Reserved judgment

EMPLOYMENT TRIBUNALS

Between

Claimant: **Mrs S McLeary**

Respondent: **One Housing Group Limited**

Heard at London South Employment Tribunal on 11 August 2017

Before Employment Judge Baron

Representation:

Claimant: **The Claimant was present in person**

Respondent: **Laura Fairchild - Solicitor**

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the claims made by the Claimant under the provisions of the Equality Act 2010 are dismissed.

REASONS

1 The Claimant presented a claim to the Tribunal on 1 December 2016. She stated that she had been employed by the Respondent from 1 April 2009 until she resigned with effect from 30 June 2016. In the claim form the Claimant indicated that she was making claims that she had been unfairly dismissed, and also of breaches of the Equality Act 2010 relying on the protected characteristic of disability. The disability in question is dyslexia. A response was duly filed. The fact of the Claimant being a disabled person was accepted, but the claims were denied.

2 There was a preliminary hearing for case management purposes on 31 January 2017. The Claimant was represented by counsel at that hearing, Miss Lewis. The Claimant was ordered to provide further details of some elements of her claims. Those details were supplied by Miss Lewis on 9 March 2017. Each of the allegations was subsequently numbered by Miss Fairchild for the purposes of identification.

3 On 9 March 2017 the Respondent's solicitors applied for this preliminary hearing to be held to decide whether the Tribunal had the jurisdiction to consider the claims of disability discrimination taking into account the statutory time limit. The time limit is three months from the date of the incident in question of which complaint is made. If there is conduct

extending over a period, then time starts from the end of that period. The three month period is extended by reason of the early conciliation procedure where appropriate. The Tribunal has the jurisdiction to extend the time limit where it is just and equitable so to do. The Claimant had contacted ACAS under the early conciliation procedure on 20 September 2016, and the certificate was issued on 3 November 2016. The date when time started to run was 21 June 2016.

4 The Respondent's solicitors gave notice to the Claimant and the Tribunal on 4 August 2017 that they intended also to make an application under rule 37 of the Employment Tribunals Rules of Procedure 2013 for the claims to be struck out as having no reasonable prospect of success, or for an order under rule 39 that the Claimant be required to pay a deposit as a condition of being allowed to continue with her claims or some of them.

5 On 14 August 2017 after this hearing had been concluded the Claimant sent to the Tribunal an email with comments on some of the documents provided by the Respondent at the hearing, and delivered to the Tribunal a pack of 64 pages of documents. I mention these further below.

6 I will deal with each of the allegations in turn. The general submission by Miss Fairchild was that the allegations were well out of time. I will not repeat that point on each occasion. I start with allegations numbered 1 to 4 inclusive, and also allegation number 7. The first three allegations are ones said to be under section 15 of the 2010 Act of having been treated unfavourably because of something arising from the disability. The Claimant said that as a result of her symptoms the Respondent saw her as a problem/difficult member of staff, resulting in unfavourable treatment. Allegations numbered 4 and 7 are allegations of harassment under section 26 of the 2010 Act.

7 Miss Fairchild submitted that each of these allegations related to the Claimant's weekly contract hours, and the imposition of a rota. She pointed out that the Claimant had herself stated in her further particulars as follows:

> On the 8th June 2015, it was finally agreed that claimant could work her weekly contract hours stated on her Employment Terms & Condition Contract, which she continued to do up to her last working day 29th September 2015.

8 Allegation 5 is an allegation of harassment, as indeed are all the allegations up to and including number 18. Allegation 5 contains two separate allegations. The first is that in May 2015 the Claimant was told that her appraisals and those of other members of her team had been lost or deleted, and the Claimant referred to the data protection legislation. The second element is that a further appraisal completed on an unspecified date in 2015 was deleted in August 2016. The Claimant had by then of course left the Respondent. Miss Fairchild submitted in respect of the first element that it was a single act and was well out of time. In respect of the second post-termination element I was referred to an email of 8 August 2017 from Warwick Clarke, HR Business Partner, in which it was said, in effect, that when an employee left the Respondent any appraisals were archived.

9 Allegation 6 relates to a telephone call to the Claimant on 12 June 2015. The Claimant says that the behaviour of Ms Boland was 'excessive'.

10 Allegation 8 is apparently an allegation that from 19 June 2015 onwards the Claimant was carrying out electronic monitoring of the Claimant, and she referred to lights flashing on her computer monitor. The Claimant accepted during this hearing that she may have been paranoid about the matter. Miss Fairchild accepted that this allegation could be considered as an act extending over a period, but pointed out that the Claimant had not worked after 29 September 2015, so that this allegation had to be some nine months out of time.

