EMPLOYMENT TRIBUNALS

Claimant: Dr A Chisholm

Respondents: Dr S Gill and Dr A Thomas (a partnership)
trading as Griffiths Practice

Heard: By Cloud Video Platform – Midlands West

On: 1 March 2024

Before: Employment Judge Faulkner (sitting alone)

Representation: **Claimant** - in person
Respondent - Mrs M Peckham (Solicitor)

PUBLIC PRELIMINARY HEARING

JUDGMENT having been sent to the parties on 5 March 2024, and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Introduction

1. This Claim concerns complaints of pregnancy discrimination arising from the Claimant's employment as a General Practitioner in the Respondent GP Practice. The Final Hearing is listed to take place later this year. This Public Preliminary Hearing was fixed by Employment Judge Camp at a Case Management Hearing in October 2023 and was to determine the issues set out below in relation to time limits.

Issues

2. The last act of alleged discrimination took place on 14 April 2022 and ACAS Early Conciliation began on 20 February 2023. The first issue for me to decide therefore, as identified by EJ Camp, was assuming that there was conduct extending over a period to 14 April 2022, would it be just and equitable to extend time under section 123 of the Equality Act 2010 ("the Act")?

3. If the answer to that question was no, it would follow that it was not just and equitable to extend time in relation to the earlier complaints and so the whole Claim would fall away. If the answer was yes, the complaint about the last act of alleged discrimination on 14 April 2022 would be in time, but that would not answer any question about conduct extending over a period to that date, nor the alternative question of whether it would be just and equitable to extend time in relation to those earlier matters.

4. The second issue therefore, again as identified by EJ Camp, was whether any part of the Claim had no or little reasonable prospect of success because of time limits, either in relation to conduct extending over a period or a just and equitable extension of time, and if so, should one or more complaint be struck out or should deposit orders be made?

5. As will appear below, Mrs Peckham did not in the end pursue any application to strike out or for a deposit order on this basis.

Facts

6. EJ Camp set out in his Case Management Orders a summary of this case, and identified the issues which would fall to be determined at a Final Hearing. For the purposes of this Hearing, I confined myself to findings of fact relevant to the issues as set out above. The Respondent produced a bundle of 96 pages, which I read before the Hearing. The Claimant produced a written statement, and gave oral evidence, on the time limit issues. My findings of fact are based on those documents and that evidence.

7. The Respondent employed the Claimant as a GP from 7 June 2021. She discovered that she was pregnant in late August 2021, formally notifying the Respondent on 25 October 2021, though her case is that she provided informal notification on 6 September 2021 and the Respondent appears to accept that Dr Gill became aware of the news by 9 September 2021.

8. The Claimant's allegations of unfavourable treatment because of pregnancy are set out in full by EJ Camp. In summary, her complaints are:

8.1. Her probation period was extended on 18 October 2021.

8.2. She was told that she had no further entitlement to sick pay on 4 November 2021.

8.3. She was subjected to insensitive comments from late September to late October 2021, and from 18 October 2021 colleagues talked to her less than before she was pregnant.

8.4. She was presented with performance concerns on 20 January 2022.

8.5. The Respondent made no wellbeing calls and provided no support when she went off sick with stress.

8.6. The Practice Manager contacted her about returning to work, on 2 February 2022.

8.7. She was sent emails sent about her performance on 10 February 2022.

8.8. She was referred to the General Medical Council ("GMC") on 14 April 2022.

8.9. The Respondent failed to carry out a risk assessment. The date by which the Claimant alleges this should have been done remains unclear, but that detail was not pertinent to my decision.

9. The Claimant went on maternity leave on 7 March 2022.

10. A GMC hearing took place on 11 May 2022, at which restrictions were placed on the Claimant's licence to practice as a doctor. She could not attend that hearing as she was by then in the early stages of labour and so a solicitor attended on her behalf. That solicitor only advised the Claimant on the GMC referral; advice was not available from them on employment claims.

11. The Claimant gave birth on 16 May 2022; the Respondent accepts, as the medical records in the bundle show, that the birth was not straightforward. She was discharged from hospital on 18 May 2022, with the associated risk assessment recording her as high risk and referring to anaemia (she received a blood transfusion) and anxiety. Related medical records referred to the requirement for surgery and 700 ml of blood loss.

12. The Claimant described the subsequent months as follows:

12.1. She was sleep-deprived because of insomnia related to anxiety and depression and because in any event she was only getting two hours of unbroken sleep at any one time because of her newborn.

12.2. For three working days a week, as well as looking after her newborn, she was taking care of her two-year-old child at home as she and her husband could only afford nursery care for two days per week.

12.3. She was anaemic.

12.4. She was also depressed. She did not take anti-depressants because she was breast feeding.

12.5. She had to deal with the GMC case. After the hearing in May referred to above, she was required in July 2022 to fill out an online assessment and provide the GMC with details of her case. The GMC then wanted to do a performance assessment, which would usually take place within eight weeks. The Claimant requested a delay in the process because she had recently given birth and because of her state of health. The GMC agreed to delay the assessment to 9 January 2023.

