EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: 4104866/2024

Preliminary Hearing held remotely by Cloud Video Platform in Glasgow on 29 November 2024

Employment Judge A Kemp

Ms S Howitt	**Claimant** **In person**
The State Hospitals Board for Scotland	**Respondent** **Represented by:** **Mr I Wells** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the Tribunal does not have jurisdiction over the claims made, and they are dismissed.

REASONS

Introduction

1. This was a Preliminary Hearing into jurisdiction over claims made by the claimant for direct discrimination on grounds of sex under section 13 of the Equality Act 2010, and harassment in relation to sex under section 26 of that Act. There may also have been a claim as to victimisation under section 27 of that Act, but it was not clear if that was being pursued or not.

The claimant stated that she wished to. It is possible that that would require amendment. In any event for the purposes of the hearing before me it was accepted by the claimant that the last date of any act of which she seeks to complain is in August 2023, although no specific date in that month was identified.

2. The claimant is a party litigant and the respondent is represented by Mr Wells. I am grateful to them both for the way they conducted the hearing before me, which was not easy for either of them for different reasons.

3. A Preliminary Hearing was held on 23 August 2024. Case management orders were made. The claimant had thereafter sent a reply to a long series of questions asked of her by the respondent, but did not answer a number of those questions, as addressed below. That hearing made arrangements for a preliminary hearing on jurisdiction, the original date for which was postponed for reasons I need not now address.

4. As the claimant is a party litigant I explained about how the hearing would be conducted, that all relevant evidence required to be given at the hearing, including referring to documents considered relevant as I would only read those to which I was referred, cross examination, and about re-examination. I explained about submissions. I further explained that I could assist a party to an extent under the overriding objective in Rule 2, including by asking questions to elicit facts under Rule 41, but not so as to act as if the party's solicitor. In the course of the hearing I sought to apply that to the furthest extent I considered permissible.

The issue

5. It was agreed at the commencement of the Hearing that there was one issue, which is whether or not it is just and equitable to extend jurisdiction under section 123 of the 2010 Act.

The evidence

6. The parties had provided a Bundle of Documents, most but not all of which was spoken to in evidence. Evidence was given by the claimant, who did not call any witnesses although I offered her an opportunity for a break to consider that further. The respondent did not lead any evidence of its own.

Facts

7. I considered all of the evidence led before me. I found the following facts, material to the issue to be determined, to have been established:

8. The claimant is Ms Sylvia Howitt.

9. The respondent is The State Hospitals Board for Scotland.

10. The respondent has employed the claimant since 2006. Her job title is Porter.

11. The claimant commenced that role in 2017. Since then she considers that she has been bullied and harassed by a number of her colleagues. A complaint was made about her, which exonerated her. She made a grievance about the treatment she was receiving.

12. The claimant is a member of two trade unions (and has been during the period from and after August 2023).

13. The claimant perceived that the bullying and harassment continued from 2017 onwards.

14. In August 2023 a wall calendar that the claimant had put up was taken down, re-arranged out of order, and replaced, on a number of occasions despite the claimant restoring the original each time. She became extremely upset by that, and the accumulation of the behaviours that she experienced.

15. The claimant worked a pattern of 7 days on shift, and 7 days off. She took a combination of annual leave and off shift time totalling 7 weeks from August 2023. She did so because she was so upset at the events that had taken place culminating in that described in the preceding paragraph. She consulted her General Practitioner in August 2023 (no dates is given in the GP report dated 31 July 2024). She was crying when consulting him, so upset that on occasion she could not speak, frustrated and distressed. The claimant was prescribed with an anti-depressant, Sertraline. The dosage of that was doubled in or around October 2023.

16. The claimant commenced a period of absence through ill health after that period of leave ended, in or around October 2023. That period of absence continues. The claimant has provided fit notes from her GP to the respondent in relation to her absence (which were not before the Tribunal).

17. On 27 October 2023 the claimant wrote by email to the respondent. She did so with the benefit of assistance from a friend. It included that "I have been advised that the option of taking my case to an Employment Tribunal is open to me but it's a course of action I do not wish to be forced to pursue."

18. The respondent referred the claimant for Occupational Health support, and a report dated 23 December 2023 noted that the claimant was unfit for work but was being referred for psychological support.

19. The claimant had a telephone call with Mr Martin Blaney of the respondent on 17 January 2024 with regard to her absence from work, and he wrote to her that day to record their discussion. A similar discussion took place on 16 February 2024 which was documented in a letter to the claimant dated 19 February 2024. Again a similar discussion took place on 22 March 2024 which was documented in a letter to the claimant dated 27 March 2024.

