EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs B Burton	v	**Cambridgeshire & Peterborough NHS Foundation Trust**

Heard at: **Cambridge** **On: 2 July 2018**

Before: **Employment Judge Foxwell**

Appearances:
For the Claimant: In person
For the Respondent: Ms B Criddle, of Counsel

JUDGMENT having been sent to the parties on 16 July 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant, Mrs Brenda Burton, was employed by the Respondent, the Cambridgeshire and Peterborough NHS Foundation Trust, between September 2010 and 20 April 2017 when she was summarily dismissed.

2. On 3 August 2017, she presented complaints of unfair dismissal, breach of contract as to notice, for a redundancy payment and of disability discrimination to the tribunal. The last claim, that is the one of disability discrimination, was based on a condition affecting her mental health, anxiety and depression.

3. The Respondent filed a response disputing the claim on its merits, not admitting that the Claimant was a disabled person within the definition in section 6 of the Equality Act 2010 and also challenging the Tribunal's jurisdiction to decide claims under that Act because of the time of their presentation.

4. The claim first came before the Tribunal on 18 January 2018 (Employment Judge Palmer). Judge Palmer considered the issues in the case with the parties and the question whether the claim of disability discrimination was in time was plainly at the forefront of his mind. He directed that the Claimant provide further particulars of her claim by 1 February 2018,

which she did. He also listed this hearing to decide whether the disability discrimination claims had been presented in time and, if not, whether it was just and equitable for the Tribunal to extend time for the bringing of them.

5. The Respondent accepts that the Claimant has suffered from anxiety and depression from time to time, although it does not accept (at least as things stand) that this condition satisfies the definition of disability within the 2010 Act.

6. I began the hearing by clarifying with the parties, what the allegations of disability discrimination are (or, insofar as they were not in the Claim Form, what allegations the Claimant would like to pursue). The Claimant identified four allegations which she would like to pursue at a hearing; these were:

   7.1 A complaint of failure to make a reasonable adjustment to workload. The provision criterion or practice which the Claimant said placed her at a significant disadvantage compared to non-disabled colleagues was the workload assigned. The adjustment she contended for was a reduction in this for her. The reason that she said she was at a significant disadvantage was that overwork caused her stress. She also said that she was slower than others as she checked her work over and over again.

   7.2 The second allegation concerned a performance review meeting on the 20 September 2016. The Claimant's alleged actions in and after this meeting were the basis for her subsequent summary dismissal. She contends that she was treated unfavourably by being called into this meeting without warning or the opportunity to be represented and having to face three managers. She says that this alleged unfavourable treatment was caused by "something", namely her level of performance, which arose from her disability. She contends, therefore, that this treatment was discrimination arising from disability under s15 of the 2010 Act.

   The next two matters that the Claimant raised were first mentioned in the further information she provided on 1 February 2018.

   7.3 The third allegation is that in the period May to August 2016, the Respondent had extended a capability process contrary to its procedures or fairness. The Claimant characterized this as a further instance of discrimination arising from disability: the extension was due to "something", poor performance, which arose, it is said, from her disability.

   7.4 The fourth allegation concerned sick pay. It appears that on 6 December 2016 the Claimant's sick pay reduced when she had exhausted her ordinary contractual entitlement to full pay. She describes this as unfavourable treatment caused by "something", sickness absence, which arose from her disability.

8. So those are the four strands of disability discrimination that she either has

pursued or would like to pursue in this case. The Respondent's position is that all of these claims have been presented out of time.

9. The relevant time limit for claims of discrimination is contained in s123 of the Equality Act 2010. This provides as follows:

"123 (1) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of –

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

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

……

(3) For the purpose of this section –

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

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

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

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

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

10. The basic time limit is three months from the act complained of, or three months from the end of a state of affairs which has continued over a period of time; this is referred to as "conduct extending over a period" or sometimes simply as a "continuing act". Where claims have been presented out of time, the Tribunal has a discretion to extend time for their presentation where it finds that it is just and equitable to do so. It is well established that a claimant must lead evidence showing that it is just and equitable to extend time and that there is no presumption that time will be extended, rather the Tribunal has to look at all the circumstances to consider what fairness dictates (see *Robertson v Bexley Community Centre* [2003] IRLR 434 and *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327). Key issues for a Tribunal in exercising this discretion are always the length of and reasons for the claimant's delay, and whether this has caused the respondent specific prejudice.

