EMPLOYMENT TRIBUNALS

Claimant: Mr Nazeem Thomas

Respondent: HCA International Ltd

Heard at: London South (in public; by CVP) **On:** 12 February 2024

Before: Employment Judge Tsamados (sitting alone)

Appearances
For the claimant: in person
For the respondent: Mr P Livingston, Counsel (Ms Mather & Mr King, Solicitors and Ms Fudge, Senior HR Business Partner, in attendance)

PRELIMINARY HEARING IN PUBLIC RESERVED JUDGMENT

The Employment Tribunal has no jurisdiction to hear the Claimant's work claims (as identified within the following Reasons) those claims having been presented outside the time limits contained within the Equality Act 2010.

REASONS

Introduction

1. This is a public preliminary hearing which took place after the private preliminary hearing on case management held today. This hearing is to determine the Respondent's strike out application. Namely, that the majority of the Claimant's claim has been presented outside the requisite time limits. The Respondent's application is at pages 70 and 71 of the preliminary hearing bundle.

Background

2. The Claimant was employed by the Respondent, a company which carries on business in the provision of healthcare services, as a Resident Medical Officer, from 14 December 2009 until 16 September 2021. Early conciliation started on 4 October and ended on 6 October 2021. The claim form was presented on 15 December 2021. This means that the earliest date on which an act could be in time would be 14 September 2021.

3. The claim consists of complaints of disability discrimination, unfair dismissal and entitlement to holiday and notice pay. The respondent denies the claim in its entirety.

4. The Claimant relies upon various medical conditions associated with chronic kidney failure and deafness as amounting to disability within the Equality Act 2010. However, he has referenced other impairments within subsequent documentation. The Respondent denies that the Claimant was a disabled person at the material times but has indicated that it will reconsider its position after disclosure by the Claimant of supporting medical evidence.

5. The Respondent had intended to rely on witness evidence from Ms Fudge. However, the parties agreed that the application could be dealt with by submissions.

6. Mr Livingston provided me with a skeleton argument and the Claimant relied upon written submissions contained within an email which he sent to the Tribunal and the Respondent on 11 February 2024. I heard oral submissions from both parties.

Submissions from the parties

7. Mr Livingston referred to his skeleton argument. References are to the paragraphs of that document. He then spoke to his skeleton.

8. Mr Livingston divided the Claimant's complaints into two categories: work claims and dismissal claims (at paragraph 2). Mr Livingston's contention is that the work claims are out of time and that the Tribunal has no jurisdiction to deal with them. He does not challenge the Tribunal's ability to hear the dismissal claims and so these do not form part of the matter before me.

9. Mr Livingston referred me to the law set out at paragraphs 20-29 of his skeleton. He explained that the starting point in relation to each of the work claims is that, on the face of it, they are 15 to 18 months out of time, unless it can be said that they form part of a continuing course of conduct or it is just and equitable to extend time.

Continuing course of conduct

10. Mr Livingston referenced paragraphs 33-35 of his skeleton argument. He stated that the Respondent's position is surprisingly simple. A continuing course of conduct can be quite difficult to determine but none of the decisions took place any later than March 2020 and the disciplinary outcome was June 2020. The Claimant was off work from 24 March 2020 and this continued until he was dismissed. So put simply, none of these things could possibly have gone on from March 2020 onwards because the Claimant was not at work. In relation to the disciplinary claim, that claim again appears to span September 2019 to June 2020 but cannot possibly be said to continue after that. The decision was made in June 2020 and so is 15 months out of time and cannot be said to continue.

11. Mr Livingston said that the Claimant's position, as far as he understood it, is it is all continuing because all of the failures and treatment exacerbated his condition and led to his dismissal. Even if it is right, this is a classic act with continuing consequences (as per the authorities he cites in his skeleton, in particular the case of Owusu.

12. At paragraphs 38-40 of his skeleton, Mr Livingston deals with the overlap of persons involved. He submits that there is not much of an overlap and his view is that the Respondent would now need to call the person who gave the Claimant the warning and so the overlap is even less.

13. In his submission, it is clear that these matters do not amount to a continuing course of conduct.

Just and equitable

14. Mr Livingston spoke to paragraph 41 of his skeleton argument. He stated that the delay by the Claimant in bringing his claim is significant, at between 15-18 months to 4 years. The reasons given for the delay are not very clear. One reason given is that he was unwell. Whilst this might explain why he did not bring his claim in April to May 2020, it does not explain why he did not do so until 2021. Particularly so, as it was not the case that he was unable to do anything at that time. He brought a grievance, he participated in the capability process. It could not be said that he was waiting on the outcome of the grievance, given that this would still mean his claim was presented 9 months out of time and in any event it is not reasonable to await the outcome of the grievance before presenting a claim. As to legal advice, Mr Livingston said that he is not sure if the Claimant is relying on lack of such but he had advice at the end of 2021 and so there is no reason why he could not have taken advice earlier and he was aware of the duty to make reasonable adjustments, as can be seen from his email of 11 March 2021 (at page 110 of the preliminary hearing bundle).

