



EMPLOYMENT TRIBUNALS

Claimant

Mr Tanawar Malik

Respondent

Home Office

v

RECORD OF A PUBLIC PRELIMINARY HEARING

Heard at: Watford
On: 27 September 2024
Before: Employment Judge Alliott

Appearances

For the Claimant: In person
For the Respondent: Mr McClean (counsel)

JUDGMENT

1. The claimant's claims of direct sex discrimination and/or harassment related to sex concerning the alleged comments made on 5 September 2022 (Issues 4.1.2, 4.1.3, 7.1.2, and 7.1.3) in the list of issues in the case management summary of Employment Judge Shastri-Hurst dated 8 January 2024 are out of time and it is not just and equitable to extend time. Consequently, those claims are dismissed as there is no jurisdiction to hear them.
2. At all material times between 1 April 2022 and 11 April 2023 the claimant was disabled within the meaning of the Equality Act 2010 by reason of chronic pain in his upper abdomen following a previous surgical procedure to repair an abdominal hernia.
3. The claimant is granted permission to amend his claim to include a s.15 disability discrimination claim of unfavourable treatment "being moved from the ground floor to the first floor in November 2022".

REASONS

Introduction

1. This public preliminary hearing was ordered by Employment Judge Isabel Manley on 23 July 2024 to determine:-

“(1) Whether the claimant should be permitted to amend his claim to include these matters brought under s.15 Equality Act 2010, one of which was

mentioned at the hearing on 3 January 2024 and the other contained in an email on 21 January 2024?

- a) *(as set out at paragraph 12 of the Case Management Summary of 3 January 2024)* - The respondent made workplace adjustments for the claimant in November 2022. Those adjustments resulted in the claimant being moved from the ground floor to the first floor. This meant he was detached from his team, who were based on the ground floor, and this led to him feeling isolated. This in turn led to an exacerbation of his mental health issues.
 - b) The respondent required the claimant to open wooden boxes heavier than the 5kg recommended in one of the OHS reports which caused an accident at work on 13 January 2023
- 2) Was any discrimination complaint presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 and, if so, should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Dealing with these issues may involve consideration of subsidiary issues including:
- a) whether there was “conduct extending over a period”;
 - b) whether it would be “just and equitable” for the tribunal to permit proceedings on an otherwise out of time complaint to be brought; and,
 - c) when the treatment complained about occurred.
- 3) Whether the claimant at the relevant time of the alleged discrimination (which is no longer than when his employment ran from April 2022 to April 2023), satisfied the definition of disability with respect to pain after a hernia operation, under section 6 of the Equality Act 2010.
- If he did not satisfy that definition, should his disability discrimination claims be dismissed on that basis?
- 4) If the only remaining complaint (or complaints) after the determination of the above issues is the complaint (or complaints) relating to payment for the notice period, can that matter be determined?
 - 5) Any further case management required for any further hearing, including consideration of the estimated length of the final hearing.”

Time

2. Section 123 of the Equality Act 2010 provides as follows:-

“123 Time limits

- (1) Subject to section 140B 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.”

3. As per the IDS Employment Law Handbook Discrimination at Work:-

At 35.37

“The Court of Appeal’s decision in Aziz v FDA [2010] EWCA Civ 304, CA also dealt with a procedural issue of “considerable practical importance”: On what basis should employment tribunals approach the question whether a claim is time barred at a preliminary hearing? The Court approved the approach laid down in Lyfar v Brighton & Sussex University Hospital Trust [2006] EWCA Civ 1548 CA that the test to be applied at the preliminary stage is to consider whether the claimant had established a prima facie case, or, to put it another way, “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.”

4. The claimant presented his complaint on 7 July 2023. The claimant notified Acas on 29 May and the certificate is dated 12 June 2023. Consequently, any act prior to 28 February 2023 is prima facie out of time.
5. The claimant resigned on 11 March 2023 with effect on 11 April 2023. Consequently, any conduct complained about from 1 March 2023 is in time.
6. Two of the allegations raised as direct sex discrimination and/harassment relate to alleged conduct on or around 5 September 2022 and concern comments allegedly made by “Fiona, Katherine and “Al”. No other allegations are made against those three individuals and, in my judgment, there is no prima facie case that that alleged conduct constituted a continuing act or an ongoing state of affairs. Consequently, I find that those allegations are out of time.
7. The allegations are nearly six months out of time. The claimant only began researching how to bring a claim shortly after he resigned, probably around April 2023, when he went to Citizen’s Advice Bureau. He was advised to contact his union. The claimant said that he was not advised how to bring a claim or of any time limits. I take into account that, at the end of 2022, the claimant had significant domestic and emotional issues concerning a very ill child who was admitted to hospital on several occasions. Nevertheless, had

the claimant wished to litigate these allegations then, in my judgment, he could and should have made enquiries of his union earlier. Further, it is noticeable that when the claimant raised a grievance in May 2023 alleging age, disability, gender and sexual orientation discrimination /harassment/bullying/victimisation he did not raise these issues. In my judgment, it would not be just and equitable to extend time and, consequently, those allegations stand to be dismissed as there is no jurisdiction to hear them.

8. The remaining direct sex discrimination and/or harassment related to sex allegation is a general one constituting “failing/refusing to deploy the claimant to a site closer to his home.” I make no finding as to whether that was a continuing act or an act with continuing consequences and, consequently, I make no ruling as to whether that allegation is or is not in time. Further, if it is not, I make no ruling as to whether it would be just and equitable to extend time. That will remain a matter for the full merits hearing. However, I do find that there is a prima facie case that it was a continuing act and consequently could run to the period after 1 March 2023.
9. Concerning the disability discrimination claims, allegations are made concerning conduct on 31 August 2022, 28 January 2023, 20 February 2023 and a decision made on or about 14 September 2022. Those are obviously all out of time if taken individually.
10. I have allowed by way of amendment an allegation concerning the claimant being required to move from the ground floor to the first floor in November 2022. In addition, the failure to make reasonable adjustments claim will require examination of the evidence as to whether there came a point when there was a decision not to provide adjustments and/or conduct inconsistent with providing adjustments and/or when the respondent could reasonably have been expected to provide adjustments and, if so, when. Again I make no findings and the matter remains live for the full merits hearing. However, in my judgment, the claimant has established a prima facie case that there could have been continuing acts or an ongoing state of affairs up to 1 March 2023. Consequently, I find that there is a prima facie case of a course of continuing conduct including those alleged incidents that are prima facie out of time. Consequently, I do not find that the claimant’s claims are out of time and that remains an issue for the full merits hearing.

Disability

11. The claimant seeks to rely on the disabilities of chronic pain in his upper abdomen following a previous surgical procedure to repair an abdominal hernia, PTSD and depression.
12. Unfortunately, the claimant has not disclosed his GP records and has presented only limited medical evidence. The only evidence of PTSD/depression is contained in two Med 3 fit notes from November 2021 and January 2022. That falls far short of the sort of medical evidence I would need in order to make a finding that the claimant was disabled within the meaning of the Equality Act at all relevant times due to PTSD. The claimant told me that he had been diagnosed with PTSD by a consultant

psychiatrist. In the circumstances, and in fairness to the claimant, I decided that he should have a second chance of putting in proper medical evidence on that issue.

13. The medical evidence concerning the claimant's chronic pain is more satisfactory. I have a letter from West Hertfordshire Hospitals NHS Trust dated 10 June 2021. This confirms that in 2014 the claimant had an open umbilical paraumbilical hernia repair. It states:-

“Since then he has been having ongoing pain and he was told this would settle. This had gradually got worse to the point where he can now feel a lump. He had an ultrasound scan done by his GP which showed a 0.5cm defect in the linea alba. The patient mentioned that the pain in worse on lying on his left. He has not been admitted to hospital with this pain before.

...

I have explained to the patient that this nodule might be a residual stitch from the previous hernia repair and therefore an exploration of his umbilicus would be the best option. I have also explained that there is a possibility of recurrence and that if that does happen we will repair this at the same time.”

14. I have a clinic letter from September 2021 from Mr Mustafa Halawa, Consultant Vascular & General Surgeon. This confirms that the claimant was operated on on 6 September 2021. The letter states:-

“Examining him today there is a sound wound healing of the supraumbilical incision with no evidence of recurrence of a hernia or a stitch sinus. I explained to him that what he feels is scar tissue underneath the skin that will take 6 to 9 months to reach its maximum tensile strength and final appearance and sensation.”

15. I have two Med 3 fit notes referencing the condition. One on 22 June 2021 refers to “Abdominal pain - under c/o of surgeons.” And one dated 23 November 2021 refers to “Post operative pain following umbilical hernia repair.”

16. The claimant told me and I accept, that he was advised to take Co-codamol, Ibuprofen and Paracetamol for pain relief. The claimant told me that he would generally take medication twice sometimes three times a day.

17. The claimant's impact statement is not particularly helpful concerning the effect of the chronic pain on his ability to undertake normal day to day activities. However, the claimant was seen by Occupational Health on 8 September 2022 and the following is recorded:-

“In my clinical opinion Tanawar Malik has an ongoing issue with chronic pain due to scar tissue on his upper abdomen. This causes him pain related to any movement of the upper torso, this includes driving, bending, twisting, stretching and manual handling. He is under the care of a specialist who has informed him that any further treatment will not be effective.”

18. In an OH assessment on 2 February 2023, the following is recorded:-

“Mr Malik has a physical disability due to suffering with chronic pain in his upper abdomen following a previous surgical procedure to repair an abdominal hernia. Unfortunately, he has been left with scar tissue that causes him pain that limits his physical efforts and can be triggered with movements or efforts around his abdomen including bending, twisting, stretching, manual handling, driving or he also reports difficulties with worsening pain walking up and down stairs.”

19. In answers to requests for further information from the respondent, the claimant has stated:-

“I was unable to take proper shower, shopping and daily routine tasks, as I was unable to bend or stretch as any impact on my abdominal [sic] cause pain, not able to sleep due to pain and stress.”

And

“My disability has a substantial effect as:

- It takes me longer with everyday tasks – for example getting dressed, going to the toilet, and preparing meals.
- I find it very difficult to go out on my own because I have ... physical restriction.”

20. Section 6 of the Equality Act 2010 provides as follows:-

“6 Disability

(1) A person (P) has a disability if—

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”

21. Schedule 1 to the Equality Act provides as follows:-

“Long-term effects

2 (1) The effect of an impairment is long-term if—

- (a) it has lasted for at least 12 months,
- (b) it is likely to last for at least 12 months”

And

“Effect of medical treatment

5 (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

- (a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.”

22. Under the guidance on matters to be taken into account in determining question relating to the definition of disability:

At B1 “A substantial effect is one that is more than a minor or trivial effect.”

23. I find that by early 2021 the claimant had the physical impairment of chronic pain in his upper abdomen following a previous surgical procedure to repair an abdominal hernia.
24. I find that by 1 April 2022 the effects of the impairment had lasted 12 months.
25. In assessing the effect on the claimant’s ability to undertake day to day activities I have disregarded the fact that he took pain relief on a daily basis. Even with pain relief the claimant confirmed that the pain limited his physical efforts such as bending, twisting, stretching, manual handling, driving and walking up and down stairs. He has also referred to difficulties dressing, showering and shopping. In my judgment, the claimant’s physical impairment had a substantial adverse effect on his ability to undertake normal day to day activities.
26. Consequently, I find that the claimant was disabled within the meaning of the Equality Act 2010 at all material times between 1 April 2022 and 11 April 2023.

Amendment

27. In determining whether to grant an application I must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment – Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT.
28. Under the reasonable adjustments claim the issues already contain an allegation that the claimant was required to perform his job, which included lifting and opening containers, and one of the reasonable adjustments contended for is manual handling restriction of 5kg. As such, I consider that the second proposed amendment is already covered in the existing list of issues and amendment is not necessary.
29. The first proposed amendment is best characterised as follows:-
- “The something arising in consequence of the disability was the requirement that the claimant work at an adjustable desk. The unfavourable treatment was being moved from the ground floor to the first floor.”
30. The allegation concerns the claimant’s line manager, Mr Rajin Shah. Other allegations are made against Mr Shah and he will be giving evidence in any event.
31. The nature of the amendment is to add one further factual allegation.

32. The issue arose in January 2024, some 10 months after the expiry of the limitation period at best.
33. The application was made at a preliminary hearing and will not affect the course of the litigation.
34. I take into account the fact that the claimant is a litigant in person.
35. Lastly, I have to balance hardship and justice. In my judgment, due to the fact that Mr Shah will be giving evidence in any event, then there will be no real prejudice to him or the respondent having to deal with one more factual allegation. Consequently, in my judgment, the balance comes down in favour of the claimant and I allow that amendment.

Employment Judge Alliott

Date: 24 October 2024

Sent to the parties on: 4 December 2024

For the Tribunal Office

Recording and Transcription

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