

Case number: 1402949/2020



EMPLOYMENT TRIBUNALS

Claimant: Mrs Mandy Mikhael

Respondent: Hampshire Hospitals NHS Foundation Trust

Heard at: Bristol Employment Tribunal

On: 27 October 2021

Before: Employment Judge Lowe

Representation-

Claimant: Leslie Millin (Counsel)

Respondent: Geraint Probert (Counsel)

PRELIMINARY HEARING JUDGMENT

The determination of the Tribunal is that:

The Claimant's claim for direct discrimination on the grounds of race, harassment and victimisation are dismissed as having been presented out of time.

REASONS

In a claim presented to the Employment Tribunal on 10 June 2020 the Claimant brings the following claims:

1. Direct Discrimination on the grounds of race, harassment and victimisation.

With the agreement of the parties this hearing was conducted by CVP video platform and was a fully digital hearing.

The Tribunal received evidence from the Claimant and Leah Gallon, Clinical Services Manager for Therapies for the Respondent.

The Tribunal was provided a digital bundle comprising 218 pages. Further witness statements from the Claimant and Leah Gallon have also been provided.

References in this judgment to the agreed hearing bundle are in the form **[B/page number]** and references to witness statements are in the form **[WS/surname/paragraph number]**.

The issue for determination

The matter is listed for a preliminary hearing to consider the Claimant's application to extend time.

The Claimant asks the Tribunal to exercise its discretion in relation to any act or omission found to be out of time in accordance with Section 123 Equality Act 2010 on the grounds that it would be just and equitable in all the circumstances to do so.

The Claimant commenced proceedings in the Employment Tribunal by a claim form dated 10 June 2020. The period of ACAS Early Conciliation was 1 day, also 10 June 2020. As such, both parties agree that, subject to this application, the Tribunal's jurisdiction is currently only in respect of acts or omissions pleaded as from the 11 March 2020 onwards.

Parties

Following a student placement with the Respondent, the Claimant was thereafter employed by the Respondent as an Occupational Therapist from 12 December 2016. The Claimant resigned from the Respondent on 4 December 2018, giving Notice in accordance with her Contract of Employment, leaving the Respondent on 5 February 2019.

The Respondent is a National Health Service (NHS) Foundation Trust providing hospital-based care and community services.

Background Summary

The Claimant was appointed to a Band 4 role commencing in December 2016. Upon receipt of her professional registration from the Health and Care Professions Council (HCPC) in January 2017, the claimant was promoted to a Band 5 Rotational Occupational Health role.

Despite there being some performance issues, the Claimant successfully completed her 20-week probationary review period on 15 June 2017. These performance issues were dealt with informally via the 1:1 meeting procedure [B/26].

Following ongoing performance concerns and a failure to renew HCPC registration by 31 October 2017, the Respondent commenced the Management of Capability process In November 2017.

A formal review of the process was held on 3 October 2018 at which the Claimant was informed that she would be moving to Stage 2 of the process.

A Capability Report for Stage Two Meeting was produced in October 2018, ahead of a formal stage 2 meeting on 11 December 2018. This report was disclosed to the Claimant and discussed in detail at the meeting.

Prior to the Stage Two meeting, the Claimant gave notice of termination of her employment with the Respondent. The effective date of termination was 5 February 2019.

During the Stage Two meeting the Capability Panel determined that it had a professional obligation to refer the matter to the HCPC. This referral was made on 21 January 2019.

Relevant statutory framework:

The Equality Act 2010

Section 123 provides:

- (1) *Subject to sections 140A and 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.*
- (2) *...*
- (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.*

Summary of Claimant's Grounds

These are dealt with fully at [B/36-41], but in summary:

Reason 1: Ignorance of the material facts

Claimant's position

The Claimant avers that she did not appreciate the full extent of the harassment, race discrimination and victimisation until she read the HCPC hearing bundle on 5 June 2020; this having been sent on 29 May 2020 [B/37].

The Claimant has clarified in her evidence that the specific information she was not aware of prior to the 5 June 2020 was twofold: altering patient records and safeguarding.

The Claimant's assessment of the bundle is that the:

'most significant original HCPC complaints by the Respondent had been based on a complaint by an unnamed "therapy colleague" who alleged that I had deleted entries on the Respondent's Electronic Patient Record (EPR) system in or around March 2019. Based on these purported allegations, which were never substantiated by direct evidence, the Respondent alleged to the HCPC that I had falsely altered therapy records' [B/37].

The Claimant states that this allegation was never raised directly with her contemporaneously and therefore was not able to respond to the allegation before it was escalated to the HCPC. Further that:

'I was not given a copy of the complaints or evidence in support made by the Respondent to HCPC in January 2019 or subsequently until I received a copy of the HCPC Fitness to Practice Hearing Bundle on 29 May 2020' [B/38].

As a result of discovering the:

'Concealed allegation of record tampering and the lack of any direct evidence to support it is what caused me to decide to pursue a claim for redress in the Employment Tribunal' [B/38].

Secondly, as a result of reading the HCPC bundle on 5 June 2020, the Claimant avers that she became aware that the Respondent's manager had:

'Raised a Safeguarding concern against me on or around 22 January 2019 without, contrary to standard NHS practice, first scrutinising the clinical records and therapy records to evaluate whether a safeguarding concern was justified. I discovered that this safeguarding concern had been dismissed by the Respondent's Safeguarding Committee shortly afterwards' [B/38].

Respondent's position

The Respondent avers that the Claimant was aware of the material facts prior to 5 June 2020, as all of the information submitted to the HCPC came from the 'Capability Report for Stage Two Meeting'. The report detailed in full the nature of the concerns relating to the Claimant's performance and was disclosed to the Claimant in advance of the formal Stage 2 meeting on 11 December 2018. Further, that it was discussed fully at the meeting itself at which the Claimant was present.

All supervision notes were provided to the Claimant after the supervision session for her comment and the Respondent met with the Claimant after the meeting on 11 December to discuss the referral and the relevant concerns [B/196].

No further information was provided to the HCPC, other than by invitation of the HCPC seeking points of clarification. In line with their normal procedure, the HCPC requested further information in March and April 2019, and this included an enquiry in relation to the deleted entries on the EPR. No new allegations were made to the HCPC.

Findings

The Claimant accepts that she was provided with the 'Capability Report for Stage Two meeting' in advance of the formal meeting on 11 December 2018; that she attended the meeting on the 11 December 2018 and was accompanied by a colleague.

I note that this was a formal panel meeting, including a professional advisor as a HCPC registrant, at which the Claimant's performance concerns were discussed with the Claimant and this included timely and accurate record keeping [WS/LG/7].

I note further that the Claimant requested a meeting with Leah Gallon in order to discuss the HCPC referral [B/196]. Ms Gallon has confirmed in her evidence that she did meet with the Claimant in January 2019 and again explained why the referral was required and the process moving forward [WS/LG/11].

In evidence the Claimant accepted that Appendix 9C was included within the documents provided with the Capability Report. This is an email dated 14 March 2018 in which it is alleged that the Claimant had on several occasions deleted/amended entries on the EPR [B/156].

In relation to the safeguarding allegation, concerns about the Claimant's record keeping were ongoing. This was incorporated within the HCPC referral list of issues outlined by the Respondent: "written documentation not being completed in a timely manner in accordance with HCPC and BAOT code of conduct" [B/204].

I am satisfied, therefore, that the material facts in relation to these allegations were in the possession of the Claimant by the date of the Stage 2 meeting in December 2018.

In my determination, the Claimant was provided with all documents that formed the subject of the referral bundle for the HCPC. Leah Gallon has confirmed that there are no additional

allegations were made to the HCPC after January 2019. Therefore, the Claimant was aware of all the material facts that constituted that referral.

Reason 2 – Lack of delay once material facts were established

The Claimant avers that following reading the HCPC bundle on 5 June 2020, she acted promptly, commencing Tribunal proceedings on 10 June 2020. This is not disputed by the Respondent.