12.6. She was unable to secure a specialist gynaecological appointment until July 2022 and so until then remained in pain daily.

12.7. She could not access legal advice via the British Medical Association ("BMA") given that some of the issues she raised predated her BMA membership. At the end of June 2022, she had a one-hour telephone call with a non-lawyer, arranged via the BMA. The call only gave the Claimant details of various options for getting legal advice, for example via her home insurance policy (she did not have the relevant cover); no advice was given to her on this occasion.

12.8. She did not seek advice from a citizens' advice bureau or legal centre.

12.9. She could not face recounting the events of her employment with the Respondent, as doing so gave rise to panic attacks, nor could she face going back to work.

12.10. In September 2022, she began therapy to assist with her mental health.

12.11. She took the decision to resign from her employment on 5 September 2022, with an effective date of termination of 5 December 2022.

12.12. The therapy proved helpful and the Claimant's panic attacks settled down towards December 2022.

12.13. She and her husband explored options for financing legal advice. Only by December 2022 were they able to secure a loan from a family member for this purpose.

12.14. At this point her newborn started to sleep better.

13. Accordingly, and as an email in the bundle shows, on 7 December 2022, the Claimant consulted a solicitor to understand if she had a case to bring an employment tribunal claim and to understand the timescale for doing so. She discussed with the solicitor all the pregnancy discrimination complaints summarised above.

14. As the documents in the bundle also show, the solicitor advised the Claimant that she had three months from the effective date of termination of her employment to bring a claim, that is until late March 2023. One message from her solicitor said, "the ACAS form will have to be submitted within 3 months less one day from your last day, i.e. before 4.3.23 though we recommend that you do this sooner rather than later". The Claimant saw no reason to question this advice until the question of time limits was raised by EJ Camp at the Case Management Hearing in October last year.

15. The Claimant started new employment as a locum on 31 January 2023; she is now employed permanently as a GP. In February 2023, the GMC closed the case against her without further action or the need for a further hearing. Much of what the Respondent relied on for the GMC referral was comprised of the performance concerns that had previously been raised with her and which form part of at least one of the separate allegations of pregnancy discrimination. The GMC apparently said that the referral should never have been made.

16. ACAS Early Conciliation took place from 20 February to 3 April 2023. The Claim Form was presented on 21 April 2023.

Law

17. Section 123(1) of the Act provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period.

18. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that time will be extended **– Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**, though extending time does not require exceptional circumstances. The Employment Appeal Tribunal ("EAT") in **Dr Nicholas Jones v The Secretary of State for Health and Social Care: [2024] EAT 2** reviewed the authorities and noted that there was a common practice among those seeking to argue that time limits should not be extended to rely on the comments in **Robertson** that time limits in the employment tribunal are "exercised strictly" and that a decision to extend time is "the exception rather than the rule", as if they were principles of law. The EAT stated that the practice of relying on these comments out of context should cease. In the EAT's view, the propositions of law for which **Robertson** is authority are that employment tribunals have a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere; the comments in question need to be viewed in that context.

19. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of the tribunal granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

20. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** Leggatt LJ in the Court of Appeal said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. He said that notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. He went on to add that there is no reason to read into the statutory language any requirement that the tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from a claimant. At most, he said,

whether any explanation or reason is offered, and the nature of them, are relevant matters to which tribunals should have regard.

21. The Court of Appeal approved **Morgan** in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ. 23**. In that case, a race discrimination complaint was dismissed when three days out of time. One of the key factors in the Court of Appeal upholding the decision was that the events with which the discrimination claim was concerned occurred long before the formal act complained of, affecting the quality of the evidence, and the Claimant could have complained about them as soon as they occurred.

Analysis

22. As already noted, the specific jurisdictional issue for me to consider was whether it was just and equitable to extend time in relation to the last act of alleged discrimination, on the assumption that what came before it was conduct extending over a period ending with that last act. During her submissions, Mrs Peckham stated that if I were to find that it was, on reflection the Respondent did not seek either a deposit order or a strike out order on the question of whether the Claimant had little or no reasonable prospect of showing that what came before was conduct extending over a period ending with the last act. This Hearing was not convened to consider either strike out or a deposit order on the substantive merits of any complaint. I was therefore left to decide the single question of whether it was just and equitable to extend time in relation to the complaint about the referral to the GMC on 14 April 2022.

23. Mrs Peckham correctly submitted that the Claimant had provided only limited medical records for this Hearing, that is related to the circumstances of her childbirth. I did not doubt however the veracity of her account on the wider issues summarised above. I found her to be wholly transparent, clear and coherent in her evidence, noting for example, on the question of her finances – which in the end I did not need to record in my findings – that she was both specific and frank about her position. This reflected her evidence generally. I accepted what she told me in its entirety.

24. The burden was on the Claimant to establish that the time limit should be extended in her favour and I have noted above that there is no presumption that it will be, but that does not require exceptional circumstances, and given the recent ruling in **Jones**, I did not proceed on the basis that an extension of time is the exception rather than the rule. Tribunals have a wide discretion, taking into account relevant factors and ignoring irrelevant ones. There is no checklist to work through, but key factors in deciding whether to exercise the discretion to extend time almost always include the length of and reasons for the delay and the question of prejudice for either party.

25. I agreed with Mrs Peckham that the delay in commencing proceedings in this case was not short. Even allowing for the maximum period of ACAS Early Conciliation, the complaint about the GMC referral should have been made by around the end of August 2022. It was in fact made in April 2023, with Early Conciliation starting on 20 February 2023, that is a delay of around 8 months. That did weigh against granting an extension of time.

26. That said, I was amply satisfied that the Claimant explained the delay in full. She faced a veritable storm of events which meant, as she put it, that she was "in survival mode" for a significant period of time:

26.1. She gave birth in May 2023 (less than a month after the limitation period commenced), which the Respondent recognises – and I found – was very difficult.

26.2. She experienced ongoing physical ill-health as a result, for which she was not able to get specialist help until July 2023.

26.3. She was the principal carer for her newborn and for her other small child for much of the working week.

26.4. She experienced anxiety and depression, and was understandably unwilling to take medication to help with that whilst breastfeeding.

26.5. She experienced panic attacks in recalling and recounting the events which give rise to her claim.

26.6. She underwent therapy for her mental health.

26.7. She took the decision to resign her employment with the Respondent.

26.8. Added to all of the above, she had the considerable burden of her professional livelihood being under scrutiny via the GMC.

27. As things improved as a result of the therapy, by December 2022 the Claimant had the capacity and sufficient wellbeing to consider getting advice on a potential claim. She was unable to secure advice via the BMA or the Medical Defence Union. As she says, whilst some advice is available online, its usefulness is limited, and she cannot be criticised for wanting specialist legal advice on her specific situation, a case she considered, not unreasonably, to be complex. It is clear that as a result of needing to raise funds, she was only in a position to obtain the bespoke legal advice she needed in early December 2022.

28. I was not in a position to reach any conclusion that could sensibly be thought to be binding, or even influential, in any other forum as to the advice given to the Claimant by the solicitors she consulted in early December 2022. What I could accept on the face of the documents shown to me is that the Claimant reasonably understood, having taken that advice, that the time limit ran only from the date on which her employment with the Respondent terminated, namely 5 December 2022. Of course, the actual time limit had expired by the time she took the advice, but her reasonable understanding of the position at that point explains the further delay in bringing proceedings and so is not irrelevant to the weighing up of all the circumstances of the case. I accepted that she only knew of the actual position relating to time limits when she was before EJ Camp.

29. These are not insubstantial reasons explaining why the Claimant acted as she did. The crucial question in the balance therefore was that of prejudice and on the materials before me I could see no forensic or evidential prejudice to the Respondent that would be occasioned by a decision to extend time in relation to the last act of alleged discrimination. On its face, the event in question is well-documented (that is, the Respondent made a written referral), and whilst Mrs

Peckham fairly said that the referral related to events going back some time, the Claimant said that:

29.1. The referral is very detailed which, although it was not in the papers before me, I found unsurprising.

29.2. The Respondent provided further supporting material to the GMC in both September 2022 and January 2023.

30. The Respondent ought therefore to be in a very good position to deal with the circumstances of the referral both by reference to contemporaneous documents and in its witness evidence. In addition, the matters that the Claimant complains about in their totality do not go back further than six months before the last act of alleged discrimination. This was not therefore a situation similar to **Adedeji**, where there was evidential prejudice because the events in question went back years before the formal act of alleged discrimination.

31. I acknowledge of course that there is prejudice to the Respondent in the sense that an extension of time requires it to defend a complaint that it would otherwise not have to. Given however that the GMC has apparently said that some or all of what was referred by the Respondent should not have been, whilst of course that does not of itself mean that the referral was unfavourable treatment because of the Claimant's pregnancy, it does confirm in my judgment that it is just that the Claimant be given an opportunity to proceed with her case in this regard and have it heard on its merits.

Summary

32. In summary:

32.1. The Claimant's complaint of pregnancy discrimination relating to the Respondent's decision to refer her to the General Medical Council on 14 April 2022 was brought out of time.

32.2. The Tribunal is satisfied that she brought that complaint within such other period after expiry of the time limit as was just and equitable.

32.3. In relation to time limits the Respondent did not pursue any application either for deposit orders or strike out of the Claimant's remaining complaints of pregnancy discrimination.

32.4. This Judgment does not prevent the Respondent from raising any issues related to time limits, other than in respect of the complaint about the referral to the GMC on 14 April 2022, at the Final Hearing of this Claim. With that proviso, the list of issues produced by EJ Camp, including in relation to time limits, remains as he drafted it. The Respondent's concession summarised at paragraph 32.3 above was for the purposes of this Preliminary Hearing only.

33. Case management orders were made at the conclusion of this Hearing to ensure the parties will be ready for the Final Hearing in due course.

Note: This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was video.

Employment Judge Faulkner
Date: 14 March 2024

Notes

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/