EMPLOYMENT TRIBUNALS

Claimant: **Mrs Ruth Carter**

Respondent: **Betsi Cadwaladr University Local Health Board**

Heard at: **Wrexham** **On: 13 May 2019**

Before: **Regional Employment Judge B J Clarke**

Representation:
Claimant: Mr Samuel Martins (legal representative)
Respondent: Mr Douglas Leach (counsel)

RESERVED JUDGMENT
(ON A PRELIMINARY POINT)

1. The following of the claimant's complaints (taken from the numbering in her combined Scott Schedule) are dismissed on the basis that they were presented to the tribunal outside the time limit set out at Section 123(1)(a) of the Equality Act 2010 and that it is not just and equitable to extend time:

    1.1 Discrimination arising from disability: allegations 1, 2, 3 & 4.

    1.2 Failure to make reasonable adjustments: allegations 8 & 9.

    1.3 Disability-related harassment: allegations 13, 14, 15, 15, 17, 18 & 19.

    1.4 Victimisation: allegations 21 & 22.

    These complaints are therefore dismissed.

2. The following complaints are not out of time:

    2.1 Discrimination arising from disability: allegations 5, 6 and 7.

2.2 Failure to make reasonable adjustments: allegations 10, 11 and 12.

2.3 Disability-related harassment: allegation 20.

2.4 Unfair (constructive) dismissal.

2.5 Wrongful dismissal (failure to pay notice).

3. A preliminary hearing by telephone will be listed to set case management directions in respect of the above complaints that will be continuing to a full hearing and to list that hearing for an appropriate duration.

REASONS

Background

1. The claimant is qualified as a cardiac technician and a clinical psychologist. She started worked for the respondent health board on 5 June 1991. She has Crohn's disease, for which she had an abdominal operation in late 2012. Her case, which I summarise below from the lengthy narrative attached to her first ET1 claim form, is that, when she returned to work from that operation in January 2013, there began what she calls a "long-running battle" with her line manager in the cardiology department (known to the parties as "VE"). The claimant believed VE's approach to her condition ranged from indifference to hostility. She has described a long process by which her relationship with her broke down as "death by a thousand cuts".

2. The narrative the claimant has put forward (and which contains only untested allegations at present) consists in large part of 2-3 years of disputes with VE about matters such as provision of a uniform, lack of study time, blocked career progression, favouritism, reduced access to training, exclusion from work rosters and many other alleged acts of harassment; some are described in detail and others referred to in only general terms. I emphasise that I am making no findings of fact about such matters; I am simply trying, at this stage, to summarise the claimant's allegations. It appears that she lodged several internal grievances during this time; she refers to them in the plural and mentions an internal grievance process she commenced in October 2013. Most of the claimant's complaints concern events in 2013 and 2014, although there are some references to events in 2015 and 2016.

3. The respondent attempted to manage the situation without apparent success; this culminated in efforts to set up a mediation session between the claimant and VE in June 2016. In the end, the claimant declined to participate. It is important to note that the last occasion on which the claimant had direct personal contact with VE was in June 2016 (at which time there was also a

strained telephone call between VE and the claimant's husband). The claimant then invoked Stage 2 of the internal grievance/dignity at work machinery. From this point on, the respondent sought to keep the claimant and VE apart. This was mostly successful, although the claimant was upset by an email that she received from VE in January 2017; she had wanted there to be no contact between them.

4. The claimant activated the respondent's internal grievance procedure on 26 April 2017. She supplemented this with a "comprehensive grievance letter" to the respondent on 8 September 2017. Although I have not seen these grievances, it appears that they contained a full account of events from 2013 to 2016, and likely of similar scope to the account given in her claim to the tribunal. There is a significant gap in time between the claimant's last material contact with VE in June 2016 and the sending of these grievances, which is germane to the issue I must consider. The main target of these grievances was VE, as it had been in her 2013 grievance. The claimant was signed off work from 13 September 2017 due to work-related stress; she did not return to work thereafter until her resignation about seven months later.

5. The claimant received a response to her grievance on 18 January 2018. It had been rejected. She was given 14 days to appeal, which she considered was too short a period and one that consequently discriminated against disabled people; she then became a self-described whistleblower about such discrimination in further grievance letters sent on 25 and 26 January 2018.

