EMPLOYMENT TRIBUNALS

Claimants: Mrs M Peel
Mr A Peel

Respondents: Royal Mail Group Limited

HELD AT: Manchester **ON:** 8 May 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimants: Not in attendance
Respondent: Mr J McArdle, Legal Executive

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that the claimant's application for reconsideration in accordance with rule 72 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 of the judgment of 28 March 2017 succeeds in respect of the age discrimination claim only. The age discrimination claim can now proceed.

REASONS

1. Following my decision at a preliminary hearing promulgated on 28 March 2016 that some of the claimant's claims were out of time and that the claimants were not disabled within the meaning of the Equality Act 2010, the claimants by an email dated 2 April 2017 sought a reconsideration of that decision.

2. The claimant's grounds for a reconsideration were as follows:

   (1) Documents from the second preliminary hearing supporting the claimant's resistance to the strike out were not available to the Employment Judge and the bundle did not include "fit for work" medical certificates. The claimants enclosed those missing documents and asked that they be taken into account.

(2) The claimants assert they did not concede that "just and equitable" should not be relied on in respect of the out of time issue.

(3) A joint witness statement was acknowledged by Employment Judge Feeney as being received and accepted to have been read.

(4) Pages 4, 5 and 6 of the second witness statement showed the updated evidence for the chronology of the claimants' medical health appointments together with the dates that their medication was increased and the dates that the "not fit for work" certificates were issued. The "not fit for work" certificates were available at the hearing but were not requested for sight of by the learned Employment Judge; they are now included with this document as an attachment.

(5) Paragraph 43 of the second preliminary hearing judgment also relies on the erroneous conclusion of there not being any medical certificates after July 2016, but in fact these were available having been received continuously up to the then present day and continuing. This was not taken into account in assessing the likelihood of the disability lasting for 12 months or longer.

(6) In addition medical certificates up to July 2016 had been sent to the respondent's solicitor by the claimants in compliance with Case Management Orders and these had been conceded as evidence.

(7) In conclusion the judgment for the second preliminary hearing had not taken into account the evidence of the medical certificates issued to the claimants since July 2016 in the calculation of the 12 month period.

(8) Paragraph 36 of the respondent's submissions for the second preliminary hearing concedes, "The effect of the medication has to be discounted when considering the question of disability. Medication for depression is not a cure".

(9) Nevertheless, paragraph 43 of the second preliminary hearing judgment states, "The claimants were receiving medication and were expected to improve however the effect of the medication should be disregarded when assessing disability.

(10) Paragraphs 37 and 38 of the second preliminary hearing judgment do not take adequate account of the oral evidence of each of the claimants.

(11) Paragraph 43 of the second preliminary hearing judgment in addition has not taken into account the claimants' oral evidence but only the medical certificates.

(12) Paragraph 41 of the second preliminary hearing judgment is inaccurate because it erroneously states the claimants were suspended from work but they never had been, and that their mental health deteriorated after being put through the disciplinary process when in fact, as already testified by the second claimant, it deteriorated prior to the disciplinary process starting.

(13) In fact when Mr Peel was cross examined in the witness box and under oath he confirmed that his condition deteriorated after Sue Whittaker had sent a letter on 22 October 2015 following her completion of the stress risk assessment on him and informing him in that letter that she did not believe he had a genuine illness and that she was now considering conduct action and not until after his dismissal as suggested by the respondent.

(14) In particular paragraph 42 of the preliminary hearing judgment the substantial adverse effect on the claimants' day-to-day activities had in fact started on 22 October 2015 before any disciplinary action began, as supported by the oral evidence and the medical certificates and not in November as stated in the judgment.

(15) As to a substantial adverse effect likely to last for a total period of 12 months or more, the increase to both the claimants' medication and the review date of the claimants' medication was not taken into account. For example the first claimant's medication was increased on 11 August 2016 and her medication review was on 19 May 2017. For the second claimant, his medication was increased on 3 August 2016 and his medication review date is 9 June 2017.

(16) In addition the concessions in the following paragraphs by the respondent's submissions at the preliminary hearing were not taken into account in the judgment:

(a) Paragraph 16 of the respondent's submission states: "It is accepted the first claimant currently suffers from anxiety and depression".

(b) Paragraph 17 of the respondent's submission states: "It is accepted that the first claimant has suffered from this condition since November 2015 and at the date of the hearing it has therefore lasted for at least 12 months".

(c) Paragraph 19 of the respondent's submission states: "It is accepted the second claimant suffers from anxiety and depression".

(d) Paragraph 20 of the respondent's submission states: "It is accepted the second claimant has suffered from this condition since November 2015 and at the date of the hearing it has therefore lasted for at least 12 months".

(17) Pages 6-16 inclusive of the second joint witness statement are the signed statements of the effects that the depressive illness was having on the claimants' day-to-day activities. These effects were not adequately taken into account in the judgment.

