EMPLOYMENT TRIBUNALS

Claimant: Ms Rodgers

Respondent: Ministry of Defence

Heard at: Leeds (by video) **On:** 8 March 2022

Before: Employment Judge Knowles

Representation
Claimant: In person
Respondent: Mr T Wilkinson, Counsel

RESERVED JUDGMENT UPON A RULE 37 STRIKING OUT APPLICATION

The Judgment of the Tribunal is that the Claimant's claims of failure to make reasonable adjustments under Sections 20 and 21 of the Equality Act 2010 which are set out in paragraphs 9 to 11 of her particulars of claim have no reasonable prospect of success and are struck out because the Claimant has no reasonably arguable case that those claims were brought in time or that time should be extended under just and equitable principles.

RESERVED REASONS

Issues

1. The Respondent made an application to strike out part of the Claimant's claims in their response to the claim which was submitted 1 February 2022.

2. The application is made in paragraph 12 of their grounds of resistance.

3. The grounds for the application are that the allegations of failure to make reasonable adjustments relate to various physical features of the Respondent's premises during the period from the Claimant's starting work at Leconfield on 3 December 2019. to 18 March 2020. After that date, the Claimant began Special Leave and was at home, not attending the office environment. The nature of the allegations differs considerably from the later allegations and they are not linked.

The Respondent will aver that there is no act continuing over a period nor has the Claimant put forward any reason why it would be just and equitable to extend time.

4. That is the application before me today.

Procedure

5. This hearing was an open preliminary hearing undertaken through HMCTS's Cloud Video Platform.

6. There were some issues at the beginning of the hearing concerning the Claimant's settings for video use. These were resolved before the hearing proceeded. No further performance issues were noted in respect of the platform for the hearing.

7. I had before me the pleadings in this matter together with another claim of unfair dismissal brought by the Claimant under case number 1800233/2022. The second claim is not relevant to this application.

8. The Respondent produced a written skeleton argument together case law authorities.

9. I had case management agenda documents prepared by both parties, including two from the Claimant (one for each claim).

10. I noted that the Claimant had engaged with the application to strike out in her agenda form and had stated that she was not seeking a remedy to the exact reasonable adjustments of the building and workplace environmental health and safety issues.

11. The Respondent enquired as to whether or not that amounted to an abandonment of the claim which are the subject of today's application.

12. We spent considerable time today discussing the issue of abandonment given that the Claimant was suggesting only that she was not seeking remedy but was as the same time suggesting that she may wish the matters to be considered. Her comments read to me as if she was stating that she was no longer seeking any recommendations that adjustments were made to the workplace because she no longer worked there. I noted that part of the Claimant's stated reservation about continuing with this part of her claim was that there are other more important aspects to her case. The Claimant made representations suggesting that there was "no point" pursuing this part of her claim.

13. The matter was then adjourned for 15 minutes to give the Claimant time to consider whether or not she was telling me that she wished to withdraw or continue with the claim, given that there are remedies other than recommendations available, and given that she appeared to me to not fully understand the implications of withdrawal. After that, the Claimant confirmed that she wished to continue with this part of her claim and we proceeded to consider the Respondent's application.

14. I heard verbal submissions from both parties and considered them in the light of the documents before me.

15. I took an inquisitorial approach to the Claimant's submissions given that she is a litigant in person, to put the parties on an equal footing, and to ensure that I understood basic matters such as the date asserted facts took place upon in the relevant paragraphs of her particulars of claim. I took care not to engage in her application.

16. Due to the time taken to attend to the Claimant's video settings, I had insufficient time to deliberate and determine the application so reserved my judgment.

The Claimant's claim of reasonable adjustments in paragraphs 9-11

17. The Claimant began early conciliation 15 December 2021 which ended on 21 December 2021. She issued her claim to the Tribunal on 23 December 2021.

18. It is important to note that paragraphs 9-11 in the Claimant's particulars of complaint are not her only claim of failure to make reasonable adjustments. There is another claim relating to placing her on special paid leave on 18 March 2020 at the beginning of the pandemic and not providing her with the means to work from home.

19. Nor are these her only claims, the Claimant form intimating other claims including sexual orientation discrimination, age discrimination and victimisation. It is unclear whether or not the claim includes a whistleblowing claim although the claimant has ticked the box asking for the relevant regulator to be informed. These are all matters that will require further case management in future. As mentioned earlier, the claimant has brought a subsequent claim of unfair dismissal.

