EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Cawte**

Respondent: **University of Southampton NHS Foundation Trust**

Heard at: **Southampton** **On: 18 October 2018**

Before: Employment Judge Maxwell

Representation
Claimant: in person
Respondent: Mr Nicholls, Counsel

RESERVED JUDGMENT

1. The Tribunal does have jurisdiction to determine the claimant's unfair dismissal claim, the same having been presented within the time permitted by section 111 of the Employment Rights Act 1996.

2. The Tribunal does not have jurisdiction to determine the claimant's disability discrimination claims in the Scott Schedule at G, H, I, J, K and L, the same not having been presented within the time permitted under section 123 of the Equality Act 2010, and those claims are dismissed.

3. The claimant's claim of automatic unfair dismissal for having made a protected disclosure, pursuant to section 103A of the Employment Rights Act 1996, is dismissed upon withdrawal.

4. Whether or not the claimant's disability discrimination claims in the Scott Schedule at A, B, C, D, E, were been presented within the time permitted by section 123 of the Equality Act 2010 will be determined at a final hearing.

REASONS

5. Pursuant to the order of Employment Judge Emerton on 12 March 2018, this public preliminary hearing was listed to determine the various preliminary issues identified at his paragraph 5. The time allocation of 1 day proved insufficient to determine all of those matters and, with the agreement of the parties, I confined myself to a determination of:

    5.1. whether the Tribunal had jurisdiction under the **Employment Rights Act 1996** ("ERA") to determine the claimant's unfair dismissal claim;

        5.1.1. whether her claim was presented within the time permitted by ERA section 111(2)(a);

        5.1.2. If not, whether the claimant shows it was not reasonably practicable for her to have presented her claim within that time and that it was presented within a further reasonable period, pursuant to ERA section 111(2)(b);

    5.2. whether the Tribunal had jurisdiction under the **Equality Act 2010** ("EqA") to determine her disability discrimination claims:

        5.2.1. whether her claims were presented within the time permitted by EqA section 123(1)(a);

        5.2.2. if not, whether the claimant had a reasonably arguable basis for contending that there was a continuing act within EqA section 123(3(a) - in which case the matter would be left to the Tribunal at final hearing to make a ruling;

        5.2.3. if not, whether the claim was presented within such other period as the Tribunal thinks just and equitable within EqA section 123(2)(b).

    5.3. whether the claimant needed permission to amend in order to purse the complaints at I to L of the agreed Scott Schedule:

        5.3.1. whether those complaints were already in the claimant's claim form on a fair non-non-technical reading;

        5.3.2. If not, whether she should have permission to amend.

6. The respondent indicated that it may, subject to the Tribunal's decision on the issues set out above, wish to pursue applications for strike out and / or a deposit order on the grounds the claimant's claims have no or little reasonable prospect of success.

7. A preliminary hearing for case management by telephone will be listed for the purpose of:

7.1. making case management orders;

7.2. considering whether (if the respondent pursues the same) to list a further public preliminary hearing for case management;

7.3. to fix the dates for a final hearing of the claims allowed to proceed.

Jurisdiction - Employment Rights Act

Facts

8. Pursuant her employment with respondent, the claimant was entitled to a right of appeal in the event she was dismissed for misconduct.

9. The claimant attended a disciplinary hearing on 22 and 24 May 2017. The decision was reserved, to be provided later in writing. On 20 June 2017, the claimant received a letter from the respondent by email which upheld the allegations and included:

> **I believe that you have not behaved in a way that meets the policies on values of the Trust I also believe that the Trust no longer has any trust in in confidence in you and your behaviour whilst at work and that you therefore unable to carry out your job effectively. I believe the Trust made all reasonable adjustments to accommodate your health issues, however I cannot accept that reasonable adjustments should allow feel poor behaviour. I believe that this therefore represents an act of gross misconduct under the Trust's disciplinary policy. Therefore the Trust has no option but to terminate your employment with immediate effect on the grounds of gross misconduct.**
>
> **Your dismissal will take effect as of today's date 20th of June 2017 and you will not be entitled to any payment in lieu of notice. […]**
>
> **You have the right to appeal against the sanction of gross misconduct. […]**

10. The claimant was not paid wages for any period following her dismissal and nor did she attend for work.

11. The claimant appealed against her dismissal and the decision in this regard was communicated by a letter of 3 October 2017, sent by email to the claimant that day, which included:

> **After listening carefully considering everything that was said by yourself and all parties, and reviewing the evidence available to me, I decided to uphold your appeal in part and to commute the sanction to dismissal with 12 weeks' notice. […]**
>
> **As was explained to you during the appeal hearing, my decision is final. I will instruct payroll to make your final notice payment.**

12. Following this appeal decision, the claimant received a lump sum payment equivalent to the pay due for her notice period.

