EMPLOYMENT TRIBUNALS

Claimant: **Miss Kidan Nags**

Respondent: **Homerton Healthcare NHS Foundation Trust**

Heard at: **East London Hearing Centre, via CVP**

On: **19 February 2024**

Before **Employment Judge A Sugarman**

Representation

For the Claimant In person

For the Respondent Bryony Clayton, Counsel

JUDGMENT

1. The Employment Tribunal does not have jurisdiction to hear the Claimant's claims as they have been brought outside the three-month time limit set out in s123(1) of the Equality Act 2010 and it is not just and equitable to extend time. All of the Claimant's claims are dismissed.

REASONS

Background

1. The Claimant presented a Claim Form on 29.12.22. She identified her job as "Staff Bank Receptionist/Administrator". It is not easy to decipher from the Claim Form the legal claims she intended to advance. It mentioned being employed on a zero hours contact and missing out on pension and holiday pay, as well as discrimination.

2. In its Response, the Respondent accepted the Claimant was employed under its "Staff Bank Terms of Engagement". It said further particulars were required of the Claimant's claim, but denied discrimination and averred that holiday pay had been paid.

3. The Claimant provided some further detail when she filed her Agenda in advance of the Case Management Preliminary Hearing. She referred to having applied for various positions that she did not get. Nevertheless, the claims were still not clearly articulated.

4. The case came before Regional Employment Judge Burgher on 26 June 2023. He sought to clarify the claims but was unable to do. The Claimant did not have full access to her documentation and there were some difficulties with communication and understanding over the phone. Regional Employment Judge Burgher made orders for the provision of further information by 7 August 2023 and ordered a further Preliminary Hearing.

5. The Claimant failed to comply and an Unless Order was sought. The Tribunal issued a strike out warning on 11 September 2023. The case came before Employment Judge Crosfill on 15 September 2023. He explained the information that Regional Employment Judge Burgher had required by 23 September 2023. He observed that it was second case management hearing and the case was still completely unclear.

6. On 20 September 2023, the Claimant provided further information. It was still not clear what claims she intended to advance.

7. The matter next came before Employment Judge Townley on 30 November 2023. She records having a lengthy discussion with the Claimant about the details of her complaints and, with the assistance of the document that she had provided, they were clarified.

8. The claims were identified as claims of discrimination because of race in relation to applications for four jobs for which the Claimant was interviewed but was unsuccessful. The applications were as follows:

    a. Ward clerk (date of application 15.10.20);

    b. Float medical secretary (date of application 15.03.21);

    c. Medical secretary (date of application 29.06.21)

    d. Ward clerk (date of application 13.10.21)

9. The Claimant had contacted ACAS on 15 December 2022 and a Certificate was issued on 19 December 2022. As set out above, the Claim Form was presented on 29 December 2022. Thus. acts pre-dating 16 September 2022 were, on their face, out of time. Given the last act about which the Claimant was complaining was approximately 11 months prior to that, Employment Judge Townley listed a further Preliminary Hearing to determine whether the claims were brought in time and if not, whether it was just and equitable to extend time. That was the issue before the Tribunal at this hearing.

The Preliminary Hearing

10. At the outset of the hearing, the Claimant confirmed that she was ready to proceed and did not require any adjustments.

11. I informed her that I sit as a part-time Employment Judge, but I am also a practising barrister and that Ms Clayton is a professional colleague of mine as she is a member of the same chambers. I also explained that her instructing solicitor, Mr Taylor, was known to me professionally as he had previously instructed me as a barrister (though not on behalf of the Respondent). The Claimant said she understood and had no objections to me continuing to deal with the case.

12. I asked the Claimant whether her claims were accurately summarised by Employment Judge Townley on the last occasion. She agreed that they were but confirmed she no longer pursued a claim in respect of the Medical Secretary role she had applied for on 29.6.21. As such, she confirmed her claims of race discrimination related to her failure to secure the other three roles.

13. I asked her initially to explain the basis of her contention that she had not been offered these roles because of her race. She said it was "complicated" and was "stereotyping possibly because of ethnic background" which she identified as Eritrean/Ethiopian.

