EMPLOYMENT TRIBUNALS

Claimant: **Mr O Robinson**

Respondent: **CFS Care Limited**

Heard at: **Manchester (in person and by CVP)**

On: **28-30 September 2022 and on 25 November 2022.**

Before: Employment Judge Leach, Ms S. Anslow, Mr D Wilson.

Representation:

Claimant: In Person

Respondents: Ms. L Amartey (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that all of the claimant's complaints under the Equality Act 2010 fail.

REASONS

Introduction

1. This case arises from the claimant's short period of employment with the respondent which ended in April 2020.

2. The claimant has a disability for the purposes of the Equality Act 2010 and makes allegations of direct discrimination and harassment. These include allegations that the respondent did not want to employ him once it became aware of the claimant's disability and so dismissed him.

3. The respondent denies all allegations of discrimination and harassment. In relation to allegations concerning the termination of the claimant's employment, it says that employment did not end by dismissal but by agreement between the parties.

The Hearing

4. At the beginning of the hearing, Ms Amartey on behalf of the respondent, made 2 applications:-

a. For day one of the hearing to be a reading day. She explained that it was necessary to allow the whole day for reading as the claimant provided his witness statements and 150 or so additional pages of documents on the day before the hearing. She needed time to consider the statement and papers and take instructions. The claimant had no objections to the application.

b. for the remainder of the hearing to be by CVP. The application was supported by the claimant who stated his personal preference for a remote hearing. He told us that he was nervous about meeting the respondent's witnesses in person and would prefer to question them remotely, on screen. He also told us that there were unrelated, personal reasons that meant that a CVP hearing would be preferable for him.

5. We agreed to set aside the remainder of day one for reading. As both parties expressed a preference, also we agreed that days 2 and 3 would be by CVP but noting that the Tribunal would continue to sit in the Tribunal room rather than each of us joining separately from different locations.

6. The claimant was also required on day one, to ensure that the tribunal had hard copies of documents that he wished to put before the Tribunal as referred to in his statement.

7. The claimant was an hour or so late on day one. He was told to ensure that, on day 2, he logged in to the CVP room ready to begin at 10am prompt.

8. The claimant was not in attendance at 10am on day 2. The Tribunal's clerk tried to contact him but without success. We waited until 10.40am before beginning the hearing. Ms Amartey had by that stage informed the clerk that the respondent intended to make an application. That application was made when we started the hearing at 10.40am. It was for an Unless Order. Whilst the application was being made and considered (at about 10.55am) the claimant joined the CVP room. He told us that he was sorry he had not joined at 10am; he had not been able to fall asleep the night before and not at all until about 08.30am in the morning, that he did not then wake up until 10.20am. He then had problems connecting. We noted that the claimant had not responded to mobile calls and email messages from the Tribunal's clerk. The claimant apologised. We decided to allow the claim to proceed. No unless order had been made by that stage.

9. We started to hear the claimant's evidence from about 11.30am. It became clear that he was not at all sure that the claim he was bringing was a direct

discrimination claim. His evidence was such that he thought he may have been dismissed after he had asked for some reasonable adjustments. After discussion the claimant agreed that he did not want to amend his claim. Ms Amartey had by then made clear her view that an amendment would cause further delay and result in an application for costs

10. On the morning of day 3 we finished the claimant's evidence. We were then able to hear from both of the respondent's witnesses being Emma Buxton (EB) who is the respondent's HR Manager and from Lianne Daniel (LD) the Chief Executive Officer.

11. We were provided with 2 bundles of documents. One bundle was prepared and provided by the respondent and contains the majority of relevant documents. References to page numbers below are to this bundle unless indicated otherwise.

12. The claimant provided an additional bundle. Helpfully the page numbers added by the claimant ran on from the end of the bundle prepared by the respondent. Combining the 2 gave us a bundle numbered up to page 392. References to page numbers below refer to the combined bundle.

13. We also received 3 documents from the respondent at the start of day 3. These were (1) a new starter form dated 3 February 2020 (2) an employment application form completed by the claimant dated 16 December 2019 and a health questionnaire completed by the claimant and dated 3 January 2020. We did not give page numbers to these documents and we refer to them below by their description.

The Issues.

14. A list of issues was drafted by the Judge at the preliminary hearing which was held for case management purposes on 9 June 2021. This was an agreed list and we repeat it below.

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 (plus early conciliation extension) of the act to which the complaint relates?
        1.1.2 If not, was there conduct extending over a period?
        1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
        1.1.4 If not, were the claims made within a further period that 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. ***Disability***

The respondent accepts that at all relevant times, the claimant had a disability for the purposes of the Equality Act 2010. This issue does not therefore need to be determined

3. ***Direct disability discrimination (Equality Act 2010 section 13)***

3.1 Did the respondent do the following things:

3.1.1 terminate the claimant's employment (exemplified by the fact that the respondent's attitude to the claimant changed as soon as he admitted to having a mental health issue); and
3.1.2 fail to provide supervision.

3.2 Was that less favourable treatment?

The claimant has not named anyone in particular who s/he says was treated better than he was and relies on a hypothetical comparator.

3.3 If so, was it because of disability ?

4. ***Harassment related to disability (Equality Act 2010 section 26)***

4.1 Did the respondent (Lianne Daniel):

4.1.1 Tell the claimant she was not comfortable employing someone with mental health problems on 9 April 2020 and that he would be better as a consultant; and
4.1.2 Tell the claimant she had an intimate understanding of how a person with the claimant's disability should present, which would be immediately obvious to most people, and that she could not see that in the claimant.

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

15. As the whole of day one was to be taken up as a reading day, it was agreed that we should consider and determine liability issues only. Remedy would need to be considered (if necessary) at a later, separate hearing. We have not therefore set out the agreed list of issues relevant to remedy.

16. We finished all the evidence by the end of day 3. There was no time for submissions. The case was listed for a fourth day on 25 November. We received written documents from both parties who also had an opportunity to add their oral submissions to these.

Findings of fact

17. These are our findings of facts relevant to the issues on liability that we need to determine.

The Claimant

18. The claimant is experienced in property investment and management. For many years until 2018 he was a landlord of a portfolio of investment properties. With the exception of one property, these were sold in 2018 due to a change in his personal circumstances. By this stage he had developed contacts in the property sector and had undertaken some consultancy work. He developed further, his contacts and consultancy work from 2018, following the sale of his properties.

19. The claimant retained one investment property in Bolton. He was hoping to be able to let this property to be used for social care for children. That required the property to meet certain standards and for him to enter into an agreement with a local authority or other recognised care provider.

20. In early 2019 the claimant's consultancy work meant that he became more involved and interested in property opportunities in the care sector. It was then that he was introduced to the respondent.

21. He was first introduced to a company with property investment interests in the Care sector, called Tristone Capital (Tristone). At that time Tristone was working closely with the respondent.

22. Rob Finney (RF) was a consultant with Tristone.

23. In December 2019 the claimant and Mr Finney discussed an employment position with the respondent. We provide further details about this (and the status of the claimant's employment with the respondent) below.

The Respondent

24. The respondent is a relatively new company, having been formed in 2018. At the relevant time (first half of 2020) it had about 25 employees. It provides supported accommodation for looked after children between the ages of 16 and 18; who have just come out of social care. The respondent needs suitable properties in order to house these young people. The respondent also operates as an independent fostering agency. As a fostering agency they are regulated (and audited) by OFSTED.

The start of the claimant's employment with the respondent.

25. Initially the claimant's relationship with the respondent was a business to business one. There were no written terms. It came about at a time when the claimant was working as a consultant with a range of organisational clients.

26. By mid-November 2019 RF told the claimant that there was an employment opportunity with the respondent should the claimant be interested. The claimant and RF agreed broad heads of terms about this whilst the claimant continued to carry out some consultancy services for the respondent. The intention to employ the claimant is confirmed in an email dated 19 November from LD to Emma Buxton (EB) and RF (page 46).

