EMPLOYMENT TRIBUNALS

Claimant: **"J"**

Respondent: **Tavistock & Portman NHS Foundation Trust**

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (in public by video link – "CVP") **On:** 18 November 2022

Before: **Employment Judge R S Drake**

Appearances
For the Claimant: Ms R White (of Counsel)
For the Respondent: Ms N Motraghi (of Counsel)

JUDGMENT

1. The claims in respect of events before 1 May 2021 are out of time and the Tribunal finds they were not presented within such further period of time as is just and equitable. Therefore, they are dismissed.

2. The claim in respect of the one complaint presented in time (relating to an event on 12 July 2021) is in time but it is not found to be part of a course of conduct capable of being aggregated with the preceding complaints, and moreover, when seen alone it is struck out under Rule 37 as having no reasonable prospect of success.

3. No further case management Orders are necessary as the claims in their entirety are dismissed. The Hearing listed for 9 December 2022 is therefore vacated.

Anonymisation Orders 25 January and 7 October 2022 ("AOs")

4. By consent, and for the same reasons for which the Anonymisation Orders made by EJ Shore and me, shall remain extant until further Order

REASONS

Introduction

5. This resumed Preliminary Hearing was set for the purpose of considering and determining the Respondent's application (dated 1 July 2022) to Strike Out the entire set of claims as set out in the ET1 and clarified by Further Information which I permitted to stand as such in my Orders dated 7 October 2022. Specifically, I am to consider whether the individual complaints as claims are out of time for the purposes of Section 123(1)(a) of the Equality Act 2010 ("EqA") and whether they have been presented within such time as the Tribunal finds just and equitable for the purposes of Subsection (1)(b) sufficient to seise the Tribunal with jurisdiction to hear the claims. This also entailed considering whether the acts complained of amounted to a continuing course of discriminatory action as pleaded in paragraph 33 of the Claimant's Grounds of the ET presented 19 November 2021 for the purposes of Section 123(3)(a).

6. The Respondents argued that all but one of the claims were presented out of time, and then that the only one ostensibly in time had no reasonable prospect of success, and so was susceptible to Strike Out under Rule 37 or had little prospect to the extent it was susceptible to the making of a Deposit Order under Rule 29.

7. The time question, and potential extension under Section 123(1)(b), was to be considered first as it has a bearing on jurisdiction, and then potential for orders under Rules 37 and/or 39 next. I recognised that if I were to determine that the claims (other than the last) were out of time and there should be no extension, then I recognised that the wording of Section 123 is very specific to the extent that claims may not be brought out of time unless time is extended under subsection (1)(b) and that thus there is an argument for saying that if I were so to determine, it would not be necessary to consider whether any out of time claims had no or little prospect of success since jurisdiction to do so might not exist.

8. However, both Counsel helpfully addressed me on the question of whether any or all of the claims might be susceptible to Strike Out or Deposit Order if time were extended, so I considered each accordingly to ensure completeness of consideration.

9. Today, I had before me substantially the same (but personal identity redacted) File of Documents as I had at the start of the hearing in October. I also had formal written detailed Submissions from the Respondents which set out a list of the claims in date order after amendment and based upon EJ Shore's identification of them in his CMOs dated 25 January 2022. I was advised that this list was common ground as to dates of events complained of following my being assured that Ms White for the Claimant confirmed this. Separately, I was taken by Ms White though the Claimant's Grievance statement document (added as PP92-103 of the Hearing Bundle), which had been presented to the Respondents in

September 2020. This was done with great care to show how the grievance itself was dealt with as the Claimant saw it from September 2020 to conclusion of the process by its dismissal by the Respondents in February 2021. That outcome was appealed and the dismissing appeal outcome was reached on 23 September 2021. I was advised that all of this is common ground,

10. I did not hear any oral evidence from the Claimant to explain why the claims had not been presented to the Tribunal before 1 May 2021 which I describe hereafter as "the cut-off date". In effect the Claimant was praying in aid the evidence apparent in the Claimant's written record of grievance, partially dated September 2020, which was dismissed by the Respondents in February 2021, the appeal against which not having been determined until 23 September 2021, which I took to be the argument relied upon to show that the claims were in time if seen as a continuing course of action spanning the "cut-off" date of 1 May 2021. However, I also noted that the grievance itself was not cited as a particular of specific complaint as listed in the table below at paragraph 11. I considered Ms White's elegantly crafted oral arguments on this point, but I find I am not persuaded by them for the reasons set out below.

Consideration

11. To assist the parties, and taking as agreed for the reasons expressed above, I set out for ease of identification in tabular form the Claimant's complaints to show the dates which I find relevant. There are now 11 (12 when one sees that two are in effect combined) following withdrawals of two. I am assisted by Ms Motraghi's unchallenged depiction of those dates as set out in her Submissions dated 17 November 2022 and I describe cross references to either paragraphs in the Claimant's Grounds of Claim or to Further Particulars ("FPs") provided pursuant to EJ Shores CMOs. In effect, because of the fact that EJ Shore identified these matters in his CMOs, I took this list to be agreed and noted that Ms White did not argue otherwise.

Claim	**Date**	**ET/FP paras CMO paras**	**Allegation**	**Bundle Pages**
1	June 2016	ET – 12 CMOs 3.1	C informed that personal lived history as a trans person was not relevant to a particular post	16 43
2	2018-2019	ET – 5 CMOs 3.3	Dr Whittaker allegedly made derogatory comments	51 36
3 &4	July 2019	FP - 21.9 CMOs 3.10 CMOs 21.10	R failed to offer trans staff protection from views expressed by colleagues and other practitioners/academics critical of certain theories (ROPD and AGP) critical of permitting children to transition	58 38 44

5	Oct 2019	FP - 21.4	C alleges she and a colleague were outed on social media	37 53
6	Nov 2019	CMOs 3.3	Dr Phillott allegedly made derogatory comments	43
7	25 June 2020	CMOs – 3.5	C alleges that being advised by C de Sousa that disciplinary procedure could ensue if C spoke out on trans issues subjects her to unwanted conduct	43
8	16 Sept 2020	FP -21.6 CMOs – 3.6	C alleges she was informed that her personal history and skillset was not relevant to a post for who she was applying	35,36,55 44
9	20 Oct 2020	FP – 21.7 CMOs 37	C alleges being admonished for describing a particular organisation as trans-phobic	44
10	8 Dec 2020	FP – 21.8 CMOs – 3.8	C alleges that there was disregard for her concern about a presentation being made by a person with known trans critical views	37,56 44
11	20 Jan 2021	FP – 21.9 CMOs – 3.9	C alleges R having a book in its library referring to theories which she did not accept in relation to ROGD and AGP was unwanted conduct	37,57 44
12	12 July 2021	FP – 21.13	C alleges that R issuing a memo regarding Covid Risk Assessment is unwanted conduct	38

Relevant Statute Law

12. This is as follows: -

Section 123(1) EqA provides: -

"Proceedings on a complaint within Section 120 <u>may not</u> 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 of time as the Employment Tribunal thinks just and equitable;

Section 123(3) also provides: -

(a) Conduct extending over a period is to be treated as done at the end of the period"

In this case Ms. White argues that even though it is clear that only the last act complained of post dates the cut off date before which claims if not presented within 3 months are ostensibly out of time, nonetheless, all are capable of being aggregated as incidents of "conduct extending over a period of time" to be able to bring them into play. Ms. Motraghi argues the opposite and specifically submits that each act is discrete, is done by different people connected only by the fact they are employees of the Respondent, and that this of itself is not evidence of conduct extending over a period of time. Therefore, I have analysed each and every allegation with the above statute law in mind and with the benefit of the following case law as guidance.

Relevant Case Law

13. The case law to which I am directed included the following: -

13.1 **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379** from which I note that the time limit for issue of proceedings "… *is a jurisdictional and not a procedural issue* … "which means that if a case is out of time and time is not extendable, the Tribunal simply has no power or jurisdiction to hear the claim; I deal with this in paragraph 16 below;

13.2 **Palmer & Saunders v Southend BC [1984] IRLR 119** from which I note inter alia that I am to consider the substantial cause (if shown) of the Claimant's failure to issue within the Primary Period, whether there was any impediment preventing issuing in time, whether or not the Claimant was aware of their right to issue a claim, whether the Respondent has done anything to mislead or impede the Claimant issuing their claim, whether the Claimant had access to advice, and lastly whether delay was in any way attributable to that advice. I deal with this in paragraphs 17 and 18 below;

13.3 **British Coal v Keeble [1997] IRLR 336** from which I note inter alia that I am to consider the length and reasons given for delay, the extent to which delay may affect cogency and recollection of evidence, any promptness of action by the Claimant once, after the Primary Period had expired, the Claimant became aware of the alleged facts which gave rise to their perceived cause of action, the steps taken once they knew of the possibility of taking action, and lastly the balance of prejudice to the Claimant of not allowing the claim to proceed and to the Respondent in allowing it to do so;

