



EMPLOYMENT TRIBUNALS

Claimant: Ms S Kandola

Respondent: Department for Work and Pensions

JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING

HELD AT: LONDON CENTRAL (By CVP)

On: 19 & 20 September 2023

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: In Person

For the respondent: Mr J Chegwiddden (Counsel)

JUDGMENT

1. The claimant is a disabled person within the meaning of section 6 of the Equality Act 2010 (EqA).
2. The claimant is not prevented from bringing her current claim because of duplication of facts/issues with her previous claim brought in 2018 (2205116/2018).
3. For the purpose of clarification: that claim, 2205116/2018, was dismissed upon withdrawal in March 2019.
4. The claimant's claims brought before 2022 (and as set out in the reasons below) are outside the relevant time limit (section 123 EqA). The Tribunal does not exercise its discretion to extend the time limit on just and equitable grounds.
5. The amendments set out at paragraph [] of the Reasons are allowed
6. The claimant is not bringing any claim for indirect discrimination under section 19 EqA.

REASONS

1. The matters considered at the Preliminary Hearing (PH) on 19 & 20 September were ordered to be heard by a Case Management Order (CMO) of 6 March 2023 made by EJ Stewart.
2. There were 3 issues:
 - Whether the claimant was a disabled person within the meaning of s6 EqA? This did not need to be considered as the respondent had conceded on 19 June 2023 that the claimant was a disabled person with the following conditions:
 - o Anxiety from October 2016
 - o Adjustment Disorder from August 2019
 - o Recurrent Repressive Disorder from February 2020.
 - Whether the claimant was prevented from bringing her current claim because of duplication of facts/issues with her previous claim brought in 2018?
3. From the evidence presented and also based on EJ Stewart's comments in CMO of March 2023, it is confirmed that the 2018 claim has been dismissed upon the claimant's withdrawal of her claims on 13 March 2019. It is noted that the 2018 claim file was destroyed in February 2020.
4. Having spent considerable time going through the substance of the claims as pleaded in the current claim, the claimant confirmed that none of the matters she raised had occurred prior to 25 June 2018, which was the date on which she lodged the 2018 claim.
5. Therefore, there is no duplication or overlap between the current claim and the 2018 claim.
6. The claimant also confirmed that she is not bringing an Indirect Discrimination claim under section 19 EqA.
7. The third issue was whether the claimant's claims or any of them should be struck out as being out of time. If out of time, is there conduct extending over a period of time and the final act falls within time? Alternatively, whether it is just and equitable to extend time (s,123 EqA)? This was the main issue for consideration at the PH.

Conduct of the Hearing

8. I discussed with the claimant at start of hearing what reasonable adjustments she would need. These were regular breaks and time to consider documents and to give answers in cross examination these adjustments were adhered to. Further, I regularly stopped the proceedings to explain to the claimant various processes and to put matters raised in context.
9. The claimant presented a 17-page witness statement (which she said had been prepared with some legal assistance) which she also asked to stand as the Further and Better Particulars of her claim, The claimant accepted that her claim had not been clearly pleaded in the ET1 and Particulars of claim as she had prepared it herself with some help from her husband.
10. As the respondent had conceded the claimant's disability status, her impact statement was not formally heard in evidence.
11. I heard evidence from the claimant. Her cross examination by the respondent's counsel lasted for just under 2 hours with regular breaks and with time allowed for the claimant to consider her answers. I also heard oral and written submissions from the respondent and oral submissions from the claimant.

The Claimant's Evidence

12. The claimant frequently gave inconsistent answers and was confused and unclear about dates. I understand that this may well be linked to her medical conditions, and I attempted, where she had given inconsistent answers, to recap on her responses and to allow her time to consider the answer she wished to give. I also recommended to the claimant that she took time to consider the question before giving any answer.
13. The claimant accepted that she had been sent the Grounds of Resistance in the 2018 claim. This contained a summary of the legal position on time limits, which was an issue being taken by the respondent. The claimant accepted (after some clarification) that she had seen the document but could not remember if she had read it in any detail as she had been on medication at the time. She had legal assistance from her Union Rep. at the time and then subsequently had advice from solicitors appointed by the Union (Thomsons).
14. The claimant did not initially recall instructing Thomsons directly: she said she instructed her Union (PCS). However, she later accepted that she had instructed Thomsons to withdraw the 2018 claim on 13 March 2019 and that she had also spoken to the solicitor after the Case Management Hearing on 11 January 2019. She had not attended that Case Management Hearing believing that she was not invited to attend. I explained the position to the claimant.

