EMPLOYMENT TRIBUNALS

Claimant: Ms M Flockhart

Respondent: Leonard Cheshire Disability

RECORD OF A CLOSED ATTENDED PRELIMINARY HEARING

Heard at: Nottingham **On:** Thursday 30 November 2017

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: In person assisted by Mr J McCorey (Partner)-by video link
For the Respondent: Miss R Owuso Aguei of Counsel

JUDGMENT

First judgment

1. The Claimant is a disabled person for the purposes of the Equality Act 2010.

Second judgment

1. The claim of unfair dismissal is dismissed it being out of time and it having been reasonably practicable to have brought it in time.

2. The claim of disability discrimination relating to failure to make reasonable adjustment pursuant to s20-21 of the Equality Act 2010 is permitted to proceed out of time, it being just and equitable so to do. However the claim of direct discrimination pursuant to s13 is dismissed it not being just and equitable to extend time.

Directions

3. These are set out in the final section of this judgement.

REASONS

Issue number 1

1. The first issue that I have to deal with in this case is whether the Claimant is a disabled person by way of a mental impairment, which I would describe as being depression/anxiety/panic attacks. The Respondent has accepted that in relation to the Claimant's back problems, she is a disabled person but it does not accept that her mental impairment as I have just described it would constitute a disability.

2. First of all I need to set out what is the definition. Section 6 of the Equality Act 2010 (EqA) says thus:

> **"*6 Disability***
> *(1) A person (P) has a disability if—*
> *(a) P has a physical or mental impairment, and*
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities*."

3. I then need to refer to the relevant extracts from Schedule 1 of the EqA, thus:

> *"Long-term effects*
> *2 (1) The effect of an impairment is long-term if—*
> *(a) it has lasted for at least 12 months,*
> *(b) it is likely to last for at least 12 months, or*
> *(c) it is likely to last for the rest of the life of the person affected."*

4. As to recurrent conditions, and thus continuing with my recitation of the Schedule:

> *"(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."*

5. I remind myself that in terms of what is meant by a substantial impairment, that the situation was made plain in the case of ***Goodwin -v- The Patent Office [1999] IRLR 4 EAT***:

> *"The Act is concerned with a person's ability to carry out activities. The fact that the person can carry out some activities does not mean that his ability to carry them out has not been impaired and the focus of the Act is on the things that the claimant either cannot do or can only do with difficulty rather than on the things that the person can do and that the word substantial means more than minor or trivial."*

6. The final point that I remind myself about is that I must ignore the beneficial effects of any treatment. What would the Claimant be like were she not to have treatment?

7. The Claimant has given evidence today by way of video link because she explained to the tribunal that at present the extent of her mental disability means that she cannot face being in a hearing with for instance the opposition, so to

speak, present. I have thus for the purposes of making a reasonable adjustment allowed the video link. It does not mean, until I have explored the reasons I am now going to give, that my action in itself demonstrates that I have found the Claimant to be disabled. But, in the course of today, I have been able to observe her and I have noticed that from time to time, despite the most gentle and fair questioning of learned Counsel, the Claimant has become distressed.

8. Against that background, the following are my findings of fact. I accept learned Counsel's point that there is definitely a gap in time, in terms of any medical treatment that one can find in the medical notes before me , between the back end of 2014 and her seeing her doctor, it seems to me circa 14 June 2016. Thence I do have a medical report dated 13 June 2017 from her general practitioner, Dr C Pillai. In that respect, and it is where I start from, he has opined:

> "…
>
> *We can confirm that Maria has suffered episodes of anxiety, panic attacks, stress, depression related symptoms since 1991. She was referred to the mental health team in 2013 and attended 12 sessions of cognitive therapy to support her in the management of her conditions. She currently takes propranolol 80mg MR tablets (one daily) for anxiety/panic attacks. She has also been on anti-depressants in the past.*
>
> *…*"

9. Propranolol is a betablocker but of course it can be used (and Counsel does not disagree with me) for lessening anxiety.

10. The medical records before me are not complete albeit the Claimant was asked to obtain the full records. From what I can gather, she did her best and we have proceeded today on what we have got.

11. First of significance is Bp[1] 133 which is an assessment on 13 October 2014 :

> "*Ongoing problems with depression and anxiety and panic."* Referred to is a past history such as inter alia following the death of the Claimant's mother in 2005; that her sister had been diagnosed with MS "*and is going blind"* and inter alia that the Claimant has had "*previous history of depression – first episode aged 16 yrs. Usually just deals with it, worse last nine years lived through mum taking numerous overdoses through her teens. Had CBT but not sure it helped."*

12. In that respect, I have the record before me that the Claimant starting in January in 2013, had presented with

> "*Initially presented me over month ago feeling distressed and describing panic attacks. Told me her sleep was affected and felt that she would snap. She informs me the recent bereavement of a close friend and ongoing concerns in regards to her daughter and issues at school .. As a consequence of that, she was referred for 12 sessions of cognitive behavioural therapy and which she completed.*"

13. I am well aware that with resources scarce, CBT is only offered following

[1] Bp = bundle page.

an initial assessment: and in this case there is one, which indicates depression.

14. Then, I can see that by the end of 2014 (to which I have now or course referred), the Claimant was back again needing further help. Her first meeting with Wellbeing, the physiological assessment service, was made for December but the Claimant did not turn up and the treatment was cancelled. The Claimant has explained to me that she could not attend without her daughter by her side and that her daughter would not, for whatever reason, go with her and thus she did not go.

15. The result of course was that this being a scarce resource, treatment for her was cancelled.

16. I agree with learned Counsel that there is no medical evidence that the Claimant was presenting in 2015 to her doctors but on the other hand, I have the statement which she has produced to the tribunal at Bp 50 onwards which does refer to ongoing problems.

17. The final point on this part of the scenario is that when I go to 2016 and commencing from what I now understand from the Claimant was her being provided via her GP with assistance by an adviser who deals mainly in money problems, which the Claimant undoubtedly had, and whose name is Carol Bennett, the Claimant was submitting an application to the Centre for Health and Disability Assessment arm of the Benefits Agency. In that document, and in particular I take myself to Bp 165 and Bp 166, she gave a further description of her mental health issues. In particular I quote:

> "*Again due to my anxiety and depression, I really struggle with social engagement. I avoid crowds and busy areas as much as possible as I have lost confidence and often feel like I need to return to a place where I feel 'safe'. I struggle in shops and often need to be accompanied so there is someone there to reassure me and help me to get away from the situation if I am starting to panic. This is even after Counselling and CBT. The pain I am constantly in* (a reference to her back) *adds to my anxiety when I am out as it becomes my main focus and I get very uptight if I cannot find somewhere to rest etc*"

18. She has described to me as to how, when she is to summarise it "feeling down", she will sit indoors at home with the curtains drawn feeling in a tunnel. She appears to now have care from her daughter, which is now state funded, but I think that is all primarily for the back issues.

19. What does this all tell me? I can take it short. I have no doubt that the Claimant has a recurring condition. I have a GP who opined to that effect at 13 June 2017 and giving a historical insight into matters. Albeit it is not that detailed, piece it together with the other documents that I do have and I have no doubt whatsoever that the Claimant does have a longstanding mental impairment which is of a recurring nature and which, when at its highest, causes her to be impaired in her ability to undertake normal day to day activities to an extent that it is more than minor or trivial.

20. Thus, can I conclude that the Claimant was a disabled person by reason of a mental impairment as well as her back at the effective date of termination in this case, namely 14 July 2016.

Issue number 2

21. The claims based essentially on the dismissal of the claimant are first unfair dismissal pursuant to s98 of the Employment Rights Act 1996 (the ERA) and second disability discrimination, the last act complained about being the dismissal. The effective date of termination in terms of the dismissal of the Claimant was 15 July 2016. Albeit the Respondent says it was 14 July, the notice of dismissal was sent to the Claimant by post, thus the effective date of termination is the date it was received by her therefore, I shall work on the premise that as per the Claimant's ET1, the effective date of termination is indeed 15 July.

22. This was a summary dismissal. The procedures of the Respondent, which of course is a well-known charity, do not provide that the employment continues if an appeal is incepted until the outcome of the same. Therefore, as it was a summary dismissal, time for the purposes of bringing the unfair dismissal claim (which must be brought within 3 months of the effective date of termination) thus ended at the latest on 14 October 2016. As it is the claim was presented on 14 January 2017.

23. The ACAS early conciliation procedures are of course now mandatory for the purposes of bringing this type of claim and they will ride to the rescue to extend time provided that ACAS EC has been started within the 3 month limitation period. This did not happen in this case. The ACAS period is between 16 November and 16 December 2016. Thus it cannot ride to the rescue. Therefore when the claim was presented it was three months out of time.

24. Turning to the Equality Act 2010 based claim, obviously predicated on disability discrimination, the time limit is the same. So it is also out of time.

25. As to the relief from sanction, so to speak, the relevant provision of the ERA is Section 112(2). Having prescribed that the claim must be brought within the 3 month period to which I have referred, it goes on to state:

> "…*or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of 3 months*."

26. When it comes to discrimination based claims, Section 123 of the EqA, having spelled out the 3 month period, goes on to state:

> "*… or within such other period as the employment tribunal thinks just and equitable*".

27. The first of these two tests is narrower, of that the jurisprudence is absolutely clear.

28. Therefore, what I am going to do first of all is to address the salient facts in this case as I find them to be and then apply first the not reasonably practicable test and then go on to deal with exercising my discretion in applying the just and equitable test.

29. I should make plain that in both cases, to extend time is the exception rather than the rule: see ***Chief Constable of Lincolnshire Police -v- Caston [2010] IRLR 327 CA.*** The burden of proof is on the Claimant.

30. So, what are the facts in this case? In some ways, they lead on from the findings I have made as to the Claimant's disability. I have no doubt that between the Claimant going off absent on 16 July 2015 and the dismissal on 14 July 2016, that she was very unwell first with the back issues and secondly with the mental health issues to which I have now comprehensively referred.

31. However, I also can also factor in that she was well aware by then that the employer was unhappy with the way in which she was reporting her absence, or rather the lack of it, and this is quite clear post her stopping sending in sick notes on 7 March 2016. It came to a head on 26 May 2016, the Respondent making plain that her absence was therefore unauthorised and that it required a "fit note"[2] as a matter of urgency.

32. This not having happened, on 5 July the employer wrote to the Claimant inviting her to attend a disciplinary hearing for 14 July. In terms of the ACAS Code of Practice, that is what I would refer to as a step 1 compliant letter.

33. On 11 July, the Claimant replied (Bp 77), inter alia she made reference to "*legal action*". I now know that from early on, certainly the beginning of 2016, the Claimant had the proactive support of Carol Bennett, who is a money "adviser". What she actually does via a housing association is to act as an advocate, inter alia for people who are seeking benefits or rehousing. I have no doubt from everything I have heard that she would be very conversant with the relevant provisions of the Equality Act 2010. It would be something she would regularly be dealing with in her advocacy of benefit claimants and those seeking public housing in one shape or form.

34. Also from the onset assisting the Claimant was her daughter Heidi, who during this period was attending college and is IT literate. It is obvious to me that the Claimant is not IT literate all.

35. The Claimant did not attend the disciplinary hearing and therefore she was summarily dismissed for abuse of the sickness reporting system; the reason was labelled as gross misconduct.

36. On 27 July, the Claimant was writing to the Respondent making clear that she had sought advice and on the back of that the Respondent invited her to complete what is known as a complaint, which in reality is what I would describe as a grievance, and this was completed by 2 August. At that stage for a third time now, she stated that she was being advised and would be seeking compensation.

37. Then on 23 August a reference to Carol Bennett who had been supporting the Claimant for some time now; and in a second email of the same day to the Respondent, inter alia "*I will be taking this matter further*".

38. Then on 8 September in a further email because by now there was a delay in terms of the handling of her complaint by the Respondent, inter alia that "*I will be contacting a solicitor*".

39. Thence, having I accept still not heard about the progress of her complaint, in the email of 20 September: "*I am now in the process of preparing a file for solicitors*".

[2] The current terminology for a sick note.

40. Against that background on 21 September 2016, she received notice that there would be a telephone case conference to accommodate her stated inability to attend physically and which would take place on 23 September. In the minutes of that case conference (Bp 113) there is clear reference to the Claimant, and I think more likely Carol Bennett, deploying the provisions of the "Disability Discrimination Act", which of course is the forerunner of the EqA.

41. And against that background, whilst awaiting the outcome (which was somewhat protracted) from the Respondent which was published on 21 November, the Claimant on 16 November started ACAS early conciliation.

42. On 26 January, the originating claim (ET1) was presented to the tribunal.

43. Dealing with this aspect of matters, on 23 March there was a case management telephone hearing before Employment Judge Evans. For reasons which he made clear, he ordered the Claimant to give further and better particulars of her case. These she provided on 3 May 2016. Then apropos my order in terms of this hearing on the out of time issues, on 4 August 2017 she provided a structured statement.

44. Against that background the Claimant is deploying that she was so unwell throughout the period as to be unable to do anything. If so how come the communications and participation that I have now referred to? The answer to that is now obvious, namely that the Claimant had throughout the support of Carol, and second Heidi, who was the author of not only these communications to which I have referred but also was the one who found out about ACAS early conciliation and incepted it for her mother; it was also her who drafted and submitted the ET1.

45. Subsequently and in terms of being able to get help from legal ports of call, I note that the statement of 4 August was prepared on her behalf by the Derby Law Centre; prior thereto I gather that the further and better particulars of 3 May were completed by Heidi.

46. That brings me back to the not reasonably practicable test. In dealing with it, I am reminded of the seminal judgment of Brandon LJ in particular in the case of ***Walls Meat Company Ltd -v- Khan [1978] October 6 CA*** which followed on from the dicta of their Lordships in ***Palmer & another -v- Southend on Sea*** in 1983.

47. As enunciated by their Lordships, and in particular Brandon LJ; *reasonably practicable does not mean reasonable which would be too favourable to employees. It means something like reasonably feasible*". Then as per Lady Smith in ***Asda Stores Ltd -v- Kayser [EAT/0165/07]***; *the relevant test is not simply a matter of looking at what was possible but to ask whether in the facts of the case as found it was reasonable to expect that that which was possible to have been done*".

48. In terms of the factors I am looking at, I have already factored in in favour of the Claimant her health and state of mind. However, what is self-evident from the further and better particulars, the statement and for the purposes of the core timelines, the intervention of ACAS and the drafting of the ET1, is that I have no doubt that Carol and Heidi (or a combination of the two) knew about the basic provisions of the ERA and the EqA and in terms of the treatment of the Claimant

by the Respondent. I have also no doubt that they knew the potentiality of litigation; it is so obviously referred to. I have Carol Bennet, who would know her way around at the very least benefits and I suspect related housing legislation and I have in Heidi somebody who is attending college and clearly not only literate but IT literate as well and somebody who could write the emails to which I have referred.

49. It would be so easy to make reasonable enquiry as to how to bring a claim to tribunal because (a) it is something that is almost universally known in our society these days, and (b) Heidi was of course at college and (c) it would be so easy to access on the internet and for instance by simply referencing the ACAS website or that of the relevant government department. Finally, a simple trip to the nearest CAB would at least have meant being given the leaflet on claiming unfair dismissal and/or discrimination claims. Last of course there is the fact that the Claimant was able, if not before than later, to access the Derby Law Centre which is easy to access via Google where they have a prominent website. They of course are not the only voluntary port of call available in the East Midlands area; there is the Nottingham Law Centre and the provision for advice now available at inter alia the law faculty at Nottingham University. The Claimant in fact was to try that later on via Derby LC but was not able to be offered the facilities of the FRU.

50. Where is the evidence that Carol and/or Heidi were blissfully unaware of the ability to claim in a tribunal, let alone as to whether or not they did not take necessary reasonable steps. They were clearly assisting the Claimant and in an extensive way particularly in the respect of Carol on the benefits front and Heidi on the employment front.

51. It follows that with the burden of proof on the Claimant, I am not persuaded that it was not reasonably practicable to have brought the claim in time. There is one final point I should make, which is that the Claimant is not seeking to say that she delayed bringing her claim to tribunal because she thought she could wait until the outcome of the appeal process. Had she sought to argue that, then I would have started from the premise, as per the jurisprudence certainly in terms of the not reasonably practicable test, that it is not a defence so to speak to wait until upon an appeal in usual circumstances.

52. It follows that I am dismissing the unfair dismissal claim.

The just and equitable test

53. As I have already indicated, this is wider in its scope. To permit the claim to proceed is still an exception rather than the rule as I have also now made clear but the scope as I have equally said is wider and that is made abundantly clear in the jurisprudence and two points I will make. First of all, going back to **Caston** and their Lordships:

> *In the court's view when considering whether a tribunal was entitled to find it just and equitable to extend time, the question that must be asked is whether there was material on which the tribunal could properly exercise its discretion*".

54. I then come on to this and which assists me greatly and which I invariably endeavour to follow unless there is something which would justify departure. Thus, it is the guidance in ***British Coal Corporation -v- Keeble others [1997] IRLR 336 EAT*** where it is suggested that tribunals would be assisted by

considering the facts as listed in Section 33 of the Limitation Act 1980. That section deal with the exercise of discretion in civil courts and personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances in the case, in particular 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 respondent has responded to requests for information[3]; 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 she knew of the possibility of taking action.

55. I will deal with those in reverse order. I have already found that the Claimant would through Carol and Heidi, and I have no evidence to the contrary, have been able to obtain the appropriate knowledge to bring a claim in time. The second point to make in that context is that Heidi clearly learned about the ACAS conciliation procedures because she was in contact with ACAS by 16 November for the purposes of conciliation and I have no evidence that that was delayed because of ignorance. Factoring in again, in terms of balancing matters, I have the Claimant's health. That goes on her side of the justice scales. So far, those scales are evenly balanced; in favour of the Respondent, those assisting the Claimant should have brought this claim within time; in favour of the Claimant, her health.

56. This is not a case where there has been a failure to co-operate by the Respondent thus hiding evidence which the Claimant would have needed to realise she had a claim hence the reason for bringing it out of time.

57. Therefore, I am down to a simple issue and that is where does the balance of prejudice lie? I start from the premise that a respondent should not be required to have to defend a claim which is out of time, in other words on the basis of 'oh let us just let it in' because that looks to be fair. It is more than that because I start from the premise that a respondent is going to have to suffer inter alia the expense of a legal action when it has been brought out of time and in circumstances where it could have been brought in time. That of course needs to be balanced by the fact that the Claimant will suffer being stood out from the justice seat.

58. At this juncture I emphasise that there is a distinction to be made between the direct discrimination claim pursuant to s 13 of the EqA and the failure to make reasonable adjustment claim pursuant to s20-21. This takes me to learned Counsel's reliance upon the further and better particulars that the Claimant submitted following upon the order of EJ Evans. In there at the second page (Bp 51), she first of all sets out as directed by EJ Evans that she is bringing a claim of direct discrimination and she cites the incidents she relies upon. The last of them is 15 July 2015. Of course that is approximately one year before her dismissal and nearly 6 months before the date of the presentation of the claim. And on this part of her case she has today contradicted herself. She told learned Counsel this morning when she was being cross-examined that she did not attend the Wellbeing appointment, which was on 3 December 2014 (Bp 130) because she would not go without her daughter because she was fearful of having a panic attack and as her daughter was not available, she did not go. The net result of that being that because the resources are so scarce, that Wellbeing thereafter made plain that therefore, certainly for the time being, she was discharged from

[3] In other words has been obstructive such as to mean a claimant is without information to present a claim.

their service. Thus it follows that her further and better particulars in which she pleads that the assessment appointment was 14 December 2014 and that she was prevented from attending by the Respondent is untenable. And even if she meant to say that they refused that she could go on 3 December, it cannot run because that was not what she said this morning. The evidence is all over the place and flies in the face of the medical documentation. And it is at the heart of the s13 claim. Therefore I am invoking **Lupetti *-v- Wrens Old House Ltd 2003 ICR 800 CA:*** the direct discrimination claim is not only considerably out of time but lacking in credibility thus I dismiss it has having no reasonable prospect of success. I add that it is so far out of time that the Respondent would be prejudiced because whoever could deal with that specific issue is no longer employed.

59. The second limb of her claim as set out in the further and better particulars is failure to make reasonable adjustments pursuant to s20-21. It is muddled. At first blush it could read that she is cutting off her reasonable adjustment claim as at 14 July 2015 but looked at carefully, that seems to me to be a typo because of course 14 July 2016 is when she was dismissed. The point becomes clear from the main paragraph at the top of Bp52 where she is referring to her treatment all the way through up until and including the dismissal. Then post her dismissal, as I have already mentioned, she put in a complaint which was on 2 August 2016. This is between Bp 84 – 86. In there, she is dealing with the historical issues and taking them up to her dismissal. In the context of that dealing with such issues as a failure of communication by the Respondent with her over her absences and that she had not been keeping out of contact and explanations about her sicknotes. And in the context thereof, she makes reference to at least one then employee of the Respondent, namely Chloe Evans at HR. Having received the complaint did Kevin Rushby, Head of Operations, opine that he could not deal with any of it because people had left the employment? The answer is no. Eventually he dealt comprehensively with the issues that the Claimant had raised in his decision of 21 November 2016 at Bp 114 – 117. In that respect, I therefore simply do not buy that the Respondent is prejudiced in being unable to defend the key issues in this case, which are whether or not the Claimant did keep in contact when she should have done during her absence; failed to co-operate on issues such as a referral to OH or not; and finally had no reason for not putting in sick notes after she ceased to do this on 7 March 2016: Her explanation on all fronts being clearly given, in particular at the telephone conference to which I have referred on 23 September 2016. And Mr Rushby in his decision makes reference to having undertaken an investigation. In that sense, the scales now tip back in favour of the Claimant.

60. Thus although the claim is out of time in terms of material events, it is not a case where the Respondent suddenly hears out of the blue months down the line about the nature of the complaint. It knew what the Claimant was complaining about very early after her dismissal.

61. Therefore what it means is that I have decided, exercising my judicial discretion, to permit the reasonable adjustment claim to proceed, it being just and equitable in all the circumstances so to do.

Directions

62. Given the limited scope of the remaining claim, my hope is that the parties might consider it suitable for judicial mediation. They will inform the Tribunal by 14 days from the issue of this judgment.

63. If this is not viable, and it is of course a matter for the parties, then by 21 days from the issue of this judgment, via the respondent proposed directions for the way forward are to be supplied for the consideration of the tribunal.

Footnote

64. Subsequently the Respondent has informed the Tribunal that it is willing to participate in judicial mediation.

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Employment Judge Britton

Date: 5 January 2018
JUDGMENT SENT TO THE PARTIES ON

10/01/18

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FOR THE TRIBUNAL OFFICE