



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Blair

**Respondent:** National Crime Agency

**Heard at:** Liverpool

**On:** 16 April 2018  
3 May 2018  
(in Chambers)

**Before:** Employment Judge Barker

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr T Holloway, Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The respondent's application to the Tribunal that the claimant's claims be dismissed having been brought outside the period of three months starting with the date of the act to which the complaint relates as per section 123 of the Equality Act 2010, hereby fails and is dismissed.

2. The claimant's complaints of a failure to make reasonable adjustments as per section 21 of the Equality Act 201 and harassment contrary to section 26 of the Equality Act 2010 were brought after the end of the period of three months starting with the date of the act complained of, but were brought within such other period as the Employment Tribunal thinks just and equitable as per section 123(1)(b) of the Equality Act 2010.

3. The claimant's complaint to the Tribunal contains no complaint of direct discrimination as per section 13 of the Equality Act 2010 and no application to amend the claim to include such a complaint has been received by the Tribunal.

# REASONS

1. The parties appeared before the Employment Tribunal on 9 March 2018 to conduct a preliminary hearing case management discussion. The matter had previously been listed for judicial mediation in April 2018. However, this was cancelled as the respondent asked for clarification of the claimant's claims and wished to pursue an application for the dismissal of all claims as being out of time. The matter was therefore listed to determine whether the claimant's complaints were brought after the end of the period of three months starting with the date of the act to which the complaint relates as per section 123(1)(a) of the Equality Act 2010 and if so, given that they were out of time, whether the Tribunal could exercise its discretion to allow the complaints to be brought within such other period as the Tribunal thinks is just and equitable as per section 123(1)(b) Equality Act 2010.

2. This preliminary hearing also sought to clarify the complaints brought by the claimant. It was necessary to clarify the complaints brought by her before considering which, if any of those, had been brought in time or whether it was just and equitable to extend time to any brought outside the three month period.

3. It is clear from the ET1 claim form, and it is accepted by the respondent's counsel, Mr Holloway, that the claimant brings claims of a failure to make reasonable adjustments and harassment on the grounds of her disability.

4. The claims of a failure to make reasonable adjustments relate to alleged failures during Adam Ainsworth's period as the claimant's line manager which started in April 2014 and ended in November 2015. These complaints relate to non-availability of software used by the claimant to manage her disabilities in the workplace and to performance management targets implemented by Mr Ainsworth, including placing the claimant on a performance improvement plan in July 2014 with the claimant allegedly being told that the performance improvement plan may result in her employment being terminated.

5. The claimant is disabled by Ehlers Danlos syndrome, dyslexia, dyspraxia and Asperger's syndrome. The respondent concedes that the claimant is a disabled person by reason of these conditions, but there is an outstanding issue between the parties as to the respondent's date of knowledge of the claimant's Asperger's syndrome.

#### **Clarification of the claimant's pleaded case:**

##### **A: Failure to make reasonable adjustments**

6. The failure to make reasonable adjustments claim relates to three elements as set out by Employment Judge Ryan in the Case Management Order following the hearing on 9 March 2018, which are:

- (i) That requiring the claimant to work in an open plan office in natural light using general office equipment and software and being subjected to a target in relation to a minimum number of pieces of work to be completed per day, and a personal improvement plan amounted to provisions, criteria or practices that put her at a substantial disadvantage as a disabled person;

- (ii) The claimant says that reasonable adjustments were required including a quiet space to work in, using bespoke hardware and software without the need for targets or for a relaxed target, and that she should not have been subjected to a performance improvement plan; and
- (iii) The claimant says that there was a delay in moving her to a quiet area away from natural light and a delay in providing her with the IT equipment required which, when provided, was not installed properly and/or has never functioned properly.

## **B: Harassment**

7. The claimant complains of two specific instances of harassment by Adam Ainsworth. The first is that she asked to be placed on a training course in September 2014 and that Mr Ainsworth came up with what she describes as a long list of reasons why she could not go, including making the comment, "*How can you learn on a course when you've got dyslexia?*". The claimant will say that these comments had the purpose or effect of harassing her and were unwanted.

8. The claimant will say that in October 2014 because of her complaints about working in an open plan office in natural light, Mr Ainsworth surrounded her desk with cardboard boxes to act as a barrier and says this made her colleagues laugh at her because it looked ridiculous. She will say that surrounding her desk with cardboard boxes was unwanted conduct that had the purpose and effect of harassing her.

9. The claimant also additionally told the Tribunal at the instant hearing that when she asked Mr Ainsworth for a lateral transfer in October 2014 he told her that she could not move because the organisation had spent money on reasonable adjustments already. She believes this to be an incident of harassment, being unwanted conduct which created a harassing effect.

## **C: The respondent's handling of the claimant's grievance of 14 May 2015**

10. It is recorded in the notes of the Case Management Order following the hearing on 9 March 2018 in two separate places that the claimant also makes claims in respect of the handling of her grievance procedure by the respondent. This grievance was dated 14 May 2015 and relates to the failure to make reasonable adjustments and instances of harassment set out above during her time being managed by Mr Ainsworth.

11. It is Mr Holloway's submission before me at this hearing that the claimant's ET1 claim form contains no such complaints about the respondent's conduct of the claimant's grievance. In particular, Mr Holloway submits that there is no reference to direct discrimination in the ET1 claim form. I note that the first substantive paragraph of the ET1 form states:

*"I am appalled and astonished at how badly the Law Enforcement Agency I work for got an investigation so one-sided and haven't followed reasonable line of investigation."*

12. Although I accept that this refers to a broad complaint about the respondent's conduct of the grievance, it does not, I find, amount to a pleaded complaint of direct discrimination. The complaint about the conduct of the grievance investigation is not said anywhere in the claimant's ET1 pleadings to be because of her disability or other protected characteristic, nor does it compare her treatment to that of those who do not have her protected characteristic.

13. Nevertheless, the claimant told me on this instance that she understood that her pleadings of direct discrimination had been accepted by the Tribunal.

14. Having carefully considered the minutes of the Case Management Order from 9 March 2018 in conjunction with the ET1 form, I find that the Case Management Order lists the complaints that the claimant stated she wished to make on that occasion. This does not equate to a formal consideration of the claimant's case, which was the purpose of this hearing on 16 April. It is noted in the minute of the case management discussion from 9 March that

*“if there is to be an extension of time the respondent requires clarification as to which claims the Tribunal accepts jurisdiction to hear”.*

#### **D: Future amendments by the claimant**

15. The claimant further told the Tribunal on this occasion (16 April 2018) that she was waiting for further advice from her union solicitors and that there would be further amendments to her pleaded case. She was asked by the Tribunal whether her solicitors were aware that the hearing was listed to take place on 16 April, to which she replied that they were.

16. The respondent made it clear that they sought to put their case on the basis of the claimant's case as currently pleaded, which the respondent states, for the avoidance of doubt, it understands only to be a failure to make reasonable adjustments and harassment and does not contain any formal pleadings to do with direct discrimination.

#### **Conclusions as to the claimant's pleaded case**

17. On balance, I accept that the claimant's claim does not include a direct discrimination complaint.

18. I also accept that no further application to amend has been made, either to include a direct discrimination complaint or other complaints.

19. Although I accept that the claimant's union and solicitors did not attend to provide the claimant with support on this occasion, it was noted in Tribunal correspondence listing the matter for a hearing on 16 April that it was possible to vary or postpone or set aside the order to attend the hearing, and the claimant did not do so.

20. The determination of the issue of whether the claimant's complaints are in time or whether it would be just and equitable to extend time will therefore be done on the basis of the harassment and failure to make reasonable adjustments claims presented in the ET1 only.

**Time Limits –Claimant’s pleaded issues are out of time****A: Failure to make reasonable adjustments**

21. I have considered the evidence put forward by the claimant and respondent, including a substantial bundle of documentation prepared by the respondent.

22. The claimant’s reasonable adjustments complaints are set out in her claim form and, as repeated in her grievance document, all relate to a failure to make reasonable adjustments during Mr Ainsworth’s period as her line manager and do not extend past November 2015. It is the claimant’s case that reasonable adjustments are still not in place to date but that is not a matter to which this claim relates.

23. Applying the reasoning of the Court of Appeal in ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640***, time limits for the purpose of bringing a complaint about a failure to make reasonable adjustments begin to run on the date by which an employer might reasonably have been expected to comply with the duty determined in the light of the facts as they would reasonably have appeared to the claimant.

24. It is clear from the evidence given by the claimant and the respondent that the adjustments required by the claimant will have been clear to the respondent and to Mr Ainsworth within a month of the claimant being managed by Mr Ainsworth, therefore within a month of April 2014. The claimant lodged a grievance with the respondent in May 2015. It is clear that from the claimant’s perspective, by May 2015 she believed that the respondent has passed the point by which the respondent might reasonably have been expected to comply with the duty.

25. The claimant complains about her performance improvement plan. The evidence before me indicated that the performance improvement plan was concluded in September 2014, and that adjustments relating to the end of the performance improvement plan were put in place at the review meeting on 10 September 2014. These adjustments were expected to be in place by the end of December 2014. The claimant complained to the respondent about the performance improvement plan in May 2015 and a failure to make adjustments that caused the implementation of the performance improvement plan in the first place.

26. Therefore, applying the test in the ***Morgan*** case, the latest possible date that the claimant had to complain to the Tribunal about the respondent’s actions in relation to the performance improvement plan was either three months from December 2014 or three months from May 2015. Her claim form was presented on 2 August 2017. It is clear that the claimant’s complaints of failure to make reasonable adjustments are out of time.

**B: Harassment**

27. The instances of harassment took place in September and October 2014 and were discrete complaints. Three months from each of these complaints runs to January 2015 at the absolute latest. The claimant’s complaint was not issued until 2 August 2017. It is clear that the claimant’s complaints of harassment are out of time.

**Just and equitable to extend time?**

28. The claimant told the Tribunal that her union representative assisted her with her ACAS early conciliation notification, which was submitted on 13 June 2017.

29. The claimant told the Tribunal that she did not receive the outcome of her grievance appeal against the grievance launched in May 2015 until the end of June or early July 2017.

30. A letter in the bundle dated 7 July 2017 formally records that the claimant's appeal against her grievance decision was unsuccessful. However, the bundle contains letters to Adam Ainsworth dated the end of May 2017 notifying him that the grievance against him had not been upheld on appeal.

31. The claimant told the Tribunal that she was on maternity leave at the end of June and in early July and that her union representative wanted to come to her house to tell her of the outcome of the grievance appeal before her employer told her, although the claimant's recollection is unclear in this regard. She told the Tribunal that she was aware in July that the grievance appeal had failed and she thought that Mr Almond, her union representative, came out to see her in person to tell her before she received the letter from the respondent.

32. On the balance of probabilities I conclude that the claimant will have been notified by her union in June, before receiving the letter from the respondent in July 2017 and that her discussion with the union in June prompted the approach to ACAS on 13 June 2017 which then in turn allowed the claimant to issue an ET1 at the beginning of August 2017.

33. The claimant's evidence to the Tribunal was that Mr Almond consistently told her that she had to go through all of the internal processes first, these being the grievance and grievance appeal, before she could "go external" and issue a claim in the Employment Tribunal.

34. She told the Tribunal that she found out that this was not correct when submitting her ET1. She also originally believed that her earlier claims would be in time because she was relying on having complained about the fact that her grievance was not conducted properly. The claimant told the Tribunal in her closing submissions that her decision to rely on her union advice to wait until the internal processes were over, was "*the worst piece of advice I'd ever been given*". When asked whether she had questioned that advice she told the Tribunal that because it was advice of the union she had no reason not to trust it, and that she first only spoke to the union solicitors after the ET1 had been submitted.

35. The respondent's representative notes that the Tribunal has no evidence of the advice received by the claimant other than the claimant's own testimony. However, in this regard the claimant was a credible and consistent witness. I find that it was reasonable of her to rely on her union's advice. She has no formal legal background and during the period in which her grievance and her grievance appeal was being considered by the respondent she had had a period of maternity leave and several periods of illness. It was therefore reasonable in the circumstances for her to rely on her union's advice, although this turned out to be incorrect.

36. In conclusion, therefore, I find that the latest possible date for the claimant's complaints to be in time was three months from the date that her grievance was submitted in May 2015, that being August 2015. As her complaint was not submitted until August 2017 it is approximately two years late. As her complaint does not contain any formal pleadings about the conduct of her grievance, she cannot rely on this being an ongoing act of disability discrimination at this stage in the proceedings. The Tribunal understands that she wishes to amend her complaint to include this, but she has not formally done so to date.

37. It is therefore necessary to consider whether it is just and equitable to extend time. I find that it is, for the following reasons.

38. Considering the issue of prejudice to the respondent, although the claimant suffers from mental health and information processing issues and the respondent expressed its concern that this would affect the quality of evidence from 2014 and 2015, it is clear from the bundle that was prepared for the preliminary hearing that the vast majority of the claimant's issues from 2014 and 2015 are recorded in contemporaneous documentation.

39. Furthermore, despite her mental health and information processing difficulties, in relation to many of the issues from 2014 and 2015 the claimant has a very clear recall of events and dates.

40. I therefore do not consider that the passage of time means that a fair hearing will not be possible or that this subjects the respondent to any particular prejudice.

41. I consider that principal reasons for the claimant's delay were the fact that she relied upon inaccurate advice by her union representative, she suffered from periods of illness relating to her disability, and also she was absent on maternity leave. It is therefore just and equitable to extend time to cover those matters formally pleaded in her ET1 claim form.

42. The matter is therefore to be listed for a case management discussion to set down Case Management Orders for the good management of the proceedings and relating to the final hearing.

Employment Judge Barker

Date 11 June 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 July 2018

FOR THE TRIBUNAL OFFICE

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