11. Another issue which has arisen in light of the Claimant's clarification of her claims is the extent to which they were contained in the claim form as originally presented. I can deal with that aspect briefly. I am satisfied that of the four issues, only the first was set out with clarity in the claim as originally presented. The second claim concerning the meeting on 20 September 2016, is not identified as a claim of discrimination arising

from disability in the claim form but is based on facts which are set out there. The third and fourth claims are wholly new. They are not referred to in any sense in the claim form as originally presented, they first make an appearance in the further information supplied by the Claimant on 1 February 2018. I shall deal with the issue of amendment to include new claims at the same time as the issue of the time limit for the claims as timing, and particularly the jurisdictional effect of timing, is a relevant consideration when deciding whether to give permission to amend or not.

12. To decide these issues, I have considered the documents to which I was taken in a slim bundle. I have also considered the Tribunal's file. I heard evidence from the Claimant and Miss Criddle had the opportunity to cross examine her. I have made my findings of fact on the balance of probabilities.

13. The first thing that I can say with confidence is that this is a case that does not turn on issues of credibility, I am quite satisfied that the Claimant gave me truthful evidence of what she did as she recalls it and of her perception of events.

14. It is probably best if I start with a little about the Claimant's background. The Claimant was a member of UNISON and acted as a union representative in her workplace pretty much from the time she started there in 2010. That role lapsed in 2016 because, for whatever reason, she had not filed the appropriate paperwork to be reappointed in that capacity. She nevertheless remained a member of UNISON until, in August 2016, she decided to join UNITE; she was a member of UNITE at all material times thereafter. Because of her role as a union representative the Claimant received training so that she could help others as a representative in disciplinary or grievance meetings. She told me that she had not had to act as a such a representative in practice however.

15. I have noted that the Claimant suffers from anxiety and depression and while I do not have any specific medical evidence of symptoms, I have taken into account, in general terms, the debilitating effect of conditions of this type.

16. In broad terms the Claimant's explanation for not acting sooner in presenting her claims had two strands; one relates to Tribunal fees and the other relates to what she thought was the effect of the disciplinary process she was subject to on the claims she wished to bring in the Tribunal. I will look at both aspects but before I do so I should point out that parts of the Claimant's claims have been presented in time. The Claimant's dismissal happened on 20 April 2017. By my calculation the limitation period for the claims of unfair dismissal claim, breach of contract and for a redundancy payment expired on or about 19 August 2017 once the extension of time arising from early conciliation is factored in (the Claimant was engaged in early conciliation between 1 June 2017 and 1 July 2017). So, there is no dispute that those claims were presented in time.

17. Turning to the discrimination claims under the Equality Act, the basic time limit of three months from when the act complained of happened expired in all cases before the initiation of early conciliation. The latest of those

claims was the change in sick pay in December 2016 and the time limit for that would have expired in March 2016.

18. The Claimant sought to argue that there were continuing acts in the period up to the date of her dismissal in respect of the failure to make reasonable adjustments to work load. I simply cannot accept that argument because in the period from the date of her meeting on 20 September 2016 until her dismissal she was not at work. So, the last date upon which such an adjustment could have been made is 20 September 2016. I find that this is not a case about acts extending over a period, but one where time limits have expired; it therefore concerns the just and equitable extension of time. It seemed to me that the Claimant had all but accepted that by the time she had got to her closing submissions.

19. I turn then, to the two strands to her explanation for not acting sooner than she did.

20. As far as fees are concerned, it is right to say that these have inhibited large numbers of claimants from bringing claims for reasons which were explained, rather more elegantly and succinctly than I can, by the Supreme Court. And of course, the Fees Order was not quashed until the Court's decision was promulgated on 27 July 2017. So, I have paid careful attention to this aspect of the Claimant's explanation. I noted that it is not an explanation that she gave in her further information dated 1 February 2018. Similarly, her evidence to me was that she only thought about bringing Employment Tribunal proceedings in July 2017 when the internal processes were at an end. This tends to suggest that fees were not at the forefront of her mind until July 2017 when the Equality Act claims were substantially out of time. Furthermore, the Claimant had access to union support throughout and may have had access to help with fees. There was no evidence that she asked, or that she made enquiries about fees remission. She did make an enquiry about legal aid but that is for assistance through State funding for legal advice, rather than assistance by way of remission of fees.

21. When I step back from that evidence, I do not accept that fees are the real reason for the Claimant not presenting her claim sooner. The explanation is simply not consistent with her evidence that she did not think about bringing a claim until the internal process was over.

22. I go then to the second strand, which is that the Claimant thought that the whole process, including these Tribunal proceedings, hung together as one. In her submissions she expressed it as having to finish the process, that is the internal process, before bringing a claim. Miss Criddle suggested in reply that the Claimant had not quite put it that way in her evidence, but it seemed to me that this <u>was</u> the thrust of her evidence: she could not begin to think of bringing this claim before the internal processes were at an end.