15. The claimant accepted (in response to questions from me) that she had been aware of the 3-month time limit in 2018, after she had lodged the first claim in June 2018. The claimant was initially unclear as to who had prepared and lodged the ET1 in 2018, but eventually confirmed that she had put in the claim herself. She had named her husband as her representative as she was awaiting formal legal representation via her Union. In her string of answers on this point the claimant referred to going to a firm of solicitors (whose name she could not recall) and also to assistance from ACAS.
16. The claimant accepted in cross examination that she had been aware that she had discrimination claims against the respondent following the grievance outcome and appeal on 13 September and 17 December 2018 respectively. The claimant also accepted that she realised she had a claim against the respondent for delays in progressing her ill health retirement application as at 17 February 2020. The claimant accepted that she had been aware of other discrimination claims in 2018, 2019 and 2020.
17. The claimant was asked why she had not acted on those claims. She said that she was relying on the Union to act on her behalf. The Union had stopped representing her as at late 2020 (around August/September). The claimant referred to documentation to evidence this, but this was not presented to the Tribunal.
18. The claimant initially said that she had not sought any legal advice after the Union had stopped helping her. However, she later said that she had sought advice from solicitors (Nelsons) in late January/February 2020 and then again in January/February 2022, but they had not discussed time limits with her. Although the claimant accepted that she knew about the existence of time limits after lodging her claim in June 2018.
19. The claimant had spoken to the CAB "on and off" although she could not remember when, but she recalled going back to them in early 2023 (after the current claim had been lodged). The claimant also spoke to a Legal Help Line which was available on her husband's insurance as a former Police officer. The claimant has also tried to get other free legal advice but said it was not easy. She did not specify when she made these attempts or the difficulties she encountered.
20. The claimant said that her husband had carried out various research online about bringing Tribunal claims and had discovered more detail about time limits. The claimant was unclear as to exactly when this was, but said it was probably in 2022.

21. I asked the claimant what had prompted her to call ACAS on 29 June 2022 and then to lodge her current claim on 11 July 2022. She said that this was because of Susan Quinn's actions on 6 and 12 April 2022: threatening to terminate the claimant's employment or to demote her. I note that the claimant contacted ACAS within three months of these actions, which suggests that she was aware of the time limit.
22. The claimant did not go into detail in her witness statement as to how her medical conditions impacted on her ability to bring her claims in time. She referred briefly in paragraph 35 to health issues and the stress of dealing with these and her husband's ill health. However, although not technically evidence, the claimant gave much more detail in her submissions about how severely her medical conditions impacted on her day-to-day abilities.
23. The claimant was asked about her medical condition in cross examination. She accepted that she had all of her three disabilities as at June/July 2022 when she lodged her current claim, without legal assistance.
24. The claimant was also referred in cross examination to the last sentence of the Particulars of Claim in the current claim where she said, "*Limited information is being provided at this stage as I am aware of issuing this claim protectively due to time limitations and that I respectively (sic) request the right to submit Further and Better Particulars of Claim at a later date if advisable*".
25. The claimant accepted this indicated she was aware of the time limits. The wording of the sentence and the use of language also suggest that the claimant was receiving some legal assistance at this stage, even though she submitted the claim herself.
26. Based on the claimant's evidence, I find that she was aware of the three-month time limit for bring claims as early as mid-2018 that the claimant had the assistance of her Union from 2018 to late 2020 and that the claimant has taken legal advice from various sources at several times over the relevant period. She also has, with the assistance of her husband, the ability to research matters relating to bringing tribunal claims and time limits etc online.
27. There is no dispute that the claimant has been seriously unwell and that she was impacted by her disabilities over the relevant period. However, the claimant has still managed to seek legal advice and deal with internal grievances and other internal resolution processes during this time, with the support of her husband, family and friends.

Respondent Submissions

28. I note that Mr Chegwidden's written submissions were most helpful in clarifying the claims brought by the claimant.

29. In considering the out of time point, three categories were identified –

- Category 1. Claims which the respondent accepts are in time and are ready to proceed (A Draft List of Issues was attached as an Addendum)
- Category 2. Claims which the claimant has not pleaded in her current claim and many of which occurred after June 2022 when the claimant approached ACAS. The claimant has requested (in her witness statement) leave to amend to allow such claims to proceed.
- Category 3. Claims which have been pleaded but which are out of time and should not be allowed to proceed.

30. At the PH we spent considerable time going through the claims identified by the claimant in her Witness Statement and categorised as above. I will not record these discussions in detail in these reasons.

Continuing Act

31. The claimant identified in her statement as a continuing act, her complaint of Failure to make reasonable adjustments (page 16 para 37 c i & ii) These concerned the respondent's handling of its absence management policy and of pay under that policy. The respondent decided to apply its policy (without changes) in 2018 and this continued up to 2022. The claimant says that as this failure continues her claim is within time.

32. The respondent referred to 123 (3) (a) EqA, namely that failure to do something is treated as occurring when the person in question decided on it. So that would be in 2018 and is out of time.

33. I asked Mr Chegwidden for authority on this point. He cited **Abertawe v Morgan [2108] EWCA Civ 640** (paras 11-16). This decided that time starts to run when failure to make the reasonable adjustment or from when the claimant is reasonably expected to see that the respondent is not implementing that adjustment. On the claimant's own evidence that would have been well before 2022. Therefore, I find that the Reasonable Adjustment claim is out of time.

34. As regards the question of the amendments sought by the claimant which related to matters occurring after the current claim had been lodged in July 2022, Mr Chegwidden accepted that he was unable to point to any real practical prejudice to the respondent in allowing the amendments.

The Claimant's Submissions

35. The claimant chose to represent herself at the PH. I suggested that Mr Kandola (the claimant's husband) might help with making submissions on her behalf. I allowed the claimant time to consider this. The claimant insisted that she wished to do this herself. I understand and respect that decision, but the claimant must accept the consequences of that decision and of choosing not to seek legal representation for the PH.
36. The claimant's submissions did not really address the issue of out of time or extension of time. She explained in detail how her medical conditions impacted on her family and day to day life. She also explained that she had found yesterday's hearing difficult, exhausting and overwhelming.
37. I sympathised and told the claimant about FRU and the Bar Pro Bono Unit (all on List of Sources of Advice sent by Tribunal) and also the Bar's direct access scheme. I encouraged her to consider obtaining free legal advice and advocacy for any further hearings. I also noted that she may be able to seek assistance from MIND or other mental health charities.
38. The claimant's submissions were confused and difficult to follow this is in no way a not criticism of her but is a practical observation. There were many irrelevant statements. The claimant appeared to say in her submissions that all the alleged acts were continuing acts, but this had not been raised in witness statement or anywhere else.
39. The claimant stressed she could not function day to day, and this impacted on her understanding of matters generally and of legal matters especially. She said she cannot put things together and this takes time. Again, I encouraged her for this reason to seek help with legal advice and advocacy. However, ultimately this is the claimant's decision.

Conclusions – Out of Time

40. On basis of the evidence and submissions, I find that the following acts are out of time. The references (other than where indicated) are to para 37 of the claimant's witness statement.

Direct Discrimination

(a) (i) and (ii)

Discrimination arising from disability.

(b) 2 - May 2019

Reasonable Adjustments

(c) These are not continuing acts and are out of time (**Abertawe**)

Victimisation (para 21)

(d) Para 21 a, b, c, d, e, g, j i&ii

Harassment

(e) (Para 22) a, b, e i & ii, h

41. In considering whether to exercise my discretion to extend time on the just and equitable basis, I am mindful of **Robertson v Bexley Community Centre [2003] EWCA Civ 536**, which reminds me that the extension is the exception and not the rule. On this basis I find that the claimant had not discharged the burden of proof to show such exceptional circumstances and I do not exercise my discretion to extend in her favour.
42. I fully recognise the claimant's disabilities and the impact which they had on her – there is no dispute on this. However, the claimant, by her own submissions, had help and support: primarily from her husband but also from her extended family, sons and friends. She was able to seek advice from her Union and legal advice (both paid and free) at various times when needed. She was able to carry out research online and was able to conduct internal resolution exercises and to bring tribunal claims.
43. The claimant accepted that she was aware of the Tribunal time limits from mid-2018. Many of the claims are longstanding and so I find it would be prejudicial (possibly to both parties) to seek and give evidence on these matters.
44. On the claimant's own evidence, what triggered her current claim was the incident in April 2022 when Ms Quinn gave an indication of demotion or termination of employment. That element of the claim is in time and so will proceed. The claimant will not be prejudiced or deprived of her right to bring that claim and others.
45. I also explained to the claimant that she will be able to use as background evidence all the earlier allegations which I have held to be out of time. These can be used as inferences to show that the actions which are in time are discriminatory. This is an argument which is commonly used in tribunal claims.

"Category 2" claims

46. As we ran out of time, I reserved my decision on these claims, but now set them out below.

Conclusions – Claimant's Amendment Application

47. The following claims are allowed to be included (as amendments to the current claim).
 - Direct Discrimination – paragraph 37 (a) (v)
 - Discrimination arising from Disability – paragraph 37 (b) 4.
 - Victimisation – paragraph 21 j (iv)
 - Harassment – paragraph 22 g and i (iii).

48. In reaching this decision, I refer to the test in **Vaughan v Modality Partnership (UKEAT/0147/20)** namely the balance of injustice and hardship in allowing or refusing the application. There would be no injustice or hardship to the respondent in allowing these amendments at this stage of the tribunal process.
49. As mentioned at the PH, I ask Mr Chegwidden to included these amendments in a Draft List of Issues to be used (and hopefully finalised) at the Further Case Management Hearing, which was agreed to be listed on 16 November 2023 before me.
50. I also repeat my encouragement to the claimant to seek free legal advice to assist her at that hearing and hopefully also at any Final Hearing of this case.

Employment Judge Henderson

JUDGMENT SIGNED ON: 26 September 2023

JUDGMENT SENT TO THE PARTIES ON
26/09/2023

FOR THE SECRETARY OF THE TRIBUNALS