6. By this time, the respondent had commenced an absence management process; the claimant had been off sick for several months. This process overlapped with her appeal against the rejection of her grievance (which she presented on 27 February 2018), her fresh grievances on 25 and 26 January 2018 and further grievance letters dated 27 February 2018 and 9 and 26 March 2018 (all of which, it seems, were rejected on 27 March 2018). The claimant resigned from her employment on 11 April 2018. She has identified the last straw as a letter she received from a manager ("LT"), which she considered failed to address the reasonable adjustments she required in order to participate in the absence management process.

7. These matters are set out in two separate but consolidated claims before the tribunal:

    7.1 Case number 1600551/2018. The narrative concerning the dispute is mostly contained within a 29-page document attached to claimant's first ET1 claim form, which is the main source of my summary above. She presented that claim to the tribunal on 14 April 2018 (following a period of Acas early conciliation which lasted one day: 14 March 2018). She named the health board as a respondent along with five of its employees, although the health board is now confirmed as the only respondent. The claimant initially relied on both Crohn's disease and

takotsubo syndrome as conditions that rendered her a disabled person within the meaning of Section 6 of the Equality Act 2010 (EqA). She now relies solely on Crohn's disease alone, and the respondent now accepts that she is a disabled person by reason of that condition.

7.2 Case number 1600986/2018. The second ET1 claim form brought the narrative to a close by covering the claimant's resignation on 11 April 2018 and her associated complaints of discrimination arising from the termination of her employment. The second claim was presented to the tribunal on 6 July 2018 (following a period of Acas early conciliation which lasted from 23 May 2018 to 7 June 2018). The complaints of protected disclosure detriment and indirect disability discrimination have since been withdrawn.

8. The respondent provided its defence to both claims in combined grounds of resistance dated 31 July 2018. It resisted the complaints, sought further and better particulars of those complaints, and suggested that the more historic aspects were time-barred.

Previous preliminary hearings

9. There was a preliminary hearing before Employment Judge Ward on 16 August 2018. The judge issued a judgment dismissing the withdrawn complaints (protected disclosure detriments and indirect disability discrimination) and directed the claimant to produce a Scott Schedule by no later than 12 September 2018, the purpose of which was to clarify the complaints she was bringing.

10. This was done through the provision of four separate schedules dealing with the EqA complaints of (a) discrimination arising from disability, (b) failure to make reasonable adjustments, (c) disability-related harassment and (d) victimisation. In an accompanying email, the claimant's representative identified the respondent's alleged repudiatory conduct on which the claimant relied as entitling her to resign and treat herself as constructively dismissed.

11. The next preliminary hearing took place before Employment Judge Howden-Evans on 21 December 2018. The judge noted that the only remaining respondent was now the health board. By this time, the four schedules had helpfully been combined into a single document which, while using the four causes of action mentioned above as headings, identified in a more accessible fashion 22 discrete EqA allegations brought before the tribunal for adjudication. The judge directed the respondent to confirm which of these 22 discrete allegations it challenged as time-barred. (The judge also issued directions in relation to the claimant's disability, which are no longer relevant.) The judge then listed a one-day hearing to determine two preliminary issues.

12. Only one of those preliminary issues remains live. It comprises two questions I must answer: (1) Were any of the claimant's allegations of discrimination, as identified in the Scott Schedule, presented outside the time limit set out at Section 123 of the Equality Act 2010? (2) If so, would it be just and equitable to extend time in respect of those allegations?

Recap: the complaints before the tribunal

13. Given the changing scope of the claim, it may assist at this stage to restate the claimant's complaints against the respondent.

14. The EqA complaints, based solely on Crohn's disease, are as follows:

    14.1 Discrimination arising from disability (Section 15 EqA);

    14.2 Failure to make reasonable adjustments (Sections 20 and 21 EqA);

    14.3 Disability-related harassment (Section 26 EqA);

    14.4 Victimisation (Section 27 EqA).

    These complaints relate to detriments during her employment (from 2013 to 2018) and to her resignation.

15. The complaint of constructive dismissal is presented in three ways. It is said to have been:

    15.1 Unfair (Sections 95(1)(c) and 98 of the Employment Rights Act 1996);

    15.2 Wrongful (which is to say, it is a claim for notice pay); and

    15.3 Discriminatory (Sections 39(2)(c), 39(4)(c) and 39(7)(b) EqA).

    The complaint of unfair constructive dismissal is predicated on an alleged cumulative breach of the implied term of mutual trust and confidence, which in turn relies on a series of alleged acts and failures.

