EMPLOYMENT TRIBUNALS

CLAIMANT: **Ms Mangoma**

RESPONDENT: **Ashford and St Peter's Hospitals NHS Foundation Trust**

HELD AT: London South (in person) **ON:** 12 June 2024

BEFORE: Employment Judge Hart

REPRESENTATION:

Claimant: Ms Mangoma, representing herself
Respondent: Mr Ross, Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's application for permission to amend the claim to add complaints for direct race discrimination, harassment and / or victimisation in relation to:

    1.1 a fitness to practice concern raised about the claimant to the Health Care Professions Council (HCPC) on or around 7 February 2024 (First Amendment);

    1.2 the exam results of the IBMS Advance Specialist Diploma conducted in November 2022 (Second Amendment);

    was NOT GRANTED.

2. The claimant's application for permission to amend the claim to add a complaint for direct race discrimination, harassment and / or victimisation in relation to:

    2.1 the information shared by Ms Ellis with Ms Fox (Third Amendment);

    was GRANTED.

3. The complaints of direct race discrimination, harassment and / or victimisation as amended were DISMISSED for lack of jurisdiction since they were not presented within the prescribed time limits and it is not just and equitable to extend time.

4. The complaints of unfair dismissal and non-payment of holiday pay were DISMISSED for lack of jurisdiction since they were not presented within the prescribed time limits, it being reasonably practicable for them to have been presented in time.

REASONS

INTRODUCTION

1. Written reasons were requested by the claimant following oral judgment announced at the hearing on 12 June 2024. These are provided along with the judgment in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

2. Ms Mangoma (the claimant) was dismissed on 16 April 2019. She has brought claims for direct race discrimination, harassment related to race, victimisation, unfair dismissal and outstanding holiday pay on termination of her contract. The last act complained of was July 2021. She submitted her claim on 18 April 2023. This hearing was listed to determine Ms Mangoma's application to amend her claim and to determine whether the tribunal had jurisdiction to consider her claims or in the alternative whether any of the complaints should be struck out and / or subject to a deposit order.

THE HEARING

3. I was provided with the following documents:
   3.1 A joint agreed hearing bundle of 515 pages, the references to page numbers in this judgment are to the pages in this bundle.
   3.2 Ms Mangoma's updated witness statement.
   3.3 Respondent's chronology and skeleton argument

4. On initial consideration of the hearing bundle it was apparent that a large number of documents were not relevant to the issues to be determined at this hearing. The parties were informed that there was insufficient hearing time for the file to be read in its entirety and they were specifically asked to identify those pages that they wished me to consider prior to commencing with the evidence. In addition I specifically asked Ms Mangoma to identify all the medical evidence in the bundle, which she identified as pages 438-439, 454-458.

5. Ms Mangoma gave evidence on her own behalf, and was cross examined by the respondent and asked questions by myself.

6. On completion of the evidence both parties made oral submissions, the respondent counsel also provided written submissions. Judgment was delivered orally.

CLAIMS / ISSUES

7. At a Preliminary Hearing on 9 February 2024, Employment Judge Leith identified the claims and issues to be determined: **pg 73-77**. A final hearing was listed for **14-18 October 2024.**

8. The matter was listed for a further preliminary hearing to determine jurisdiction (time limits). The issues were identified as:

   8.1 *'Whether the race discrimination claims were presented within the prescribed time limits, including whether it is just and equitable to extend time?*

   8.2 *Whether the following claims were presented within the prescribed time limits, including whether it was reasonably practicable to present them in time or within a further reasonable period:*
   8.2.1 The claim of unfair dismissal?
   8.2.2 The claim of non-payment of holiday pay?

   8.3 *In the alternative, to consider under Rule 53(1)(c) of the Rules whether the claims should be struck out under Rule 37(1)(a) on the basis that they stand no reasonable prospect of being found to have been brought in time, or under Rule 53(1)(d) of the Rules whether the claims should be the subject of deposit orders under Rule 39 on the basis that they have little prospect of success on that basis.*

   8.4 *In the alternative, to consider under Rule 53(1)(c) of the Rules whether the claims should be struck out under Rule 37(1)(a) on the basis that they stand no reasonable prospect of success generally, or under Rule 53(1)(d) of the Rules whether the claims should be the subject of deposit orders under Rule 39 on the basis that they have little prospect of success generally.'*

9. On 20 May 2024 Ms Mangoma applied to amend her claim to add further complaints of direct race discrimination, harassment and / or victimisation in relation to:

   9.1 a fitness to practice concern raised about the Claimant to the Health Care Professions Council (HCPC) on or around 7 February 2024 (First Amendment);

   9.2 the exam results of the IBMS Advance Specialist Diploma conducted in November 2022 (Second Amendment); and

   9.3 the information shared by Ms Ellis (Mr Shambayati's girlfriend) with Ms Fox (OUH Cytology Manager) (Third Amendment): **pg 99-100**.

