



EMPLOYMENT TRIBUNALS

Claimant: Marie Robertson
Respondent: The Chief Constable of Hampshire Constabulary
Heard at: Southampton **On:** 29 January 2018
Before: Employment Judge Gardiner

Representation:

Claimant: Mr Stephen Butler, Counsel
Respondent: Miss Heather Platt, Counsel

JUDGMENT AT PRELIMINARY HEARING

1. The following disability discrimination claims are claims that the tribunal has jurisdiction to consider. Although they were presented outside the primary limitation period it would be just and equitable to allow them to be considered on their merits :
 - a. The Respondent directly discriminated against the Claimant contrary to Section 13 of the Equality Act 2010 in the following respect :

In September 2015, DS Morrison taking cases away from her to give to other employees;
 - b. The Claimant's dismissal was an act of discrimination arising from disability contrary to Section 15 of the Equality Act 2010, which the Respondent cannot show is a proportionate means of achieving a legitimate end;
 - c. The Respondent has failed to make reasonable adjustments, contrary to Section 21 of the Equality Act 2010, in the following respects :
 - i. Not providing the Claimant with an ergonomically appropriate chair, given the effect that her disability had on normal day to

day activities. The Claimant says that this failure started in January 2015 and continued until August 2015. The provision, criterion or practice relied upon is the provision of standard chairs to all employees. The Claimant says that this put her at a substantial disadvantage in the light of her ongoing symptoms;

- ii. Failing to make a suitable adjustment to the height of the Claimant's desk and to keep the desk adjusted to the appropriate height for the Claimant. The Claimant says that a suitably adjusted desk was not exclusively available to her at any point from January/February 2015 onwards. The provision criterion or practice is the practice of hot desking, which placed the Claimant at a substantial disadvantage in that she did not have exclusive use of an appropriately configured desk;
 - iii. Failing to ensure that the Claimant had access to a disabled parking bay at all times. The Claimant says that this was a problem for her from April 2015 onwards when she returned to work. The Claimant argues that the relevant provision, criterion or practice is that disabled parking bays were regularly blocked by other car park users;
 - iv. Failing to prevent other employees from adjusting the specialist equipment that had been specifically adjusted for the Claimant. The Claimant says that this occurred from April 2015 onwards. The provision criterion or practice on which the Claimant relies is that other employees would regularly adjust the specialist equipment that had been provided for the Claimant's use, so as to require readjustment by the Claimant.
2. The remaining discrimination claims forming part of the Claimant's claim are dismissed as presented out of time in circumstances where it would not be just and equitable to extend time.
 3. The unfair dismissal claim has been presented outside the applicable limitation period. The tribunal accordingly has no jurisdiction to consider this claim and it is dismissed.

REASONS

1. This Preliminary Hearing was listed to determine whether the Tribunal has jurisdiction to consider the Claimant's claims on their merits at a full hearing.
2. The Respondent employed the Claimant as a Police Staff Investigator until the Claimant's dismissal on 2 December 2015. She alleges that this was an unfair dismissal and that it also amounts to discrimination arising from disability. She also argues that events during her employment that precede her dismissal constitute disability discrimination in certain respects, for which she ought to receive a remedy.

3. The claim was issued on 24 October 2017, over 22 months after her dismissal. In its Response, the Respondent argues that all of the claims advanced are out of time and for that reason that the Tribunal does not have jurisdiction to consider them.
4. At the outset of this Preliminary Hearing, it was necessary to clarify the precise claims that the Claimant was advancing in these proceedings. When she issued her proceedings, she did not have legal representation. She drafted her original ET1 herself and also drafted a subsequent two page email sent to the Tribunal on 15 November 2017 [13-14]. This email has been treated by the Tribunal as an amendment to the claim.
5. Appendix 1 to these Reasons lists the employment claims that the Claimant wishes to bring in these proceedings. It is accepted by the Respondent that all issues, apart from one, fall part of the existing proceedings. As a result, no amendment is needed in order to advance such claims. The one matter that is not referenced even obliquely in the ET1 and subsequent email amendment, is the contention that there was a failure to make a reasonable adjustment in terms of the car that the Claimant was asked to drive to fulfil her role and the distances that the Claimant was expected to travel.
6. It is common ground that all of the claims fall outside the primary limitation period. The issue is whether time should be extended, considering the date on which the primary limitation period expired, and applying the correct legal test as to limitation for each claim advanced. On this issue I have heard evidence from the Claimant, Mrs Robertson. I have also read the documents to which I have been referred in the agreed bundle for the Preliminary Hearing and considered the Skeleton Arguments put in by both parties, as the caselaw there referred to. The representatives also made oral closing submissions.