14. I clarified with her that she understood the purpose of today's hearing was to deal with time limit issues and it was clear that she did. Given the issues, it seemed sensible for the Claimant to give some evidence, which I permitted. There was no witness statement. She then gave evidence about the matters relevant to time limits.

The Claimant's Evidence

15. The Claimant confirmed that she was interviewed for each role soon after she applied and that she found out she was unsuccessful on the same day as her interview or the next day. As such, the dates of applications are close in time to the decisions she complains about.

16. In respect of the Ward Clerk role in October 2020, she was not sure who made the decision but remembered being interviewed by two people, one of whom was white and the one she believed was Nigerian. The Respondent said she was interviewed only by Dorothy Anakwue. As to why she believed race had a role to play, the Claimant said she believed there was a rumour going round that she was a witch. However, she did not explain the link between the alleged rumour and her ethnicity and she did not suggest the people who interviewed her had referred to her as a witch or even that she thought they were aware of the rumour. The successful candidate was Asian and the Claimant accepted she was good at her job. She wondered if stereotyping may have had a role to play in the decision. She could not explain why that may be a possibility but suggested she may have been treated differently as a first generation immigrant because she was new in the country and less accustomed to the culture. She did not know however if the successful candidate was also a first generation immigrant, nor indeed whether the interviewer she thought was Nigerian was either.

17. In respect of the Float Medical Secretary role in March 2021, she was interviewed by Lisa Harber and someone else. The Respondent said it was Jade Morgan-Squire, which the Claimant did not dispute. She said Ms Harber was "influenced by something" albeit she did not know what. A Spanish colleague Anna, who was new in the country, was successful. The Claimant said she was a good person and "entitled to have the job".

18. In respect of the 3rd role, the Ward Clerk position she applied unsuccessfully for in October 2021, she was interviewed by Dezerree Berry and Sharon Moscoso-Victorio, who she believed were from the Philippines. She said Ms Berry had in fact encouraged her to apply. She believed the successful candidate was African, albeit she didn't know her very well. The Claimant did not wish to speculate about why the other African candidate may have been preferred.

19. Other than the fact all three were job refusals, she did not suggest there was any other link between the decisions of what were ostensibly different decision makers.

20. The Claimant was asked about the reason for not bringing her claim sooner. She said she did contemplate brining a claim shortly after the 1st rejection, and after each rejection thereafter, and she contacted the Citizens Advice Bureau to ask them how to take a claim to the Employment Tribunal. She said they did not dissuade her from taking a claim but said it was best to sort out internally with her employer if she could. She therefore decided not to bring a claim then and went back to work. She did not however bring a grievance or other internal complaint about the treatment she now complains about. At that point, she was still getting regular work and did not wish to jeopardise it.

21. The catalyst for her bringing claim a year approximately a year later was a reduction in her shifts necessitating a trip to the job centre, which she felt was unfair and she was clearly upset by. When she came out of the job centre, she decided to call ACAS to start the early conciliation process. She also said she was in bereavement around that time. She has since been suspended but that is not the subject matter of this claim.

22. When asked if there were any other reasons she relied upon as to why it may be just and equitable to extend time, she said that people ought to be behave like adults and no-one should be allowed to have another person's life in their hands.

The Parties' Submissions

23. In summary, the Respondent averred that the claims were significantly out of time. The most recent act dated from October 2021 and the other acts were older than that. Different people were responsible for the decisions which were said to be discriminatory and the Respondent submitted there was not continuing act. It was the Claimant to persuade the Tribunal it was just and equitable to extend. The Respondent contended that she had chosen to wait to bring her claim, having had advice, and her reason for not bringing the claim sooner was not a good one.

24. Further, the Respondent said it was prejudiced– there were 8 potential witnesses. 3 of those who interviewed had left the Respondent's employ and two further witnesses were on temporary career breaks. Also, the Respondent only keeps documents on its recruitment system was 12 months and it said it was unable to locate any documents in relation to when the Claimant was notified that her 2020 & 2021 applications were unsuccessful. The Respondent also submitted the merits of the claim were ostensibly poor.