10. At the hearing before me it was agreed that the tribunal should first determine Ms Mangoma's application to amend since it could affect jurisdiction (time limits). It was also agreed that the application to amend and the issue of

jurisdiction / strike out would be dealt with together, with a separate hearing on the issue of a deposit order (if required), due to the need for additional evidence as to Ms Mangoma's means.

11. The respondent confirmed that the issue of employment status was to be left for the final hearing.

FINDINGS OF FACTS

12. I have only made findings of fact in relation to those matters relevant to the issues to be determined. For the purposes of this hearing I have taken the claimant's case at its highest, and assumed facts in her favour where there are facts in dispute. I confirm that I have taken into account all the documentation and evidence that I was referred to during the hearing. If something is not specifically mentioned that does not mean that I have not considered it as part of my deliberation.

13. On 29 September 2015 Ms Mangoma commenced work as a Senior Biomedical Scientist for Oxford University Hospital (OUH) in a permanent role working 32 hours pw.

14. On 1 August 2016 she was additionally engaged as bank cytology screener for the respondent hospital. She was required to comply with the BAC Code of Conduct: **pg 121-122**.

15. Between February and December 2019, Ms Mangoma says she was being "stalked" by an individual who was sending unwanted messages and following her to work. She informed the police and OUH. I accept Ms Mangoma's evidence in relation to this individual since Ms Fox (Ms Mangoma's OUH cytology manager) referred to this individual contacting OUH making various allegations against Ms Mangoma including that she was working elsewhere without their knowledge: **pg 399-400 and 497**.

16. Around February / March 2019 Ms Fox had a conversation with Ms Ellis (the girlfriend of Mr Shambayati) who informed her that Ms Mangoma was doing work for the respondent: **pg 400 (First Amendment)**. Around the same time Ms Mangoma alleges that the respondent informed OUH that she had breached the BAC Code of Conduct (by working more than 6 days pw as a screener) (**First act of Discrimination)**. Ms Mangoma only discovered this when she made a Subject Access Request to OUH in 2021 (SAR disclosure)**.**

17. On 10 April 2019 Mr Blackman (Cytology Department lead for the respondent) emailed Ms Mangoma raising concerns about the hours she had worked for the respondent in March 2019. He referred to her exceeding the safe amount for reporting (a reference to the BAC Code recommendation of working no more than 6 days pw) and breaching the European Working Time Directive. Ms Mangoma responded providing a breakdown of her hours and informing him that she was not working full time for OUH. Mr Blackman responded that he would discuss the matter with Mr Shambayati (**pg 172-173**).

18. Later that day Mr Blackman gave Ms Mangoma notice of dismissal: **pg 171-172 (Second act of Discrimination).** Ms Mangoma emailed Mr Shambayati expressing her shock at being dismissed and explaining that she thought she had been doing the respondent a favour by working during her annual leave / toil: **pg 171**. She referred to the decision as 'harsh' and requested a meeting to resolve any misunderstanding or confusion. She alleges that Mr Shambayati failed to respond to her email (**Third act of Discrimination).**

19. On 17 April 2019 Ms Mangoma's contract with the respondent was terminated (**Unfair Dismissal and Holiday Pay complaints).** In her statement Ms Mangoma alleges that her dismissal was unfair because the limit on working 6 days was a BAC recommendation only and was not a mandatory requirement. In contrast she referred to the respondent permitting its own cytology staff to work overtime in breach of BAC mandatory limits on screening.

20. On 30 April 2019 OUH's solicitors, Grant Thornton UK LLP, asked the respondent to respond to a request by the OUH's counter fraud investigators for personal data under Schedule 2 of the Data Protection Act 2018: **pg 179-181**. It was alleged that Ms Mangoma had been working for the respondent whilst on sick leave from OUH. The respondent was asked to provide OUH with a breakdown of her hours of work.

21. On 2-3 May 2019 Ms Mangoma attended a conference where she saw Mr Shambayati. She alleges that he refused to discuss her termination with her (**Fourth act of Discrimination).**

22. On 20 May 2019 the respondent provided OUH with Ms Mangoma's timesheets for her bank work: **pg 188 (Fifth act of Discrimination)**. Ms Mangoma only became aware of this following the SAR disclosure.

23. In February 2020 OUH initiated a disciplinary investigation against Ms Mangoma for personal and professional misconduct: **pg 436.**

24. From March 2020, due to COVID-19 OUH asked Ms Mangoma to work from home.

25. In March 2021 Ms Mangoma returned to work after lockdown and faced further allegations by OUH.

26. On 4 May 2021 Ms Mangoma submitted a SAR request against OUH.

27. On 10 May 2021 Ms Mangoma submitted a grievance against OUH: **pg 445**

28. On 10 May 2021 Ms Mangoma attended a Healthy Minds assessment. She was identified as having 'low mood' and 'anxiety' and a course of CBT was recommended: **pg 438.**

29. On 18 May 2021 Ms Mangoma attended a consultation with Healthy Minds, and it was recommended that she have six treatment sessions: **pg 439**

30. On 4 June 2021 Ms Mangoma received the OUH SAR disclosure by email with 14 folders (attachments): **pg 440**. She said that that she was unable to continue to read this disclosure after reading two emails in the second folder which recorded her OUH managers discussing how she should be dismissed.

31. On or around 8 June 2021 Ms Mangoma contacted a solicitor about the SAR disclosure: **pg 444**. It appears from the correspondence that this was in relation to lodging a complaint to the Information Commissions Office (ICO).

32. On 8 June 2021 Ms Mangoma emailed the respondent informing them that she would be lodging a complaint to the ICO for sharing personal data (time sheets) with OUH without her consent: **pg 187-191.** Ms Mangoma says that the respondent failed to respond to her email (**Sixth act of Discrimination)**.

33. The same day OUH provided the claimant with the outcome of her grievance hearing, stating that three of her complaints were not substantiated and that the other five needed to be investigated further: **pg 445.** Ms Mangoma appealed this decision.

34. On 20 July 2021 Ms Mangoma's solicitor advised her to report the respondent's failure to respond to her emails to the ICO 'as I could not progress any further with Employment Tribunal'. Ms Mangoma provided no further information about what she had discussed with her solicitor.

35. On 21 July 2021 Ms Mangoma caught COVID-19. An extract from the GP records dated 20 August 2021 recorded that Ms Mangoma as presenting with 'shortage of breadth', no other concerns were identified and she was discharged: **pg 448.** This was the only GP record that I was referred to.

36. Ms Mangoma says that over this period her mental health deteriorated and she took time off work due to anxiety and stress. Her therapist advised her not to engage in any issue that would trigger her mental health.

37. In December 2021 Ms Mangoma had a further COVID-19 infection.

38. On 21 April 2022, Dr Morhan, Consultant Occupational Physician (OUH Occupational Health) reported that Ms Mangoma had long COVID symptoms since her first infection in July 2021. This comprised of a persistent fatigue and cough and resulted in her not being able to sustain 'physically demanding activities': **pg 450.** Dr Morhan also reported that Ms Mangoma's 'long term medical conditions are reported as overall manageable at present'. Ms Mangoma informed me, and I accept, that this was a reference to her mental health condition. Dr Morhan stated that Ms Mangoma was fit for work with recommendations. These were to continue working from home, maintain restrictions from the most physically demanding tasks (laboratory based work), to keep her workload manageable and take short breaks. I note that none of these appear to relate to any mental health condition.

39. On 19 October 2022 Ms Mangoma was informed that she had failed the Institute of Biomedical Sciences (IBS) Advanced Specialist Diploma: **pg 402 (Second Amendment).**

40. On 20 October 2022 Ms Mangoma appealed her exam results to Mr Ward, Head of Examinations: **pg 407.** She specifically stated that the appeal was not against the examiners but directed at the procedure and guidance used. In cross examination she accepted that she had all the information she needed to complain about the exam result in November 2022.

41. Between October 2022 and January 2023 Ms Mangoma attended trauma counselling to 'face her fears'.

42. In January 2023 Ms Mangoma submitted a claim against OUH.

43. Between 11-16 April 2023 Ms Mangoma 'decided to face her fears' and read the rest of the SAR disclosure. She discovered that in March 2019 Mr Shambayati had been in email correspondence with her managers from OUH about her hours of work without her consent: **pg 166-170,** and read for the first time the statement of Ms Fox: **pg 497-498**. This referred to Mr Blackman and Mr Shambayati getting into trouble with the HR team because they had been accused of unfair dismissal by Ms Mangoma: **pg 498**

44. Ms Mangoma also discovered that Mr Shambayati had been the Chief Examiner for the IBS Advance Specialist Diploma.

45. On 16 April 2023 Ms Mangoma entered into ACAS early conciliation naming the respondent. The certificate was issued on 18 April 2023 and she submitted her claim form the same day.

46. On 20 April 2023 Ms Mangoma wrote to Mr Wells informing him that Mr Shambayati should have declared a conflict of interest and requested that her exam be re-marked: **pg 427-430**.

47. On or around 7 February 2024 Ms Mangoma was informed that a referral had been made to the HCPC regarding a fitness to practice concern due to working whilst off sick: **pg 434** (**Third Amendment**).

48. On 9 February 2024 Ms Mangoma attended a Preliminary Hearing before EJ Leith, the claims and issues were identified and the matter was listed for a further preliminary hearing to address the issue of jurisdiction (time limits): **pg 67-78**.