Law

13. The effective date of termination (”EDT”) is a statutory construct found in ERA section 97(1). Where an employee is summarily dismissed the date on which that takes place will, generally, be and remain the EDT. Where, however, the employee exercises a contractual right of appeal against dismissal and on appeal the decision is made to overturn the dismissal, the employee is then treated as no longer having been dismissed at all; see **Patel v Folkstone Nursing Home Limited [2018] IRLR 924 CA**.

14. The position where a decision is made on appeal to allow the appeal to some extent, but not overturn the decision entirely, was considered by the EAT in **Hawes & Curtis v Arfan and another [2012] ICR 1244**, per HHJ Richardson:

> **37. What if the employer, on appeal, takes a decision which necessarily affects the duration of the employment – for example, if the employer substitutes a dismissal on notice, or extends the period of the contact?**
>
> **38. In our judgment such a decision will have an impact on the effective date of dismissal. Take first the case where the employer substitutes a dismissal on notice; in principle section 97(1)(a) will apply, and the EDT will be the date on which the notice expired. Take then a case like this, where the appeal varies the date on which termination takes effect. In principle section 97(1)(b) will apply, and the EDT will be the date on which the termination takes effect.**

15. The principal that the EDT might be varied by an employer’s decision on appeal was confirmed by the Court of Appeal in **Rabess v London Fire and Emergency Planning Authority [2017] IRLR 147**, per Laws LJ:

> **11. It is common ground that the employee's EDT can be retrospectively altered by the employers' decision on an internal appeal: see Hawes & Curtis Ltd v Arfan [2012] ICR 1244. It is plain that, leaving out of account any effect of the Appellant's later internal appeal, the Appellant was summarily dismissed on 24 August 2012. The question here is whether in the circumstances of the case the outcome of the appeal should be taken to have made a difference.**

Conclusion

16. The claimant was summarily dismissed by the respondent’s letter of 20 June 2018, with effect on its receipt that day. The question is whether that position was changed retrospectively by the appeal decision.

17. Mr Nicholls submits the position was not changed. He relies upon the various factors set out under paragraph 11 of his skeleton argument. He suggested that this case was much the same as that considered by the Court of Appeal

in **Rabess**, which he described as the final word on this subject, and urges me to reach the same conclusion, namely that the EDT was not varied and all that happened was the respondent decided to pay PILON. I do not agree.

18. In **Rabess**, the Tribunal at first instance found (and the Court of Appeal did not differ) that where the claimant had been summarily dismissed on 24 August 2012, the EDT was unchanged by an appeal decision which downgraded a finding of gross misconduct to misconduct and stated, expressly, that there would be a payment in lieu of notice ("PILON") and the EDT would remain 24 August 2012. The respondent's appeal decision in this case was in very different terms; the letter did not say the claimant would be given 12 weeks PILON, nor did it say that her EDT would remain 20 June 2018.

19. The appeal outcome letter provided "I decided to uphold your appeal in part and to commute the decision to dismissal with 12 weeks' notice." The effect of this decision was to substitute for the sanction of summary dismissal, a dismissal with 12 weeks' notice. A dismissal "with notice" is the very opposite of a dismissal with PILON (i.e. without notice and with pay in lieu of the same). Had the claimant been dismissed with 12 weeks' notice on 20 June 2017, she would have continued in the respondent's employment for a further 12 weeks, namely until 12 September 2017. The facts of this case fall squarely within the first example given at paragraph 38 of **Hawes & Curtis**. Accordingly, the EDT is varied to when notice would have expired, namely 12 September 2017.

20. No light was shed on this situation by the payment of the 12 weeks' pay in a lump sum, as the relevant time for wages to be paid as they would have fallen due had already passed and the entire sum was then owed, nor by the lack of wages paid or work done between 20 June and 12 September 2017, as this was entirely consistent with the original decision to dismiss.

21. Given a EDT of 12 September 2017, the claimant had until 11 December 2017 in which to present a claim even without taking account of the extension of time for ACAS early conciliation. Accordingly, her unfair dismissal claim presented on 28 November 2017 was in time.

Jurisdiction - Equality Act

Law

22. So far as material section 123 of the **Equality Act 2010** ("EqA") provides:

> **(1) Subject to sections 140A and 104B 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.**

23. The question of what amounts to a "continuing act" was considered by the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, per Mummery LJ:

> **52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. [...]Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.**

24. The Court of Appeal revisited the concept of a "continuing act" and considered the correct approach to be adopted at a Preliminary Hearing in **Aziz v FDA [2010] EWCA Civ 304**. Having cited **Hendricks** Jackson LJ observed:

> **33. In considering whether separate incidents form part of "an act extending over a period" within section 68(7)(b) of the 1976 Act, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see British Medical Association v Chaudhary, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208.**
>
> **34. One issue of considerable practical importance is the extent to which it is appropriate to resolve issues of time bar before a main hearing. Obviously there will be a saving of costs if matters outside the jurisdiction of the ET are disposed of at an early stage. On the other hand a claimant must not be barred from presenting his or her claim on any issue where there is an arguable case.**
>
> **35. The Court of Appeal considered the correct approach to this matter in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548. In that case the claimant complained of 17 incidents of racial discrimination over a period of many months. The question of time bar was dealt with at a pre-hearing review. The claimant gave oral evidence on that occasion. Having heard the claimant's evidence, the ET allowed five of the claimant's complaints to proceed but dismissed the other 12 complaints as being out of time. The EAT and the Court of Appeal both upheld that decision. Hooper LJ gave the leading judgment, with which Hughes LJ and Thorpe LJ agreed. Hooper LJ stated that the test to be applied at the pre-hearing review was to consider whether the claimant had established a prima facie case. Hooper LJ accepted counsel's submission that the**

> **ET must ask itself whether the complaints were capable of being part of an act extending over a period.**
>
> **36. Another way of formulating the test to be applied at the pre-hearing review is this: the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs: see Ma v Merck Sharpe and Dohme Ltd [2008] EWCA Civ 1426 at paragraph 17.**

25. An Employment Tribunal applying section 123 has a broad discretion and, pursuant to the decision in **British Coal Corporation v Keeble [1997] IRLR 336 EAT**, the factors relevant to its exercise may include those under section 33 of the **Limitation Act 1980**, in particular:

    25.1. the length of and reasons for the delay;

    25.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

    25.3. the extent to which the party sued had cooperated with any requests for information;

    25.4. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.

26. The balance of prejudice between the parties will always be an important factor.

27. There is, however, no presumption that time will be extended; see **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 343 CA**, per Auld LJ:

> **25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they 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 discretion is the exception rather than the rule. […]**

Conclusion

28. The respondent accepts that the claimant's complaint at F in the Scott Schedule of discrimination arising from disability [EqA section 15] and indirect discrimination in relation to disability [EqA section 19] is in time, as it includes a complaint about the appeal decision or outcome on 3 October 2017 and her claim was presented on 28 November 2017. Given that complaint is in time, if the claimant has an arguable basis for a continuing act including the same, then I should allow that to proceed to a final hearing.

29. Broadly, the claimant's complaint at F involves an assertion that the investigation, decision to dismiss and failure to reverse the same on appeal were all discriminatory because the respondent:

    29.1. failed to attach sufficient weight to the evidence / consideration that the conduct for which she was dismissed was caused or contributed to by her disability (depression and anxiety) when deciding:

        29.1.1. on her credibility as a witness relative to that of others who gave evidence;

        29.1.2. whether she was guilty of misconduct

        29.1.3. whether dismissal was an appropriate sanction;

    29.2. ought to have disregarded her sickness absence record insofar as the same was attributable to he disability;

30. Although the claimant cites "the disciplinary process" as the PCP for her section 19 claim at F, the case law urges tribunals to avoid such generally worded PCPs and instead to engage with the specific difficulty (usually something simple) which the claimant is complaining caused her difficulty. The claimant here alleges that her disability caused or contributed to her conduct, which in turn bought her within the disciplinary process. The PCP in such circumstances would seem to be the requirement not to engage in conduct of the sort for which the claimant was dismissed. The particular disadvantage is the increased likelihood that she (and others, similarly disabled) would carry out such conduct and then be at risk of discipline or dismissal.