Findings

The report from the HCPC was sent to the Claimant on 29 May 2020 and read by her on 5 June 2020. ACAS Early Conciliation was expedited to the extent that it was instigated and completed on the same day [B/15]. A claim form was thereafter submitted on 10 June 2020. In conclusion, I accept that following receipt of the HCPC hearing bundle the Claimant issued her claim within an approximate 2-week timeframe.

Reason 3 – Lack of prejudice to the Respondent

Claimant's position

The Claimant avers that the documents which prove my allegations:

‘are virtually all contained within the HCPC bundle and my personnel file held by the Respondent’ [B/40].

As such, there is no prejudice to the Respondent as they have access and control over the relevant documents necessary in order to respond to my claims.

Respondent's position

The Respondent avers that the length of delay is a critical factor in terms of prejudice to the Respondent. The allegations date back to 2017, some 15 months after the Claimant left the employment of the Respondent and approaching a four-year timeframe to date.

Findings

The time that has elapsed since the majority of the allegations in 2017 and 2018 is significant.

Whilst the documents referred to are within the possession of the Respondent, crucially witnesses would still need to be traced and their respective statements obtained. This would necessitate a recollection of events and rationale for decisions made some three or four years ago. Given the length of the intervening period, this in my view, would place the Respondent at a considerable disadvantage.

Reason 4 – Defending the regulatory proceedings

The Claimant avers that she had to prioritise the regulatory proceedings until 10 June 2020; the outcome of which had the potential to have an adverse impact on her career [B/40].

Findings

It is agreed that the Claimant was subject to the regulatory proceedings from the date of referral, 21 January 2019, until the outcome notification was received at the end of May 2020. I also acknowledge that these were significant proceedings which could have been detrimental to the Claimant's career.

I note, however, that the HCPC process represents only a proportion of the delay in this matter. In particular, it does not account for why Tribunal proceedings were not instigated prior to the referral process being instigated.

Further, the Claimant was asked by the HCPC for a response to the allegations. A detailed response was provided, outlined at [B/79]. Whilst I acknowledge that the Claimant would have remained mindful of the pending decision of the HCPC, there was nothing further the Claimant needed to actively prepare or address after she had provided this response.

Reason 5 – Intermittent fluctuating mental illness

Claimant's position

The Claimant avers that between 21 March and 21 May 2018, she was signed off unfit to work due to work-related stress and prescribed anti-depressants. The HCPC proceedings placed the Claimant under additional pressure.

The Claimant underwent a course of counselling and received therapy during the period 2 August and 14 November 2019.

The Claimant states that she:

‘did not feel able to cope with the additional mental pressure of starting Employment Tribunal proceedings until 10 June 2020. I had to prioritise safeguarding my mental health and holding down my current NHS Occupational Therapy post’ [B/40].

Respondent's position

The respondent avers that any work-related stress alleged by the Claimant would have ceased following her resignation on 4 December 2018 and termination of her contract on 5 February 2019. As such, this could not have been a continuing contributory factor to explain the delay after this timeframe.

Further, that the Occupational Health report of 3 May 2018 confirmed that the cause of the Claimant's stress and anxiety was her working relationship with her supervisor [B/168].

Nothing else was highlighted as a potential cause of concern in respect of the Claimant's mental health and well-being.

In November 2017, it came to light that the Claimant was completing extra bank shifts as a Health Care Assistant (HCA) at weekends over and above her full-time therapy role.

On 20 December 2018, the Claimant sought clarification as to whether she could continue/recommence HCA shifts in addition to her Occupational Health role.

Findings

I accept that during the period March – May 2018, the Claimant was unwell, and this necessitated a period of absence from work. There is a diagnosis of anxiety and depression during this period [B/217].

Whilst the Claimant continued to take medication from this time, the medical evidence [B/218] records no further prescriptions beyond 4 March 2019; the notes having been printed on 27 October 2020.

The period of counselling attended was for the period August – November 2019, with 8 sessions having been attended [B/216]; three booked sessions having been cancelled or not attended and one session not attended due to a holiday commitment.

After returning to work, the Claimant's health improved to a level that allowed her to seek and perform additional work as a HCA. This was again the position in December 2018 when the Claimant enquired, entirely properly, as to whether she was able to recommence this work.

The Claimant has accepted in her evidence that 'my mental health condition...has been stable and controlled since November 2019'.

I am therefore satisfied that the Claimant's intermittent ill-health, of itself, does not account for the delay. After June 2018 (following hand, foot and mouth), there were no further periods of absence from work. In fact, additional work was undertaken. There were no further medical referrals, aside from counselling, after March 2019.

Reason 6 – Balance of fairness

Claimant's position:

The Claimant avers that she has suffered substantive and procedural unfairness due to the failure of the Respondent to properly investigate the therapy colleague's complaint in relation to falsification of records. If a proper investigation had been carried out, the Claimant states that the allegation would have been dismissed and that there would not have been a referral to the HCPC [B/40].

The Claimant avers that she has suffered prolonged occupational stress caused by workplace bullying and victimisation between March 2018 until January 2019. Further, that

she was subjected to substantively unfair Stage 1 written notice disciplinary proceedings [B/41].

Respondent's position:

The Claimant underwent a performance capability procedure. A formal review was held on 3 October 2018, during which, the Claimant was informed that she would be moving to Stage 2 of the process [B/183,32].

A 'Capability Report for Stage Two Meeting' was produced by the Respondent in October 2018 ahead of the formal stage 2 meeting on 11 December 2018. This report, with appendices, was disclosed to the Claimant prior to the meeting and was discussed in detail at the meeting. Further discussion took place after the Stage 2 meeting.

At all times, the Respondent acted in accordance with the capability procedure and the Claimant was kept informed of all matters throughout the process.

Findings

The Claimant's position is that, in the absence of the falsification of records allegation, there would not have been a referral made to the HCPC. In my view, this is not the case. The Full list of matters that formed subject of the referral are listed at the [B/204].

In addition, the Claimant has accepted in her evidence that the Respondent was under a duty to refer any matter that raised the possibility of non-compliance with the HCPC's standards, and that the allegations which had been made, fell within this criterion. I note that it was the Capability Panel who, after consultation with the Claimant, reached the decision that they were under a professional duty to refer the matter to the HCPC. The HCPC themselves concluded that the matter met the initial threshold necessary to warrant further investigation [B/212].

I am satisfied that the Performance Capability procedure and subsequent referral to the HCPC were conducted in accordance with the Respondent's Policy and the relevant professional standards.

Conclusions

I remind myself that the burden of persuading the Tribunal to exercise its discretion rests with the Claimant. In *Robertson v Bexley Community Centre [2003] IRLR 434*, where Auld LJ stated at para. 2 that:

"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that

it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

In *Abertawe Bro Morgannwg University Local Health Board v Morgan* UKEAT/0305/13 (18 February 2014, unreported), Langstaff P held that a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions:

"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

The length of delay in this matter is considerable. The earliest allegations date back to 2017, with the majority being in 2018. As a consequence, I consider the extent to which the evidence is likely to be affected by the delay to be highly prejudicial to the Respondent.

I have carefully considered each of the reasons for delay put forward by the Claimant.

I am completely satisfied that the Claimant knew of the alleged discriminatory treatment by the Respondent prior to 4 December 2018 – indeed, the Claimant states that she resigned as a consequence of it [MM/41]. No other reason has been advanced that, in my view, accounts for the delay, either individually or collectively. As a consequence, it is impossible to hold that it was not reasonably practicable to have presented the claim within time.

In those circumstances, I am bound to hold that the tribunal has no jurisdiction to hear the claim.

The table format Scott Schedule at [B/96] cites 10 separate claims, some of which go beyond the pleadings within the claim form. In particular, these include allegations:

Row 7 – Failure to scrutinise medical records before escalating matters to the safeguarding team;

Row 9 – Supervising staff allowing other staff members to be unprofessional towards the Claimant;

Row 10 – Not recording any of the Claimant's awards/certificates in her personnel file.

There is no application to amend the claim form to include these allegations. As such, I conclude further that the Tribunal has no jurisdiction to hear these additional matters.

Employment Judge Lowe

Date: 21 November 2021

Judgment & reasons sent to parties: 29 November 2021

FOR THE TRIBUNAL OFFICE