27. By late December 2020 agreement was reached between Claimant and Respondent for the claimant to become the respondent's employee. The main terms (relating to remuneration particularly) were agreed. These terms are set out in in internal (Tristone) email that we have seen dated 13 December 2019. We find the terms were subsequently sent to and agreed with the claimant. On or about 16 December 2019, the claimant submitted an application for employment form.

28. The claimant completed an employment health questionnaire on or about 3 January 2020. The hours that the claimant worked for the respondent (and the amount that he was paid) increased in January 2020. For that month he was paid in consultancy fees the same amount as the gross salary that it was agreed he would receive as an employee.

29. The claimant was provided with a formal employment contract in early February 2020). It referred to a start date of 1 February 2020 although by January 2020 the time spent by the claimant working for the respondent was substantially full time. Even so, he invoiced for consultancy services for January 2020 (as well as November and December 2019)

30. In his evidence the claimant claims that his employment started before 1 February 2020, that it began in November 2019. We note the following:-

a. On his claim form the claimant provided his start date as 1 February 2020.
b. The claimant signed a contract with a start date of 1 February 2020.
c. An employment application form was completed on 16 December 2019 – indicating that the start date must have been after then.
d. The claimant received consultancy fees in November, December 2019 and January 2020. The ones paid for January 2020 (but not before) were effectively the same as his starting salary.
e. It is not necessary, in reaching decisions about the claimant's complaints, for us to make a finding as to when the employment started.

<u>Discussions and agreement of contractual terms – February 2020.</u>

31. The claimant had some concerns about the terms of the contract provided. In early February 2020 he met with the respondent's HR manager Emma Buxton (EB) when they discussed these.

32. The claimant told EB that he had recently split up with his partner, was on anti-depressant medication and was having counselling. He explained that he needed to be based at home as sometimes the medication made him sleepy in the mornings.

33. He also asked for some flexibility with his time so that he could attend counselling sessions.

34. When giving his evidence to the Tribunal the claimant said that he told EB at this meeting that he had been an in-patient at the Priory Hospital. When giving her evidence, EB denied that she was told this. We find that the claimant did not provide this information to EB. We note particularly that the claimant makes no reference to

this in his statement. We also make our finding having heard from both the claimant and EB and preferring EB's version of events. We found EB's evidence to be open and candid. Had she been told that the claimant had been an in-patient at the Priory, she would have remembered it and it would have been in her evidence.

35. The claimant made a handwritten amendment on the contractual document he had been given, noting (at clause 3.1) that he would be home based rather than based at the respondent's office.. He also identified that some more clarity was needed against references in the contract to "agreed timescales." These were the only amendments noted on the contract before he then signed it in agreement and dated 17 February 2020.

36. Although the claimant did not note this in his handwritten amendments, some flexibility with working hours was also agreed between the claimant and EB that would enable him to attend counselling appointments.

<u>The claimant's annual leave – February 2020</u>

37. On 5 February (a day or 2 after, the claimant and EB had met) the claimant sent an email to EB in which he said as follows:-

> *"Between 18 Feb and March 4th I will be in Mexico and therefore unavailable for meetings in person and only contactable between 14:00 and 20:00.*
> *Due to CFS Care being at such a critical stage in its growth I intend on working remotely wherever possible during those hours."*

38. LD was copied into this email. Understandably both EB and LD had concerns. The claimant appeared to be informing both that he was going to be on holiday for 2 weeks (having just commenced his employment) but giving only 13 days' notice of this. This was the first time that the claimant had told the respondent he was going away to Mexico on those dates and his notice was in breach of the terms of the contract of employment that he had just been given (that required 4 weeks' notice of holidays). There was also concern about the claimant's stated intention to work whilst in Mexico. Having read the email and heard from the claimant we find that his intention was not to use his annual leave entitlement but to assume that it would be acceptable for him to be in Mexico but continuing to engage in his employed work. AGREE?