11 Allegation 9 again raises the issue of data protection, and also raises other possible claims. The Claimant says that during the period from 20 to 26 July 2015 she was advised that timesheets from before 12 May 2015 had been deleted. That, said Miss Fairchild, was a one-off act which was well out of time. The Claimant also referred to 'increase in workload, deadlines to clear backlog with minimum support/adjustments to meet disability needs'. Miss Fairchild referred me to a supervision record of 8 May 2015 where the increase in workload was discussed, and it was agreed that there would be a review in two months thereafter. It was intended that at that time the Claimant would 'begin carrying out sign ups.' I was also referred to further supervision records of 7 and 20 August 2015. There was a further discussion about workload during the third supervision, and the Claimant referred to dyslexia. Miss Fairchild again pointed out that the Claimant had not worked after 29 September 2015.

12 Allegation 10 is linked to the previous allegation. It is that by an email dated 21 July 2015 her line manager, Ms Boland, asked her to complete a sign up as there had by then been sufficient time for the Claimant to catch up with her work load.

13 Allegation 11 refers to the period from late July 2015 to early August 2015. It appears to be an allegation that the Claimant's work mobile telephone had been reconfigured so as to prevent her obtaining access to her emails on that equipment. The Claimant says that she referred this to Ms Boland on 2 September 2015, and did not obtain any reply.

14 Allegation 12 is dated April 2016 and relates to the outcome of a grievance the Claimant had made which is linked to the previous allegation. The Claimant appears to be saying that Mr Pryce-Kennedy, who investigated her grievance, received an inadequate ICT report concerning her allegations on the subject, and so there was an incorrect finding by him.

15 Allegation 13 is both a specific and a general allegation concerning Ms Boland. The specific allegation refers to a workshop on 18 August 2015, although exactly what is alleged is not stated. The general allegation relates to her evidence during the grievance process. The grievance appeal was heard on 27 May 2016 and any evidence must have been given before that date.

16 Allegations 14 and 19 both refer to the Respondent's sickness absence procedures. The period in question for the former is stated to be 22 August 2015 to 18 September 2915, and for the latter 11 to 14 August 2015. The

factual complaint is that the Claimant received an Informal Warning. It is common ground that that was reduced to a Caution on 27 April 2016. Allegation 14 also refers to the commencement of a disciplinary investigation. That process lasted from 22 August to 18 September 2015.

17 Allegation 19 is said to be an act of victimisation. The alleged protected act is that the Claimant raised concerns in May and June 2015 concerning proposed changes to her contract hours. The Claimant did not state in her particulars on what basis she says that those concerns were raised in the public interest.

18 Allegation 15 is a complaint by the Claimant that on 27 September 2017 the Claimant worked on her own for a period in excess of three hours before the Deputy Team Manager arrived to join her.

19 Allegation 16 is a complaint that Ms Boland had complained on 26 and 27 October 2015 that the Claimant had not provided an up to date medical certificate.

20 Allegation 17 is a very generalised complaint that Ms Boland looked for situations or issues to add to the disciplinary process or discredit the Claimant's name, and had provided false information to external agencies. Further reference was made to the evidence provided by Ms Boland in connection with the Claimant's grievance.

21 Allegation 18 referred to the period from 29 October 2015 to February 2016 when the Claimant was on sick leave. The allegation is that email communications from HR were unsympathetic and hostile.

22 Allegation 20 is another allegation of victimisation. The allegation is stated to refer to the period from 21 August to 18 September 2015. It is unclear as to the treatment of which the Claimant is complaining, but it appears to refer to the disciplinary process, and specifically that a disciplinary hearing took place in December 2015 at a time when the Claimant was absent on sick leave.

23 Allegation 21 is of a failure to make reasonable adjustments. The period in question is October 2012 to 30 June 2016. Various factual allegations are made. The first is that the Respondent became aware of the Claimant's disability in October 2011 and should have carried out a risk assessment. I note in passing that that is not in itself an allegation of a failure to make a reasonable adjustment, as such assessment can only be a preliminary step in the ascertaining of whether any adjustments are required. The second allegation is similar in that an assessment ought to have been carried out when the Claimant returned to work in October 2012. The third allegation is that once an assessment had been carried out in March 2015 there was a delay to November 2015 in complying with the recommendations made as a result of the assessment. Under this heading the Claimant repeated matters raised under allegations 5 and 13 above.

24 Miss Fairchild submitted that all of the claims made under the Equality Act 2010 were out of time, and there was no justification for extending them on the basis that it was just and equitable so to do. She reminded me that extending time is not the norm, and submitted that in the absence of any reason being given by the Claimant for an extension then one could not be

granted.[1] Miss Fairchild submitted that as at least some of the allegations were of considerable antiquity the quality of the evidence would inevitably have been adversely affected. There was specific prejudice to the Respondent, she said, because three key witnesses had left the employment of the Respondent. They were Emma Roberts, Claudia Sylvia and Jason Pryce-Kennedy. Each of them was mentioned in the further particulars of the claim.

25 Miss Fairchild also referred to the contact that the Claimant had had with ACAS to which I refer below, and criticised the Claimant for delaying until 20 September 2016 before initiating the early conciliation procedure.

26 Mrs McLeary replied. She stressed that although the complaints may look minor on paper, consideration ought to be given to the impact of the matters on her. She stressed the extra efforts she had made in her work. Mrs McLeary also elaborated to some extent on the allegations being made. In particular she said that she had only learned on 28 August 2016 about what she called the 'deletion' of her 2015 appraisal.

27 After some further comments by Mrs McLeary about her various complaints I intervened and explained that I was at that stage concerned about the time issue. Mrs McLeary agreed that all the claims were made out of time. She said that her union did not assist her until her grievance appeal which took place on 27 May 2016. The Claimant said that she had not been well enough until 2 February 2016 to present a grievance and that it had taken her longer than she had wished to write it. It is indeed a detailed letter. Mrs McLeary said that she had hoped that the grievance would resolve the situation.

28 The Claimant's evidence about making contact with ACAS and the advice given to her by her union was not entirely clear. At some stage before her employment ended on 30 June 2016 the Claimant had been in contact with ACAS under the early conciliation procedure, but had cancelled that procedure on the advice of her union representative who wanted to talk to the union's solicitors. ACAS had supplied a cancellation slip, she said, but that had not been disclosed.

29 The Claimant knew of the three month time limit from at least the date when her employment ended. She blamed her union representative for not giving her sufficient assistance. She said that she was a hard worker and that the treatment of her by the Respondent had not been fair.

30 Miss Fairchild replied. She pointed out that although the Claimant had not attended work after 29 September 2015 she had been perfectly capable of corresponding by email and of writing her detailed grievance of 2 February 2016. I was also shown emails of 21 May 2016 from the Claimant to witnesses in the grievance to demonstrate that the Claimant was capable of pursuing her issues at that time.

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[1] *Robertson v. Bexley Community Centre* [2003] IRLR 434 CA and *Edomobi v. La Retraite RC Girls School* UKEAT/0180/16

31 I now turn to the law, a consideration of the matter and my conclusions. It is acknowledged that the claims under the 2010 Act are out of time. The Tribunal may extend time where it is just and equitable so to do. I agree with the submissions made by Miss Fairchild above that a claimant must show that it is fair in all the circumstances for time to be extended. I also accept the proposition that in the absence of a claimant showing a credible reason for the delay which had occurred then time cannot be extended. There is simply nothing to work on.

32 In this case the Claimant put forward three reasons for the delay. The first was that she was not well. The second was that she had been let down by her union. The third was that she hoped that the matter would be resolved through the grievance process. The difficulty I have with the first two is an absence of detail. The difficulty with the third is that the letter providing the outcome of the grievance appeal was dated 28 June 2016, but the Claimant did not contact ACAS under the early conciliation procedure until 20 September 2016.

33 Tribunals often bring into play in these circumstances the guidance contained in *British Coal Corporation v. Keeble* [1997] IRLR 336 EAT. The factors mentioned in that case are not binding on the Tribunal, and arise in a different jurisdiction. Nevertheless they can be useful. The principal factor is the reasons for the delay and the extent of that delay, combined with the promptness with which the claimant in question took action after being aware of the relevant facts. I have mentioned the reasons for the delay, and I do not consider that they carry much weight. Further the various delays were significant. The earliest factual allegations date back to March 2015, and there are many other allegations from 2015. There is in particular the delay of almost three months after the grievance appeal outcome letter had been sent. That occurred after the Claimant's employment had been terminated.

34 I accept that inevitably the cogency of the evidence will have deteriorated by the delay, but it is impossible to assess with any accuracy the extent of that effect. Another major factor, and perhaps the overriding one, is the prejudice to the parties. There will of course be prejudice to the Claimant if the claim is not allowed to proceed, and also prejudice to the Respondent if it is allowed to proceed. That is inevitable in all such situations. However in this case there is particular prejudice to the Respondent in that three important witnesses have left its employment. There can be no certainty that they will be available and willing to give evidence for the Respondent.

35 When considering an extension of time in these circumstances the Tribunal is entitled to consider the apparent merits of the claims, but ought to notify the parties that that factor was to be taken into account. Although the Respondent's solicitors had given notice that it was intended to apply for an order under rule 37 of the Employment Tribunals Rules of Procedure 2013, or under rule 39, I was not addressed on those points. If I had considered an order under either of those rules then I would have had to consider the prospects of the claims succeeding.

36 For those reasons I decline to extend time in respect of the Claimant's claims under the Equality Act 2010 and they are dismissed. This judgment

does not affect the claim by the Claimant that her resignation on 30 June 2016 amounted to a 'constructive' unfair dismissal.

37 As mentioned above, after this hearing I received a large volume of correspondence and documents principally from the Claimant. I have scanned the documents to see if there was anything in them which would obviously justify reconvening this hearing. The principal assertion made by the Claimant was that there was evidence that a statement by Ms Boland had been edited and then put in the bundle for this hearing. The Respondent's solicitors later replied. In my view the point is of no relevance to the issue which I had to decide, which is whether the application of the statutory time limit meant that the Tribunal did not have the jurisdiction to consider the claims being made.

Employment Judge Baron
23 November 2017