EMPLOYMENT TRIBUNALS

Claimant: **Mrs Janice Trustram**

Respondent: **EasyJet Airline Company Limited**

Heard at: **Watford Hearing Centre (by video hearing)**

On: **5 June 2023**

Before: **Employment Judge Tobin (sitting alone)**

Appearances
For the claimant: in person
For the respondent: Ms A Greenley (counsel)

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. **The claimant's claims of discrimination on the grounds of her disability have been presented outside of the time limit contained in s123 Equality Act 2010. Having considered the circumstances, it is not just and equitable to extend time for bringing these complaints.**

2. **The Employment Tribunal does not have jurisdiction to hear the complaints brought by the claimant on 28 July 2022. Consequently, proceedings are now dismissed.**

REASONS

The hearing

1. This has been a remote hearing which has been consented to by the claimant and the respondent. The form of remote hearing was a video hearing through HM Courts & Tribunal Service cloud video platform and all the participants were not physically at the hearing centre. A face-to-face hearing was not held because it was considered that all of the issues could be determined at this hearing.

2. The hearing was listed as an Open or Public Preliminary Hearing by Employment Judge Reindorf to determine:

   a. whether the claim has been presented outside the time limit for the presentation of claims, and if so whether the Employment Tribunal should extend time;

   b. whether the claimant was at the relevant time is a disabled person for the purposes of the Equality Act 2010 ("EqA"); and

   c. case management as appropriate.

3. The case was helpfully summarised by Employment Judge Reindorf. Judge Reindorf identified that the claimant was pursuing claims of discrimination arising from disability (pursuant to 15 EqA) and a failure to make reasonable adjustments (pursuant to ss20 and 21 EqA). Essentially, the claimant suffered a medical condition, namely migraines. She underwent an annual medical assessment at which she was termed unfit to fly and was subsequently placed on long-term sick leave, which meant that the claimant could not qualify for furlough pay. The case was listed for a 4-day hearing 19 -22 February 2024.

4. At the outset of the hearing, I confirmed that all participants had access to, and had had time to go through, a Preliminary Hearing Bundle, which was indexed and consisted of 120 numbered pages. On the morning of the hearing, I was provided with a email/statement from the claimant in respect of time limits and a separate email/statement dated 5 June 2023 entitled Impact Statement for a Disability Discrimination Case. I spent some time going through the Hearing Bundle the day before and the morning of the hearing and I read the claimant's statements before we commenced. The claimant gave evidence at the hearing, in which she confirmed her statements and was cross-examined by Ms Greenley. I also asked questions for clarification.

The law

5. Claims of discrimination in the Employment Tribunal must be presented *within 3 months* (i.e. 3 months less a day) of the act complained of, pursuant to s123(1) EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA goes on to say that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the

3-month time limit period if they think it *just and equitable* to do so, under s123(1)(b) EqA.

6. For a discrimination complaint, *continuing acts* under s123(3)(a) EqA are distinguishable from one-off act(s) that have continuing consequences; time will run from the date of the one-off act(s) complaint of; see *Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, Aziz v FDA [2010] EWCA Civ 304* and *Okoro and another v Taylor Woodrow Construction Limited and others [2012] EWCA Civ 1590*. So far as I could ascertain, the act that the claimant complained of does not represent a continuous pattern or course of alleged discriminatory conduct by any specific individual; it is a discreet act with ongoing consequences.

7. The ACAS Early Conciliation period will extend time limits for the parties to attempt to resolve their differences without the need for Employment Tribunal proceedings: see s18A and s18B Employment Tribunals Act 1996 and the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014.

8. There is no presumption that Employment Tribunal's should extend time, the onus is on the claimant to persuade the Tribunal that it is just an equitable to do so: *Robertson v Bexley Community Centre CA [2003] IRLR 434*.