39. LD met with the claimant on 13 February 2020. She referred to the meeting as a supervision meeting. We accept LD's notes of the meeting (pages 67-70) as accurate. The claimant had advance notification of the meeting and was able to prepare for it. In summary:-

a. The claimant told LD that he liked his role but wanted to discuss it further; that he enjoyed working with companies and finding properties but did not want the responsibility or accountability that came with the employed role:
b. The claimant said that he was not sure he wanted to be an employee, he liked the freedom to be his own boss, taking leave when he wants and not having to ask for it. This was a particular reference to the concern

which was being raised about his announcement that he would be in Mexico for 2 weeks.

c. The terms of employment were discussed – his request to work from home (which he noted he had already agreed with RF); the flexible working (that had by then been agreed). He told LD the reasons why he needed these changes, that he had split up from his girlfriend and was struggling with anxiety and depression.
d. When discussing the claimant's visit to Mexico LD told him that when employees went on leave they were not expected to work and LD told the claimant about the process of requesting leave. The claimant responded by saying that was another aspect of the contract he wanted to discuss; that he does not want to request annual leave; he wants to take leave when he likes.
e. The claimant also raised concerns about a term of the contract which said that he needed permission before doing other work. He explained that he works with lots of companies and if he is held to these terms he would prefer to go back to being a consultant.
f. LD asked the claimant to review the contractual terms and either sign the contract or raise points that he wants to discuss further. The claimant agreed he would do this.
g. LD confirmed that she would approve his holiday leave at short notice on this occasion.

40. Before his annual leave began, the claimant signed his contract with some hand-written amendments referred to already.

<u>The "second" contract</u>

41. The respondent was in the process of updating its employment contracts in early 2020 and that the claimant (like the respondent's other employees) received an updated contract in early April 2020.

42. These revised terms included terms that recognised the flexibility regarding the claimant's working hours and his being based at home. However on this occasion, the claimant wanted to raise many more points, including about clauses relating to:

    a. Notice and permission for holiday leave;
    b. Working for others;
    c. Bonus arrangements;
    d. Required measures of performance under a "property plan"

43. LD and EB arranged to meet with the claimant on 9 April to discuss his concerns about the revised contractual terms. LD's notes of this meeting are at pages 103-104 and EB's notes at 105-6. We accept the notes as a broadly accurate summary. Whilst far from identical, the notes set out each writer's version of the meeting and it is clear from reviewing both sets of notes that they are about the same meeting. We refer to these jointly below as "the meeting notes."

<u>Meeting on 9 April 2020</u>

44. The meeting was held remotely,(by Zoom). The key finding for us to make about this meeting is whether it ended in agreement that the claimant's employment contract would end.

45. We find that it was agreed between claimant, LD and EB that the contract would come to an end. We note particularly:-
    a. The meeting notes record that the claimant stated that he was struggling to move from a consultant to an employee mindset. The claimant, in evidence he gave to us, agreed he said this.
    b. The meeting notes also record the claimant stating that working as an employee was a struggle and that he was used to working for himself, with flexibility and the ability to work with other companies without seeking permission. In his evidence the claimant accepted that he had said he had struggled working as an employee.
    c. The claimant volunteered that he did not want to work to property timelines and the pressure from the Board that came from this
    d. The meeting notes record that LD told the claimant they could not accept the requests that he was making in his mark up. We find that these related principally to; (1) carrying out work for others; (2) changes to the bonus arrangements- for example where there is a delay/reduction in bonus where the respondent has suffered from delays in property completion and handover; (3) changes to holiday terms.
    e. The meeting notes record that it was agreed that the claimant would stop being employed but would work for another week (notice) to provide a handover and that the claimant would then put together a plan as to how the respondent would work with him on a consultancy basis. The intention was that the claimant would continue to be professionally involved with the respondent, but under a different relationship; a consultancy or business relationship to allow the claimant greater freedom in terms of his own time, activities and other business opportunities.

46. In his evidence the claimant told us that it was LD and EB who decided that the employment should end and that this shocked and terrified him. We do not accept this. Whilst the claimant wanted to review arrangements following the meeting (see below) we are satisfied that it was the claimant who expressed his reservations about being restricted by an employment relationship and that he wanted a different relationship. EB and LD also by that stage had plenty of indication that the claimant did not want an employment relationship and were in no way resistant to it coming to an end. That is why the meeting ended with agreement that the claimant's employment would end.

47. We also find:-

    a. That LD did not tell the claimant that she was not comfortable employing someone with mental health problems;
    b. That LD did not say that she had an intimate understanding of how a person with the claimant's disability should present which would be immediately obvious to most people and she could not see that in the claimant.

48. The claimant emailed EB and LD later that day (9 April). A copy of the email is at page 108. In this email the claimant indicates that he may be wavering a little about his decision. He refers to a preference to "let the dust settle" and discuss further; that he wants to ensure that it is not a "knee jerk decision on both sides."

49. The claimant does not indicate in this email that he had (or believed he had) been dismissed. We find the email to be confirmation of an agreed decision. We also find that the email indicates that the claimant may have been having some second thoughts about the decision.

50. In his evidence the claimant told us that he agreed to move back to a consultancy role although he was not happy about it. This supports our finding – that it was his decision even though he was not entirely comfortable that he had made the best decision.

51. The claimant and LD agree that they spoke by telephone a day or 2 after the zoom meeting on 9 April 2020. LD did not provide evidence in chief about this call. She gave evidence generally about the continuation of an amicable relationship and negotiating the terms of a consultancy agreement. The claimant's evidence of this discussion is that during this call, LD refused the claimant's suggestion to continue to employ him.

52. There are no notes of this discussion and differing accounts. We prefer the evidence of LD. We note particularly the correspondence that followed this discussion which is consistent with LD's evidence. It shows the claimant was willingly negotiating consultancy and even instructing solicitors to assist. It also shows amicable email discussions about the completion of properties and handover of keys.

53. During this call, LD did not make either of the statements noted at 47 above. Our findings here (and at 47 above) is supported by the following:-

    a. Our own assessment of the claimant's and LD's evidence to the Tribunal
    b. EB's evidence that LD made no such comments;
    c. LD's support for the claimant in the light of the information she did receive about his mental health in February 2020
    d. Her willingness to employ the claimant/continue his employment and then (at the claimant's request) work with him to put together a consultancy arrangement. Whilst the negotiations over a new consultancy arrangement were ultimately fruitless, we are satisfied that LD engaged in that negotiation with an intention to reach agreement.

54. As for the claimant's instructions to solicitors, had the claimant been (or felt he had been) dismissed it is very likely that he would have told his solicitors and received advice about his rights. There is no evidence that happened. By 17 April 2020 the claimant was in a position to email the respondent with consultancy agreement proposals. The email starts as follows:-

> *"Following on from last week's conversation, as requested, here is how I think my consultancy will work best for CFS/Tristone. There has to be consideration for when IR35 comes in next year. I have sought legal advice and consultancy advice …."*

55. The claimant attached an email from a firm of Manchester solicitors setting out their advice.

The respondent's knowledge of the claimant's disability

56. The respondent was aware from the beginning of the claimant's employment , that the claimant was on medication for anxiety and depression (see EB's statement at para 7). The claimant met with EB in early February 2020 and they discussed that.

57. In early January 2020, the claimant completed and submitted a health questionnaire. This provided the respondent with the following information

    a. that he has anxiety and depression;
    b. that he last consulted his doctor on 18 September 2019 because of a low mood;
    c. that he was on medication including anti-depressant medication.

58. The claimant met with EB on or about his first day of employment/very early in February 2020. One of the topics they discussed was the claimant's health. See 32 above.

59. LD also became aware in early February 2020 of the depression and anxiety suffered by the claimant. Neither knew that the claimant had received treatment at the Priory (see 33 above). We also note that the information provided by the claimant in the health questionnaire supports the respondent's position that the claimant did not disclose in February 2020 that he was being treated at the Priory for a serious mental impairment. In his answers on the health questionnaire, the claimant states that he saw a doctor in September 2019 for a "low mood. " We recognise that many individuals would be reluctant to disclose that they had received treatment as an inpatient in hospital for mental impairments. But in this case, the claimant alleges that he did disclose that information. We find that he did not go so far in disclosing his mental impairment. We also find that when he disclosed information about a mental impairment and a need for support, that the respondent was sympathetic and provided the support requested.

60. At the meeting on 9 April 2020 a comment was made by the claimant, that he was having "dark thoughts." The claimant was asked what support could be provided by the respondent. The claimant replied that he had his own techniques that he uses. We find that the respondent was willing to engage in supportive discussions with the claimant and to put measures in place to assist him.

The respondent's supervision of the claimant.

61. EB met with the claimant on or about 1 February 2020. This was a "new starter" meeting and it also involved a discussion with the claimant about the support that the respondent could provide to assist the claimant manage his mental health.

62. LD (the claimant's line manager) met with the claimant on or about 13 February 2020. LD called this a supervision meeting. We have noted above the discussions about the contractual terms, annual leave and the restrictions that come with employment status. We find it was a meeting that was open and the claimant was able to freely raise anything he wanted to.

63. The claimant was then absent – on annual leave in Mexico – until about 8 March 2020.

64. The claimant and LD did not meet again on a one-to-one basis before the claimant's employment ended. However:-

    a. In his evidence, the claimant referenced EB having an open-door policy.
    b. LD was absent from the respondent business for the last 2 weeks of March 2020 as she had contracted Covid and was poorly.
    c. The claimant did meet with LD and others on a regular (weekly) basis to discuss operational issues. The claimant's work was closely supervised including via these meetings.

Submissions

65. Both parties provided written submissions which we read through on 25 November 2022. Both parties had an opportunity to comment on the submissions provided by the other.

66. We recognised when reviewing the claimant's submissions (as we did throughout the hearing) that he is an unrepresented party and as we explained to him, we would not expect detailed submissions. In fact he did provide a lot of detail. This included:-

    a. Evidence that he had not provided before (even though we had informed the claimant that, when he made submissions at the end of the hearing, it was not an opportunity for him to provide new evidence)
    b. A number of comments that he attributed to the Tribunal that none of us has any recollection (or note) that we made. One example is the following comment in his submissions *"The judge verbally contested my suggestion that Lianne could have been expected to have known the severity of my illness on April 8."* The closest note we have to that is where the witness (LD) was asked to clarify her evidence about knowledge of the claimant's disability.
    c. Lengthy submissions about the date when his employment commenced. As we have noted in our findings of fact, it may well be that an employment relationship (as opposed to a consultancy, business relationship) was formed shortly before 1 February 2020 but nothing turns on this.
    d. Lengthy submissions about knowledge of disability and (it appears from some comments) an assumption that the Tribunal will find

that the respondent did not know of his disability before his employment ended. We note the undisputed evidence that the respondent was aware from January/early February that the claimant had a mental impairment. We also note the respondent's admission in these proceedings that the claimant was disabled at the relevant time.

67. Ms Amartey addressed us on the law and made submissions about findings of fact we should make and why. She also responded to various points raised by the claimant in his submissions.

68. Understandably, in relation to the meeting of 9 April 2020, Ms Amartey notes the claimant's acceptance that he agreed to return to a consultancy role. Given this and the clear evidence from EB and LD, she says, we are left with little choice but to make a finding that the employment ended by agreement. Ms Amartey's submissions also note that, even if we find that there was a dismissal, the reason for the dismissal was the claimant's discomfort with employment; nothing to do with the claimant's disability.

The Law.

69. All complaints are made under the Equality Act 2010 (EqA)

Time limits

70. Section 123 EqA provides that complaints may not be brought after the end of 3 months "*starting with the date of the act to which the complaint relates"* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

71. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

72. We note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre 2003 IRLR 434**:-

> *"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so."* (para 23)
>
> *"…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."* (para 25 of the Judgment)

73. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. **British Coal v. Keeble EAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

b. Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT. This case noted that the issue of the balance of prejudice and the potential merits of the (in that case) reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

Harassment– section 26 Equality Act 2010 ("EqA")

74. Section 26 (1) states:

" *A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct relating to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of

(i) Violating B's dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B

75. The EAT decision in **Richmond Pharmacology Limited v. Dhaliwal [2009] IRLR 336** emphasised the need for Employment Tribunals when deciding allegations of harassment to look at three steps, namely:-

a. Whether the respondent had engaged in unwanted conduct

b. Whether the conduct had the purpose or effect of violating the claimant's dignity or creating an adverse environment

c. Whether the conduct was on the grounds of the applicable protected characteristic?

76. We have applied these three steps.

Direct Discrimination – section 13 Equality Act 2010 ("EqA")

77. Section 13 states:

> *"A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably7 than A treats or would treat others."*

78. An important question for us is whether the claimant's disability was an effective cause of the respondent's treatment of the claimant. As was made clear in the case of **O'Neill v. St Thomas More Roman Catholic School [1996] IRLR 372** the relevant protected characteristic need not be the only cause of the treatment in question.

79. We also note the following:-

a. the House of Lords in **Nagarajan v London Regional Transport [1999] ICR 877, HL**, held *"discrimination may be on racial grounds even if it is not the sole ground for the decision……..If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."* (judgment of Lord Nicholls)

b. Paragraph 3.11 of the EHRC Employment Code which states that *'the characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause'*

Burden of Proof

80. We are required to apply the burden of proof provisions under section 136 EqA when considering complaints raised under the EqA.

81. Section 136 states:

> *This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection 2 does not apply if A shows that A did not contravene the provision."*

82. We have considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. The annex to the judgment sets out guidance. (the amended Barton guidance).

83. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example

Madarassey v. Nomura International [2007] ICR 867, where the following was noted in the judgment:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

Discussions and conclusions

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 (plus early conciliation extension) of the act to which the complaint relates?
1.1.2 If not, was there conduct extending over a period?
1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.1.4 If not, were the claims made within a further period that 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?

84. The complaint relating to supervision is the only complaint that is potentially out of time. We have made findings of fact and reached decision on the complaint about lack of supervision. The respondent was able to provide their evidence on this. Having heard the evidence, on being satisfied that neither party was prejudiced in being able to put forward its evidence and given that the complaint about a lack of supervision arguably relates to the whole of the claimant's employment with the respondent, our decision is that if the complaint is out of time at all, it is just and equitable to extend time.

2. Disability

85. No decision required. The respondent accepts that at all relevant times, the claimant had a disability for the purposes of s6 of the Equality Act 2010.

3. Direct disability discrimination (Equality Act 2010 section 13)

3.1 Did the respondent do the following things:

3.1.1 terminate the claimant's employment (exemplified by the fact that the respondent's attitude to the claimant changed as soon as he admitted to having a mental health issue); and
3.1.2 fail to provide supervision.

3.2 Was that less favourable treatment?

The claimant has not named anyone in particular who he says was treated better than he was and relies on a hypothetical comparator.

3.3 If so, was it because of disability ?

86. We have made a finding that the respondent did not terminate the claimant's employment. The claimant's employment ended by agreement after the claimant made clear that he was unhappy with the constraints of an employment relationship.

87. There was not a failure to provide supervision to the claimant. In the short period of employment, he met with the HR manager (EB) in early February, the respondent's operational head (LD) on 13 February and, further had regular weekly meetings with LD and others.

4. Harassment related to disability (Equality Act 2010 section 26)

4.1 Did the respondent (Lianne Daniel):

4.1.1 Tell the claimant she was not comfortable employing someone with mental health problems on 9 April 2020 and that he would be better as a consultant; and

4.1.2 Tell the claimant she had an intimate understanding of how a person with the claimant's disability should present, which would be immediately obvious to most people, and that she could not see that in the claimant.

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

88. We find that those comments were not made by LD.

Employment Judge Leach
Date: 30 November 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
2 December 2022

FOR THE TRIBUNAL OFFICE