



EMPLOYMENT TRIBUNALS

Claimant
Mr M Hove

v

Respondents
**Imperial College Healthcare NHS
Trust**

OPEN PRELIMINARY HEARING

Heard at: London Central (By CVP remote videolink)

On: 9 September 2022

Before: Employment Judge Brown

Appearances

For the Claimant: Mr B Jones, Counsel
For the Respondents: Mr C Adjei, Counsel

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. There is a reasonably arguable basis for the contention that the Claimant's 2018 complaints are so linked to complaints which are in time as to be continuing acts or to constitute an ongoing state of affairs.
2. Whether the 2018 complaints were brought in time will be decided at the final hearing.

REASONS

Background

1. By a claim form presented on 9 February 2022 the Claimant brought complaints of race discrimination against the Respondent, his employer. The Claimant identifies as black African. The Claimant had undergone ACAS Early Conciliation. Day A was 15 December 2021 and Day B was 10 January 2022.

2. At a Preliminary Hearing on 24 May 2022 EJ Heath identified the following issues in the claims:

1. Time limits

1.1. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the acts to which the complaint relates?

1.1.2. If not, was there conduct extending over a period? The Claimant contends that the alleged treatment from July 2018 onwards amounts to a continuing act.

1.1.3. If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.1.4. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1. Why were the complaints not made to the Tribunal in time?

1.1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

2. Direct Race Discrimination (Equality Act 2010 section 9 and section 13)

2.1. Did the Respondent treat the Claimant unfavourably in any of the following alleged respects that have taken place since 2018 to date:

2.1.1. Subjecting him to a formal disciplinary investigation in July 2018.

2.1.2. Failing to properly investigate the disciplinary allegations, and/or deliberately seeking to exclude the evidence of Felicity Bevan from the investigation process in December 2018.

2.1.3. On 14 December 2018, issuing the Claimant with a formal warning at the conclusion of the disciplinary process.

2.1.4. For the entire period, excluding him from the Respondent's Friday teaching programme without explanation, consultation or opportunity to return to the programme.

2.1.5. For the entire period, not inviting/arranging for trainees to attend his Monday theatre sessions, preferring instead to pay trainees overtime to attend Saturday sessions.

2.1.6. For the entire period, rostering him to work every Friday morning preventing him from attending consultant meetings despite the Claimant's requests made in September 2021 to change this.

2.1.7.

2.1.8. Taking excessive time to progress his November 2021 grievance, in contradiction of the Respondent's own policy.

2.1.9. In November 2021, refusing to investigate whether other consultants were overpaid in the same way the Claimant was.

2.2. If so, has the Claimant proven facts from which the Tribunal could conclude that the unfavourable treatments mentioned at paragraph 2.1 above were because of his race?

2.3. If so, can the Respondent show that there was no unfavourable treatment because of the Claimant's race?

2.4. Who is the appropriate real or hypothetical comparator for the purposes of establishing the alleged less favourable treatment? As the only black consultant, the Claimant will rely on any of the 27 other consultants in the Respondent's ophthalmology department.

3. Victimisation (Equality Act 2010 section 27)

3.1 For the avoidance of doubt, the parties agree that the Claimant did a protected act by raising a grievance on 3 November 2021.

3.2 The Tribunal will decide whether the Respondent did the following things:

3.2.1 Fail to progress the Claimant's grievance promptly, in contradiction to its own policy, resulting in the Claimant having a prolonged period of unpaid leave; and

3.2.2 On 24 November, demand repayment of overpaid wages from the Claimant whilst refusing to look into whether other colleagues had been similarly overpaid.

3.3 If so, by doing so, did the Respondent subject the Claimant to a detriment?

3.4 If so, has the Claimant proven facts from which the Tribunal could conclude that he was subjected to a detriment because he did the protected act?

4. Remedy for discrimination or victimisation

4.1. Should the Tribunal make a recommendation that the Respondent provides an acknowledgement of wrongdoing and a formal apology to the Claimant?