23. It is worth looking at the time line in this context. The performance review took place on 20 September 2016 and the Claimant went off sick that day and, in practical terms, did not return to work. In December 2016, she received a letter informing her of a disciplinary process arising from events

at the meeting, or after the meeting on 20 September. She contacted her union in December at the latest (she may well have been in touch with them before) and from that time on she had assistance from Tony Ellington, a regional organiser. In the same month she lodged a grievance. I have seen a copy of the grievance and it refers, amongst other things, to the Respondent's alleged failure to make reasonable adjustments for the Claimant as a disabled person under the Equality Act 2010. In that month the Claimant's pay also reduced from full to half pay.

24. At the beginning of January 2017, the Claimant was certified fit for work by her doctor and would have returned to work but was in fact suspended on full pay pending the disciplinary process. The disciplinary hearing took place on 20 April 2017 and the outcome, as I have mentioned, was summary dismissal. Again, as I have mentioned, early conciliation began on 1 June 2017, there was an appeal which was dealt with on 11 July 2017 and the outcome was given that day, or certainly within 24 hours by letter dated 12 July 2017. The Supreme Court's decision came later that month and the claim was presented at the beginning of August. The further information, again as I have mentioned, was provided on 1 February 2018 and I have treated that as the effective date of the Claimant's application to amend.

25. I find that the reason for the delay in presenting the Equality Act claims is the Claimant's belief that she had to wait until the whole of the process was concluded before bringing her claims. It is well established that such a belief can be a relevant factor in the just and equitable extension of time, but it is by no means a deciding factor. In looking at that explanation I must consider the Claimant's own experience, her access to advice and her level of training. The Claimant had access to advice, she was being assisted by a regional officer of her union and was assisted throughout the disciplinary process. She was aware of the facts of her claims in 2016 and indeed had gone as far as to articulate them in her grievance of December 2016. So, although the Claimant believed that she had to wait until the internal process was at an end, I am not satisfied that it was reasonable for her to believe this given the access to advice that she had, the source of that advice and her own experience as a trade union representative.

26. I have considered the prejudice to both parties. There certainly would be prejudice to the Claimant were I not to extend time for her Equality Act claims on just and equitable grounds as she would no longer be able to pursue them. On the Respondent's side, no specific prejudice has been identified but there is, of course, always the general prejudice of having to face a claim which would otherwise be outside the Tribunal's jurisdiction. In this case, it would make the claim more complex and costly to defend and expose the Respondent to potentially different remedies.

27. Those are the competing factors in respect of the application to extend time. Before I express a conclusion on where justice and equity lies in that regard, it is still necessary for me to deal with the application to amend. I am satisfied from everything that I have seen on the claim form that the second of the four issues amounts to no more than a relabeling of facts already pleaded. To that extent it falls within the first, or arguably, the second of the *Selkent* categories. In either case I would permit that

amendment subject to the wider arguments on time.

28. I pause to note that time is not a decisive factor in applications to amend; it is relevant of course, but almost always claims will be out of time when an application to amend to include them is made. So, if I can leave it this way with the second claim, subject to the issue of time, there is a powerful argument for permitting that amendment.

29. I take a different view in respect of the third and fourth allegations. These were not intimated until 1 February 2018, and that is the date that I believe I should have in mind when considering time in respect of this part of the application (although I give full effect to the decision of the Employment Appeal Tribunal that the date of an amendment takes affect when the amendment is allowed, which would be today). By 1 February 2018 the two new issues raised were substantially out of time, one related back to events in the summer of 2016 and the other at the end of 2016. The facts of the new claims were known to the Claimant at all relevant times, albeit she had not recalled them when she initially presented this claim.

30. Even were I to find it just and equitable to extend time more generally, I would not grant permission to amend to include the two new claims because they are wholly new and brought substantially outside the relevant time limit in circumstances where the Claimant had had a considerable period in which to consider the scope of her claim as well as access to the advice to which I have already referred.

31. I come then to my decision on the issue of time itself. This is a case where the Claimant had access to advice and was aware of the cause of action at an early stage. I do not find in those circumstances that it is just and equitable to grant an extension of time for the disability discrimination claims in this case. It seems to me that the underlying intention of Parliament, which is for these claims to be pursued promptly, should be applied. I therefore do not grant an extension of time.

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Employment Judge Foxwell

Date: 14 August 2018……

Judgment sent to the parties on

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For the Tribunal office