EMPLOYMENT TRIBUNALS

Claimant: **Ibi Fawehinmi- Lloyd**

Respondent: **Hertfordshire County Council**

Heard at Watford **On: 30 April 2024, 1 May 2024, 2 May 2024. 3 May 2024 (in chambers)**

Before: **Employment Judge S. Matthews**
Members: **Mr.A.Scott**
Ms. A. Brosnan

Representation
Claimant: **Mr Lennard (Litigation Consultant)**
Respondent: **Mr. Lansman (Counsel)**

RESERVED JUDGMENT

1.The claimant's claim for harassment relating to race is dismissed.

2. The claimant's claim for harassment relating to religion and/or belief is dismissed upon withdrawal.

REASONS

Background

1. The claimant was employed by the respondent as a Senior Carer from 6 April 2021 until 31 July 2022. The claimant was on sick leave from mid February 2022 until her dismissal by reason of redundancy on 31 July 2022.

2. The claimant's claim is about conduct which she alleges occurred when she worked at the Fairway Care Home (Fairway) which she alleges was harassment on the grounds of race under the Equality Act (EA) 2010 (4-16). Early conciliation started on 16 May 2022 and ended on 26 June 2022. The claim form presented on 8 November 2022.

3. At the outset of the hearing the representative for the claimant confirmed that the allegation of harassment relating to religion and/or belief is withdrawn.

4. The respondent denies it discriminated against the claimant and submits that the claim is out of time (17-26).

5. The hearing was listed for four days. It was agreed that we would not hear evidence on remedy in the first part of the hearing; we would hear evidence on liability only. Remedy would be dealt with on the final day of the hearing if the claimant was successful. In the event we did not finish hearing evidence and submissions until the end of day 3. The Tribunal deliberated on day 4. A provisional date was set for the remedy hearing on 21 June 2024. That hearing will not now proceed.

Issues

6. The Case Management Order of Employment Judge Bartlett dated 9 May 2023 sets out the issues for the Tribunal to decide. As indicated above the claim for harassment on the grounds of religious belief was subsequently withdrawn and the issues were therefore confirmed at the hearing as being:

1. Time Limits

1.1 Whether the Claimant's claims of discrimination are brought within the time period set out in s.123(1)(a) Equality Act (EA) 2010. (Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 29 June 2022 may not have been brought in time.)

1.2 Whether the alleged discriminatory acts form part of conduct extending over a period of time under s.123(3)(a) EA 2010, or whether they are distinct acts.

1.3 If not in time, whether it would it be just and equitable for the Tribunal to extend time for submission of these claims under s.123(1)(b) EA 2010.

2. Harassment by reason of race

2.1 The Claimant is relying upon the following protected characteristic: Race: Black

2.2 Whether the following conduct occurred?

a. The claimant was employed as a Senior Care Worker but was "forced to carry out the duties of a Carer/Cleaner". From April 2021 until February 2022 when the claimant went off sick;

b. The claimant's name was intentionally misspelt on the training board for the duration of her employment. Fateh Hamoudi, Collette Mangan carried out this act.

c. Fateh Hamoudi told the claimant that her Qualifications/experience "takes you nowhere" in a meeting which took place at the end of May 2021. This was shortly after CQC came into see if there were people who could do certain jobs.

d. The claimant's lunch was put in the bin in August 2021 by Lynne, one of the cleaners.

e. Joanne Roscam signed the claimant out of the building when the claimant was in the building in January/February 2022.

f. Fateh Hamoudi attacked the claimant with a trolley 16 July 2021.

2.3 Whether the conduct related to her protected characteristics of race.

2.4 Were the acts complained of unwanted conduct?

2.5 If so, whether they had the purpose of violating the Claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

2.6 Was it reasonable for the conduct to have that purpose or effect, taking into account the perception of the Claimant and all the circumstances of the case?

Procedure

7. The Tribunal heard oral evidence from the claimant and 2 witnesses on behalf of the respondent, Joanne Roscam (former Senior Care Worker at Fairway) and Fateh Hamoudi (former Assistant Manager at Fairway). Paragraphs in their witness statements are referred to below by the witnesses' initials and the number of the paragraph (XY/XY).

8. The respondent also served a witness statement by Colette Mangan (CM) (former deputy manager at Fairway). She did not attend the Tribunal to give evidence and we decided to disregard her statement.

9. The Tribunal was initially provided with a bundle of 480 pages. Numbers in brackets below are references to pages in the bundle (XY).

10. During the course of the hearing there was further disclosure by the respondent as follows:

    The claimant's CV (481-484).
    Photographs of a staff roster which appeared on a WhatsApp group (485-487).
    A form signing off the claimant to dispense medication (488-493).

11. The Tribunal decided that they were relevant documents that should be admitted in evidence, but expressed concern that they were disclosed so late in the proceedings. Late disclosure causes delay in the hearing and potential prejudice to the other party. While the Tribunal appreciate that Fairway has now closed down and that could make locating documents more difficult the

fact that they were located during the hearing indicates that a thorough search was not made at the time of disclosure.

12. The Tribunal decided that any prejudice to the claimant could be averted by giving the claimant's representative the opportunity to cross examine both the respondent's witnesses on the documents.

13. The claimant's representative also sought disclosure of a document very late in the proceedings, when all the witnesses had completed their evidence. This was a page from a website which was not identified, and which was marked 'Archived '(494-507). The relevance of the document to the claimant's role was not explained and it was not referred to by the claimant's representative in submissions. The Tribunal decided to disregard it in evidence.

Finding of Facts

14. In this section of the Judgment we set out our findings of fact as they relate to the issues set out at paragraph 6 above.

Recruitment and Job Title

15. By a letter dated 30 March 2021 the respondent offered the claimant the post of Senior Care Worker (98). A Contract of employment was attached to the letter (100-115). It states that the claimant will commence employment on 6 April 2021.

16. Under the heading 'Job title' the contract states 'Senior Care Worker'. Under the 'Job title/ duties' section the contract refers to a job description, which sets out the main responsibilities. This was not produced in evidence. We relied on oral evidence which we set out below.

17. When the claimant commenced work for the respondent in April 2021 it was just after the end of the third national Covid lockdown (this was in place from 6 January 2021 to 8 March 2021). Some restrictions remained in place. It was not until 19 July 2021 that the majority of the restrictions were eased.

Fairway

18. Fairway was set up by the respondent in the Covid pandemic as a Covid unit for people requiring short term residential care.

19. The number of residents staying in Fairway fluctuated. Some residents would stay for a week or more and some for one day. When the claimant first joined there were no residents or very few residents (FH/9). This had an impact on the opportunity to train her on the procedures for giving medication which is referred to at paragraph 34 below.

20. Fateh Hamoudi (FH) (former Assistant Manager at Fairway) was seconded from his substantive role at Watford General Hospital to Fairway shortly before the claimant joined in March 2021. He helped get Fairway ready to receive residents following the lockdown. He left Fairway on 9 August 2021, returning to his substantive role.

21. Joanne Roscam (JR) (former Senior Carer at Fairway) had worked at Fairway as a Carer since 5 April 2020. She was promoted to Senior Carer following an interview and took on her role at the same time as the claimant. JR left Fairway at the same time as the claimant when it closed in July 2022.

Qualifications to be a Senior Carer

22. It was a requirement of the role to have a relevant level 3 qualification or be working towards one. The claimant was well qualified for the role. She has a BTEC level 5 Higher National Diploma in Health and Social Care Management (481-484).

23. The claimant had higher relevant qualifications than JR who was working towards a level 3 NVQ at the time she was promoted to Senior Carer. However, JR was in a better position to slot straight into the role. As she explained in evidence, she 'had been there from day 1 setting up the processes so I had a good understanding of them'. This is relevant to the procedures relating to administering medication which we refer to at paragraph 32 below.

24. The issues we need to decide include an allegation that FH told the claimant that her Qualifications/experience 'takes you nowhere' in a meeting which took place at the end of May 2021 (**Issue 2.2 c**).

25. We found that the claimant was unclear in her evidence about exactly when she alleges this conversation took place and what was said. The List of Issues says that it was shortly after the Care Quality Commission (CQC) came to Fairway to see if there were people who could do certain jobs at the end of May 2021. In an interview on 20 July 2021 she said the date was 20 April 2021 and it was during a team meeting (122). In her witness statement she said FH said her qualifications were 'useless' (ILB/3). In evidence to the Tribunal she said that FH told her on numerous occasions that 'Level 5 is nothing, you don't know what some of us here have. You don't have enough experience'.

26. FH denies that he said words to that effect that her qualifications would take her nowhere or were useless. He has no recollection of the meeting she refers to and was adamant that CQC did not visit Fairway during that period.

27. The Tribunal accept that FH may have said something about the claimant's qualifications and that the claimant took offence. The Tribunal can envisage a situation where FH said that the claimant's qualifications were not equivalent to experience when he was managing her during her first few months at Fairway.

28. Whether it was reasonable for the claimant to take offence depends on how and what was said. The claimant's evidence was not sufficiently clear for the Tribunal to make a finding on this. If it was said in the context of the claimant not being able to administer medication before going through Fairway's induction (see paragraphs 32 to 33 below), that was a reasonable observation to make. The claimant did not know Fairway's procedures and needed to be trained in them. If, as the claimant has suggested, FH implied that her qualifications were useless we accept that could be deemed offensive by the claimant. We find on balance that if he did say anything about her qualifications it would have been in the context of the knowledge needed for the particular

role at Fairway and that it was not reasonable for her to view the comments as offensive.

29. The claimant did not put forward any suggestion or evidence to indicate to the Tribunal that the alleged comment or comments were related to her race.

Induction

30. The Tribunal heard evidence on the claimant's induction and training which was relevant to her role as a Senior Carer.

31. When she first joined the respondent she was given a file to read which contained information on matters such as the fire drill. Around 6 months after joining, in October 2021, she attended a 5-day induction in Stevenage (IFL/7) which all staff were required to attend and which is referred to in her contract (111-112).

32. As well as those formal inductions a further stage of induction was the need to shadow other Senior Carers before being allowed to administer medication. FH and JR outlined the reason for that requirement in oral evidence. Fairway had specific procedures because of the fluctuating number of residents and the differing lengths of stay. JR explained that 'the booking in and out of individuals' medication was a huge job', complicated by the fact that the turnover of residents was high. Many patients came in with medication and instead of dispensing it in pre-prepared dosset trays it would be kept in the original packets. Some residents were allowed to self-administer their medication. It was deemed essential that new staff shadowed other seniors before giving out medication and that they understood the medication audit process. As JR had been there from day 1 setting up the processes, she already had a good understanding of them (380).

33. The claimant accepted when giving her evidence that it was necessary for her to do the relevant induction and training before administering medication.

34. The claimant was assessed as competent to administer medication on 2 November 2021 (488-493). That was nearly 7 months after she joined. In evidence FH said that it was not unusual for it to take 6 months before a Senior Carer was signed off. The reason for delay could be a lack of residents which reduced shadowing opportunities. It was necessary for an employee to be observed administering medication on a minimum of 3 occasions and to learn how to carry out audits. When the claimant first joined there were no or very few residents. Fairway got busier from August 2021 when Covid restrictions were fully lifted.

35. It is surprising that it took so long for the claimant to be assessed, notwithstanding FH's explanation. The Tribunal noted that an investigation in November 2021 found that 6 staff had not had probationary reviews (152) and it is reasonable to infer that the delay was due to general failures in management and supervision and that the claimant was not singled out for different treatment.

Roster Board

36. The claimant could not be put down as a Senior Carer on the roster board until she was signed off as competent to administer medication. FH explained in evidence that the reason for this was that the Senior Carer on duty was the person who administered medication on the shift. As indicated at paragraph 34 above she was not signed off to administer medication until 2 November 2021. Accordingly, the claimant was designated a Carer and not a Senior Carer on the roster board in May 2021 (37-38).

37. The Tribunal heard persuasive evidence indicating that this situation did not continue throughout the claimant's employment. Part way through the hearing the respondent disclosed photographs of roster boards on a Fairway What's App group which JR still belongs to. Those show that the claimant was designated on the roster board as Senior Carer in late January and February 2022 (485-487).

38. The claimant's representative challenged the authenticity of the photographs supplied by JR in written submissions. He did not put this challenge to her in cross examination, although he had the opportunity to do so. The claimant did not disclose any rosters after May 2021 to counter the authenticity of the photographs.

39. In any event it is reasonable to infer that the claimant started being designated as Senior Carer on the roster board from November/ December 2021 when she was signed off as competent to administer medication. In her grievance submitted in April 2022 she refers to administering medication from December 2021 (340). She would not have been permitted to do this if she was not designated as a Senior Carer on the roster.

40. It may not have been the case that she was designated Senior Carer every day. Other Senior Carers such as Meghan and Paul were put on the roster as carers (37-38) even though they were employed as Senior Carers. FH explained in evidence that would be normal practice if they had more Senior Carers than they needed on a particular day.

<u>Not treated as a senior carer</u>

41. Having determined the reason for the claimant not being named on the roster board as a Senior Carer the Tribunal have gone on to consider fully the claimant's wider allegation that she was 'forced to carry out the duties of a Carer/Cleaner from April 2021 until February 2022 when she went off sick' **(Issue 2.2 a).**

42. In her statement she describes not being invited to Senior meetings, and constantly being 'put down' by FH and CM. She states that others told her that FH and CM had instructed them not to take instructions from her and to treat her 'like a Care Worker'. She asserts this was racially motivated because when she first started working there FH asked her which country she was from (IFL/4).

43. The claimant did not put forward any specific evidence of cleaning or caring duties that she had to carry out which were not part of her role as a Senior Carer.

44. JR's evidence was that everyone worked as team and in practice everyone carried out the same duties save that the Senior Carer administered medication.

45. The Tribunal found that the difference in practice between a Carer and a Senior Carer was the administering of medication which could only be done by a Senior Carer who had been signed off to administer medication.

46. The claimant was paid as a Senior Carer and there is no dispute that it was her job title. The other staff were aware that she was appointed as a Senior Carer. JR told the Tribunal that a 'Congratulations' notice to announce the new Senior Carers, herself and the claimant, was put up on the noticeboard in April 2021. The only respect in which the claimant was not treated as a Senior Carer was that she was not designated as such on the roster until she was able to administer medication in November 2021.

Mis spelt name

47. The claimant alleges that her name was intentionally misspelt on the training board for the duration of her employment by FH and CM, a former deputy manager (**Issue 2.2 b**).

48. Her name was abbreviated to Ibi Fawe (her first name and part of her surname) on a sheet which set out training requirements. Other double-barrelled surnames of a similar length were fully set out (39-43). FH said the sheet was not prepared by him but by administration staff. JR stated that the staff that prepared it were Jamie and Marta.

49. The sheet disclosed by the claimant is dated May 2021. The claimant has not disclosed evidence to show that later sheets abbreviated her name. She said in evidence that the training board was prepared quarterly but she has not disclosed later versions.

50. The claimant says she complained verbally about the abbreviation on several occasions to FH. FH left in August 2021. The Tribunal infers that either it stopped occurring after August 2021 or the claimant was not sufficiently concerned about it to raise it later. It is not recorded in the notes of the investigation in July 2021 (121-125) or her grievance submitted in April 2022 (337-341).

51. We find that the name was not misspelt, but it was abbreviated. The claimant did not find it sufficiently troubling to complain about it in the investigation meeting which took place shortly after it occurred or in her grievance in April 2022. The claimant did not suggest or put forward evidence that abbreviating her name was related to her race.