Legal principles

7. So far as the unfair dismissal claim is concerned, the tribunal must consider whether it was reasonably practicable for proceedings to be issued within three months of the effective date of termination. If it was, then the tribunal has no jurisdiction to extend time and the case fails. If it was not reasonably practicable to issue within time, then the tribunal must consider whether proceedings were brought within a reasonable time thereafter. "Reasonably practicable" should be interpreted as meaning reasonably feasible (*Palmer v Southend on Sea Borough Council* [1984] ICR 372). The onus of proving it was not reasonably practicable for her to issue proceedings earlier is on the Claimant (*Porter v Bandridge* [1978] IRLR 271 at para 12). In *Cullinane v Balfour Beatty Engineering Services Limited* UKEAT/0537/10 (10 April 2011), Underhill J stated at paragraph 16 that the question of whether a further period is reasonable is not the same as asking whether the claimant acted reasonably. It requires "an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted", given the "strong public interest in claims being brought promptly".

8. So far as discrimination claims are concerned, the Tribunal must consider whether it would be just and equitable to extend time to enable the Tribunal to determine the claims on their merits. The burden of establishing it would be just and equitable is on the Claimant, and case law has emphasised that extending time is the exception rather than the rule (*Robertson v Bexley Community Centre* [2003] IRLR 434 at para 25). The Tribunal is to consider the same factors that Courts are directed to consider in personal injury claims under Section 33 of the Limitation Act 1980 (*British Coal Corporation v Keeble* [1997] IRLR 336). These factors are a non-exhaustive list in which the most important factor is to weigh the prejudice that would be caused to the Respondent if the claim were to be determined outside the primary limitation period against the prejudice to the Claimant if that claim were to be dismissed on jurisdictional grounds as out of time. The Tribunal is also expected to have regard to the reasons for the delay.

Findings of fact

9. The pertinent facts can be summarised shortly. It is common ground that the Claimant has a medical condition, rheumatoid arthritis, and that this amounts to a disability, as defined in the Equality Act 2010. This condition was first diagnosed in 2012. Throughout the period to which these proceedings relate, she has suffered from joint pains of varying severity that interfered with her normal day to day activities. On occasions, they have prevented her from attending work at all. As a result of the extent of her sickness absences, she was dismissed on capability grounds in October 2014. Following a successful appeal, she was reinstated in January 2015, although she did not return to work until April 2015. A final written warning was substituted for the decision to dismiss.
10. Certain adjustments were made to her work over the course of the next eight months, but the Claimant was dissatisfied with their sufficiency. She experienced further periods of sickness absence. She was dismissed in December 2015. The reason given was her lack of capability to do the job, given her ongoing restrictions and their effect on her ability to perform the role. Her appeal against her dismissal was heard at the end of February 2016, and was unsuccessful.
11. In the period up until October 2014, the Claimant was a member of Unison and her union subscriptions were deducted directly from her salary. Following her dismissal, her union subscription ceased. Although her pay was reinstated from January 2015 onwards, there was no reinstatement of her union subscription. This omission was not appreciated either by the Claimant or the union. Unison continued to support her at work, attending various meetings with her under the Respondent's sickness absence procedures. It was only in January 2016, after her dismissal, when she enquired about making a tribunal claim, that it was appreciated that her subscriptions were substantially overdue. The union treated her as having ended her membership and therefore as not entitled to further benefits. Although she offered to pay the arrears on her subscription, this was refused. The result was she did not have union assistance with potential tribunal proceedings. Had she been regarded as a union member, Unison

would have paid her Tribunal fees. Without union membership, she was responsible for paying those fees herself.