20. The claimant continued to attend Occupational Health who issued further reports.

21. In discussion with the respondent the claimant clarified that her email of 27 October 2023 was not intended to be a grievance, and as a result of that was not treated as such by the respondent.

22. The claimant commenced Early Conciliation on 22 April 2024. The Certificate was issued on 23 April 2024. The Claim Form was presented on 3 May 2024.

23. In or around April 2024 the claimant sought legal advice, and had assistance thereafter including in preparing the Claim Form.

24. When responding to questions asked by the respondent, in compliance with a case management order made by the Tribunal, the claimant did not

answer a series of such questions. She did not do so as she did not understand them.

25. The claimant remains employed by the respondent.

Submissions

26. In basic summary the claimant argued that she wished to go to work and feel safe. The respondent had a duty of care. It was unacceptable for them not to deal with bullies. It was easier for them to brush things under the carpet. She had not heard of time-bar until she contacted ACAS. She had had a breakdown in 2023, and the October 2023 email stated how she felt, not to raise a grievance.

27. Again in basic summary the respondents argued that the claim should be dismissed. The last incident was in August 2023 and there was a considerable period of time in the claims made dating back to 2017. The claimant was a union member who had spoken to a friend before emailing on 27 October 2023. She was not incapable of making the claim then. Occupational Health reports show that she was engaging with that, as she did with Mr Blaney. The claimant struggled to explain the delay. There had not been specification of key elements of the claims made. It was not shown that the claimant could not have instructed a solicitor or taken other advice. The email of 27 October 2023 shows that she was aware of the claim. There was not sufficient to establish a just and equitable reason. The respondent would suffer the greater prejudice if the claim proceeded. They covered 6 or 7 years, but where the claimant had not made a grievance.

The law

28. The Equality Act 2010 ("the Act") provides the following as to time:

> "**123 Time limits**
>
> (1) Subject to section 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…….

(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."

29. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable.

30. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***).

31. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held:

> "First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these

> circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see ***British Coal Corporation** v **Keeble** **[1997] IRLR 336***), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see ***Southwark London Borough Council** v **Afolabi** **[2003] EWCA Civ 15; [2003] ICR 800***, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see ***Dunn** v **Parole Board** **[2008]** EWCA Civ **374; [2009] 1 WLR 728***, paras [30]-[32], [43], [48]; and ***Rabone** v **Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72***, para [75].
>
> That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

32. That was emphasised more recently in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*****,** which discouraged use of what has become known as the ***Keeble*** factors as form of template for the exercise of discretion. Section 33 of the Act referred to is in any event not a part of the law of Scotland***.***

33. Some cases at the EAT held that even if the tribunal disbelieves the reason put forward by the claimant for delay it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** There are a number of others the most recent of which I have found is ***Owen v Network Rail Infrastructure Ltd [2023] EAT 106.***

34. The EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14.*** There it was held, in brief summary, that a failure to provide a reasonable explanation for the delay in raising the claim was fatal to the issue of what was just and equitable. In my view that authority and the line of cases following it is not consistent with the terms of the section and the comments made in ***Morgan***. In ***Rathakrishnan***. there was a review of authority on the issue of the just and equitable extension, as it is often called. The EAT concluded "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative." In my view that analysis, and others such as in ***Owen***, are correct.

Discussion

35. I was satisfied that the claimant was giving honest evidence. I was also satisfied that she genuinely believes that she has been bullied and harassed by others at her work, and that she became unwell in or around August 2023 such that she took periods of leave, and was then absent through illness.

36. It appears to me that I must consider all the circumstances, this being a wide discretion as set out above. It is for that reason that I consider that the ***Habinteg*** line of authority to be wrong. The length of and reason for the delay is one of the factors that is relevant to the consideration, but is not considered in isolation. Here although the claimant commenced early conciliation because it was not commenced timeously it does not affect the timing of the claim and whether it is presented in time. That means that, taking the last date in August to be of assistance to the claimant, Early Conciliation ought to have commenced by 30 November 2023. Early Conciliation was commenced well over four months late. The Claim Form itself was presented on 3 May 2024. That is the date that I take for purposes of considering the length of the delay. It is over five months late. That is a significant period of time, and although it was not suggested by the respondent that there was evidential prejudice from that five month

period in isolation it does require to be considered in context as addressed below.