(18) The signed third witness statement of both claimants were sent to the Tribunal at the same time as the second witness statement and was available at the second preliminary hearing and for deliberations prior

to judgment being made. It was supplied for additional clarity as to the effects on the claimants.

(19) The documents had been available to the Employment Tribunal since December 2016 but were not adequately taken into account in the judgment.

(20) Accordingly it is respectively requested that in the interests of justice and in the light of these observations the judgment that the claimants are not disabled within the meaning of the Equality Act 2010 is reconsidered.

(21) The claimants apply for a reconsideration of the judgments made on 8 December because the following evidence was not taken into adequate account when arriving at the judgment decision on time limits.

(22) It was conceded by the respondent at the first preliminary hearing that the time limits started from 16 October for all claims so some of the discrimination claims are not out of time contrary to what the Employment Judge has said in the second preliminary hearing.

(23) Page 26 of the second joint witness statement refers to extensive discussion with Judge Holmes at the first preliminary hearing when time limits were discussed and agreed by both the respondent and the claimants, and particularly with regard to any preliminary issues.

(24) This was again referred to at the second preliminary hearing and again there were no objections from the respondent or the claimants. There were no time limit issues taken from the incident on 16 October and the subsequent unfair dismissal.

(25) In addition paragraph 56 of the respondent's submission for the preliminary hearing reads: "For the avoidance of doubt the respondent concedes that all acts relating to the claimants' walk out incident and dismissals have been presented within the applicable time limits and/or it is just and equitable for the Tribunal to hear these complaints".

(26) Paragraph 27 of the second joint witness statement, paragraphs 13 and 14, are within the agreed time limits and should not have been deemed as out of time and accordingly should not have been judged as outside the Tribunal's jurisdiction and should not have been dismissed.

(27) Paragraph 64 of the respondent's submission for the preliminary hearing reads: "The claimants suggest that their claims against Sue Whittaker are part of a continuing act leading to their dismissal and the events surrounding 16 October 2015. However Sue Whittaker played no part in the dismissal process and therefore it cannot be said that these acts link to the claimants' dismissal".

(28) Sue Whittaker was the witness in chief, the person that started the conduct procedure that led to the dismissal of the claimants, and the person that before the facts of the incident were gathered and

determined sent to Dave Weir, the Conduct Manager, an email entitled "Conduct Information" before the fact finding meeting and before he was allocated the case, and as such it was linked to the claimants' dismissal.

(29) Paragraph 22 of the second preliminary hearing judgment refers to the evidence that the claimants supplied, the relevance of which was not adequately taken into account. The date of the email was an important part. At that date the claimants were not undergoing any disciplinary or conduct procedures. A fact finding meeting to determine whether there had been any conduct issues had not taken place and Dave Weir was not allocated to the case until 5 November 2015. The email was a severe breach in protocol and procedure and was sent by Sue Whittaker who had inputted the words "Conduct Information" onto the email and as such prejudged the outcome of the fact finding meeting, and as such further linked her to the eventual outcome that she was seeking i.e. to have both claimants dismissed.

(30) Accordingly there is a prima facie case that this was not adequately taken into account of continuing discrimination because the agreed time limits run from 16 October and it is respectively requested that in the interests of justice the judgment that the marital and disability discrimination claims are out of time is reconsidered.

(31) For the sake of emphasis as to whether the discrimination claims are direct or indirect or how they were linked and continuous or the just and equitable rule applies, the claimants attach to this request for reconsideration further and better particulars of the claimants' discrimination claims.

3. I considered two preliminary matters:

(1) That the claimants were now submitting new evidence – I could not accept the new evidence as there was no reason why it could not have been referred to at the original hearing; and

(2) Regarding further and better particulars – the claimants would have to apply to amend . This reconsideration is of the original judgment when these further and better particulars were not provided.

The Law

4. I have considered their reconsideration request in accordance with rules 70, 71 and 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. Rule 70 says:

> "A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the decision (the original decision) may be confirmed, varied or revoked. If it is revoked it may be taken again."

5. Rule 71 states:

"Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing and copied to all the other parties within 14 days of the date on which the written record or other written communication of the original decision was sent to the parties, or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary."

6. Rule 72 process:

"(1) An Employment Judge shall consider any application made under rule 71 if the Judge considers that there is no real prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused) the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application had not been refused under paragraph 1 the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further representations.

(3) Where practicable the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full Tribunal which made it, and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full Tribunal which made the original decision. Where that is not practical the President…shall appoint another Employment Judge to deal with the application, or in the case of the decision of the full Tribunal shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or part."

7. I decided to hold a hearing to decide the matter and give the claimants full opportunity to put their case in person in respect of the reconsideration, but the claimants' representative was ill and the claimants chose not to attend.