12. Her take home pay whilst employed by the Respondent was in the region of £1750 per month. When she was dismissed in December 2015 she was paid three months pay in lieu of notice. Thereafter, she continued to spend at the same level as she had done whilst employed. This involved total expenditure of about £1750 a month, even though her benefits were in the region of £600 a month. In March and April 2016, the balance in her bank account was higher than £3000, so she did not qualify under the employment tribunal fees remission scheme.
13. She says, and I accept this was her view at the time, that she considered she could not afford the fees she would need to pay both to issue the claim and to bring it to a final hearing, which would be a total of £1300. Taken together, the issue fee and the listing fee would amount to more than two months of her current level of benefits.
14. At the time of her dismissal, the Claimant owned her own home, on which there was a mortgage. She was concerned that she would not be able to keep up the mortgage payments. She chose not to tell her mortgage provider that she was now unemployed.
15. From her dismissal onwards, the Claimant was in a relationship with the person who has now become her husband. At the time, they were not cohabiting, and the Claimant says that they were not pooling their finances whilst living apart. They started cohabiting in July 2016, when Mr Robertson sold his house. The sale proceeds were used to pay off the Claimant's mortgage. They subsequently married in April 2017.
16. At the end of July 2017, the Supreme Court issued its decision in *R (on the application of Unison) v Lord Chancellor* [2017] ICR 1037, which I refer to as 'the Unison case'. Unison were challenging the legitimacy of the fees regime that had applied in the employment tribunals since 2013. The Supreme Court unanimously decided that the fees regime was unlawful, because the fees were not set at a level that everyone could afford, taking into account the availability of full or partial remission (see paragraph 91). Fees must be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded (paragraph 93).
17. Of particular relevance to the present case, the Supreme Court considered that the fees regime denied access to justice for those in the Claimant's broad income bracket – see paragraphs 50-55 and 94 - because it discouraged them from taking action to enforce their legal rights given the sacrifices they would otherwise need to make in their ordinary and reasonable expenditure in order to afford the fees.
18. Judgment in the Unison case was given on 26 July 2017. Thereafter, there has been some uncertainty in the legal community as to the consequences of the Supreme Court judgment for cases not yet brought as a result of the lack of affordability of fees now declared unlawful. No appellate guidance has yet been given on the implications of the judgment for time limits.

19. I have to factor that Supreme Court decision into the established legal principles that govern whether time should be extended.
20. The Claimant told the Tribunal that she keeps up with current affairs, and knew of the Supreme Court judgment in the Unison case shortly after it was decided. She obtained a copy of the judgment and had to read it three or four times so that she could understand its significance. This took place over a period of a week or so after the decision had been announced, such that she had digested the ruling by about 4 August 2017.
21. Her explanation for the further delay between early August and 24 October 2017 is that she was continuing to suffer from symptoms from her medical condition. There is evidence in the bundle that she was receiving ongoing treatment for her condition during this period. She told me that she had good days and bad days during this period. On bad days she was unable to function to any significant extent. On good days she was able to use a computer, to read, and to venture from her house.
22. She contacted ACAS in September 2017 and on 27 September 2017 she initiated the Early Conciliation Procedure. She was immediately issued with an Early Conciliation Certificate, presumably because she had already instigated the Early Conciliation process back in early 2016.
23. On 20 October 2017 she contacted the Employment Tribunal Helpline for guidance and was apparently told to present her claim within 3 months of the Unison judgment. The proceedings were instigated on 24 October 2017.

Unfair dismissal claim

24. The Claimant argues it was not reasonably practicable for her to bring her unfair dismissal claim until after the Supreme Court decision in the Unison case, and that she issued her proceedings a reasonable time thereafter. Alternatively, it was not reasonably practicable for her to issue unfair dismissal proceedings within the primary limitation period due to the effect of the tribunal fees regime and she issued proceedings within a reasonable time thereafter. She refers in particular to her on going illness, its effect on her ability to carry out day to day activities, and the impact of the Supreme Court decision in the Unison case.
25. My decision is that time should not be extended to enable the unfair dismissal claim on its merits. This is because the Claimant has not persuaded me it was not reasonably practicable for her to have issued proceedings before the Supreme Court decision in the Unison case, nor that she issued proceedings within a reasonable time thereafter. My analysis of the period from December 2015 until proceedings were lodged on 24 October 2017 is as follows:
 - a. In relation to the period from the dismissal until the end of the primary limitation period, it was not reasonably practical for her to bring unfair dismissal proceedings, given her situation and given her income. She had lost her job and was on benefits of £600 a month at a time when her regular monthly bills, excluding food and clothing were £820. Although she had received three months notice

paid in a lump sum at dismissal, she was in a precarious financial position in the light of her ongoing monthly outgoings, her limited income on state benefits and without any new job on the horizon;

- b. However, in the middle of 2016, her financial position changed. Firstly her mortgage was paid off as a result of her partner selling his property and moving in with the Claimant. Secondly, at that point, her partner moved in with her and they lived together as a couple, subsequently marrying in April 2017. The Claimant has not sought to suggest that she and her partner continued to keep their finances entirely separate from mid 2016 onwards. In fact, the Claimant has provided no details whatsoever about the total household income from mid 2016 onwards;
- c. In any event, there is insufficient evidence justifying the delay between the Supreme Court decision on 26 July 2017 and issuing proceedings on 24 October 2017. Although the Claimant may have felt very unwell and incapacitated on several days during this period, she had good days on which she could have set out her complaints in simple terms and presented them to the Tribunal. Her partner was a trade union official for the GMB union and there is no sufficient explanation as to why she could not have sought his help. He is named as her representative on the ET1 Claim Form;
- d. C never sought any advice from any organisation offered advice with legal rights, such as the Citizens Advice Bureau. Although she apparently sought advice from the Employment Tribunal Helpline, that was only done on 20 October 2017, almost three months after the Supreme Court decision;
- e. Therefore the unfair dismissal claim was not brought within a reasonable time after the end of the primary limitation period. There is a substantial delay from mid 2006 until 24 October 2017 which in all the circumstances means that the proceedings were not issued within a reasonable period after it ceased to be reasonably practicable to bring such proceedings.

26. The onus is on the Claimant to show that limitation should be extended so that the claim can be considered on its merits. She has failed to show that it was not reasonably practicable from mid 2016 onwards to bring the claim given the level of fees imposed and the absence of evidence as to her means at that point. Alternatively, she has failed to show that she issued within a reasonable time after it became reasonably practicable.

Discrimination claims

27. As can be seen from the Appendix to these Reasons, there are several different disability discrimination claims that the Claimant wishes to bring arising out of her employment with the Respondent. I need to consider each of them separately and decide whether it would be just and equitable for them to be considered by the Tribunal on their merits. They do not stand or fall as a whole.

28. In making these assessments, I bear in mind the following salient features:

- a. The Claimant asked her union for assistance to bring an employment tribunal claim arising from her dismissal shortly after her dismissal and in any event well within the time for bringing a claim in relation to her dismissal;
- b. The reason why a claim was not brought at that point was because her union withdrew from assisting her, and specifically were not willing to pay the employment tribunal fee;
- c. The Respondent was at least partially to blame for the union's stance. It was its failure to collect the Claimant's membership subscription following her original dismissal and subsequent reinstatement that prompted the union to treat her as if she had resigned her membership. But for the Respondent's mistake, the Claimant may well have brought proceedings arising out of her dismissal and the circumstances that led to it within the primary limitation period;
- d. The decision to dismiss the Claimant was taken after a Final Stage Hearing under the Attendance Management Procedure, which was audio recorded, and a copy of the audio recording was apparently available on request [44]. There is no suggestion that this audio recording is no longer available, or that documents no longer exist in relation to the appeal hearing;
- e. Further, the evidence on which the dismissal decision was taken was contained in a file submitted by management and a file submitted by Unison on behalf of the Claimant [44]. Again, there is no suggestion that those files are no longer available;
- f. To the extent that a Tribunal Hearing covers the same evidential ground as the dismissal hearing and subsequent appeal, the same documentary evidence ought to be available. The dismissal decision was based on the extent of the Claimant's sickness absence in the past, and the extent to which an improvement could be expected in the future. In deciding whether the decision to dismiss amounts to discrimination arising from disability contrary to Section 15 of the Equality Act 2010, the Tribunal's decision will be wholly or almost wholly dependent on an analysis of the documents, rather than the recollection of the witnesses;
- g. At the Stage 3 Hearing, the Panel considered the extent to which reasonable adjustments had been put in place to assist the Claimant in maintaining good attendance. As such, there ought to be contemporaneous documents dealing with the extent to which the Claimant was arguing the same failures to make reasonable adjustments that she now advances in these proceedings, and the Respondent's position on those arguments;
- h. Other than the inherent prejudice caused by the passage of time, the Respondent has identified no particular prejudice that it would suffer if it has to justify the dismissal and the preceding reasonable adjustments on their merits;

- i. The Claimant was supported by her union during the period until December 2015. The tribunal has not been told that she complained formally or informally at the time about any of the alleged instances of direct discrimination she now alleges took place from October 2014 to September 2015;
 - j. Those direct discrimination allegations – with one exception – are allegations that turn on disputed oral evidence as to what was said or done in circumstances where there is likely to be little or no contemporaneous documents. At a final hearing, factual findings would have to be made largely if not wholly based on witness recollection stretching back a period of 3-4 years. In the case of one of the allegations – an allegation that pre-dates the original dismissal decision in October 2014 - the alleged perpetrator (Justin Powell-Hills) is no longer employed by Hampshire Police;
 - k. Whilst the Claimant has adequately explained the delay in bringing proceedings from December 2015 to the middle of 2016, she has not given a persuasive justification for her failure to bring the discrimination claims thereafter, apart from the fact that she remained out of work and that until the end of July 2017 a fee potentially remained payable. For the reasons given above, when analysing whether the unfair dismissal claim should proceed, I consider that there was some fault on her part from mid 2016. In mitigation, for parts of the total period, the Claimant was too unwell to consider issuing proceedings.
 - l. I bear in mind that there is a public interest in claims being brought promptly and that employers have a legitimate expectation of finality once the primary limitation period has ended. I also bear in mind that the delay here is a long one – in relation to some of the claims for failure to make reasonable adjustments time would start to run from shortly after January 2015 (when the Claimant was reinstated) or shortly after April 2015 (when the Claimant returned to the workplace).
29. In the light of all these factors, I consider that the balance of prejudice favours allowing the Claimant's challenge to her dismissal in December 2015 and to advance criticisms of the reasonable adjustments that were put in place after her reinstatement in January 2015. It would also be appropriate to allow the discrete allegation of direct disability discrimination relating to an alleged decision to take work away from her and give it to others in September 2015. The latter specific allegation ought to be supported by contemporaneous documents and therefore ought to be capable of determination without significant forensic prejudice to the Respondent. Whilst the extension to the primary limitation period is a long one in absolute terms in relation to each of these claims, I consider the Claimant has shown there are sufficiently exceptional circumstances to allow these specific claims to proceed.
30. However, the balance of prejudice favours disallowing the remainder of the allegations of direct discrimination. Resolution of those allegations will turn on witness evidence as to what was said several years ago and it would not be fair to the Respondent to have to meet such stale claims now

when they could have been raised much earlier and close to the time at which they are alleged to have occurred.