31. Complaint A concerns the issue to the claimant of a verbal warning at a formal attendance review meeting on 15 May 2016, which was confirmed in a letter of 1 June 2016. This is pursued as unfavourable treatment because of something arising in consequence of her disability (i.e. she received he warning because she was absent and was absent because of her disability). The PCP for her section 19 claim is the percentage calculator under the policy (i.e. she was required to maintain a certain level of attendance to avoid triggering its application). Broadly, this is a complaint that her disability-related absence should have been disregarded. She makes the same complaint at F, in the context of the her appeal. These are, on the claimant's case, instances of the same policy or practice being applied to her, namely one in which disability-related absence is counted against her when it ought not to have been. On this basis, it is at least reasonably arguable that they comprised a continuing act. Whilst Mr Nicholls for the respondent said the claimant was dismissed for conduct and attendance management is an entirely separate matter, the claimant's allegation asserts a different factual case, namely that her poor attendance record did play some part in her dismissal and she was able to refer me to a reference in the appeal outcome letter where the decision-maker asserted she did not have an "unblemished

employment history" because of her sickness absence. I will allow this matter to proceed to a final hearing for the Tribunal to make a determination on continuing act, it is at least reasonably arguable there was one.

32. Complaint B concerns a 3-month review meeting on 29 July 2016, in which her conduct was raised as a matter of concern. This is pursued under EqA sections 15 and 19. Broadly, this is a complaint that her conduct was caused or contributed to by her disability and that her employer failed to take this into account, sufficiently or at all, when deciding how to respond. This clearly echoes her complaint at F. There is an arguable basis for a continuing act, being instances of the same policy or practice of the respondent failing to make allowance for the claimant's disability when looking at her conduct.

33. Complaint C concerns 1-1 meetings with the claimant's line manager. This is pursued under EqA section 15 only. The claimant complains that "negatives and underperformance" were raised and that OH evidence to the effect that her "actions" arose from her disability was not considered. There is a clear echo of the complaint about her dismissal at F. Whilst complaint C is made against her line manager as perpetrator, similar complaints are made at F about the dismissal and appeal decision-makers and, in substance, this amounts to a complaint that over a lengthy period her disability caused her conduct, her employer failed to take that factor into account, and rather than looking at any alternatives progressed her through informal and then formal processes toward dismissal. There is a reasonably arguable basis for a continuing act.

34. Complaint D concerns the claimant's appraisal on 18 August 2018. This is pursued under EqA section 15 only. The complaint is that the matters for which she was criticised (poor performance, not engaging with 1-1s) arose from her disability. Whilst the claimant has set out in the Scott Schedule that the "something" arising is the respondent using the appraisal system to raise performance or conduct concerns when that was "not the window", factually the "something" emerging from the facts she contends for is her performance and / or conduct. Again she contends that her disability as a cause was not taken into account sufficiently. I did consider whether this allegation was properly separable on the basis that, in part at least, it concerned performance rather than conduct. The later disciplinary process, however, includes matters such as a failure to complete work on time or alert her line manager to deadlines likely to be missed, which have at least a hint of performance about them. Again, I am satisfied there is a reasonably arguable basis for a continuing act.

35. Complaint E is about the claimant's suspension in connection with the matters for which she would later be dismissed. This is pursued under EqA sections 15 and 19. Broadly, the claimant is complaining that her disability caused the conduct and she should not have been suspended, rather an allowance should have been made for this behaviour or some other route followed. Her points on this are sufficiently similar to her points on the

disciplinary and appeal to say that she has a reasonably arguable basis for a continuing act.

36. Complaint F is agreed to be in time, as set out above.

37. At G, H and I, the claimant complains that her workload should have been adjusted, she should have received better pastoral care, a mediator should have been appointed between her and her line manager, she should have been downgraded in the pay structure, she should have been transferred to another post or workplace, her hours should have been reduced, and she should have received supervision. These are complaints of a different nature from those discussed thus far. The claimant complains at A to F about the respondent's decision to hold her to standards of conduct and / or attendance, without making any sufficient allowance for her disability having caused the same, whereas at G and F she is complaining about the respondent having failed to take steps which might have been supportive of her in employment. Whilst there is some scope for factual overlap, the complaints at G, H and I cannot readily be seen as examples of a general policy or practice of pursuing conduct or poor attendance under the respondent's procedures without taking into account disability as a cause. Furthermore, these complaints rely upon a different cause of action, EqA sections 20 and 21. Accordingly, I am not satisfied the claimant has a reasonably arguable basis for contending that G, H and I form part of a continuing act with A to F.