20. The Claimant's particulars of claim state the following:

> *"9. That the MOD have failed to provide a safe working environment for me and to fully comply with reasonable adjustment requests. On arrival in post at Defence School of Transport, Leconfield, East Yorkshire (DST) HQ Training Delivery from MOD Lyneham, Wiltshire I struggled with the environment of an old 1930's airfield building that seemed not fit for an office workplace human habitation with warped window frames that did not close; mould and peeling paint on the walls; drafts from open doors and windows on all four sides of the building; overhead vents through the ceilings that emerged in every office and carried smells, dust and debris (and there is currently a new buildings project at DST); pink ink powder from a broken printer that had apparently according to Rebecca Burrows been like that for at least a year prior to my arrival and had not been attended to by the management staff of Rebecca Burrows and Simon Watkins.*
>
> *10. All of this affected my asthma. and caused fear and stress. I was told by Rebecca Burrows there was no contract to replace the printer; and that it was not in the cleaners' contract to clean the office, they only vacuumed carpets and emptied bins. The solution Simon Watkins and Rebecca Burrows came up with was to paint the office. therefore the painters would have to clean it, and this caused me alarm and stress as paint fumes are a major trigger for my asthma. Being newly arrived in post and looking forward to this new job. I was now sent home on Special Paid Leave, and on return was moved about from office to office, which caused disruption, stress, anxiety. not only for me but for other staff. I asked for a workplace*

Occupational Health assessment of the building and environment and this was refused. I was then harassed and pressured about myself attend an OH assessment, which made me feel that I was being blamed, rather than the environment and DST taking responsibility for a building that was not fit for purpose as a workplace environment or for an employee suffering from asthma. I consulted with MOD Reasonable Adjustments team for advice, and I also asked DST to be moved elsewhere; I asked Rebecca Burrows to agree to my Reasonable Adjustments passports which has been in place for a number years and implemented by other MOD line managers at other MOD establishments without question and being supportive with empathy and compassion, and she refused to do so. I asked Rebecca Burrows to help me move a table covered in pink printer-ink powder in the stationary storeroom, where I daily needed to go as part of my job role tasks, and she refused. staring at her computer screen she said someone would help me in a few weeks' time, meaning the new clerk who was being processed. This was January. in any event, the new clerk did not start until about May. Rebecca Burrows forced me to attend an OH consultation, she did not seem to believe me about my established reasonable adjustments and medical conditions that had been cleared and recorded by the MOD. the DBS, recorded on HRMS as a Reasonable Adjustments Passport, the OH that I had had a consultation with just a year previously. and recorded again on renewal of my Security Check clearance in 2017 when my GP provided the MOD Vetting full disclosure of my medical conditions and these were accepted by the MOD and my security clearance renewed for another ten years to 2027. I am not obliged to disclose to a line manager my medical conditions, these are personal and private and that information is held on record by the MOD, I would assume to prevent managers and staff being prejudiced and discriminating about disability. Which is exactly what happened when Rebecca Burrows disclosed to Simon Watkins my medical conditions, and distributed this to other staff in the workplace.

11. I reported my concerns about Health & Safety and the affect on my asthma to the Commandant of DST, Chris Henson, and my concerns about Rebecca Burrows, how she had spoken to me since I arrived in post, and her refusal to assist me. He acted swiftly. The contaminated table was removed from the stationary storeroom the next day. However, all hell broke loose and Rebecca Burrows turned on me and things got nasty. A meeting was held with Nick White to resolve matters and he suggested mediation, which Rebecca Burrows wanted to organise and to appoint her own mediators from the Defence Business Service the HR branch of the MOD (038) for whom she had worked and had close relationships with, I requested that mediators should be independent and impartial and not from the DES and Nick White said to her that if I was not happy with DBS mediators then it was not fair and that both parties had to be happy with mediators and attending mediation, which left us at a stalemate because Rebecca Burrows would not agree to my request. I named Nick White as a witness, but he declined to give evidence, and claimed he had left the MOD and Armed Forces although he was later serving elsewhere during the complaints process. Later Rebecca Burrows invited me to a meeting and this was arranged with the onsite ED&I and I was accompanied by Gary Jones, which I thought was to talk things over amicably and sort things out with a view to getting on with a working relationship moving forwards, however at the meeting Rebecca Burrows read from a piece of paper what she thought of me, that she was OCD, I cannot recall after nearly two years

all that she said but I was shocked and hurt, and when I tried to speak and to discuss the OH issues that had caused the conflict, she refused to do so, got up and walked out of the room in a highly upset and agitated manner that astonished and scared me. Gary Jones said to me that he had never seen a line manager behave in that way. I called Gary Jones as a witness in my Formal Complaint of Bullying & Harassment FC 709692 but he declined to give evidence."

21. The remainder of the claim form continues in a narrative fashion to raise other discreet issues.

Submissions

22. The Respondent submitted the following:

a. There is no real prospect of the claimant establishing that this claim ought to continue despite the time limit issues. In paragraphs 9-11 the contents refer to working environment she left in March 2020. The latest point in time is March 2020. If we look at para 9-11, the issues date back even beyond that. The narrative is that RB was replaced in February 2020. Some aspects date before February. In para 10, there is a reference to January, which must be 2020.

b. If time started to run in March, the Claimant had until June 2020 to bring a claim.

c. On 15 December 2021 the Claimant made her early conciliation notification to ACAS. There has been an 18 months delay in bringing this claim.

d. See the case of ***Hendricks***. The Respondent submits paragraphs 9-11 are specifically in relation to a safe working environment. There is no reference to a continuing state of affairs. Even if there is, and are personnel present throughout, considering the nature of the claim the physical aspect ceased March 2020 when the Claimant was sent home.

e. It is not apparent that the Claimant is submitted there was a continuing state of affairs. There is no reasonable prospect of satisfying a Tribunal that this was a continuing act.

f. There is no evidence from the Claimant on whether it would be just and equitable to extend time. She has not suggested that it would be just and equitable. See para 6 of the skeleton argument concerning Section 33 of the Limitation Act 1980 which is a helpful guide, but is not intended to be a checklist.

g. The claim is at least 18 months late. This is as significant length of delay as we come across.

h. There will be substantial prejudice to the Respondent, dealing with evidence concerning a working environment dating 2 years ago now. Maybe it has changed. Regardless, the likely cogency of evidence is vastly and significantly affected.

i. It is a matter for tribunal to consider the balance of hardship. It has to be a factor she has significant other claims which she can and is able to pursue.

j. There will always be an element of prejudice to a Claimant not being able to proceed, but this Claimant has a number of claims she is able to pursue.

k. The Claimant has provided no evidence why the claim could not have been brought any earlier.

l. The Claimant has brought other claims in the past as we understand it. There is nothing to suggest she did not know or could not ascertain the time limit.

m. The Respondent accepts that tribunals are often reluctant to strike out a claim, but this is clear cut. The claims are discreet. The issue is not repeated later in the claim.

n. There is no real prospect of C establishing that these claims ought to be found to be in time or that it is J&E to extend time.

23. The Respondent's skeleton argument is brief and all material points were covered in verbal submissions. I read the skeleton argument prior to the hearing.

24. The Claimant confirmed that she had received a copy of the Respondent's skeleton argument before today's hearing.

25. The Claimant submitted the following points which I sent back over with her in order that she could add dates to the points that she was making. The following includes the dates added through that process:

a. The reasonable adjustment was an ongoing issue into March 2020. I had asked for a workplace assessment so OH could come in. The Respondent refused. I was still in contact with the reasonable adjustments team until 27 Feb 2020. There were ongoing discussions about OH assessment in Leeds in 2020.

b. The main reason that adjustments were put on hold is coronavirus. We were instructed by the Respondent to go home, and stay at home, on 18 March 2020.

c. We couldn't anticipate how long it would take. I had no idea I would be at home for such a long time. We all thought it would be a few weeks.

d. The adjustments weren't resolved then COVID shut everything down. I wasn't enabled to WFH, I had no contact with anyone, a new line manager was in place, and we did not discuss it. The focus was keeping defence going, everything else put on the back burner.

e. I didn't leave the office, I was put into protective measures, special paid leave to December 2020. We had that ongoing.

f. There was no discussion about the building or resolving those issues. Because of all of that, I was treated differently, which impacted negatively on me. I wasn't given a laptop, others were, and they had an attitude towards me because of reporting these issues to the commandant of the school in February 2020. He did act to sort things out. He removed the table the next day, then we were thrown into COVID and it was put on the back burner. As someone who reported failings this contributed to how I was treated being at home.

g. In 2020 and 2021 there was no expectation to return to the office. The Respondent was trying to protect me. There are 1,000 people, 600 soldiers, 300 military staff, plus civilians at the school.

h. We didn't get to a safe position until December 2021. I live next door, nothing had changed.

i. The main factors were that COVID put everything on a back burner. I was ill.

j. My mother diagnosed with cancer in March.

k. In 2021 I worked from home. I created and designed ways, templates and formats so we could work online. There were a lot of cases of COVID and other illnesses. We rolled it out with the Royal Marines. We didn't get to the point of me going back until December 2021 I was working from home from January to December 2021.

26. I reminded the Claimant that the Respondent was stating that she had not suggested any continuing act and note that everything she had told me appeared to involve a decision which was reached at a point in time rather than something that was a continuing state of affairs.

27. The Claimant made additional comments about conversations with her new line manager continuing, but again referred to him stating in February that there was nothing they could do, she could not be moved, because all of the other buildings were the same.

28. I asked the Claimant what she believed would happen next and she stated that she had been to an initial occupational health assessment in January 2020 and she expected to have a face to face assessment but nothing ever came of it because the assessors ceased face to face consultations during the pandemic.

29. The Claimant's submission was effectively that the matters she has mentioned were not the end of the story and were put on hold and therefore there was a continuing state of affairs.

30. The Claimant submitted that she had never asked once she went home in March 2020 and that the issue was never discussed before her dismissal in January 2022. She stated that she expected it to be picked up when she returned to work, which but for the dismissal was expected to take place in January 2022.

31. I asked the Claimant whether or not it was correct that she had raised previous claims in the Tribunal and she confirmed that she had raised a claim but withdrew it during the proceedings.

The Law

32. Section 123 of the Equality Act 2010 contains the following provisions concerning time limits:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

33. In ***Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170 CA*** the Court of Appeal considered the application of time limits in cases involving alleged failures to make a reasonable adjustment. The Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point (see S.123(4) EqA). The first of these, which is when the person does an act inconsistent with doing the omitted act, is fairly self-explanatory. The second option, however, requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time. Both Lord Justice Lloyd and Lord Justice Sedley acknowledged that imposing an artificial date from which time starts to run

is not entirely satisfactory, but they pointed out that the uncertainty and even injustice that may be caused could be, to a certain extent, alleviated by the tribunal's discretion to extend the time limit where it is just and equitable to do so. Sedley LJ added that 'claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission'.

34. In the ***Matuszowicz*** case, the claim was held to be in time in the light of the fact that the failure to make a reasonable adjustment was put as an omission which until a date which was within time. In the absence of the Respondent asserting an intervening act, the Court found that the claim was in time.

35. A tribunal must therefore consider when time begins for time limitation periods. That will involve determining whether or not there has been an actual decision not to comply in which case that will fix the date. Where there is no decision, the question will be has there been an intervening date which fixes the time limit. In the absence of an intervening date, the tribunal will be considering what is period of time within which the employer might reasonably be expected to do the omitted act if it was to be done. The latter involves imposing that "artificial date".

36. The Respondent has submitted in this case that whether conduct extends over a period of time is a question of whether there was an ongoing situation or continuing state of affairs (***Hendricks v Commissioner of Police of the Metropolis [2002] EWCA Civ 1686***, para 48).

37. The onus is on the Claimant to satisfy the tribunal that it is just and equitable to extend the time limit (***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 Court of Appeal***).

38. Case law has made it clear that the Tribunal may be guided, in making a determination on extending time limits, by matters such as 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 has cooperated 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; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. Cases have also made it clear that lists such as these are only a guide and in some cases some of those factors may not be relevant. Case law has also suggested that the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh) are almost always relevant.

39. In all cases the Tribunal should take into account the balance of prejudice between the parties in granting or refusing an extension of time.

40. The above sets out the legal position on time limits where that is the issue to be determined.

41. It should be noted however that the purpose of this hearing is not to determine the issue of time limitation.

42. This is an application to strike out the claim under Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

43. In determining whether or not for the purposes of Rule 37(1)(a) the claim has no reasonable prospect of success, the question is whether or not the Claimant has a reasonably arguable (or prima facie) case either that the claim was brought within time or that time should be extended under just and equitable principles (***E v X, L & Z 2020 UKEAT/0079/20/RN***).

44. The point is also emphasised in ***E*** that the Claimant's pleaded case should be taken at its highest.

Conclusions

45. I firstly considered whether the matters referred to by the Claimant in her claim form were omissions that had been determined and concluded by the Respondent on a specific date.

46. As I noted above, I needed to take the Claimant through her claim form to ascertain the dates of the matters she is referring to in paragraphs 9-11.

47. In expanding upon each of the issues raised in paragraphs 9-11 in her particulars of claim, the Claimant gave me a date for each of the Respondent's decisions and actions which was not later than February 2020.

48. When I noted to her that there appeared to be nothing to suggest the matters, she refers to in paragraphs 9-11 were continuing after that she responded with giving me details of further conversations with her line manager in February 2020. This was another reference to a decision which did not take the timeline any further into the future nor did it indicate a continuing state of affairs.

49. I note that that matter is not included in the Claim form.

50. The Claimant then added in submissions that a face to face occupational health referral was to be arranged but it never happened due to the pandemic.

51. Again there is no reference to anything being put on hold or remaining outstanding in the Claimant's claim form.

52. My conclusion is that the Claimant's answer to the continuing omission point is to seek to introduce new facts which change the nature of her claim. No application to amend has been made nor has the Claimant suggested why, if that is her complaint, it could not have been set out that way in the claim form.

53. I also concluded that the reference to matters outstanding appear on the face of the Claimant's submissions to be her understanding. The Claimant submitted that she had never asked once she went home in March 2020 and that the issue was never discussed before her dismissal in January 2022. She stated that she expected it to be picked up when she returned to work, which but for the dismissal was expected to take place in January 2022.

54. There is nothing in the Claimant's case suggesting that the matters that the Claimant suggests show that there was a continuing state of affairs had in any way

been agreed with the Respondent. As I state earlier, these appeared to me to be the Claimant's expectations only.

55. Clearly, if an employee states that draughty windows and doors are affecting her health and asks to be moved then if the employer refuses and the employee continues in that workplace that state of affairs continues.

56. However, whilst that state of affairs may continue in my conclusion there has been a determination not to further change the premises (beyond the redecoration which had already taken place) or to move the Claimant because there was nowhere to move her to that was more modern or draught free.

57. In my conclusion, on the facts of this case as pleaded by the Claimant in her claim form, the Claimant has not shown a reasonable argument that Section 123(3)(a) will be engaged, namely that conduct extending over a period is to be treated as done at the end of the period. Even if it were, that period is on her pleaded case a period which ended in February 2020.

58. Additionally, the Claimant has not shown a reasonable argument or a prima facie case that Section 123(3)(b) will not be engaged, i.e. that the failure to do something is to be treated as occurring when the person in question decided on it. That was, on the Claimant's pleaded case, the Respondent's determinations between January and February 2020 that no further works would be undertaken and she could not be moved to another building.

59. I accept and prefer the Respondent's submission that the Claimant has no reasonable prospect of defeating an argument that time then began to run and 3 months would have expired before the end of June 2020. In circumstances were the claim was brought in December 2021, some 18 months later, it is clear that the claim was brought well outside the ordinary time limit.

60. I next considered whether or not the Claimant had shown a reasonably arguable or prima facie case that time should be extended on just and equitable principles.

61. I noted that the Claimant had at the beginning of this hearing considered abandonment of this part of the claim and that in her view there were more important aspects to her case in the other parts of her claim.

62. I noted that the Claimant has other significant claims which would not be affected if her claim is struck out.

63. I took into account the Claimant's reasons why the claim was put in on the date it was submitted; that she had expected the matter would be picked up upon her return to work after the pandemic.

64. I noted the hardship that the Claimant had been under as a result of staying at home on her own during the pandemic.

65. I took into account that the Claimant has some experience of bringing employment tribunal claims and has not suggested that she was not aware of time limitations. Indeed I can see that in paragraph 23 of her particulars of complaint, in relation to another matter, she accuses the Respondent of delay to prevent her being able to pursue that part of her claim. This is clearly a reference to moving

her outside of a time limitation relating to that part of her claim. Knowledge to me does not appear to be a factor in this matter despite the Claimant being a litigant in person.

66. I noted that in her agenda form the Claimant referred repeatedly to not seeking remedy for the failure to make adjustments.

67. In all I concluded that the Claimant had not demonstrated a prima facie case that she would suffer any significant hardship if her claim of reasonable adjustments in paragraphs 9-11 of her particulars of complaint is struck out.

68. I noted the period of delay and the difficulty that this would present in dealing with significant issues concerning the facts complained of, the relevant period for assessing disability status (which is disputed), and the possibility of change in the workplace during the period which has elapsed.

69. I noted that this matter will require further case management and the hearing is expected to require 10 days. It will be many months before further case management can be dealt with and a final hearing listed. I concluded that the matter may come to final hearing up to 3 years after the events complained of.

70. In all of the circumstances I concluded that the Claimant has not shown a reasonably arguable or prima facie case that it would be just and equitable to extend time by the degree required to bring her claim within time.

71. I concluded therefore that the Claimant has no reasonable prospect of succeeding in her claim of failure to make reasonable adjustments as set out in paragraphs 9-11 of her particulars of claim.

Employment Judge Knowles
8 March 2022