- 31. The Claimant has alleged at this hearing that there was a failure to make a reasonable adjustment to the type of car with which she was provided and to the distances she was expected to travel. This is not within the original claim or the amendment set out by email. It would require a further amendment and there is no formal application for an amendment before me. Therefore this is not an allegation that can go forward to a final hearing.
- 32. In so deciding this preliminary issue, I express no view as to the merits of the discrimination claims that are permitted to proceed. Miss Platt, for the Respondent, indicated that her clients would want to argue that a deposit order should be made, given her contention as to the weakness of those claims. It will be for the Respondent, on taking considered instructions, to decide whether such an application should be made and if so, whether to list for a further Preliminary Hearing to consider that issue. I asked the Claimant to get advice from those who now represent her on the prospects of the discrimination claims that are allowed to proceed.
- 33. I also encouraged the parties to consider whether it might be appropriate to ask for judicial mediation or engage in some other discussions between lawyers to see if settlement can be achieved. I have made case management orders on the assumption that the parties are unable to achieve settlement and a four day hearing is necessary to bring this long running dispute to an end. Those case management orders have been notified separately.

Employment Judge Gardiner

Date 29 January 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

APPENDIX 1

LIST OF CLAIMS ORIGINALLY BROUGHT BY THE CLAIMANT

1. Was the Respondent's decision to dismiss the Claimant on 2 December 2015 an unfair dismissal, contrary to Section 98(4) of the Employment Rights Act 1996 ?
2. Did the Respondent directly discriminate against the Claimant because of her disability in the following respects :
 - a. In being excluded from other jobs by DS Justin Powell-Hills whilst working on the case of Vaskevicious. The Claimant contends that this happened on two occasions before October 2014;
 - b. In the application of the Attendance Management Policy to the Claimant during the period from January 2015 to December 2015;
 - c. In being told to work on another floor;
 - d. In being subjected to a comment by DC Gary Allsop in June 2015 namely "Let's throw fishheads at the disabled people"
 - e. In September 2015, DS Morrison taking cases away from her to give to other employees;
3. Was the Claimant's dismissal on 2 December 2015 an act which amounted to discrimination arising from her disability, contrary to Section 15 of the Equality Act 2010 in that :
 - a. the decision to dismiss the Claimant on grounds of capability was an act taken because of something arising out of her disability, namely the extent of her sickness absence;
 - b. the decision to dismiss the Claimant was not a proportionate means of achieving a legitimate aim.
4. Did the Respondent discriminate against the Claimant by failing to make reasonable adjustments in the light of her disability, contrary to Section 21 of the Equality Act 2010 in the following respects :
 - a. Not providing the Claimant with an ergonomically appropriate chair, given the effect that her disability had on normal day to day activities. The Claimant says that this failure started in January 2015 and continued until August 2015. The provision, criterion or practice relied upon is the provision of standard chairs to all employees. The Claimant says that this put her at a substantial disadvantage in the light of her ongoing symptoms;
 - b. Failing to make a suitable adjustment to the height of the Claimant's desk and to keep the desk adjusted to the appropriate height for the Claimant. The Claimant says that a suitably adjusted desk was not exclusively available to her at any point from January/February 2015 onwards. The provision criterion or practice is the practice of hot desking, which placed the Claimant at a substantial disadvantage in that she did not have exclusive use of an appropriately configured desk;

- c. Failing to ensure that the Claimant had access to a disabled parking bay at all times. The Claimant says that this was a problem for her from April 2015 onwards when she returned to work. The Claimant argues that the relevant provision, criterion or practice is that disabled parking bays were regularly blocked by other car park users;
- d. Failing to prevent other employees from adjusting the specialist equipment that had been specifically adjusted for the Claimant. The Claimant says that this occurred from April 2015 onwards. The provision criterion or practice on which the Claimant relies is that other employees would regularly adjust the specialist equipment that had been provided for the Claimant's use, so as to require readjustment by the Claimant.

ADDITIONAL ALLEGATION RAISED DURING THE PRELIMINARY HEARING

- e. Failing to permit the Claimant to have access to smaller vehicles and be only required to travel shorter distances in the course of her duties. The Claimant says that this was a problem from when she returned to work in April 2015 onwards. The provision criterion or practice on which the Claimant relies is that the Claimant should have had access to smaller vehicles and only be expected to travel shorter distances.