Observations on the combined Scott Schedule

16. As noted above, the combined Scott Schedule contains 22 separate complaints under the headings of four separate causes of action. Rather than refer respectively to alleged unfavourable treatment, alleged failure to adjust, alleged acts of harassment and alleges acts of victimisation, I will, for the sake of convenience, describe them simply as "allegations". A manuscript amendment has placed the four groups of detriments in numerical order (1-22), which I adopt.

17. The Schedule is in four parts:

    17.1 The first part concerns seven allegations of alleged discrimination arising from disability (allegations 1-7). Notably, allegations 1-3 are complaints arising from 2013 and 2014 and which are aimed at VE. Allegation 4 concerns a return to work in 2016 relating to an investigation about those complaints. That sets them apart from allegations 5-7: these concern the allegedly defective way in which, on 18 January 2018, the respondent rejected her grievances from April and September 2017 and the conduct of the absence management process that prompted her to resign in April 2018. Those later allegations also concern entirely different managers, such as LT.

    17.2 The second part concerns the alleged failures to make reasonable adjustments (allegations 8-12). Allegations 8 and 9 are similarly aimed at events involving VE in 2013 and 2014. In contrast, allegations 10 and 11 concern her complaint about the short period of time she was given to appeal the rejection of her grievance on 18 January 2018 and the failure to adjust aspects of the absence management process. I think allegation 12 falls in this category too. Again, the later allegations involve different managers.

    17.3 The third part concerns the alleged disability-related harassment (13-20). Allegations 13-18 all relate to the events between 2013 and 2015 involving VE. Allegation 19 is a complaint that VE ignored the claimant in 2016. By contrast, allegation 20 is a complaint that the respondent's delay in responding to her grievances from April 2017 and September 2017 (which it rejected on 18 January 2018) was an act of harassment, again involving different managers.

    17.4 The fourth part concerns the alleged victimisation (detriments 21-22). Allegations 21 and 22 concerns events in 2013 and 2015 involving VE.

Evidence at this preliminary hearing

18. To address the time limit point, the parties attended the preliminary hearing with a bundle of 270 pages. Each party had also prepared written submissions. The claimant had, in compliance with the direction of Employment Judge Howden-Evans, provided a witness statement in relation to the matters to be determined at this preliminary hearing.

19. The claimant's witness statement was brief. On the issue of why she brought her claims when she did, the statement comprised, in total, four paragraphs. I set them out in full below:

The reason/s for the delay in submitting these claims was due to my continual poor health, I was and still am very unsettled physically and mentally in my day to day activities.

Every time I reported VE to Senior Managers I was told they would look into the matter. However I would wait for their response and the Senior Managers moved to other posts. I would then have to repeat the process when a new manager took post. This was one of the main reasons for the delay. I reported VE to three managers and the matter was never resolved.

I find it hard to concentrate on matters that will cause me stress hence when I realised that I could no longer bear the treatment at work, I drafted a grievance in October 2013 and May 2015 and these were factors that weighed on my mind when I resigned on 11 April 2018.

I obtained professional representation in April 2018.

20. In response to a short cross-examination by Mr Leach, the claimant confirmed the following:

    20.1 That she had the assistance of trade union representation throughout the time of her concerns at work, and access to advice through them;

    20.2 That being off sick did not act as an impediment to her presenting a claim to the tribunal; and

    20.3 The reason she did not bring a claim sooner is because she thought her managers were going to "do something about it" at the time.

Findings of fact

21. Based on the claimant's evidence, therefore, I find that she had access to trade union advice throughout this unhappy phase of her employment from 2013 to 2017 and that she did not bring a claim to the tribunal sooner about VE's actions for two reasons: first, as she confirms in her statement, she had poor health and she was unsettled (although, as she accepts, not such as to impede the presentation of a tribunal claim); and, secondly, because she had faith her managers would resolve her concerns. She only acted swiftly to present a claim once she gained professional representation in April 2018.

The relevant law

22. A discrimination claim must normally be submitted to an employment tribunal before the end of "the period of three months starting with the date of the act to which the complaint relates" (Section 123(1) EqA). As we have seen, some of the alleged acts in this case date back to 2013. However, acts occurring more than three months before the claim is brought may still form the basis

of the claim if they are part of "conduct extending over a period", and the claim is brought within three months of the end of that period (Section 123(3) EqA). This is the principal argument relied upon by the claimant in this case.