49. On 4 March 2024 Dr Morhan provided OUH with a further occupation health report: **pg 457**. In the report Dr Morhan referred to Ms Mangoma having long COVID and an unspecified long term mental health condition and a respiratory condition both requiring regular medication. She noted that Ms Mangoma was undergoing private counselling 'which is beneficial' and was reporting an increase in stress due to ongoing litigation against OUH. She referred to Ms Mangoma working compressed full-time hours over 4 days with 2 days on site

doing administration and project work and 2 days at home which she finds 'overall manageable at present'. Dr Morhan recommended that Ms Mangoma was fit for work with recommendations; this included a gradual return to laboratory work which she had not been doing sine 2020. Again no recommendations appear to have been made in relation to Ms Mangoma's mental health.

50. On 15 March 2024 the respondent submitted an amended Grounds of Resistance in the light of the claim as understood at the preliminary hearing on the 9 February 2021: **pgs 69 and 81.** This was in compliance with order 10, albeit the respondent had requested a 1 week extension to do so.

51. On 20 May 2024 Ms Mangoma applied to amend her claim on the basis of new information that had been disclosed and now understanding the requirement to provide further clarification: **pg 99-100**. In so doing she explicitly accepted that she was making new factual allegations which amount to changing the legal basis on which she was making a claim: **pg 99.**

52. On 7 June 2024 the respondent objected to Ms Mangoma's application to amend on the basis that the amendments sought was unclear and not properly particularised, that they were out of time and that the respondent would be prejudiced were the amendments to be permitted: **pg 478-479.**

APPLICATION TO AMEND: THE LAW

53. In order to be considered, amendments must be properly formulated and sufficiently particularised so that the responding party can know the case it is to meet: **Constable of Essex v Kovacevic** (UKEAT 0126/13); **Remploy v Abbott** (UKEAT/0405/14). Further any application to amend a claim must be considered in the light of the actual proposed amendment.

54. When considering an application to amend the legal principles to be adopted are well established and set out in the leading cases of **Selkent Bus Co Ltd v Moore** [1996] ICR 836; most recently in **Vaugham v Modality Partnership** [2021] ICR 535. The balance of hardship and injustice is the paramount consideration. In terms of the factors to be taken into account when considering the balance of hardship and injustice, **Selkent** identified the following three factors that may be relevant: the nature of the amendment, any time limits, and the manner in which an application was made. This list is not exhaustive and other facts may be taken into account, and no one factor is likely to be decisive. A practical approach should be adopted and should underlie the balancing exercise.

APPLICATION TO AMEND: CONCLUSIONS

First Amendment: A fitness to practice concern raised about the Claimant to the HCPC on or around 7 February 2024

55. All that is known about this 'concern' is that the HCPC notified Ms Mangoma on 7 February 2024 that it had received a concern regarding her employment at a

hospital whilst she was on sick leave: **pg 432**. Ms Mangoma does not know the source of the concern raised with HCPC. It could have been the respondent, OUH or a third party. Ms Mangoma has assumed it is the respondent because the University denied making the referral. She says it is unlikely that OUH would have referred her 5 years later. However it is equally, if not more, unlikely that the respondent would have referred her 5 years later since there was no ongoing relationship after her dismissal in 2019. It seems to me that the concern was most likely to have come from the same individual (the stalker) who had previously complained to OUH that Ms Mangoma was working elsewhere without their knowledge.

56. Further the 'concern' was in relation to a matter that the respondent had never raised with Ms Mangoma or investigated. Indeed it is unlikely that the respondent would have known whether or not Ms Mangoma was on sick leave from OUH during any of the periods that she worked for it as a bank worker. The extent of the respondent's involvement was to provide OUH with information regarding her hours of work for it. Further the respondent had not dismissed Ms Mangoma for working whilst on sick leave but for breach of the BAC Code. It is inherently implausible that the respondent would raise an unrelated concern with the HCPC.

57. Further and in any event Ms Mangoma has not set out at all any facts as to why the referral of any concern to the HCPC, if made by the respondent, would amount to race discrimination and / or victimisation.

58. Having regard to the ***Selkent*** factors, I considered that this was an application to add a wholly new and unconnected cause of action. It involved different facts and potentially different respondents. Although the compliant was out of time, it was only by a few of weeks and therefore not fatal to her application. Ms Mangoma was aware of this referral on or around 7 February 2024 but explained that she only decided to submit a claim against the respondent after having made enquiries with OUH who denied that they had made the referral.