37. I then considered the reasons for the delay. Clearly the claimant was greatly upset by the events in August 2023. She consulted her doctor, whose report dated 31 July 2024 refers to her state of health at that time, and the obvious distress she was in. She received medication. What I consider is an important aspect of the evidence however is the email the claimant sent on 27 October 2023. That is within the time of commencing a competent claim for the last event relied on in August 2023. It refers to making a claim at the Employment Tribunal in the terms set out above. The claimant therefore clearly knew about that possibility, and appears deliberately to have decided not to do so, as that is what her message infers.

38. I accept that she had assistance from a friend to write it, but that email, which is lucid, clear, and reasonably lengthy in setting out her views, does not suggest someone wholly incapable of managing matters. On the contrary it suggests someone who can, and it appears to me that someone able to write such an email was able then to commence Early Conciliation. The test is not of the high standard for incapacity, and I accept that although the claimant was ill at the time, in receipt of medication, and off work, but that does not of itself mean that Early Conciliation cannot be commenced, nor that a Claim Form can be prepared and presented timeously afterwards.

39. I took into account the GP report but that refers to the position in August 2023. It does not directly address the position in October or November 2023 when a Claim could have been commenced within time. The claimant received medication, the dosage of which was doubled from her own evidence in about October 2023, and one would ordinarily anticipate an improvement in symptoms. That anticipation is to an extent supported by the other evidence including the email of 27 October 2023 and the later Occupational Health reports. The timing is not exact, but overall it appears to me reasonable to infer from the evidence before me that the claimant's health was improved to an extent after August 2023.

40. She later, during the early months of 2024, engaged both with Occupational Health of the respondent, and with Mr Blaney. That again in my opinion demonstrates a degree of ability to deal with matters albeit at that later stage outwith the three month time limit period.

41. In my view these factors of themselves are not sufficient to lead to a decision that it is not just and equitable to allow the claim to proceed, although they suggest that the reasons for the delay are not strong ones and that that factor weighs in the balance against the arguments of the claimant.

42. I also consider that it is relevant to have regard to the impact on evidence. Whilst there is no direct evidential prejudice from the four months of delay before the Early Conciliation stated, the period of early conciliation does not count as it was not started in time and the period is a little longer by around a month accordingly. What is I consider relevant is firstly that the claimant's Claim Form alleges conduct going back to 2017, involving a number of parties, and the respondent is I consider right to point to prejudice in seeking to address such a claim going back so many years at such a late stage. That is all the more so in the context of the claimant not pursuing claims earlier, in any of the years from 2017, despite being a union member. The union was, or could have been, a source of support and assistance to her at a time when she was not ill, as she became in August 2023.

43. The period of delay of five months is therefore not to be seen in isolation but in the context of seeking to investigate claims going back already a substantial period of time. There may or may not have been conduct extending over a period, but that period is a lengthy one and involves several alleged participants, and at latest continued up to 31 August 2023. It is not at this stage clear on what basis the claimant contends that there was conduct extending over a period for these purposes up to such a date. Even therefore taking matters at the highest that could be argued for the claimant there would be I consider material prejudice to the respondent in seeking at this point in time to investigate allegations going back over seven years.

44. The next factor I consider relevant is the issue of prospects of success. The claimant has not identified what it is that leads her to argue that the conduct was because of her sex for the section 13 claim, or related to it for the section 26 claim, or because of a protected act for the section 27 claim if that is being made and an amendment for it allowed. It did not appear to me obvious from the Claim Form that there was a claim of indirect discrimination. That would also I consider require amendment.

45. The claimant had been ordered to provide answers to questions for specification, but those questions directed to the issues which might loosely be called causation – related to whether matters were because of sex or related to it, or because of any protected act, in brief summary - the claimant did not answer. That meant that in that respect she was in breach of the order. I appreciate that for a party litigant the issues can be complex, and that she did not understand the questions, but there are sources of advice available or the claimant could have responded setting out her difficulties and asking for more time or other facilities to be offered to her. She is a union member, as noted above.

46. In cross examination she was asked to explain her position as to the connection between her sex and what happened, and her reply was that it was “aimed at me, maybe not due to being female”. I take that comment as one that was made in the context of the hearing, such that she was answering it without prior notice necessarily and that answer is not determinative, but in the context of pleadings that do not identify any link other than the behaviours she challenges and that she is a woman the overall picture from the answer is that the argument largely rests solely on those facts. It is possible that there is a little more, such as a reference to a “toxic male atmosphere” in the email of 27 October 2023, but what that refers to and why is not specified in the email and when the questions were asked they were left as blanks as noted above.