25. The Claimant submitted that when she applied for the Medical Secretary role, she did not think Anna was better than her, but she did not blame the manager

for taking someone Anna over her now, but she was doing the job at the time. She said she had been happy with the Respondent initially but not more recently. She said her manager had told her she deserves a payrise and she could say that was unfair.

The Law

26. Section 123 (1) of the EqA 2010 provides, so far as is material:

> *(1) 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.*
>
> *(2) 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.*

27. These time limits are modified by the Early Conciliation regime by reason of s140B of the Equality Act 2010.

28. In **British Coal Corporation v Keeble** [1995] UKEAT 413/94, Holland J had suggested that the tribunal should have regard to factors in section 33 of the Limitation Act 1980 which gives courts the power to extend the primary time limit in personal injury cases.

29. However, in **Southwark London Borough Council v Afolabi** [2003] ICR 800, the Court of Appeal confirmed that whilst the checklist in s33 of the Limitation Act 1980 may provide a useful guide for tribunals, it need not be adhered to slavishly. In **Department of Constitutional Affairs v Jones** [2007] EWCA Civ. 894, [2008] IRLR 128, Pill LJ at para. 50 of his judgment referred to **Keeble** as "a valuable reminder of factors which may be taken into account" but continued: "*Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found*."

30. In **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 the Court of Appeal held in relation to extending time: “there is no presumption that [the employment tribunal] 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.”

31. That does not however mean that exceptional circumstances are required and **Robertson** does not set out any proposition of law to that effect. Subsequent cases have suggested the comments in **Robertson** need to be understood in

their proper context, per HHJ Tayler in **Jones v Secretary of State for Health and Social Care** [2024] IRLR 275.

32. Indeed, in the more recent Court of Appeal case of **Chief Constable of Lincolnshire Police v Caston** [2009] EWCA Civ. 1298, Wall LJ held that **Robertson** simply emphasised the "wide discretion which an ET has…" Sedley LJ agreed: "…there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

33. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194, Lord Justice Leggatt, as he then was, said that the "factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

34. That does not mean that the absence of a good reason for the delay will automatically prevent time being extended. Leggatt LJ went on:

> *As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.*

35. Exhausting internal procedures will not necessarily justify a delay but may be one of the relevant considerations. In **Apelogun-Gabriels v London Borough of Lambeth** [2001] EWCA Civ. 1853, the Court of Appeal rejected the suggestion that there is a general principle that an extension should always be granted where a delay is caused by a claimant invoking an internal grievance or appeal procedure, unless the employers could show some particular prejudice. It held at §16:

> *"It has long been known to those practising in this field that the pursuit of domestic grievance or appeal procedures will not normally constitute a sufficient ground for delaying the presentation of an appeal."*

36. The length of the period a claim is out of time may will be likely relevant, but a short period of time does not necessarily mean that an extension will be granted, whilst a long delay does not necessarily mean it will be refused. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 2, the Court of Appeal upheld an employment judge's refusal to extend time for a race discrimination claim presented three days late. In considering delay, it is likely to be important to consider what the consequences of any delay are.

37. In **Miller v MoJ and Thompson v MoJ** UKEAT/0003/15/LA, UKEAT/0004/15/LA, Laing J in the EAT held that if there was forensic prejudice to the respondent, that may be "crucially relevant". However, the converse is not necessarily true so that if there is no forensic prejudice, that is not necessarily decisive and "may not be relevant at all".

38. Although some care may need to be taken, particularly in discrimination claims, the merits may also be a relevant factor, as long as they are assessed properly by reference to identifiable factors, taking into account that the tribunal does not have all the evidence at a preliminary stage (**Kumari v Greater Manchester Mental Health NHS Foundation Trust** [2022[EAT 132.)

Conclusions

39. It is not in dispute that the claims advanced by the Claimant are brought outside the 3 month time limit specified in s123(1) Equality Act.