23. The test for a "continuing act" is whether the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (*Hendricks v. Metropolitan Police Commissioner* [2002] EWCA Civ 1686). The following observations can be made:

    23.1 There may be a continuing act where the employer operates a discriminatory policy, rule, regime or practice (*Barclays Bank plc v. Kapur and others* [1992] ICR 208).

    23.2 It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected; see *Lyfar v. Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548, where a tribunal legitimately grouped 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time.

    23.3 A refusal of a request, where it is repeated over time, may constitute a continuing act (*Cast v. Croydon College* [1998] IRLR 318).

    23.4 In *Hale v. Brighton and Sussex University Hospitals NHS Trust* (EAT/ 0342/17), the EAT held that the NHS Trust's decision to instigate disciplinary proceedings against Mr Hale created a state of affairs that would continue until the conclusion of the disciplinary process. It was not a one-off act with continuing consequences. The EAT noted that this outcome avoided a multiplicity of claims since if an employee were not allowed to rely on an ongoing state of affairs in such circumstances, time would begin to run as soon as each step was taken under a disciplinary procedure.

24. A tribunal can extend time for bringing a discrimination claim by such period as it thinks just and equitable (Section 123(1)(b) EqA). It should not extend time unless the claimant convinces it that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule (*Bexley Community Centre (t/a Leisure Link) v. Robertson* [2003] EWCA Civ 576).

25. This does not mean, however, that a claimant must put forward a good reason for their delay, or that time cannot be extended in the absence of an explanation for the delay from the claimant (see *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640).

26. The EAT, in both *British Coal Corporation v Keeble* [1997] IRLR 336 and *DPP v Marshall* [1998] IRLR 494, held that the tribunal's discretion in these

circumstances is as wide as that of the civil courts under Section 33 of the Limitation Act 1980. This requires courts to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- 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 they knew of the possibility of taking action; and
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

27. While this may serve as a useful checklist, there is no legal obligation on the tribunal to go through the list, providing that no significant factor is left out (*London Borough of Southwark v. Afolabi* [2003] IRLR 220 CA).

Submissions

28. Acting for the claimant, Mr Martins' skeleton argument provided a helpful chronology. His point was essentially that this was a case of the respondent's continuing "failure to do something", which started in 2013 and culminated with the rejection on the claimant's grievance in January 2018, which was therefore the point at which time began to run. In his supplementary oral submissions, he said that this case resembled *Abertawe Bro Morgannwg University Local Health Board v. Morgan* [2018] EWCA Civ 640.

29. He also referred to *Apelogun-Gabriels v. Lambeth London Borough Council* [2002] ICR 713 CA. In that case, the Court of Appeal held that the correct approach to whether it is just and equitable to extend the time limit, where a claimant has been using an internal procedure, was laid down in *Robinson v. Post Office* [2000] IRLR 804 EAT. In short, there is no general principle that it will be just and equitable to extend time where the claimant was seeking redress through the employer's grievance procedure before embarking on legal proceedings. The general principle is that a delay caused by a claimant awaiting completion of an internal procedure may justify the extension of the time limit, but it is only one factor to be considered.

30. Mr Leach confirmed that the respondent accepted that the claimant's claim was in time insofar as six detriments set out in the combined Scott Schedule were concerned (5, 6, 7, 10, 11 and 20). The respondent's challenge was instead to 16 of the detriments in the combined Scott Schedule (1, 2, 3, 4, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22). His contention was that they could and should be severed because they are thematically different, historic and involved different managers. I have adopted this distinction, although a

re-reading of the Scott Schedule has persuaded me that allegation 12 deserves to be in the first category.

Analysis

31. I reject the claimant's submission that, in this case, there has been a continuing state of affairs between 2013 and 2018, of the type examined in *Hendricks*, such that time for presenting a discrimination complaint did not begin to run until the rejection of the claimant's grievance on 18 January 2018. My reasoning is as follows:

    31.1 Mr Martins' suggestion that the nexus was the respondent's continuing "failure to do something" is an over-simplification and insufficient to create the necessary linkage. Even on the claimant's own account, the respondent suggested mediation between her and VE; and, after these efforts failed in June 2016, it tried to keep them apart. It was not simply doing nothing.