Findings and Conclusion

8. The claimants brought claims of unfair dismissal, marriage discrimination, age discrimination and disability discrimination, and the original hearing was to determine two matters:

(1) Whether they were disabled within the meaning of the Equality Act 2010; and

(2) Whether their claims or some of them were out of time.

9. The claimants' claims are set out in the bundle for the preliminary hearing at pages 23-27. Unfortunately they are not consecutively numbered and therefore referring to them by number was somewhat difficult.

10. There were ten claims under marriage discrimination; six claims under disability discrimination; one claim "joint" and one claim under age discrimination, plus a joint age claim.

11. The claimants submitted that their illness had started on 22 October and not when disciplinary action began in November as referred to in the Judgment. The claimants' reconsideration said that further evidence was available.

12. I find in relation to this that no explanation has been given for why the evidence now referred to was not available. The claimants said the evidence "was in the Tribunal room". On that basis that there was no reason why this evidence could not have been referred to, or at least the claimants could have asked to present it at the time.

13. Further in any event, the evidence does not make any difference to my findings. The issue is not whether the claimants were or have had an impairment for 12 months per se, but whether at the relevant time, which at the latest was the claimants' appeal on 6 February 2016, they either had had a condition which had lasted for 12 months or which was likely to last for 12 months. The relevant point was the latter one: was the condition in February likely to last for 12 months? By that stage on the claimants' evidence it had lasted since 22 October, and on my finding from November.

14. Obviously this is a difference of 1-2 weeks which is relatively insignificant in determining whether the illness/impairment was likely to last for 12 months. There is no evidence adduced which suggested that in February it could be reasonably anticipated that they would be ill with anxiety and depression for 12 months. The matter of a potential dismissal was resolved, albeit obviously not to their satisfaction, in February. They were receiving treatment and it was a reasonable assumption to believe that over a period of time their condition would improve and that it was unlikely they would still be suffering from a condition that had a substantial adverse effect on their day-to-day activities by October/November 2016, a further eight months from the date of the appeal hearing.

15. Consequently, while my primary position is that the new evidence should not be admitted there was no reason why it was not produced at the time of the original hearing (particularly given I allowed the claimants during the course of the original hearing to retrieve an additional document from their car). Nevertheless, the further evidence does not alter the basis of my findings as to why the claimants were not disabled within the meaning of the Equality Act 2010.

Claimants' paragraph 2

16. The claimants state that they did not concede that they only wished to rely on continuous discrimination and not on the just and equitable discretion. However, I have a clear note that the claimants' representative said this during the course of discussion about the issues, and stated they wished to rely on continuing conduct only, and I have a further clear note of discussing in Tribunal the fact that the

respondent's representative did not need to cross examine on these issues. This was discussed in advance of cross examination as there were matters in the claimants' witness statements that may have required such cross examination had just and equitable been pursued.

Claimants' paragraph 8

17. Paragraph 8 refers to the fact that the effect of medication has to be discounted when considering the question of disability. While this is correct, the issue here was the likelihood of the condition continuing to which the ability to take medication was relevant, and there is no bar to considering that issue in this context. I understand the claimant's point that medication should be discounted in assessing the effect on day-to-day activities, but having considered it further I find that does not apply to what is a rather artificial exercise in any event of assessing at the relevant time whether the illness was likely to last for 12 months altogether.

Claimants' paragraph 9

18. This is the same as the claimants' paragraph 8.

Claimants' paragraph 10 and 11

19. These refer to the same issues as in paragraphs 1, 3, 4, 5 and 6.

Claimants' paragraph 12

20. "That the preliminary hearing judgment was inaccurate because the claimants were not suspended from work and therefore their mental health deteriorated before the disciplinary started rather than when it started". As referred to above, taking the claimants' case as being correct on this point, this means that they were ill, they say, from 22 October rather than from 8 November. Accordingly I find that this makes no difference to the decision that the claimants were not disabled because of the 12 month issue at the relevant time. The claimants left the premises on 22 October and obtained sick notes from their doctor. However, other evidence persuaded me that their illness became a disability in legal terms on 8 November.

Claimants' paragraphs 13 and 14

21. See above.

Claimants' paragraph 15

22. See above.

Claimants' paragraph 16

23. See above.

Claimants paragraph 17

24. See above.

Claimants' paragraph 18

25. See above.

Claimants' paragraph 19

26. See above.

Claimants' paragraphs 20 and 21

27. These are submissions rather than reconsideration points.

Claimants' paragraphs 22, 23, 24, 25 and 26

28. These paragraphs refer to what the claimants describe as the respondent's concession made at the first preliminary hearing held by Employment Judge Holmes that the respondent had conceded that time ran from 16 October for all claims. There is no reference to this in the actual written minute of that first preliminary hearing. However, in the respondent's submissions for the preliminary hearing which I held it does say:

> "For the avoidance of doubt the respondent concedes that all the acts relating to the claimants' walk out incident and dismissals have been presented within the applicable time limit and/or it is just and equitable for the Tribunal to hear these complaints."

29. This refers to the claimants' unfair dismissal claim and to a claim that any claim that the dismissal itself was discriminatory which is included at number one of the marriage discrimination list. This is described as direct/indirect/harassment/victimisation and more specifically as follows:

> "On 22 December 2015 multiple discrimination of Mrs Peel (first claimant) when she was dismissed by Dave Ware for breaches of discipline which were far less serious than those of her husband, Mr Peel (second claimant) who was also investigated and dismissed at the same time with her. The respondent discriminated on the protected characteristic of marriage by treating a married couple as a single entity during the dismissal process."

30. It is accepted that this is a claim which is in time and can continue.

31. However, it is clear that the respondent made an application that other matters within the further and better particulars were out of time, and they were not conceding that the other matters were in time or continued up to 22 December with the dismissal.

32. As I refer to in my judgment, I asked the claimants what brought their complaints against Sue Whittaker as continuing conduct up to 22 December. They were allowed to obtain a document not produced before which was an email from 29 October to Dave Ware setting out basically the claimants' names, where they worked and when they started work. As I recorded in the judgment, that information established only the names, etc., of the claimants, whilst it was headed up "conduct" there was no actual detail of any conduct matters recorded in it. It was an innocuous document and there was no basis for suggesting information contained in it could have influenced an investigating officer or a fact finding officer as it literally was just

standard information. In any event, that act took place on 29 October and therefore the matter would still not be in time.

33. However, whilst I was considering this matter and reviewing the further particulars of the claimants' claims of discrimination, there were two other matters which I felt needed dealing with in more detail. The first was the claim that Sue Whittaker did not accept that either or both the claimants had a genuine illness and refused to pay them full sick pay. This was a marriage discrimination claim: number 3 on the further and better particulars. This event, however, occurred on 22 October, and in my view in the light of **Sougrin v Haringey Health Authority [1992] Court of Appeal** is a one-off act with continuing consequences, for example although I do not know this to be the case , that the claimants were either paid/not paid or paid a reduced rate. If it is just that Mrs whittsker subjected them to unfavourable treatment in relation to this it is evn more clearly a one off act. The act took place on 22 October and although it may have had continuing consequences time runs from 22 October, and therefore that matter is out of time on its own basis and does not bring any other claims within time.

34. I also considered the age discrimination claim which, although there were three paragraphs to it, was discrete. This was that Sue Whittaker in her email to David Ware on 9 December 2015 and in her interview with Simon Walker on 4 February 2016 stated that the claimants always took longer in comparison to their colleagues. The claimants say the respondent discriminated on the protected characteristic of age as on two occasions Sue Whittaker insinuated that their younger colleague could perform much quicker.

35. The other two matters referred to in the section on age discrimination are not claims and in any event refer to events on 16 October and 26 October which would be out of time if the other matter is not in time. However, on reconsidering this and taking the claimants' claim at its highest I accept that on 4 February there is a potential age discrimination claim which would be in time. Accordingly I find that in respect of age discrimination there is potentially a course of conduct starting on 16 October and finishing on 4 February which is in time and the claimants can pursue this claim.

36. However, I would say that the claim does not appear to be particularly compelling as the claimants do not refer to any actual words which link the comment to their ages. It may be that the claimants have not fully expressed their claim, however I have ordered they provide further and better particulars in order to set out these claims in more detail and explain why 1, 2 and 3 under the age discrimination heading are related to their ages.

37. Since giving judgment in this matter the claimants have pointed out that their age discrimination claim was not ruled out of time originally. Accordingly I record that. There is no practical consequence as it is clear stated in the CMOs as an issue to be decided by the full tribunal.

Claimants' paragraphs 28 and 29

38. These refer to the email of 29 October which has been dealt with above.

Claimants' paragraph 30

39. This is a submission that requires no comment.

Claimants' paragraph 31

40. Refers to the claimants providing further further and better particulars of their discrimination claims when they apply for a reconsideration. The claimants had full opportunity to provide further and better particulars earlier in the case. They have had full opportunity at the previous preliminary hearing to provide evidence and submissions in respect of the matters at issue, and in the light of the overriding objective I have not considered these further further and better particulars. The decision was made on the claim as pleaded, the written evidence, the oral evidence and the submissions provided at the time of the preliminary hearing, and the claimants would have to apply for amendments if they wish to alter the basis of their pleaded claim.

41. I have set out in the Case Management Orders which have already been sent to the parties what the outstanding issues now are and made orders for the preparation of the case for hearing.

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Employment Judge Feeney

Date 5th July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 July 2017

FOR THE TRIBUNAL OFFICE