Trolley incident

52. The claimant alleges that on 16 July 2021 FH 'attacked her' with a trolley (**Issue 2.2 f**). In oral evidence to the Tribunal the claimant described herself trying to take the food trolley through the narrow office corridor to the kitchen. FH saw her and told her to go through the dining room. She wanted to carry on trying to take the trolley through the corridor and an argument developed.

She said FH went in front of her so that he was holding the other end of the trolley and he jerked it causing her knees to buckle. She said it made contact with her legs. When asked specifically by the Tribunal where the trolley made contact with her legs she first said it hit her right leg, then she said it hit her left leg, then she said it hit both legs.

53. We found the claimant's evidence about the incident and the injuries she alleges she sustained inconsistent both when comparing her oral evidence to the documents and when comparing her versions of events in the documents themselves.

54. Her story developed as follows in the documents:

> In a handwritten note which she was told to prepare as an incident report at the time (IFL/4) she wrote, 'he suddenly pulled the other end of the trolley from me... I noticed he was getting aggressive, I had to immediately leave the trolley so as not to hurt me' (48).
>
> On 20 July 2021 in an interview, she is reported as telling Managers ED and AC that FH pulled the trolley from her in an aggressive manner, and she said that she was going to see the doctor 'for her knee' after the incident with the trolley (125).
>
> At the grievance investigation a year later, on 12 July 2022, she is reported as saying, 'He tried to pull it from me, but I kept hold of it. When I didn't let go, he shoved it away from himself ... It didn't hit my knee, just the jerking and sudden movements made my knee buckle' (327).

55. To summarise; In the contemporaneous incident report, she said he pulled the trolley from her, and she immediately left the trolley so as not to get hurt (no mention was made of any contact to her legs or knees). A few days later in an interview she is reported as saying he pulled the trolley from her, and she was going to see the doctor 'for her knee'. A year later at the grievance investigation she is reported as saying he pulled and pushed it. It did not hit her knee but made her knee buckle. In oral evidence to the Tribunal she said he jerked the trolley which caused her knees to buckle and then it hit either her right or left leg or both.

56. FH accepts that there was an altercation about her taking the trolley down the narrow corridor when in his view it was easier to go through the dining room. He denies he pushed, pulled, shoved, jerked or even touched the trolley.

57. The claimant relied on photographs to evidence her injuries. These were not consistent with an injury to the knee. The Tribunal did not find them credible evidence that supported her version of events, and the inconsistency was sufficiently concerning for the Tribunal to infer that the claimant's version of events was deliberately exaggerated. One photo dated 12 February 2022 shows bruises on the left thigh (419). This is dated some 7 months after the incident and the Tribunal do not find it credible that any bruising would still be present and do not see how it can relate to the incident. Another undated photo shows a bruise in a different part of the thigh (44) and another shows a photo of a bruised foot (45).

58. We find that the claimant's first report of the incident is the most likely to be true. The trolley did not contact her leg or legs. FH denies pulling the trolley from her or even touching it. Based on the claimant's contemporaneous report, we accept he may have taken hold of the other end of the trolley, but we do not find he pushed or pulled it or used the force which the claimant alleges. The claimant has over time exaggerated and changed her story. The photographs that she has produced for the Tribunal and the changing nature of her story, even in the course of giving oral evidence, impact significantly on her credibility in respect of this incident.

59. The claimant did not put forward any evidence or suggestion that FH's actions were related to her race.

Lunch in bin

60. The claimant alleges that in August 2021 (**Issue 2.2 d)** or November 2021 (IFL/8) her lunch was put in the bin by Lynne, one of cleaners. The claimant's case is that Lynne knew it was her lunch. It was a takeaway that had been delivered for her. The claimant was involved with 'Pat' testing at the time. When the claimant discovered that it had been put in the bin she complained, and Lynne told her to get it out of the bin if she was really hungry (IFL/8).

61. The respondent's explanation for the lunch being put in the bin was that Covid protocols at the time required very thorough cleaning to be undertaken and everyone was provided with lunch on site because of Covid (FH/21). There was a policy in place that unlabelled food should be thrown in the bin (447).

62. The Tribunal find that in the circumstances of Covid where there was extra caution around cleaning the actions of the cleaner were not intended to offend. It was not reasonable for the claimant to find them hostile or humiliating as she would have understood the reason for the policy, particularly in a setting where there were vulnerable residents.

63. The claimant did not put forward any evidence or suggestion that the action was related to her race.

Sign out of building

64. The claimant complains that JR signed her out of building on 8 January 2022 when she was still in the building (**Issue 2.2 e**). The respondent accepts in the Grounds of Response that the sign out sheet for that day (406) shows that the claimant was signed out but asserts that it is not clear who signed her out. JR denies that it was her.

65. The Tribunal found that JR had a good recollection of the day and accepts her version of events. JR left early that day as her young daughter had Covid and she wanted to get back home to look after her. She only lived about 2 minutes away from work. On reaching home she received a call from the claimant. She did not know what the call was about; she 'just heard anger'. JR, feeling under pressure to look after her daughter and it being outside work time told the claimant to 'fuck off'. She immediately reported herself to the manager.

66. JR admits that she did sometimes sign people out if she was the last to leave the building and they had forgotten to sign out. She is certain she did not do

so that day because she remembers being the first to leave because of her daughter.

67. The claimant, on the other hand, had no evidence that it was JR that signed her out. She had just made an assumption. She was angry about being signed out rather than about the altercation that subsequently developed when she phoned JR.

68. In her statement the claimant says 'These people purely hated me because of my race' (IBL/10). We do not agree that her being signed out of the building was evidence of that. We note that alterations have been made to the sign out times of 2 other staff on the same date and to the claimant's arrival time. The action is not therefore indicative of the claimant being singled out for different treatment. We find that signing someone out of the building when it is known they have left is a proportionate action. If there was an emergency it is important that the emergency services have an accurate record.

Race

69. In respect of each allegation the Tribunal have considered whether there is any evidence of the conduct alleged being related to race.

70. The claimant's statement and oral evidence made very few specific allegations that the conduct was related to race.

71. We have referred to the allegation relating to the claimant not being treated as a Senior Carer at paragraph 42 above and in relation to her being signed out of the building at paragraph 68 above.

72. Aside from that the claimant refers in her statement to being 'treated so badly' because she was the only black Senior Care Worker in the day team (IBL/15). She says that 'the occurrence of each incident was designed to frustrate me out of my job, because of my ethnic background/ origin. Fellow colleagues of white background/ origin were not subject to the same type of conduct/ treatment I had faced' (IBL/15).

73. The claimant did not put forward any evidence (oral or documentary) to suggest that there was an intention to 'frustrate' her out of her job. She did not make that allegation when the Issues for the Tribunal to decide were discussed. The relevant issue for the Tribunal is whether the conduct related to her race. The Tribunal did not hear evidence to persuade them that the conduct was related to race in respect of any of the incidents.

Delay in issuing

74. The claims were not brought within the primary time limit under the EA 2010. All the alleged conduct occurred before 29 June 2022.

75. The Tribunal heard evidence on the claimant's reason for delay in bringing proceedings. Sadly, her brother died of Covid in October 2021. Another close relative was diagnosed with cancer in February 2022.

76. The claimant lodged a grievance in April 2022 (IFL/14) which was acknowledged on 24 May 2022 (342). It included matters which were investigated in July 2021, namely the trolley incident, not being treated as a Senior Carer, her designation as a carer on the roster board and that she was told that her qualifications would get her nowhere. It did not refer to the mis-spelling of her name on the training sheet or to being signed out of the building. It did refer to her lunch being thrown into the bin. The grievance outcome letter is dated 30 November 2022 (441-450). The claimant says that the delay in dealing with her grievance resulted in her submitting ET1 late (IFL/15)

77. In relation to potential prejudice to the respondent if time is to be extended, the Tribunal noted that Fairway closed down in July 2022 and that the witnesses no longer work there.

Law

Time limits

78. Section 123 (1) EA 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

79. A claimant may argue that time runs from the date of the last act of discrimination where she can prove 'either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs', Hendricks v The Commissioner of Police for the Metropolis [2003] ICR 530 CA at [48].

80. Anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim (s18A of the Employment Tribunals Act 1996). Time stops running for calculating the time limit during the certificate period.

81. The Tribunal can extend time for bringing a discrimination claim by such period as it thinks just and equitable (section 123(1)(b)). Tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule (Robertson v Bexley Community Centre [2003] EWCACiv536).

82. British Coal Corporation v Keeble [1997] IRLR 336 sets out a list of factors that can be useful to consider when deciding whether to exercise discretion to extend time. The factors are (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

83. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to

apply the Limitation Act checklist or any other check list under the discretion afforded tribunals by s123(1), although it was often useful to do so. The only requirement is not to leave a significant factor out of account (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account (paragraph 25). Nevertheless, it is important not to lose sight of the fact that the burden is on the claimant to persuade the tribunal to extend time.

84. The relative prejudice to the parties must always be considered in exercising judicial discretion. The Tribunal must consider whether it is possible to have a fair trial of the issues raised by the claimant and if a fair trial is possible despite the delay, it cannot be said that it would be unjust or inequitable to extend time (DPP v Marshall 1998 IRLR 494).

85. In Chief Constable of Lincolnshire v Caston [2010] IRLR 327 it was emphasised that the discretion to extend time in which to bring Tribunal proceedings has remained a question of fact and judgment for individual Tribunals, on a case-by-case basis.

86. The merits of an out-of- time complaint may be a factor to consider when the Tribunal is determining whether it is just and equitable to extend time Kumari v Greater Manchester NHS [2022] EAT 132.

Harassment by reason of race

87. The definition of harassment appears in section 26 EA 2010 as follows:

> '(1) A person (A) harasses another (B) if –
>
> a) A engages in unwanted conduct related 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...
>
> (4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.'

88. Section 26 EA 2010 requires the Tribunal to adopt a two step test; did the claimant generally perceive the conduct as having that effect (the subjective question) and in all the circumstances was that perception reasonable (the objective question)? (Pemberton v Inwood 2018 EWCA)

89. Under s. 9 EA 2010 race is a protected characteristic and includes colour, nationality and ethnic or national origins.

Burden of Proof

90. Section 36 EA 2010 provides for a shifting burden of proof as follows:

> '(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) 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.'

91. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

92. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Submissions

93. Written and oral submissions were received from the claimant's representative and oral submissions from Counsel for the respondent.

94. The claimant's representative argued that the conduct was continuing at the time the claimant left the respondent's employment. He submitted there was a constant failure to allow the claimant to discharge her duties.

95. Counsel for the respondent argued that the conduct ceased at the very latest in February 2022 when the claimant went off sick.

96. We do not set attempt to summarise their submissions here on the merits of the claim, but we have taken the points raised into account when reaching our conclusions.

Conclusions

Time Issue

97. The Tribunal first considered the issue of whether the claims were brought within the time limit set out in s.123 (1) EA 2010. The time limit runs from the date of each act of complaint. Anything that happened before 29 June 2022 was not brought within the primary time limit.

98. All of the conduct alleged in the List of Issues to be decided by the Tribunal occurred before 29 June 2022. Issues 2.2 (b), (d) and (f) occurred in 2021. Issue 2.2 (e) was the latest alleged incident and occurred on 8 January 2022. Although it is alleged that the conduct at 2.2 (a) continued until the claimant went off sick in February 2022 the Tribunal found that by November/ December 2021 the claimant was able to administer medication and fully participate in her role as Senior Carer.

99. The Tribunal decided that the conduct alleged did not constitute a continuing act of discrimination. The events are not sufficiently closely linked in time, the people involved or the type of act. Issue 2.2 (a) is an allegation against the management generally. Three of the allegations involve FH. FH left Fairway in August 2021. The other 2 alleged acts were by different people (JR and Lynne) and occurred 5 months apart.

100. The reason for the delay can be a relevant factor. Although the claimant had personal issues in late 2021 and early 2022, she did not explain why it took her until 8 November 2022 to present her claim.

101. The claimant was understandably annoyed by the delay in receiving her grievance outcome, but she could have issued her claim at any time from when she went off sick in February 2022. The grievance raised issues that had been investigated in 2021. The only new allegation that relates to the issues is that her lunch was thrown in the bin. It is not credible that she was waiting until the grievance outcome, in part because many of the issues had already been investigated and dated back to 2021 and in part because she presented her claim before she received the outcome of the grievance.

102. The most important factor for the Tribunal to take into account is the balance of prejudice between the parties of allowing or refusing to exercise discretion to extend time.

103. The Tribunal accepts the respondent's contention that the delay would affect the ability to have a fair trial of the issues. Fairway closed down in July 2022. The Tribunal find that would affect the ability of the respondent to access evidence and documents because all the staff working there had left more than three months before the claimant presented her claim. If the claimant had issued proceedings promptly Fairway would still have been open or only recently closed. Documents could have been located more easily and retained. Witness statements from all relevant staff could have been obtained.

104. In addition, when considering prejudice to each party we have considered the merits of the claimant's claim. As set out below we do not find in favour of the claimant on the merits of the claim. We therefore find that the claimant is not prejudiced by being unable to pursue her claim and the balance of prejudice lies in favour of the respondent.

<u>The Harassment claim</u>

105. In order to succeed in a claim under s.26 EA 2010 the claimant needs to establish facts from which the Tribunal can decide that the conduct

prescribed by the Act occurred. We have considered the provisions of s. 26 in respect of each allegation.

106. We accept that the conduct alleged was 'unwanted' conduct in respect of each allegation.

107. We did not find that the conduct alleged was related to the claimant's race in respect of any of the allegations.

108. In respect of each allegation at 2.2 of the List of Issues we made the following further relevant findings:

Issue (a)

109. The claimant was not forced to carry out the duties of a carer/cleaner. Her duties were the same as those of a Senior Carer and she was treated as a Senior Carer from November/ December 2021 onwards. The only respect in which she was not treated as a Senior Carer was when she first joined the respondent and had not been inducted to administer medication. While that was the case she was designated on the staff roster as a Carer.

110. That did not constitute treatment that had the purpose or effect of violating her dignity or creating an intimidating, hostile, humiliating or offensive environment. Everyone, including the claimant, understood the reason for the policy which was to safeguard residents.

Issue (b)

111. The claimant's name was not misspelt on the rota, but it was abbreviated by the administration staff. The reason for the abbreviation is not known as the staff did not give evidence but it is reasonable to infer, in the absence of evidence to the contrary, that it was not intended to undermine her. In any event the Tribunal find that the claimant was not significantly offended by it as she did not raise it at the investigation meeting in July 2021 or her grievance in April 2022 even though she had plenty of opportunity to do so.

Issue (c)

112. The claimant's evidence about what was said about her qualifications was not sufficiently clear for the Tribunal to make a finding that the conduct occurred. The Tribunal found that if any such comments were made it was likely to be in the context of comparing qualifications to experience. The claimant may have taken offence at this, but it was not reasonable for her to do so as it was a valid observation to make in the case of Fairway and the need for specific procedures.

Issue (d)

113. The cleaner put the claimant's lunch in the bin because she was following strict Covid cleaning procedures. The cleaner was justified in doing so and did not intend to offend. It was not reasonable for the claimant to take offence as she knew that there was a good reason for the cleaner's actions; to safeguard staff and vulnerable residents during Covid.

Issue (e)

114. The Tribunal found that the trolley incident did not occur as the claimant alleged. The claimant has changed and exaggerated her version of events over time.

Summary

115. All of the claimant's complaints have been brought out of time. Even if the complaints had been brought in time the Tribunal would not have upheld them. It is not just and equitable to extend time. Accordingly, the claimant's complaints are dismissed.

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Employment Judge **S. Matthews**

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Date 5 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
6 June 2024
.....

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FOR EMPLOYMENT TRIBUNALS

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