13.4 **Robertson v Bexley Community Centre [2003] IRLR 434** from which I note that application of S123(b) involves the exercise of a discretion which is an exception rather than the rule; this point is augmented by the EAT's decision in **Simms v Transco [2001] All ER 245** which is authority for the proposition that whilst the fact a fair trial is impossible will most likely preclude extension of time, it does not follow that merely because a fair trial is still possible time should be extended – each case is fact specific; In short the guidance in Bexley incudes the point that time limits are to be construed strictly and there is no presumption in

favour of extension. These decisions, together with that of the CA in **Abertawe Local Health Board v Morgan [2018] EWCA Civ 640** all serve to emphasise the importance of me not leaving out of my consideration any significant factor as mentioned below.

13.5 **Afolabi v Southwark BC [2003] ICR 800** from which I note that it is my duty to ensure no significant circumstance is left out of my consideration when considering whether to exercise my discretion or not and also that if I fail to take account of prejudice to a Respondent of allowing a claim to proceed out of time, I will be in error; I deal with the **Keeble, Abertawe** and **Afolabi** points in paragraph 18 below

13.7 **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** in which the CA held in relation to complaints involving continuing acts, that an Employment Tribunal had not erred in law in construing acts extending over a period as continuing acts of discrimination. It advised that concentration on concepts such as policy, rule, scheme, regime, or practice were too literal, whereas what should be considered was the actual content of different acts and whether they were distinct from each other as a succession of unconnected or isolated specific acts; I deal with this in paragraphs 14.7 – 14.9 below;

13.8 In a most recent CA decision **Adedeji v University of Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, it was held that the factors " … almost always relevant to consider when exercising discretion are (a) length of and reasons for delay and (b) whether the delay has prejudiced the Respondent by for example preventing or inhibiting it from investigating the claim while matters were afresh … " (my emphasis showing that it is both length and reasons for delay construed together, not disjunctively); I deal with this in paragraph 18 below;

13.9 The Claimant at some stages (and specifically in the Grievance) has sought to rely on the first instance decision in **Forstater v CGD Europe Ltd [2022**] but overlooks the fact it has been overturned by the EAT. The Claimant sought to argue significance in the fact the Respondents had a book in their library (the penultimate complaint) that has near identical critical views within it to those in **Forstater** in relation to trans people; As indicated, such reliance is now misplaced given the overturning of it by the EAT.

Findings

14 I noted and found the following: -

14.1 Because it was common ground that all but one of the complaints are clearly out of time, it is for the Claimant to show that presentation of the proceedings was within such time as I can find just and equitable, and/or that I can conclude that the acts complained of were acts extending over a period of time. Yet I heard no evidence (either orally or by written statement) other than by hearing oral argument based on the Claimant's record of the progress of a grievance raised in September 2020 ("the Grievance") – now added to the Hearing Bundle for today;

14.2 Ms. White invited me to take this as if it were evidence. Ms. White argued that what was pleaded and /or otherwise was set out in Further Particulars amounts to evidence because of its cogency as argument. Cogency and whether they raised triable issues in and of themselves was particularly emphasised;

14.3 Despite absence of oral evidence, I considered all this material and what was orally submitted when I commenced my deliberations;

14.4 It was common ground that the Claimant has had access to specialist and indeed expert professional advice from an early but yet unidentified time; the Claimant's records of the matters of which complaint is made bespeak a degree of perspicacity going beyond a lay person's awareness of issues in Equality law;

14.5 The Grievance raised by the Claimant was raised at a time when proceedings could have been presented, albeit perhaps for purely protective purposes, but the current claims were not presented at the time the grievance was first raised; Thus, the last matter complained of, leaving aside the one matter which is in time, occurred on 21 January 2021, fully 9 months before the claim was presented. I am told and accept that the Claimant was by this time being professionally advised and that a grievance was raised in very detailed form some 14 months before the claims were presented;

14.6 The Grievance was dismissed, and the outcome (February 2021) was appealed; The appeal was also unsuccessful (September 2021) but no explanation is before me for the further delay until presentation of the claims on 19 November 2021. The ACAS Early Conciliation process had already started on 30 July 2021 and concluded on 10 September 2021, so I am left unable to discern any account for the delay thereafter.

14.7 I was taken by MS White almost line for line through the Grievance record made by the Claimant, but I see that it is based on the premise that it expresses the whole of the Claimant's grievances but that they date from September 2020 and do not account for what happened thereafter. Thus, the Grievance was raised before certain of the events complained of occurred and yet none of those subsequent events was sufficient to cause the Claimant to reflect and present her claims until November 2021. I simply do not have the benefit of any cogent reason for this state of affairs; The Grievance cannot explain subsequent delay and is not probative in this respect;

14.8 I have re-read the Grievance with care and note that it expresses a wide range of differences of professional opinion both as to content and approach to the provision of clinical services by the Respondent. Though expressed eloquently, it expresses subjective views and is not of itself self-proving as to the validity of the perceived causes of action referred to nor events it refers to.; It includes reference to a piece of case law which is itself misleading since that decision has been overturned i.e., **Forstater;** As such, this complaint is misconceived in law;

14.9 I am persuaded by Ms. Motraghi's submission that the individual events complained of do not form part of an ongoing continuum such as to demonstrate

conduct extending over a period of time. I also find persuasive her submission that the last act complained of is not causally or generically connected to the event preceding it. Having a book in a library (complaint 11) the contents of which the Claimant rejects and to which exception is taken merely because it is there, is in my judgment vastly different to the issuing of a memo (complaint 12) about Covid Risk Assessment such as to show no connectivity of any kind.

14.10. The Claimant argues (P20 – ET1 para 23) that being asked, when doing a risk assessment, to contact a clinic so as to advise " … the relevant sex category based on an individual's personal medical history … " might reasonably be seen as seeking to know how a person seeks to be identified and thus as such it is difficult to see how this might be demeaning or harassing.

Conclusions

15 All but the last identified cause for complaint are out of time. I had no oral evidence before me explaining why proceedings had not been presented before 19 November 2021 in relation to any of them but for what I inferred was explanation that grievance process had been commenced and did not conclude until September 2021. I cannot see any connection in terms of content between the events which occurred before, but particularly after the raising of the Grievance. In particular I note Ms Motraghi's submission that even just looking at the penultimate event for example, that event has no legal basis as a claim which disconnects the chain between preceding events and the last event in an even more pronounced way.

16. The time limit for presenting claims goes to jurisdiction and proceedings may bot be brought if out of time subject to such further time being thought just and equitable.

17. I have not had established to me the substantive cause for delay in presenting the claims – I accept Ms Motraghi's submissions on this point which is that there is an absence of explanation. I do not find that the reliance on the argument that a grievance process was being undertaken does not in this case explain why with the benefit of professional advice and having undertaken early Conciliation, proceedings were still not presented until 19 November 2021.

18 The explanation I have before me for delay is not persuasive. I have then turned to the issue of balance of prejudice. I accept that if time were extended, the Respondent would have the much weightier task of preparing to defend the claims and meet the Claimant's evidence and that the claims are stale to the extent that what the Claimant is actually challenging is attitudes of mind rather than a case which can be supported effectively by documentary weight in favour of the Respondent. On the other hand, I also recognise that if the claims were not allowed to proceed, then the Claimant would have no right of redress for what is seen subjectively as wrongs committed by individuals in the Respondent's employ. If that were the case, then it might seem rare for any Claimant's case not to survive time challenge. I balance in this case the absence of cogent reason for explaining delay notwithstanding competent advice and personal perspicacity on the Claimant's part against prejudice of not pursuing the claims.

19 I cannot find that Section 123(3)(a) applies and thus brings into play any of the events now found to be out of time by linkage to the last event as I have already found I cannot recognise such linkage in nature or content of the events. This leaves the last event as the only event in time and this in turn brings into play consideration of Rule 37.

20 I have found that this last event is thinly pleaded being an unexplained assertion as if self-proving that being asked how a person seeks to be identified is somehow a cause for feeling demeaned and harassed without anything more. I conclude it is not self p[roving and nor that it discloses a triable cause of action. Thus, it does not cause me to find that it has any reasonable prospect of success when seen alone. I am persuaded by Ms Motraghi's submission that where a claim is legally misconceived, striking out is fully justified. There are no contentious facts which might tend the necessitate due consideration and finding on testimony. What happened is agreed, what is not agreed is the effect of what happened and its legal significance. Accordingly I conclude that it must be struck out as having no reasonable prospect of success.

Signed 23 November 2022

Sent to the parties on:

25 November 2022

For the Tribunal Office: