EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Lynda Jane Wright Williams	**v**	(1) Step Teachers Limited (2) Synergy Multi Academy Trust

Heard at: Norwich (by CVP) **On:** 15 February 2022

Before: Employment Judge M Warren

Appearances
For the Claimant: Mr S Irving, Trade Union Representative, (NSTN).
For the First Respondent: Miss J Barnet, Lay Representative.
For the Second Respondent: Mr L Millington, Solicitor.

JUDGMENT ON AN APPLICATION TO STRIKE OUT

1. The Claimant's claim of disability discrimination is struck out for want of jurisdiction on the grounds that it is out of time.

2. The Claimant's claims under the Agency Worker Regulations are not struck out and shall be heard. Case management orders in respect of that claim appear separately.

3. A deposit order shall not be made.

REASONS

Background

1. This case is brought by Ms Williams against the agency for whom she worked as a supply teacher and a Trust that ran a school to which she was assigned in 2019/2020. Her claims as set out in a claim form issued on 16 October 2020 are of unfair dismissal, unpaid wages, breach of contract and discrimination.

2. The matter came before Employment Judge Kurrein on 11 May 2021 for case management. He identified potential claims of associative disability

discrimination and claims under the Agency Workers Regulations. He gave directions for the provision of an Impact Statement and medical evidence relating to the Ms Williams' daughter, on whose disability Ms Williams relied. He made provision for witness statements from Ms Williams herself and he directed that the matter be listed for a further Open Preliminary Hearing to deal with a number of potential matters which included the possible strike out of the claim on the grounds that it had no reasonable prospects of success, possibly a Deposit Order, to decide the question of whether or not the claimant's daughter was at the relevant time a disabled person and whether the alleged disability discrimination claim should be struck out because it is out of time.

Evidence Today

3. For today I have been provided with a pdf bundle. I am grateful to Mr Millington for putting that together. Unfortunately omitted from the bundle was a statement Ms Williams prepared in June 2021. There is an error in the date against her typed signature at the end, it is dated 2 June 2020, but it must be June 2021.

4. One curiosity about today's hearing is that it is an open hearing at which I would expect to hear evidence. Whilst I have an Impact Statement from the Ms Williams' daughter, (who I think is aged 21) and from Ms Williams, neither are here to give oral evidence and to have their evidence challenged under oath by way of cross examination. I am told by Mr Irving, recently instructed, (he is a Trade Union Representative) that Ms Williams is too ill by reason of stress to attend. No medical evidence about that is produced and there is no application for a postponement.

5. Insofar as it is necessary to rely on witness statement evidence where the witnesses are not here, I have to treat that evidence with a degree of circumspection because the individual has not attended to have their evidence tested. I attribute such weight as I consider appropriate.

Time – Strike Out Application

6. The first matter that I am going to deal with on which I have heard submissions from both parties after an adjournment, is whether I should strike out the disability discrimination claim on the grounds that it is out of time.

Facts

7. The discrimination claim is founded on the following allegations of fact:

    7.1 The claimant was supplied as an agency worker by the first respondent to the second respondent to teach at a particular school.

    7.2 During the first part of 2020 when the country was in lockdown because of Covid, teaching was done from home and Ms Williams

was part of that. There came a point when the second respondent wanted its teachers to return to their schools.

7.3 Ms Williams has a daughter aged 21 but living with her at the time, who has asthma. Ms Williams says that her daughter's asthma was such that she was disabled and that she was at extreme risk because of Covid. Whether she is disabled or not is another issue, I do not deal with that at the moment, I put it to one side. Because of her daughter's vulnerability, Ms Williams told the second respondent that she could not return to the school to teach in person.

7.4 There came a point when the second respondent decided that it could not manage without someone in the claimant's role physically in the school and it therefore terminated her assignment. There is a quotation from an email that is set out in Ms Williams witness statement on the first page. It is apparently an email from the school to the agency dated 18 March 2020, in which the head teacher is quoted as saying:

> "Due to (Lynda's) family member health status … she is not able to come to work and with this in mind, I will have to terminate her contract."

7.5 Ms Williams' assignment to the school was therefore terminated on 22 May 2020.

7.6 At the time she was receiving advice from the National Education Union about her agency worker rights and a possible discrimination case. She says that she received negligent advice.

8. Ms Williams commenced early conciliation with regard to potential claims against both the first and second respondents on 7 October 2020, which ended on 14 October 2020. She issued this claim on 16 October 2020. Her complaint is that the decision to end her assignment was associative disability discrimination on the part of the second respondent and that the first respondent colluded in that decision.

Law

9. Section 123 of the Equality Act requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

10. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the EAT has said in the case of Cohan v Derby Law Centre [2004] IRLR 685 that a Tribunal should have regard to the Limitation Act checklist as modified in the case of British Coal Corporation v Keeble [1997] IRLR 336 which is as follows:

(1) The Tribunal should have regard to the prejudice to each party.

(2) The Tribunal should have regard to all the circumstances of the case which would include:

(a) Length and reason for any delay
(b) The extent to which cogency of evidence is likely to be affected
(c) The cooperation of the Respondent in the provision of information requested
(d) The promptness with which the Claimant acted once he knew of facts giving rise to the cause of action
(e) Steps taken by the Claimant to obtain advice once he knew of the possibility of taking action.

11. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded tribunals by s123(1), (see also Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR DG, CA) but that it was often useful to do so. The only requirement is not to leave a significant factor out of account, (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account, (paragraph 25).

12. The apparent merits of a claim may be a relevant factor in deciding whether it is just and equitable to extend time. See for example Lupetti v Wrens Old House Limited [1984] ICR 348, EAT.

13. In the case of Robertson v Bexley Community Services [2003] IRLR 434 the Court of Appeal stated that time limits are exercised strictly in Employment Law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

14. That has to be tempered with the comments of the Court of Appeal in Chief Constable of Lincolnshire v Caston [2010] IRLR 327 where it was observed that although Lord Justice Auld in Robertson had noted that time limits are to be enforced strictly, his judgment had also emphasised the wide discretion afforded to Employment Tribunals. Lord Justice Sedley had noted that in certain fields such as the lodging of notices of appeal in the EAT, policy has led to a consistently sparing use of the power to extend time limits. However, this has not happened and ought not to happen in relation to the discretion to extend time in which to bring Tribunal proceedings which had remained a question of fact and judgment for the individual Tribunals.

Discussion and conclusions

15. Three months from the date of the alleged act of discrimination takes us to the 21 August 2020. Early conciliation did not commence until 7 October, that is after time had expired. The claim is therefore out of time, the question then arises, is it just and equitable to extend time?

16. In weighing up whether it is just and equitable to extend time, a relevant factor is the merits of the case, its chances of success. As I have said, I am ignoring for the time being, the question of whether or not the daughter's asthma amounted to a disability. There are three potential claims: direct discrimination under s.13 of the Equality Act 2010, failure to make reasonable adjustments contrary to s.20, and discrimination arising from disability under s.15.

    16.1 Under s.15 the statute provides that such a claim relates to unfavourable treatment because of something arising in consequence of *the claimant's* disability; that wording therefore precludes a claim of associative discrimination i.e. discrimination because of somebody else's disability.

    16.2 Similarly, s.20 requires a provision, criterion or practice to put *the* disabled person, (the claimant) at a disadvantage. It is not therefore a claim that can be brought by way of associative discrimination, (see Hainsworth v Ministry of Defence [2014] IRLR 728).

    16.3 That leaves s.13 direct discrimination which, as is well-known, can be relied upon in a claim of associative discrimination. That is because its concept is, "less favourable treatment because of *a* protected characteristic", (in this case disability). It does not have to be the protected characteristic of the claimant.

17. If I was considering simply whether to strike out the claim on the grounds that it had no reasonable prospects of success, I would have to take the claimant's case at its highest, but that is not the exercise I am undertaking at this point. At this point, I am weighing up whether it is just and equitable to extend time and part of that exercise is having regard to the chances that this case might succeed.

18. With direct disability discrimination, the reason for the less favourable treatment must be the disability. It is in this case the claimant's daughter's disability that must be the reason operative in the mind of the decision maker that caused the decision maker to make the decision. In effect, the decision maker saying, "Ah Ms Williams has a disabled daughter therefore I am going to terminate her assignment". It is a common mistake, Mr Millington says by lay people, I go so far as to say it is quite a common mistake by lawyers, to approach the question on the basis of what we call the, "but for" test. We do not ask ourselves, "well, but for the fact that the claimant had a disabled person daughter, would her assignment have been terminated?" It is incorrect to reason that if the claimant had not had a

disabled daughter, her assignment would not have been terminated and therefore, termination of her assignment must be because of her daughter's disability and therefore she has been discriminated against. It is the operative reason in the mind of the decision maker that we are looking for, "because" is the key word.

19. The answer to the question, what was operative in the mind of the decision maker, is very likely in the documentary evidence which is sourced from the claimant, in the wording of the email that I have quoted. It is apparent from that quotation that the thought process of the decision maker was that the claimant was not able to go to work. That is why her contract was terminated. If she had not been able to go to work for some other reason, her contract would still have been terminated.

20. It is because of this very difficulty with direct discrimination, which stems from the Malcolm case which I know EJ Kurrein referred the parties to in his preliminary hearing, that the Equality Act 2010 introduced the concept of discrimination arising from disability at section 15. This provides, to put it in simple terms, because of my asthma which is a disability, I can't go to the school. I'm dismissed because I can't go to the school. I'm dismissed therefore for a reason, (not being able to go to the school) which arises from my disability. That is what s.15 is aimed at, but it does not apply to the disability of another person, only to the disability of the claimant.

21. Ms William had the benefit of advice at the time. One would have thought that she would have been advised of the importance of issuing her claim in time and what the time limit was.

22. Ms Williams has sought to explain her delay by reference to seeing a clear picture of her case in documents disclosed pursuant to a subject access request. Those documents were disclosed in December 2020, 2 months after the claim was issued and therefore do not explain the delay up to 16 October 2020. The other reason offered for delay is the incompetence of those advising her.

23. Cogency of evidence is unlikely to be significantly affected by the delay.

24. In balancing the relative prejudice, I take account of the fact that Ms Williams still has an apparently in time complaint pursuant to the Agency Worker Regulations. As Mr Irving put it, she sees that as her primary case. The prejudice to the respondent is, at it always is, of having to answer a case that has been issued outside a time limit parliament has seen fit to put in place. Beyond that, it will be put to the expense of defending a claim that seems unlikely to succeed, with no realistic prospect of recovering its costs of doing so.

25. Having regard to these matters, I find that it is not just and equitable to extend time and I therefore strike out the disability discrimination claim for want of jurisdiction.

Claim pursuant to Agency Worker Regulations 2010

26. I identified that the remaining claims were pursuant to the Agency Worker Regulations. The respondent accepts that this claim is potentially in time. In discussions with Mr Irving I identified the issues in the case with him as set out in the paragraphs below. We had an initial discussion before lunch. Over the lunch break I attempted to draft a list of issues. That led to further discussions after the lunch break, resulting in the final agreed list of issues set out below.

27. I should record that Miss Barnet left the hearing over the lunch break as she had a family wedding to attend. Before the lunch break, Mr Irving confirmed in answer to a question from Miss Barnet, that there was a regulation 13 claim, (i.e. a claim that Ms Williams had not been afforded the same access to vacancies as a comparable worker). After the lunch break when I took Mr Irving through a detailed analysis of the provisions of regulation 13 and its requirement for an actual comparator in the employment of the respondent at the time, we established that no such claim was sustainable.

28. We identified the issues as follows:

    28.1 Whether pursuant to regulation 5 of the Agency Worker Regulations 2010, (AWR) the claimant was paid the same, after the 12 week qualifying period, (which ended on 26 August 2019) as she would have been paid had she been recruited as an employee to do the same job on 3 June 2019. The claimant says that she should have been paid £189.95 per day, (as a teacher on scale M6, under the School Teachers Pay and Conditions) but was in fact paid £140 per day until December 2019 and £175 per day thereafter, until her assignment was terminated on 22 May 2020. The claimant has calculated the difference at £2,200.

    28.2 Whether pursuant to regulations 5(1) and (2) the claimant enjoyed the same basic working and employment conditions as she would have enjoyed has she been recruited as an employee to do the same job on 3 June 2019 in that had she been such an employee, instead of her assignment being terminated on 22 May 2020, she would have had the benefit of, “due process”. By that she means, conversations would have been held with her to explore how her concerns could have been accommodated, so as to enable her to attend the school to perform her duties in line with her defined assignment which was due to finish on 17 July 2020.

    28.3 Whether pursuant to regulation 16 of the AWR, the claimant made requests for information on 16 October 2019, (the first week after her qualifying period ended)? The claimant says she did not receive answers to her request for information, in that the answers she received did not provide all of the information requested and the

respondent's replies were evasive, contrary to regulation 16(9). Accordingly, the claimant will invite the tribunal to draw inferences.

28.4 Was the claimant subject to detriment because she sought equal pay pursuant to the AWR? The detriment relied upon is that she lost the chance to be interviewed for a permanent post which was to commence in September 2020. The vacancy, the existence of which she was notified of and encouraged to apply for. She applied for the post, but was not granted an interview.

28.5 As things presently stand, all claims are brought against both respondents. Mr Irving indicated that may be refined in due course when some of the complaints are narrowed down to being against one respondent or the other.

28.6 Regulation 18 of the AWR requires claims to be brought within 3 months of the alleged infringement. There is the usual provision for otherwise out of client time claims to be regarded as in time, if there were continuing acts and there is the possibility that time might be extended if it is just and equitable to do so. Because of the potential continuing act issue, the question of whether any of the claims are out of time should be left to the final hearing.

Case Management

29. Because this Judgment and Reasons must be published on the internet, my further case management of the case is dealt with in an Case Management Summary that appears in a separate document.

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Employment Judge M Warren

Date: 21 February 2022

Sent to the parties on: 4/3/2022

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For the Tribunal Office