15. Mr Livingston spoke to paragraph 44 of his skeleton. He submitted that there would be significant prejudice to the Respondent in extending time. The Respondent would have to take statements from 10-11 witnesses as opposed to 2-4 in just dealing with the dismissal claims. There would be significant extra documentation. The hearing length would be significantly longer. Witnesses would need to recall events that occurred between 4 and 7 years previously. Several witnesses have since left the Respondent's employment. Prejudice to the Claimant would be limited because he still has his dismissal claims and his claim for unfair dismissal. In as far as the Claimant alleges that the Respondent's behaviour worsened his health, he can either pursue this in his separate personal injury claim (although the Claimant has since indicated that he is not going to bring such a claim) or raise this as background to his unfair dismissal claim.

16. I then heard from the Claimant. He relied on his submissions contained in his email of 11 February 2024. By way of amplification, he stated that he believes that his claims are all part of a continuing state of affairs. All of the Respondent's actions amount to a pattern of behaviour relating to his health condition whilst they were fully aware that it was a progressive one. The Respondent is a worldclass health organisation and should have been able to support him and help his

condition so as to avoid it from deteriorating. They did very little and had they done so, he would not have had to take ill-health absence, which he had never done before. The only reason the Respondent did not is because it was disability discrimination. Alternatively, the Claimant submits that the Tribunal should extend the time limits for the various reasons set out in his email. As to his personal injury claim, he stated that he did not want to go through another legal process for health and financial reasons.

Relevant Law

17. Section 123 governs time limits under The Equality Act 2010. It states as follows:

(1) [Subject to sections 140A and 140B,] 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…
(3) 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.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

18. There are two ways in which an Employment Tribunal can have jurisdiction for what on the face of it are out of time claims.

19. An act of discrimination which "extends over a period" shall be treated as done at the end of that period under section 123(3) Equality Act 2010. In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a claim form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is "continuing discrimination".

20. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a "continuing discriminatory state of affair". Whether the same alleged perpetrators were involved in the incidents is one relevant factor in respect of whether there was conduct extending over a period (Aziz v FDA [2010] EWCA Civ 304, CA). I have also considered the points made by Mr Livingston at paragraphs 21 to 24 of his skeleton argument.

21. A Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.
22. The factors to take into account (as modified) are these:

22.1 the length of, and reasons for, the worker's delay;
22.2 the extent to which the strength of the evidence of either party might be

affected by the delay;

22.3 the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;

22.4 the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;

22.5 the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

23. However, subsequent case law has said that a Tribunal should not limit its enquiry to these factors. That said, 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).

Conclusions

24. I had insufficient time at the hearing to reach a decision and so I reserved Judgment. I must apologise to the parties for the length of time it has taken to provide this Judgment which unfortunately was due to a combination of my part-time working pattern and pressure of work.

25. I have had the opportunity to consider this matter carefully. I accept Mr Livingston's submissions that the Claimant's complaints can be categorised into two distinct periods which he calls "the work claims" and "the dismissal claims", as he further details within paragraph 2 of his skeleton argument. Mr Livingston only challenges the jurisdiction of the Tribunal to deal with the work claims and does not take any issue with the dismissal claims.

26. As a preface, I would say that this task has been made all the more difficult by the confused and extended way in which the Claimant has attempted to set out the details of his various complaints. I appreciate that the Claimant is a litigant in person and has done the best that he can. But nevertheless it is not helpful to have so many documents containing what are intended to be the particulars of his claim. I refer to those documents identified by Mr Livingston at paragraph 13 of his skeleton argument. Whilst it took a considerable amount of time today, at the private hearing, to attempt to further identify the sort of complaints that the Claimant is bringing, the allegations relied upon and the issues arising from them, it was nevertheless helpful in terms of identifying when exactly those matters happened and what it is said happened. This exercise is important in terms of then having to determine time limits.

27. Dealing first with whether the work claims can be said either in whole or part to form part of a continuing course of conduct, the last act of which falls within the time limit within which the claim should have been presented. As indicated above, this date was on or after 14 September 2021.

28. As Mr Livingston has identified, as further identified by the Claimant, these matters cover a range of events over a number of years, involving a large number of

people and what certainly appear on the face of it to be discreet matters albeit with continuing consequences. I refer to those matters set out at paragraph 16 of Mr Livingston's skeleton argument as further delineated within paragraph 35 with regard to each individual matter and the dates thereof. I accept Mr Livingston's submissions as amplified before me today, that these matters simply do not amount to conduct extending over a period of time.

29. We are talking about a range of events which have occurred between four years and 18 months before the Claimant presented his claim and certainly well before 14 September 2021.

30. Whilst there is an overlap with those individuals involved in the dismissal claims, this is limited. The individuals involved in both sets of claims are as identified at paragraphs 38 and 39 of Mr Livingston's skeleton argument.

31. I have also considered the submissions made by the Claimant and I am not convinced by his contention that the various complaints are linked together so as to amount to an ongoing state of affairs.

32. I think the difficulty that the Claimant has is that he has conflated what he refers to as the pronounced and extended decline in his health with something capable of connecting together a succession of unconnected or isolated specific acts involving a number of different persons albeit all employed by the Respondent.

33. For these reasons, I do not accept that the work claims form part of a continuing state of affairs.

34. Turning then to whether it is just and equitable for me to extend time to allow all or part of the work claims to continue, i.e. that the Tribunal has jurisdiction to hear them.

35. I have considered the law as stated above and as Mr Livingston has identified at paragraphs 26 to 29 of his skeleton argument.

36. The length of the delay in bringing the claim is significant. The work claims are between 18 months and four years out of time as I have said above. The reasons that the Claimant gives for the delay is not entirely clear and to an extent Mr Livingston has assisted the Claimant in postulating them at paragraphs 41 b. and 42 of his skeleton argument.

37. Indeed, the Claimant has not given cogent reasons as to why it took him so long to present his claim and, in particular, that he was clearly aware of the duty to make reasonable adjustments clearly at least as early as 11 March 2021 (his email as referred to above) and in his own submissions he states that he in fact knew of this duty from January 2020.

38. The Claimant relies upon his state of health. But as Mr Livingston submits whilst this might explain why he did not bring his claim in April to May 2020, it does not explain why he did not do so until 2021. In particular, it does not appear to be the case that his state of health rendered him incapable of managing his affairs. During this time he brought a lengthy grievance, he participated in the Respondent's capability process. I accept that whilst it might be said he was

waiting on the outcome of the grievance process, it was still 9 months before he brought his Tribunal claim.

39. As to legal advice, as Mr Livingston said, it is not clear whether the Claimant is relying on the lack of such as an explanation for the delay in bringing a claim. However, the Claimant had received advice by the end of 2021 and he has given no reason why he could not have taken advice earlier. Indeed, he was certainly aware of the duty upon the Respondent to make reasonable adjustments from January 2020 as I have set out above.

40. Whilst I was not really provided with sufficient information on which to judge the merits of these complaints, I have to say that even after going through the process today of attempting to finalise the complaints, the allegations and the issues arising (at the private preliminary hearing), it does appear that some of the complaints are still nebulous.

41. However, my major concern is the balance of prejudice to each party dependent on whether I allow the work claims in or not.

42. It is certainly clear that to allow the claims to continue would require a much longer hearing, which in turn would have time and cost implications for both parties and the Tribunal. At an early stage, the Tribunal listed the full hearing for 6 days. The Respondent in its case management agenda states that to deal with the dismissal claims would require a 3 day hearing. To accommodate a 6 day hearing would almost certainly mean that the dates that the Tribunal could offer would most likely be at the end of 2025 or into 2026. A 3 day hearing could be accommodated in early 2025.

43. Whilst I do not have any clear indication, it is more likely than not, given the number of years over which the claims are alleged to have occurred, that to allow these claims to continue would significantly increase the number of documents to be disclosed and included within the bundles required for the final hearing, again adding to time and cost for the Respondent.

44. Again, whilst I do not have any clear indication, I am aware of the numbers of potential witnesses involved and that of course they will be required to remember events which at present occurred between four and seven years ago, and obviously longer by the time of the final hearing. This of course has an impact on the cogency of evidence and the ability for there to be a fair hearing.

45. In particular, Mr Livingston points to 2 of the witnesses who are no longer employed by the Respondent and the Respondent has no contact with them, making it unclear how willing they would be to give evidence.

46. On the other hand of course, the Claimant will suffer prejudice if he is not allowed to continue with his work claims. However, this will not be as extensive as the prejudice caused to the Respondent by allowing them to continue.

47. The Claimant will still be able to pursue the dismissal claims and the complaint of unfair dismissal. The latter will involve his allegations that the Respondent failed to factor in its failure to make adjustments whilst the Claimant was working and the resulting impact on his health and the outcome of dismissal. In other words,

his allegation that the Respondent's conduct worsened his condition and that the Respondent should have taken this into account when dismissing him This in effect would essentially allow him to pursue the matters that form part of the work claims.

48. For these reasons I have reached the conclusion that it is not just and equitable to extend time and so I find that the Tribunal has no jurisdiction to hear the work claims.

49. Further case management is dealt with in the record of the private preliminary hearing.

Employment Judge Tsamados
13 June 2024