40. The last rejection about which complaint is made took place in or around October 2021, yet the Claimant did not contact ACAS until 15 December 2022. The earlier rejections are even further out of time, occurring some 7 and 12 months prior to that. They may however form part of a continuing act, something I am not making a definitive finding on in this judgment. Even if they do however, the last act is still some 11 months out of time.

41. In terms of the reason for not presenting the claims in time, or earlier, this is not said to be a case about ignorance of the right to bring proceedings or indeed how to bring proceedings. Rather, the Claimant believed she had been discriminated against at the time and sought advice about those matters but thereafter made a positive decision not to bring a claim at the time of the rejections because she continued to work regularly for the Respondent and did not wish to jeopardise the relationship. It was only in December 2022, after work began to drop off and she had to attend a job centre, that she decided to bring a claim about the rejections in 2020 and 2021. The drop off in work is not pleaded to be an act of discrimination.

42. The Claimant said she had been given advice that she was better off resolving her concerns internally. However, there is no evidence that she in fact then sought to do so. She did not lodge a grievance about the rejections nor was there any ongoing internal process on-going that might explain, to some extent, the delay in presenting a claim.

43. The Claimant does not rely on any ill health grounds that might have prevented or hindered her bringing a claim sooner.

44. I take into account that the Claimant said she had bereavement at around the time she contacted ACAS, though this does not explain the earlier delay or constitute a good reason for it.

45. Overall, I am not satisfied there was a good reason for the delay. However, that is not a reason on its own for refusing to extend time, I must weight it in the balance.

46. In terms of the length of the delay, it is a significant one of circa 11 months from the last pleaded act (potentially much longer for the earlier ones).

47. It is not just the period of the delay that is problematic but its consequences. In this case, I accept it has caused the Respondent prejudice. Due to the passage of time, a number of likely witnesses have left the Respondent's employ, including both of those who interviewed the Claimant for the Float Medical Secretary position. Further, it appears important documentation is no long retained given documents are held on the Respondent's recruitment system for 12 month absent some reason to keep them for longer, so that it could not local

documents in relation to when the Claimant was notified that her 2020 / 2021 applications were unsuccessful. Given the lack of internal complaint, no investigation was done into the Claimant's concerns contemporaneously either.

48. I must balance the Respondent's prejudice against the Claimant's. I do not allow time to be extended, the Claimant will be unable to pursue her claims and that will cause her real prejudice too. However, she took that risk when choose not to bring claims at the time of, or shortly after, the rejections, having thought about doing so and sought advice about it too.

49. Further, the prejudice the Claimant will suffer appears limited because the prospects of success of the claims appear limited too. The race discrimination claims are difficult to comprehend. The Claimant was able to point to no evidence that might possibly link her rejections to her race and the Tribunal noted that the successful candidates included a fellow African and a Spanish colleague who had not been in the country for a long time. The Claimant referred to a rumour that she was a witch although it was not clear how this fits into her race discrimination complaint and in any event, she did not suggest there was any evidence that any of the decision makers were aware of it.

50. I am conscious that the case is at an early stage and it is a discrimination case, so it is fact sensitive. However, even bearing that in mind, it appears palpably weak. It was only at this hearing the Claimant was able to identify the race she relied upon, but she advanced nothing of substance that might suggest the transfer the burden of proof would be transferred to the Respondent. Her case appears to be based on speculation only.

51. If I were to grant an extension, the Respondent will lose what would otherwise be a valid time bar argument, which is prejudicial to it. It would be required to spend further time and money on a case which is significantly out of time. The Respondent has already had to attend 4 separate Preliminary Hearings in what ought to have been a straightforward case, given the lack of clarity in the Claimant's pleadings. It will be put to further likely irrecoverable expense in responding to claims which are out of time and lacking in any obvious merit.

52. Overall, balancing the prejudice to both sides and the other material factors, I have concluded the claims are out of time and it is not just and equitable to extend time. As such, it is my decision that the Tribunal has no jurisdiction to hear the claims. The Claimant advanced no other reason why the claim should not be dismissed and so all of her claims are now dismissed.

Employment Judge A Sugarman
Date:21 April 2024