9. In exercising any discretion, the Tribunal should consider the prejudice that each party would suffer as a result of granting or refusing the extension of time and should have regard to all of the other relevant circumstances. *British Coal Corporation v Keeble [1997] IRLR 336* said that the Tribunal should adopt the factors set out in s33 Limitation Act 1980 as useful checklist:

- The length of and reason for the delay
- The extent to which the cogency of evidence is likely to be affected by the delay
- The extent to which the party sued had cooperated with any requests for information
- The promptness with which the claimant acted once he knew the possibility of taking action
- The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibilities of taking action.

10. A key issue to be addressed, according to *ABM University Local Health Board v Morgan UK EAT/0305/2013* is as follows:

a. Why was it that the primary time limit had been missed?

b. Why, after expiry of the primary time limit, was claim not brought sooner than it was?

11. The Court of Appeal said in *London Borough of Southwark v Afolabi [2003] IRLR 220* that a Tribunal is not required to go through all of the above checklist in considering whether it is just and equitable to extend time, provided no significant factor had been left out in the exercise of the Tribunal's discretion.

My findings of fact

12. The claimant commenced employment with the respondents on 23 February 2005 and is still an employee of the respondent. The claimant worked as a member of cabin crew when she suffered a head injury at work in August 2019 and she went on to develop migraines with auras [see Hearing Bundle p60-63]. Following the coronavirus pandemic, she was placed on furlough with effect from 1 April 2020.

13. The claimant was referred for a medical assessment; and on 26 April 2021 she was assessed as unfit in her aero-medical assessment by AXA Health occupational health service [HB59]. This resulted in a decision to place the claimant on the roster code as "Long-Term Sick", which meant that the claimant was taken off furlough and placed on the respondent's sick pay. This is the detriment that the claimant complains of, and so far as I can tell, it occurred on 26 April 2021.

14. The claimant was subsequently reassessed, and on 18 June 2021 Dr Normy Ahmed, Specialist in Aviation and Occupational Medicine, assessed the claimant as unfit for work and unlikely to be fit for the next few weeks at least [HB60-63]. The claimant does not allege that the respondent reviewed or reassess its decision to label the claimant as Long-Term Sick and there is no evidence to suggest that any review or reassessment took place at this point.

15. By a report dated 20 August 2021, Dr Ahmed assessed the claimant as fit to return to work [HB64-67]. The respondent acted upon Dr Ahmed's report and the claimant was re-coded as "fit" on 26 August 2021 [HB68].

16. The claimant engaged with ACAS Early Conciliation on 27 May 2022 and on 8 July 2022 an ACAS Early Conciliation Certificate was issued.

17. A Claim Form was received by the Employment Tribunal on 28 July 2022.

My determination

18. The respondent contends that the claimant's claims are out of time. The respondent contends that any allegation made about events prior to 27 February 2022, is time-barred under s123 EqA. This calculation is on the basis that the claimant could take advantage of the Early Conciliation period, so the respondent calculated the 3 months statutory time limit to runs from the period before ACAS Early conciliation.

19. The claimant entered into ACAS Early conciliation over 1 Year and 1 month after the cause of action arose. The statutory time limit ran out on 25 July 2021. The claimant did not enter ACAS Early Conciliation by this date, so I do not accept that she is entitled to the benefit of ACAS Early Conciliation to extend the time limit. Even if she was, on the best-case analyses, she is 10 months out of time as opposed to just over 1 year and 3 months.

20. The claimant gave 3 principal arguments for her late issue of proceedings: her lack of awareness; her personal circumstances; and her exhaustion of internal procedures, although some of these appear to overlap.

21. The claimant said that she thought that the detriment was ongoing. This is mistaken. The detriment related to a single decision to recode the claimant on the roster. The claimant does not contend that this decision was taken daily or every time the roster was referred to and the limited evidence available does not support such an interpretation. The decision was taken on 26 April 2021, and this was communicated to the claimant promptly as she became aware very quickly of the change in her pay rate. Of course the (alleged discriminatory) decision had an ongoing effect, but as stated above, the contended discriminatory act must be separated from the continuing consequences. The respondent says that it restored the claimant as "fit" to the roster on 26 August 2021, but, at best, this rectified or mollified the consequences of the contended discrimination, and this was over 11 months prior to the claimant issuing proceedings.

22. The claimant said that she was not aware of her rights in respect of the time limits, and she was not given the correct support from her trade union. The claimant was an intelligent employee. She did not suffer any cognitive impairment; she was able to bring and engage with these proceedings and argue her case eloquently. She is not a lawyer, so I do not assess her by these high standards. However, she was a trade union branch representative, i.e. a shop steward, with Unite. I accept the claimant's evidence that she had not undertaken any shop steward's courses, because of the covid disruption and I accept that the trade union was stretched at this time advising members on the effects of the Covid-19 crisis which had profound consequence on the employment landscape. However, lack of knowledge of an individual's rights is not a sufficient excuse for non-compliance with time limits and I discount that argument. The claimant as a trade union representative inevitably had a more sensitive antenna to irregularities in the workplace and she was in a position to find out more information and access support networks. The claimant said that she discussed her case with the Unite convener, the union's regional officer and also the union's legal branch. I note that the claimant sorted out a secondment and subsequently raised a grievance; but the grievance was not until December 2021 and attempts to sort out matters outside the Employment Tribunal, commendable as they are, do not stop-the-clock.

23. The claimant said that she suffered from panic attacks and anxiety/mental health deterioration during the period under scrutiny. The medical evidence available did not support the proposition that the claimant had such difficulties, and this was significant. The claimant was able to secure a secondment and hold down a difficult and demanding job, support fellow trade union members and all without significant absence. I do not accept that she was so incapacitated that she could not issue proceeding within the limitation period and possible ACAS Early Consolidation extension.

24. The alleged discrimination was limited to pay so the prejudice for the claimant would be significant if she was not allowed to pursue her claims; however, I note that the claimant raised a grievance, so she did have the opportunity to ventilate her complaints, internally at least. Of greater significance, I note that the claimant is still employed by the respondent, so the discrimination contended was not of such magnitude so as to destroy the employment relationship. The balance of prejudice to the respondent employees may be significant also. They face discrimination allegations and reputational damaging complaints for proceedings that were not

brought within the appropriate timescales. The claim was not brought promptly so memories will have faded to some extend and documents might not be available, particularly as the grievance was not prompt either. I find the balance of prejudice favours not allowing these claims to proceed.

25. There is no evidence that the respondent has withheld information from the claimant such to justify late proceedings and I do not see that the claimant was impeded by delays in obtaining professional advice.

26. Discrimination complaints should, as a general rule, be decided only after hearing all of the evidence, see *Anyanwu v South Bank Students' Union [2001] IRLR 305 HL*. However, this case applied to circumstances where the claimant relied on an alleged continuous course of discriminatory treatment where some of the acts relied upon were brought in time. That is not the case here, no identified complaints were brought in time.

27. The discretion is wider for the discrimination claims. Lack of knowledge of Employment Tribunal time limitations or miscalculating these or misinterpreting them is not accepted as a sufficient explanation for non-compliance with s123 EqA. The case law is clear that only in unusual circumstances is a claimant entitled to rely upon this factor. The claimant is impressive and articulate; she is a mature and experienced employee. She is capable of undertaking research and interpreting the Employment Tribunal jurisdictional requirements. The claimant missed her limitation date because she though as the consequences of the discrimination was ongoing so must be the limitation date. This is wrong and I never received a clear answer as to why proceeding were issued in July 2022 and not by late Sumer 2021.

Conclusion

28. In summary, the claimant's complaint are out of time and for the reasons stated above, it is not just and equitable to extend time in respect of the claimant's disability discrimination complaint, pursuant to s123(3) EqA.

Disability

29. I do not determine whether or not, at the material time, the claimant was disabled under s6 and sched 1 EqA because as I determine the Employment Tribunal does not have jurisdiction to hear this complaint, such a decision is otiose,

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Employment Judge Tobin
8 September 2023
JUDGMENT SENT TO THE PARTIES ON

8 September 2023

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