimant with a ‘hard’ and an electronic copy of the bundle by **4pm, 23 August 2024**. The bundle should only include documents relevant to any disputed issue in the case should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are

relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;

- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

### **3. Witness statements**

- 3.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **4pm, 18 October 2024**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle(s); contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages she is claiming, together with an explanation of how it has been calculated.

### **4. Final hearing preparation**

- 4.1 **On the first day of the hearing** the following parties must lodge the following with the Tribunal:
- 4.1.1 four copies of the bundle(s), by the respondent;
- 4.1.2 four copies of the witness statements by whichever party is relying on the witness statement in question;

### **5. Other matters**

- 5.1 The respondent is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.
- 5.2 The claimant is ordered to prepare a short, neutral chronology for use at the hearing.
- 5.3 These documents should be agreed if possible.

## **CONSEQUENCES OF NON-COMPLIANCE**

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

---

**Employment Judge Alliott**

Date: 31/7/23

Sent to the parties on:

14/8/23

.....  
For the Tribunal:

J Moossavi  
.....