3. EJ Heath listed this Preliminary Hearing to decide:

a) Whether the claimant's claims relating to the 2018 disciplinary matter (List of Issues, issues 2.1.1, 2.1.2 and 2.1.3) should be struck out under rule 37 because the claimant has no reasonable prospect of establishing that they have been brought in time, having regard to section 123(1)(b) (just and equitable extension) and section 123(3)(a) (continuing act) of the Equality Act 2010.

b) Whether the claimant's claims relating to the 2018 disciplinary matter (List of Issues issues 2.1.1, 2.1.2 and 2.1.3) should be subject to the payment of a deposit order under Rule 39 because the claimant has little reasonable prospect of establishing that they have been brought in time, having regard to section 123(1)(b) (just and equitable extension) and section 123(3)(a) (continuing act) of the Equality Act 2010.

4. EJ Heath said, "The Judge hearing the application to strike out at the Preliminary Hearing will retain the discretion to decide whether it is in the interests of justice to leave these points for determination at the final hearing.

5. Mr Jones for the Claimant contended that, on the basis of the way the issues for the PHC had been drafted, my decision would not include whether time should be extended for any complaints which were out of time, but should only address whether the Claimant had no reasonable or little reasonable prospect of persuading a tribunal that time should be extended. He said that I could not decide whether time should be extended because the Claimant is not giving evidence. He said that the Respondent had been told that the Claimant would not give evidence.
6. Mr Adjei disagreed and said that provision had been made for the parties to provide witness statements; that the Claimant had made a witness statement, which addressed a just and equitable extension and that the Claimant himself had decided not to give evidence.
7. I decided that the way in which the issues had been formulated was that I should decide whether there was no reasonable (or little) reasonable prospect of time being extended on a just and equitable basis. The issues were not formulated to include me making a decision about whether, on the facts, time should be extended. On that basis, it was reasonable for the Claimant not to have attended the hearing to give evidence. It would be unfair for me to decide whether time should be extended when the Claimant was not present to give evidence and I would not have the opportunity to ask him relevant questions.
8. There was a bundle of relevant documents although it was not clear that disclosure was complete. The parties made oral submissions.

Time Limits

9. By *s123 Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of
 - a) the period of three 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.
10. By *s123(3) EqA* conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.
11. In *Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530*, the Court of Appeal held that, in cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken' in order to establish a continuing act. The Claimant must show that the incidents are linked to each other, and that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'. The question is whether there is "an act extending over a period," as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'. Paragraph [52] of the judgment.
12. Employment Tribunals can decide at a Pre-Hearing Review whether acts of discrimination are out of time and therefore not permitted to go to a full Hearing or, on the other hand, whether they could form part of a course of continuing acts and therefore should be allowed to proceed to a final Hearing where the question of

whether they do form part of such a course of continuing acts will be determined. At such a Pre-Hearing Review, in deciding this question, Tribunals apply the tests set out in *Lyfar v Brighton & Sussex University Hospital Trust* [2006] EWCA Civ 1548 and *Aziz v FDA* [2010] EWCA Civ 304. In *Aziz* the Court of Appeal said that the test to be applied at the Pre-Hearing Review was to consider whether the Claimant has established a prima facie case. The Employment Tribunal must ask itself whether the complaints were capable of being part of an act extending over a period. Another way of formulating the test to be applied at the Pre-Hearing Review is this: 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. One relevant, but not conclusive factor in deciding whether there is a prima facie case of a continuing act, is whether the same, or different, individuals were responsible for the discriminatory acts.

Discussion and Decision

13. It was agreed that, in order for there to be a reasonably arguable basis for contending that the 2018 allegations were linked to later acts, it was only necessary for one of the 2018 acts to be so linked to one of the later, continuing acts.
14. I make clear that, in coming to my decision, I am not making any findings of fact which bind the Final Hearing.
15. I considered that there was a reasonably arguable basis for the contention that that the same person, Mr Ali Mearza, was involved in the decision to subject the Claimant to a formal disciplinary investigation in July 2018 (allegation 2.1.1) and also then undertook the investigation (allegation 2.1.2) and was involved in the decision to exclude the Claimant from the teaching programme (continuing act allegation 2.1.4).
16. The Respondent contends that an independent person, the Associate Medical Director, Dr Geoff Smith, who left the Trust, decided to undertake an investigation into alleged misconduct by the Claimant in July 2018. It contends that Dr Smith left the Trust in 2019, so there is no possible link between his decision and later, continuing acts. The Respondent will rely on a letter from Mr Smith to the Claimant dated 9 August 2018, in which Mr Smith says that he has decided that a formal investigation is necessary under the Trust's Procedure for Handling Concerns about the Conduct, Performance and Health of Medical staff and that Mr Smith will be the case manager and Ali Mearza will investigate the matter, p63 - 64.
17. However, I was also shown a letter at p61 of the Bundle from Julie Eaton, HR officer, to Mr Ali Mearza, saying that she would draft a letter "for Geoff Smith's signature" describing the allegations and investigation. Ms Eaton asks Mr Mearza to review the letter for accuracy and that Mr Mearza send her evidence to support the complaints.
18. I considered that there was a reasonably arguable basis for the contention that Mr Mearza was operative in the decision to commence an investigation into the Claimant; in that Mr Mearza appeared to be closely involved in drafting the decision letter to commence the investigation, and in collating evidence for the letter. by contrast, the relevant letter was said only to be "for [Mr] Smith's signature".

19. I further considered that there was a reasonably arguable basis that Mr Mearza was involved in all the 2018 decisions in light of a letter from Mr Mearza dated 2 August 2018, p118 – 119, apparently expressing strong opinions as to the seriousness of the Claimant's misconduct even before an investigation was commenced – and, thereafter, Mr Mearza's involvement in the investigation and his attendance at the disciplinary hearing, p99. There was a reasonable argument that Mr Mearza was present at all the important decision-making stages.
20. The Respondent contended, however, that there was clear evidence that the person who excluded the Claimant from the Friday teaching programme was Melanie Corbet, because she gave him the explanation as to why he had been excluded, p106. The Respondent contended that there was no arguable link between the exclusion from the teaching plan and the 2018 allegations.
21. However, in her email at p106, Ms Corbett appeared to suggest that "it was widely felt" that the Claimant had included inappropriate material in his teaching so his teaching would not be repeated and that the Claimant would have received feedback about this in his appraisal. Her assertion that "it was widely felt" suggested that Ms Corbett had not been the sole decision maker.
22. In the same email chain, the Claimant said that Mr Mearza had been the person who had given him his feedback.
23. I considered that it was reasonably arguable that Mr Mearza was one of those who had made the decision that the Claimant would not be included as a teacher, if Ms Corbett had envisaged that Mr Mearza would communicate that decision and the reasons for it to the Claimant during his appraisal.
24. Accordingly, it was reasonably arguable that Mr Mearza was involved in both the 2018 allegations and the continuing act allegation at 2.1.4. There was a prima facie case that these actions were linked by Mr Mearza's involvement.
25. Mr Mearza's involvement is not conclusive of the matter, However, more generally, the Claimant relies on the statement which Felicity Bevan, General Manager in the Ophthalmology Department at the Claimant's hospital, gave to the GMC regarding an investigation into the Claimant's fitness to practice. At paragraphs 24, 25 and 29, her statement said, "24. As no one enjoyed the A&E work, no one would swap the shifts with Mr Hove. Mr Hove would tell us if he would want to take time off. Other consultants would just turn up late or not turn up at all. We never had this issue with Mr Hove. He would come in early and stay late. He was a very patient centred doctor, more so than his colleagues. 25. I do not think that it is a coincidence that he is the first black consultant at the Hospital to get to his level and is also the person in the Department to be referred to the GMC. His fellow colleagues were not nice to him and it doesn't shock me that this complaint has been escalated, but any concerns about other consultants have not. No one was willing to help him on these weekends and he did what he thought was right and got cover. His colleagues did not support him in his post, and I recall that when he was offered this, the other consultants who were not even in the interview contested him being appointed. 29. As a final remark, I would say I have never worked in a department with such subterfuge within the consultant body. ..."
26. I considered that these comments could reasonably be used to support the Claimant's argument that there was a continuing discriminatory state of affairs in the department in which the Claimant worked, throughout his employment.

27. On the material available to me, therefore, I considered that there was a prima facie case of a continuing act from 2018, including the 2018 allegations and the subsequent, and continuing, exclusion of the Claimant from the teaching roster.
28. I considered that this was a case where the facts ought to be established at a final hearing and a decision about time limits and continuing acts made once that had been done. This was not a case where it was appropriate to say, at this preliminary stage, that the Claimant had no, or little, reasonable prospect of establishing that the 2018 allegations were part of a continuing discriminatory state of affairs.

EMPLOYMENT JUDGE BROWN

On: 9 September 2022

SENT TO THE PARTIES ON

09/09/2022

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FOR SECRETARY OF THE TRIBUNALS