47. It is difficult to assess prospects of success purely from paperwork, and the discussion at the hearing with the claimant appearing as a party litigant, but I consider that I should take into account the difficulties I envisage face the claimant in establishing the claims. So far as direct discrimination is concerned In ***Glasgow City Council v Zafar [1998]***

IRLR 36, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour and a protected characteristic that is held. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on. In ***R (ex part Birmingham) v EOC [1980] AC 1155*** it was held that it was not enough for the claimant to believe that there had been less favourable treatment. In ***Burrett v West Birmingham Health Authority [1994] IRLR 7*** it was held that this is a question of fact, and the perception of the employee is relevant. But by itself such a perception is not enough.

48. The test of causation for what may constitute harassment is lower. Para 7.9 of the Equality and Human Rights Commission Code of Practice states that the provisions in section 26 should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. This was applied in ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** where it was held that whether there is harassment must be considered in the light of all the circumstances; in particular, where it is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording. The test for “related to” is different to that for whether conduct is “because of” a characteristic. It is a broader and more easily satisfied test – ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another EAT 0039/19.***

49. But there does have to be something that in some way links it so as to relate to the protected characteristic of sex, more than the fact of the characteristic, in my view. Here it appears to me that the claimant has at the least not articulated that link. That was what the questions asked of her sought to do, but are those which she did not answer. In cross examination she accepted that the behaviours of colleagues she complains about may not be because she is female, and although that is not the test for the section 26 claim it was I consider indicative of there being nothing clear put forward to show the basis of such a link.

50. In submission she referred to breach of the duty of care, but that is not of itself evidence of that link. If there is breach of such a duty that may found an action of damages for personal injury, but in a civil court, as is a claim for breach of contract where employment continues, or an action under for

example under the Protection from Harassment Act 1997 or for interdict under common law. None of these require such a link to the protected characteristic of sex, but the claims made before this Tribunal all do, to different degrees.

51. Similarly where there is consideration of victimisation the detriment alleged must be because of the protected act, but that again was not set out in the answers to questions. For these reasons, where the claimant has not articulated how the causation issues would be met, it appears to me that her claim is liable to fail.

52. Taking all of the matters before me in the round, I consider that it is not just and equitable to allow the claim to proceed, however much personal sympathy I have for the claimant. There would be prejudice to the respondent which I consider to be greater than that to the claimant on the basis of what is before me. The claimant, by my decision, is not able to argue her claim, but it is not a claim with what I consider to be more than limited prospects of success. I do not discount the possibility of success, but for the reasons given it appears to me on the basis of what is before me to be likely, simply because the link to sex as the protected characteristic has not been articulated despite a number of attempts to secure it.

53. The prejudice to the respondent would be the cost and time of defending a claim going back many years involving several parties and events, which the claimant did not wish to pursue as a grievance in that same email of 27 October 2023. That is against the backdrop of important aspects of the claims being made not yet being clear. The case would require further case management, and if a Final Hearing takes place is likely to involve several days of evidence. It appears to me that given my assessment as to the likelihood of success the cost and time of such an exercise would be substantially prejudicial to the respondent, assuming that they succeed. Their ability to defend such a claim is however affected by the late pursuit of the claim, the claimant not doing so in October 2023 and then her decision not to pursue any internal grievance although she could have done so. That is in the context that because of the incomplete answering of questions even at this stage in early December 2024 the full

details of fundamental aspects of the claims made are missing. Without them it is very difficult for the respondent to investigate the claims.

54. This is all also in the context of the email of 27 October 2023 which I consider for the reasons given above is indicative of someone who was able to manage affairs adequately at that time, and suggests that she had decided not to pursue a Tribunal claim although was aware of that being possible. Whilst the claimant stated in submission (although not in evidence) that she had not been aware of time-bar until contacting ACAS it was possible for her, perhaps with assistance, to research that issue, or seek advice from her union, or as she did in or around April 2024 with advice from a solicitor. That is in my view a factor strongly suggesting that the reason for the delay is not one that favours the claimant, even with the evidence of ill health I heard.

55. Balancing all the factors together I am not satisfied that the claimant has established that it is just and equitable that the claim, accepted to be late to a material extent, should be permitted to proceed under section 123 of the 2010 Act. The result is that the Claim is not within the jurisdiction of the Tribunal.

Conclusion

56. The Claim must therefore be dismissed. I am conscious that the claimant remains in the employment of the respondent, with discussions as to redeployment such that she may return to work, and in light of that have confined my comments to those required to address the issue before me.

A Kemp

Employment Judge

04 December 2024

Date of judgment

Date sent to parties **05 December 2024**