59. Taking into account all the above circumstances and the balance of prejudice between the parties, I have decided not to permit the amendment. This is because the respondent would suffer considerable prejudice by the addition of a vague and speculative claim. A claim that the respondent currently cannot respond to since it does not know the identity of the discriminators, or any of the facts that Ms Mangoma relies on. Further as currently presented, it is wholly unconnected to matters already pleaded. Adopting a practical approach if permitted Ms Mangoma would first need to be ordered to provide further particulars, the respondent would then need to be given time to investigate, take instructions and submit a further amended response. Not only would this put the respondent to additional expense but would in all likelihood lead to the postponement of the final hearing listed for October 2024. Further it could involve an unspecified number of additional witnesses and therefore increase the length of the hearing.

60. Against the prejudice to the respondent I considered the potential prejudice to Ms Mangoma in not granting the amendment in that she would be unable to

add a complaint to an existing claim. However this was not a significant prejudice since as presented the amendment was a weak complaint against this respondent: Ms Mangoma had not pleaded any facts from which a tribunal could to infer that the referral to the HCPC came from the respondent yet alone that it was because of, or related, to her race and / or victimisation.

61. I concluded that permitting an amendment which was unconnected to the pleaded claim and has real practical difficulties tipped the balance of prejudice in the respondent's favour.

Second Amendment: The exam result of the IBMS Advanced Specialist Diploma conducted in November 2022

62. The amendment as drafted provided no factual detail as to what Ms Mangoma was complaining about: what aspect of the exam results was she complaining about, who were the discriminators and / or why she alleged that the result amounted to direct race discrimination, harassment and/ or victimisation. In her appeal dated 20 October 2022 she specifically stated that she was not complaining about the examiners but the procedure and guidance used and made no reference to race discrimination and / or victimisation.

63. Having regard to the *Selkent* factors, I considered this to be a substantial amendment which was not obviously connected to matters already pleaded. Allowing this amendment without clarity as to what was being alleged, who is alleged to have discriminated and why, could result in a substantial new enquiry which may be wholly unconnected to the existing claims.

64. Unlike the first amendment, this complaint was significantly out of time. The act occurred in October 2022 and Ms Mangoma accepted in evidence that she was aware of how she had been scored in November 2022. She has provided no explanation for failing to include this compliant in her original claim form submitted on 18 April 2023. Nor has she provided any explanation for the further one year delay in making the application. In particular she has not explained why she did not raise this issue at the previous preliminary hearing on 9 February 2024 when the claims and issues were being considered, or prior to the respondent being put to the expense of serving an amended response following the clarification of her claim at that hearing. Whilst not fatal to her application these factors are significant factors weighing against granting the amendment.

65. Taking into account all the above circumstances and the balance of prejudice between the parties I have decided not to permit the amendment. Ms Mangoma has failed to properly particularise this complaint and it appears to be unconnected to matters already pleaded. Adopting a practical approach if permitted Ms Mangoma would again need to be ordered to provide further particulars, the respondent would then need to be given time to investigate, take instructions and submit a further amended response. For the same reasons as the previous amendment, this could lead to postponement of the final hearing listed for October 2024 and an increase in the length of the hearing. Again I did not consider the prejudice to Ms Mangoma to be significant in that as pleaded

it was a weak claim, which not only required particularisation but also had no pleaded facts from which a tribunal could infer race discrimination or victimisation.

66. I concluded that permitting an amendment which was unconnected to the pleaded claim and has real practical difficulties tipped the balance of prejudice in the respondent's favour.

Third Amendment: The information shared by Ms Ellis with Ms Fox.

67. Although this amendment was missing particulars, such as the date and the nature of the information that was shared, unlike the previous two amendments it did identify the discriminators. Further Ms Mangoma had referred to the information in her witness statement at paragraph 46 with reference to the statement of Ms Fox dated 16 July 2019: **pg 400**. On that basis I was prepared to accept that it had been sufficiently particularised to enable the respondent to respond at this hearing, which it was able to do.

68. Having regard to the *Selkent* factors, this amendment was connected to the pleaded case. As the respondent accepted it provided background evidence regarding the respondent's decision to dismiss Ms Mangoma in 2019. Therefore the amendment merely added a further factual cause of action to a matter already before the tribunal.

69. On the other hand of the three amendments, this was the one that was most out of time since the conversation took place in February 2019, although I accept that Ms Mangoma could only have known about this conversation following the SAR disclosure in June 2021. Her case is that she did not read this disclosure until April 2023. This was before she submitted her claim form and for the same reasons as above she has not explained the subsequent 1 year delay or why she did not raise it at the preliminary hearing on the 9 February 2024. Whilst not fatal to her claim this is a significant factor weighing against granting the amendment.

70. Taking into account all the circumstances including the balance of prejudice to the parties, I have decided to grant this amendment. This is because unlike the other two amendments it is sufficiently particularised and is closely connected to the existing claim. As the respondent recognised it was background evidence in any event. Adopting a practical approach I did not consider that granting this amendment would have an impact on the current hearing listing. There was no need for further particulars, although the respondent may wish to amend its response. There was no additional disclosure attached to this particular complaint and at most it would add one further respondent witness, who may have been called in any event.

71. Whilst I accepted that the complaint was significantly out of time, that was a matter that I thought was better addressed when dealing with jurisdiction of the entire claim. However as an amendment to an already out of time claim it did not significantly add to any prejudice that the respondent faced. On the other

hand, Ms Mangoma could be prejudiced if she is not able to rely on an act that was closely connected to the claim that she has already brought to the tribunal.

JURISDICTION (TIME LIMITS): THE LAW

Not reasonably practicable test

72. Section 111 of the Employment Rights Act 1996, provides that:

"(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

Similar provisions apply to claims for outstanding holiday pay under the Working Time Regulations 1998.

73. Therefore the first question is whether not it is 'not reasonably practicable' for the claimant to submit her complaint within 3 months. It is well established that the 'not reasonably practicable' test should be given a liberal construction in favour of the employee; is a question of fact for tribunals to decide; the burden of proof rests with the claimant. 'Reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible': **Palmer and Anor v Southend-on-Sea Borough Council** [1984] ICR 372 (CA).

74. If it was not reasonably practicable to submit the claim in time then the second question is whether the claim was presented 'within such further period as the tribunal considers reasonable'. This is a less stringent test than that for 'not reasonably practicable'. It is only necessary to consider this issue if the tribunal finds that it was not reasonably practicable to submit the claim in time.

75. Ignorance of a fact that is fundamental to the right to bring a complaint may render it 'not reasonably practicable' to present the complaint in time. The key principles were summarized by Elias P in **Cambridge and Peterborough NHS Foundation Trust v Crouchman** [2009] ICR 1306 at paragraph 11. These were (in summary):

74.1 that ignorance of a fact which is crucial or fundamental to a claim will in principle be a circumstance rendering it impracticable to present a claim in time;

74.2 the fact must genuinely and reasonably change the claimant's state of mind on learning of it;

74.3 the ignorance of the fact and the change of belief in the light of new knowledge must both be reasonable; and

74.4 the above test must apply to each head of claim that is out of time

76. A debilitating illness may prevent a claimant from submitting a claim in time: **Schultz v Esso Petroleum Co Ltd** [1999] ICR 1202 (CA). Mere stress is probably not sufficient. Whilst medical evidence is not conclusive it is desirable and should not just support the claimant's illness but also that the illness prevented the claimant from submitting the claim in time.

'Just and equitable' test

77. Section 123 of the Equality Act 2010 provides that:

(1) …. 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.

78. Where a complaint has been brought outside the 3 month time limit, the onus is on the claimant to persuade the tribunal to exercise its discretion in her favour. A tribunal has a wide discretion and should take into account all the relevant factors including the reason and length of the delay and the respective prejudice to the parties: **Abertawe v Morgan** [2018] ICR 1194 (CA).

JURISDICTION (TIME LIMITS): CONCLUSIONS

Unfair dismissal claim

79. Ms Mangoma was dismissed on 17 April 2019. This is the effective date of termination. Therefore her complaint runs from this date. The 3-month deadline for her to submit her complaint was 16 July 2019. She started ACAS early conciliation process on 18 April 2023; therefore her complaint was submitted 3 years and 9 months out of time.

Ignorance of a crucial fact

80. Ms Mangoma knew that she had been dismissed and that the reason for her dismissal was that the respondent considered that the hours that she had worked were in breach of the BAC Code of Practice.

81. Her explanation for not submitting her complaint within 3 months was that she only thought she had a valid complaint upon reading the SAR disclosure between 11-16 April 2023. That informed her that Mr Blackman and Mr Shambayati had got into trouble with the HR team because they had been accused of unfair dismissal by Ms Mangoma: **pg 498**. This may be evidence in support of a complaint for unfair dismissal but is not a crucial or fundamental fact the ignorance of which rendered it impractical for her to submit a complaint in time. Ms Mangoma may not have known about the view of HR at the time, but this is an opinion not a fact. Whereas she did know she had been dismissed and the purported reason for her dismissal which was that she had worked 6 days in breach of the BAC Code. Her evidence before me was that she considered her dismissal to be unfair because she was dismissed merely for breaching a BAC recommendation whereas her colleagues were allowed to work in breach of BAC mandatory requirements. The differential treatment with her colleagues was something she knew at the time and the interpretation of the BAC Code was something she could have sought advice on. Further she knew that she had been dismissed without being given the opportunity to explain her position. She objected at the time but the respondent refused to meet her to discuss it with her. Therefore she was in possession of the requisite facts to bring a complaint for unfair dismissal. The SAR disclosure did not provide new factual information or alter Ms Mangoma's reasons for objecting to her dismissal. At best obtaining knowledge of the HR view reinforced her pre-existing view but did not change it.

82. In any event, even if it was not reasonably practicable for Ms Mangoma to consider that her dismissal was unfair until the SAR disclosure in June 2021, at that point she had all the relevant facts in her possession. It was her decision not to read this document until April 2023. It was also her decision not to seek advice or ask anyone else to read through it on her behalf for a period of 21 months. This was not reasonable given that she had instructed solicitors in June / July 2021 in relation to an ICO complaint and therefore could have sought advice in relation to any employment tribunal claim and / or the SAR disclosure. Her explanation was that she was advised by her therapist to avoid triggers causing her anxiety. However she has provided almost no medical evidence in relation to her mental health condition over this period, indeed what she has provided (the OH report dated 21 April 2022) suggests that her mental health was 'manageable'. Certainly there is nothing to suggest that it was reasonable for her not to read the SAR disclosure either on receipt or at any time over the 21 month period up to April 2023. For these reasons I do not accept that it was not reasonably practicable for her to submit her claim in time due to ignorance of a crucial fact.

Other factors

83. Whilst I have found Ms Mangoma was being stalked she has not explained why this prevented her from submitting a tribunal claim. Whilst this undoubtedly

caused her stress, I note that she was able to continue to work for OUH over this period of time, make email representations to Mr Shambayati and attend a conference. Nor have I seen any evidence that at this point Ms Mangoma was prevented from submitting her claim due to a debilitating illness. On her own evidence the first point at which she was referred to healthy minds was in May 2021. Therefore neither of these factors make it not reasonably practicable to submit her unfair dismissal complaint within 3 months of the date of dismissal.

Holiday pay claim

84. Other than ticking to box for holiday pay, Ms Mangoma did not provide any evidence as to what annual leave she was owed and when, nor did she explain why she was not able to bring a claim within 3 months of the date her contract was terminated. She has not suggested that the delay was due to obtaining later information or knowledge as to her entitlement. Therefore I consider that it was reasonably practicable to submit this complaint in time.

Discrimination claims

85. Ms Mangoma relies on 6 acts of direct race discrimination / harassment / victimisation (list of issues plus Third Amendment). The acts complained of started in February 2019 and the last in time was 20 July 2021. For the purposes of this hearing it was assumed that all the acts of discrimination / victimisation were part of a continuous act ending with the last in time; therefore the time limit for submitting a claim expired on or around 19 October 2021. Ms Mangoma started the ACAS early conciliation process on 16 April 2023 and her claim was submitted on 18 April 2023. Therefore her claim was 18 months out of time. Ms Mangoma has identified a number of reasons for this delay which are addressed in turn.

Date of Knowledge

86. Ms Mangoma claims that she was unaware of the discrimination until she read the SAR disclosure between 11-16 April 2023. These are the documents that she had had in her possession since June 2021. However this did not apply to all the acts of discrimination / victimisation. I therefore find as follows:

    86.1 *That in February / March 2019 the respondent informed OUH that Ms Mangoma had breached the BAC Code (First act of Discrimination):* I accept that this was information that Ms Mangoma only received as a result of the SAR disclosure.

    86.2 *On 10 March 2019 the respondent informing Ms Mangoma that her bank worker engagement was to be terminated (Second act of Discrimination):* This was a fact that Ms Mangoma was aware of at the time since she was informed that her contract was to be terminated. Therefore this complaint is not affected by the SAR disclosure and her date of knowledge was 10 March 2019.

    86.3 *That Mr Shambayati failed to respond to her email of 10 April 2019 (Third act of Discrimination):* This was a fact that Ms Mangoma was aware of at the time since she was aware that she had received no response to

the email. Therefore this complaint is not affected by the SAR disclosure and her date of knowledge was 10 April 2019.

86.4 *Mr Shambayati refusing to discuss her termination at the conference on 2-3 May 2019 (Fourth act of Discrimination):* This was a fact that Ms Mangoma was aware of at the time since she was aware that he refused to have a discussion with her. Therefore this complaint is not affected by the SAR disclosure and her date of knowledge was 2-3 May 2019.

86.5 *The respondent sharing Ms Mangoma's time sheets with OUH (Fifth act of Discrimination):* I accept that this was information that Ms Mangoma only received as a result of the SAR disclosure. However on her own evidence the date of knowledge was June 2021 since this was the reason she sought legal advice and made a data protection complaint to the respondent.

86.6 *The respondent failing to respond to her email sent in July 2021 (Sixth act of Discrimination):* This was a fact that Ms Mangoma was aware of at the time since she received no response to her email and received advice from her solicitor in relation to the failure to respond. Therefore her date of knowledge was July 2021.

86.7 *The information shared by Ms Ellis with Ms Fox in February 2019 (Third Amendment):* I accept that this was information that Ms Mangoma only received as a result of the SAR disclosure.

Therefore the failure to read the SAR disclosure until 11-16 April 2023 only explains the failure to bring the First act of Discrimination and Third Amendment.

87. In relation to whether it is 'just and equitable' to extend time due to Ms Mangoma's decision to not read the documentation until April 2023 this is considered in conjunction with the other reasons provided. I do not accept that this reason alone is sufficient to extend time in her favour since the information was in her possession over the relevant period and she could have read it at any point. Further in June / July 2021 she had instructed solicitors and could have asked them for advice as to whether she had an employment claim against the respondent and / or sought their assistance about what was in the SAR documentation. Her failure to take this action, or make any attempt to progress her claim over a 21 month period was not reasonable.

Stalker

88. This not a relevant consideration since on her evidence this stopped in December 2019.

Ill health

89. This is a potentially relevant factor. On 21 July 2021 Ms Mangoma caught COVID-19 and presented to her GP on the 20 August 2021 with shortage of breadth. She again caught COVID in December 2021 and was seen by OUH Occupational Health on 21 April 2022. It is recorded that she had long COVID symptoms since the first infection.

90. In addition Ms Mangoma had as long term mental ill health condition. However I was provided with limited evidence about this condition. The only

documentary evidence provided by Ms Mangoma were two Healthy Minds letters in May 2021. Ms Mangoma gave evidence that she had also undergone trauma therapy between October 2022 and January 2023. She referred to her therapist telling her to avoid triggers, which was the reason she gave for not reading the SAR disclosure.

91. She describes being very ill and being signed off sick. However when questioned she was vague as to when and for how long she was signed off work; she has not provided any corroborative sick notes or GP records and provided only two occupational health reports (neither of which support her evidence as to the state of her mental health and being so ill that she was unable to work). In particular, both occupational health reports were primarily in relation to having long COVID, and both identified her as 'fit for work with recommendations' which were aimed at her long-COVID condition. Further the April 2022 report referred to her mental health condition being 'manageable' at that time.

92. On the basis of this evidence I did not consider that Ms Mangoma's physical or mental health condition was such that it prevented her from reading the SAR documentation until April 2023. I took into account that over this period Ms Mangoma was well enough for most of this period to work for OUH, instruct solicitors in June / July 2021, submit an appeal in relation to her grievance against OUH in July 2021, submit an appeal against her IBS Advanced Specialist Diploma exam results in October 2022 and submit a claim against OUH in January 2023.

Merits

93. I accept the respondent's submission that this is a relevant consideration. The allegations as pleaded amount to bare assertions. Ms Mangoma relies on the fact that she is a black person of African heritage, but has not pleaded any facts as to why she says the respondent discriminated against her on this basis. The mere fact that a claimant has been subjected to less favourable treatment and has a protected characteristic is not in itself sufficient to make a finding of discrimination or to shift the burden of proof onto the respondent for an explanation. Therefore as currently presented these claims appear to be relatively weak, albeit I acknowledge that it is always difficult to assess the merits of a discrimination claim brought by a litigant in person at a preliminary stage before all the evidence is heard and determined.

Balance of prejudice

94. The length of the delay is a significant factor when considering the balance of prejudice. Whilst there is a strong public interest in discrimination claims being determined at a final hearing there is also a strong public interest in claims being brought promptly. This is in accordance with the overriding objective but also common sense; memories fade over time and this affects whether the parties are able to have a fair trial. In this case, with one exception, all the acts complained date back to 2019, now five years ago. This is not a claim where

some matters are in time with the out of time matters forming part of the background to more recent events. The whole claim is 18 months out of time.

95. When the length of the delay is combined with the inexplicable failure to read documents in her possession the balance of prejudice is tipped in the respondent's favour. It would have to be a strong claim on the merits to offset these two factors, and that is not the case here.

FINAL CONCLUSION

96. Therefore I conclude that the claim in its entirety should be dismissed for lack of jurisdiction.

POSTSCRIPT

97. Following the announcement of my judgment, Ms Mangoma claimed there were some factual inaccuracies. She was informed that these are matters for reconsideration and / or appeal. I do however address two points now:

    97.1 Ms Mangoma stated that it was the discovery of Mr Shambayati as the Chief Examiner that was the 'new information' that formed the background of her Second Amendment. There was no reference to this fact in the text of the amendment, and is an example of why it is important for amendments to clearly specify what is being alleged, against whom and why. In any event it is still not clear what Ms Mangoma is alleging that Mr Shambayati has done in this capacity and why she considers anything that he has done to be race discrimination and / or victimisation. In any event this remains a new cause of action which is not connected to facts already pleaded since it is separate from Ms Mangoma's dismissal by the respondent and the matters surrounding that decision.

    97.2 Ms Mangoma stated that there was other medical information in the bundle that I had not referred to. I confirm that I have considered all the medical documents that she had identified at the commencement of these proceedings.

Employment Judge Hart
Date: 11 September 2024

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