38. Given a suspension from work on 4 October 2016 (which lasted until her dismissal) that would appear to be the last date by which any such adjustments could have been made. A claim in this regard would need to have been presented by 3 January 2017. The claimant's claim presented on 28 November 2017 was, therefore, almost 11 months late. The claimant explained not having made an earlier complaint on the basis that she was relying upon her trade union and was unaware that a complaint could be made to a Tribunal before dismissal; this is surprising evidence, given the wide publicity in the media often attached to discrimination claims and to the extent the claimant held such a belief, it was not a reasonable one. The further particulars in which G, H and I are spelled out in detail were not provided until March 2018, circa 18 months after the events in question. If the claims were allowed to proceed, the respondent would be prejudiced in that witnesses would be required to recall events going back a very considerable period and be asked to explain why they didn't take the steps now being contended for, which is likely to be more difficult as a result of the time which has passed. I find it would not be just and equitable to allow these late claims to proceed, the claimant does not have a good reason for the delay and the respondent would now be prejudiced in having to respond to them.

39. Complaints J and K are allegations of harassment against the claimant's line manager. They are discrete events said to have taken place on 4 and 5 May 2016, when a letter and iPhone messages were shown to the claimant. The

claimant suggests this was done deliberately to unsettle her. These matters are of an entirely different character to any of A to F. Whereas elsewhere the claimant complains that processes were applied to her mechanistically, without any allowance being made for her disability, here she alleges a malicious attack with the proscribed purpose within EqA section 26(1)(b). There is no reasonably arguable basis for a continuing act.

40. A complaint about 5 May 2016 ought to have been presented by 4 August 2016. The claimant did not present her ET1 until nearly 17 months later. For the same reasons as given in connection with complaints G, H and I above, it is not just and equitable to allow these late claims to proceed.

41. L, is a further allegation of harassment against the claimant's line manager. This cites comments made by her during formal interviews carried out as part of an investigation into the claimant's grievance. The claimant alleges these things were said deliberately to unsettle her. Necessarily, the grievance process was instigated by the claimant rather than the respondent. To the extent that complaints were made about the claimant's management or line management, it will have been necessary for her line manager to answer questions as part of that formal process. An allegation that questions were answered in a particular way with a malign motive is entirely different in character from A to F and not remotely an incident of the general policy or practice which the claimant is alleging. There is no arguable basis for a continuing act.

42. The last comment complained of under L is said to have been made on 5 January 2017. Whilst this claim was not as late as G to L, it was substantially out of time. For the same reasons as given in connection with G to L, it is not just an equitable to allow this late claim to proceed.

Amendment

43. Given my ruling on limitation in connection with claims I to L, the question of amendment does not arise. In case I am wrong about the lack of jurisdiction, however, I would have ruled that an amendment was necessary and that it was not in the interests of justice to allow the same. The claimant accepted that I to L were not in her claim form and she was right to do so. Whilst the word harassment appears in her original claim and particulars, there was no hint of the particular factual allegations now made under that heading. These are substantial amendments, seeking to introduce entirely new factual allegations. The claimant does not have a good reason for her late claim, as her belief that she could not bring a claim until she was dismissed was unreasonable. The respondent would be prejudiced, in having to deal with these claims. The complaints were made for the first time in March 2018, between 14 and 22 months after the events in question. The claimant's line manager would be required not only to recall precisely what she did, but also why she did that or chose to use particular words; the passage of time will make that more difficult. The balance of prejudice favours not allowing the amendments and I would have refused permission for the same.

Future Conduct

44. A preliminary hearing for case management will be conducted by telephone. The Tribunal administration will contact the parties in order to arrange the same.

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Employment Judge Maxwell

Date: 19 October 2018

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JUDGMENT SENT TO THE PARTIES ON

.....30 October 2018.....

FOR THE SECRETARY TO THE TRIBUNALS