    31.2 Furthermore, an examination of the claimant's account in her first ET1 claim form and the contents of her combined Scott Schedule also reveal that most of her concerns about VE arose in 2013 (allegations 1, 3, 8, 14 and 15) and 2014 (allegations 2, 3, 9, 13, 16, 17), with more occasional incidents in 2015 (allegations 18 and 22) and 2016 (allegations 4 and 19). Allegation 19, for example, is a complaint that VE ignored the claimant at the very same time that, on her own account, the claimant was declining to meet with her for mediation purposes. As noted above, there is then a significant gap in time between the claimant's last material contact with VE in June 2016 and her decision to activate the grievance procedure in April and September 2017.

    31.3 I agree with Mr Leach that the claimant's narrative falls into three different parts:

        (a) The first part arises from the claimant's concerns about VE and her previous attempts to address those through earlier grievances.

        (b) The second part arises from the respondent's handling of the claimant's decision to revisit her concerns with further grievances in April 2017 and September 2017 and the respondent's rejection of those grievances in January 2018 (and its rejection shortly afterwards of her fresh grievances and appeals).

        (c) The third part arises from the respondent's conduct of the absence management process.

31.4 There is no dispute that the claimant's complaints are within time insofar as they challenge the January 2018 decision to reject her grievance (the second part) and the conduct of the absence management process which ultimately led her, as the final straw, to resign (the third part). For present purposes, the important point is that the second and third parts involve different managers to the first part. I understand that VE has remained employed by the respondent and there is no allegation that she played any role in the later issues from 2017 onwards. Indeed, despite initially naming five individuals as respondents to her first ET1 claim form, on the basis that they were involved in the mismanagement of her grievance and the conduct of the absence management process, the claimant expressly disavowed on the face of her claim bringing any complaint against VE, on the basis "there has not been any 'last act' by VE which has occurred within the last three months".

32. Consequently, adopting an approach like that taken in the *Lyfar* case, by which allegations are grouped, I have concluded that all allegations relating to the first part of the claimant's complaints, the focus of which is VE, are not part of a "continuing state of affairs" connecting them with the second and third parts discussed above. Her claim in that respect is time-barred, unless it can be saved by the "just and equitable" principle at Section 123(1)(b) EqA.

33. In that regard, I have concluded that it is not just and equitable to extend time. Looking at the *Keeble* factors, these points have particularly influenced my analysis:

33.1 The delay is lengthy. More than half of the claimant's allegations concern events that occurred between four and five years before the presentation of her claims to the tribunal. Many of them had been subjected to earlier concluded grievances or attempts at mediation-led resolution; there is no evidence that the organisational response was to ignore her.

33.2 The cogency of the evidence is very likely to be affected by the delay. In particular, I do not consider it fair to expect VE (who has not lived with the dispute to the same extent as the claimant) to give cogent evidence to the tribunal on matters that, from the vantage point of today's date, occurred between five and six years ago.

33.3 There is no suggestion that the respondent has failed to co-operate with any requests by the claimant for information relevant to her right to pursue a tribunal claim, save for criticisms of delay in responding to her grievances in April and September 2017.

33.4 The claimant had access to trade union advice throughout. She also accepted that her poor health and feelings of being unsettled did not

act as an impediment to presenting a claim sooner. This does not provide sufficient excuse for the delay, one factor that is relevant to the overall assessment.

Conclusion

34. Allegations 1, 2, 3, 4, 8, 9, 13, 14, 15, 15, 17, 18, 19 21 and 22 are dismissed on the basis that they are time-barred. While the claimant's historic allegations against VE provide important context to understanding her grievances in April and September 2017, and she may refer to them in her witness statement by way of background, they will not constitute freestanding complaints of discrimination, harassment or victimisation before the tribunal.

35. By contrast, the following allegations are not time-barred and will proceed to a full hearing: 5, 6, 7, 10, 11, 12 and 20. These relate to the respondent's decision in January 2018 to reject her grievance, the conduct of the absence management process and the circumstances in which she came to resign. In addition, the claimant will continue to pursue her contention that her resignation was a constructive dismissal that was both unfair and wrongful.

36. Although it was not one of the issues for determination at this preliminary hearing, Mr Leach made a related contention about the complaint of unfair constructive dismissal. He argued that, if there is no reasonably arguable case of a single continuing act covering all events between 2013 and 2018, it must follow that there is no reasonably arguable case of a continuing or accumulative breach of the implied term of mutual trust and confidence between 2013 and 2018. I have some sympathy with that contention, but it has not been the subject of a full argument and it is a matter, I think, best addressed at the full merits hearing.

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Regional Employment Judge B J Clarke
Dated: 5 August 2019

JUDGMENT SENT TO THE PARTIES ON
6 August 2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS