EMPLOYMENT TRIBUNALS

Claimant: Mrs Donna Cairns

Respondent: Burton Hospitals NHS Foundation Trust

Heard at: Nottingham Employment Tribunal

On: 01.11.18

Before: Employment Judge Dyal

Representation:

Claimant: Mr Bidnell-Edwards of Counsel
Respondent: Ms Varney of Counsel

JUDGMENT

1. The complaint of unauthorised deduction from wages is dismissed upon withdrawal.
2. The first application to amend (relates to Equality Act 2010 claim) is allowed by consent.
3. The Second Application to amend (wrongful dismissal) is refused.
4. It is not just and equitable to extend time in respect of the Equality Act 2010 complaints which are therefore dismissed.

REASONS

The issues

1. The matter came before me today to determine:
   1.1. Whether it was just and equitable to extend time;
   1.2. Whether the Claimant was a disabled person within the meaning of the Equality Act 2010.

2. In the course of the hearing two further issues arose:
   2.1. Whether the Claimant's first application to amend should be allowed;
   2.2. Whether the Claimant's second application to amend should be allowed.

The hearing

Migraine and lighting

3. Before the hearing commenced, my clerk reported that the Claimant was suffering from a migraine and struggling with the bright lighting in the waiting room. I had the impression at that point that she was not fit to enter the hearing room. I therefore asked to see the parties' counsel in open tribunal to discuss the way forward. Mr Bidnell-Edwards explained that the Claimant did not have a migraine but had begun to experience some preliminary symptoms because of the bright lighting in the waiting room. However, her sunglasses had been obtained and the problem had abated. She was fit and happy to continue. It was agreed, however, that we should turn off the lights in the tribunal room and make do with the natural light. That is how the hearing proceeded. There was no further suggestion that the Claimant was unfit to proceed and I made clear to the Claimant that she should let me know if she felt unwell.

Comment on cross-examination

4. The Claimant gave evidence and was cross examined. There were some less than entirely temperate exchanges between counsel in the course of this although matters remained within normal limits. On one occasion Mr Bidnell-Edwards submitted that Ms Varney was 'misleading the witness' as to the content of the bundle and that this was a very serious matter. The essence of the issue was that Ms Varney had put to the Claimant that there were no references to her suffering from depression in the bundle. In fact there were about three and this prompted the interruption. Context, however, is important. The witness had just been taken to two of the three references to depression and it was clear, to me at least, Ms Varney was not trying to mislead. It was plain to me that what she was getting at was that there were no references to depression in the bundle that were contemporaneous with or ante-dated the alleged acts of discrimination. Such references as there were post-dated it. In summary, I thought the cross-examination was conducted in an unremarkable and acceptable manner.

Concessions on time-limits

5. Ms Varney accepted that there was a prima-facie case that the acts of discrimination complained of formed conduct extending over a period and therefore that it was right for me, for today's purposes, to use the effective date of termination as the starting point for limitation for all claims.

6. In the course of the hearing Mr Bidnell-Edwards conceded that the Claimant's letter of resignation dated 23 October 2017 had the effect of summarily. He therefore accepted that all claims were out of time and the issue was whether time should be extended.

Withdrawal of claim for holiday pay

7. The claim for holiday pay was withdrawn during the course of the hearing.

The first application to amend

8. In the course of discussing the issues for adjudication, Mr Bidnell-Edwards indicated that he had an application to amend. The proposed amendment was in writing but Mr Bidnell-Edwards had spotted an omission and wanted to add to the draft before making the application. No advance notice was given of the application before today and I was concerned initially that it may be unfair to expect the Respondent to deal with it on the hoof. I therefore rose for Mr Bidnell-Edwards to finalise the proposed amendment and

email it to the tribunal and Ms Varney. The tribunal staff printed the document with copies for all parties and myself. I gave time for the proposed amendment to be considered. Having seen it, I formed the view that it essentially put the existing claim into a more coherent legal framework in a way that is typical of a list of issues drafted by counsel. It was not confined to that, however, in as much as there were a small number of new matters albeit they seemed very closely related to what was originally pleaded. For instance, the proposed amendment made clear what was implied but unstated in the claim form: that the complaints of discrimination included complaints of (constructive) discriminatory dismissal.

9. Ultimately, Ms Varney consented to the proposed amendment save for paragraph 4. Mr Bidnell-Edwards, on reflection, was satisfied that paragraph 4 was unnecessary and withdrew the application to amend in respect of that paragraph. I was content to allow the application to amend (excluding paragraph 4) without at that point considering time-limits. The issue of limitation of course remained at large for determination in relation to all discrimination complaints.

Is it just and equitable to extend time for the discrimination complaints?

Facts

10. The Claimant was employed by the Respondent as Healthcare Assistant from February 2016 until her resignation in October 2017.

11. By the latter stages of the Claimant's employment the relationship had become unhappy. On 10 October 2017 the Claimant's GP indicated on a Fit-Note that the Claimant was suffering from "*work related emotional stress*" and advised that the Claimant may be fit for work with amended duties. The fit note ran from 10 October 2017 to 10 November 2017.

12. In around 20 October 2017, the Claimant attempted to resign orally in conversation with Ms Joanne Ebbutt, Senior Sister. She was told that if she wanted to resign, she should put the resignation in writing and give notice. She did put the resignation in writing; but she did not give notice. By a letter dated 23 October 2018, the Claimant gave notice to the Matron of her resignation to "take immediate effect".

13. As the evidence progressed, it became apparent that the Claimant had posted the letter of resignation to the Respondent. This had not been obvious previously. In her witness statement she had said "*as far as I can remember, I did say I was going to give my month's notice when I resigned on 23 October 2017".* In oral evidence the Claimant disowned that part of her statement not least because she had posted her letter of resignation and had not spoken to anyone relevant on 23 October 2017.

14. Initially, upon Mr Bidnell-Edward's concession that the letter of 23 October 2017 summarily terminated the Claimant's employment, the parties agreed that the effective date of termination ('EDT') was 23 October 2017. However, it having become clear that the letter had been posted, it was agreed that a finding was necessary as to when it was posted and when it was received because this impacted upon the EDT.

15. The Claimant could not remember exactly when she posted the resignation letter: it was either late afternoon on 23 October 2017 or the next day. An entry in her GP records on 24 October 2017 states she is 'going to hand notice in'. On that basis I infer and find that the Claimant sent the letter to the Respondent during the course of the day on 24 October 2017. She sent the letter by first class recorded delivery. It is likely to have been received and read on 25 October 2017. I therefore find that 25 October 2017 was the

effective date of termination. I should say, however, that nothing I later decide turns on where in the range of 23 – 25 October 2017 the effective date of termination fell.

16. I am satisfied that although the Claimant resigned without notice, she had a mistaken belief that she had resigned on notice. The GP note referred to says "*has to give one month's notice"* and that corroborates the Claimant's witness evidence. Am also satisfied that the Claimant continued to labour under that mistaken belief until the ET3 was served and the time point taken. Although the mistaken belief remained genuine it was a peculiar mistake to make in all the circumstances.

17. The Claimant was, in error, paid on 27 October 2017 as if her employment had continued to the end of that month – this appears to be because the resignation came so close to pay-day. However, she was not paid at all in November 2017. On a date unknown, but around the very beginning of December, the Claimant wrote a letter in which she complained that she had not been paid holiday pay or sick pay. That letter was not before the tribunal (it appears no-one has a copy). However, the response to it was. In a letter dated 7 December 2017, Hannah Musson, HR Manager, thanked the Claimant for her letter which she recorded had been received on 5 December 2017. She went on:

> *In your letter you query wages that you feel are owing to you from Burton Hospitals NHS FT. However as you resigned from your post as Trainee Healthcare Support Worker on Ward 7 with immediate effect from 23 October 2017 (this was by letter to Matron Gibbs), you would not been entitled to sickness pay or annual leave pay after this date as you were no longer classified as an employee at Burton Hospitals NHS FT.*
>
> *We would look at any outstanding annual leave payments that may be owed to you, however in this case you have taken over your accrued number of hours of annual leave by 39 hours.*

18. This, in my judgment, was a clear and, even to a lay-person, easily intelligible, representation from the Respondent that the Claimant's employment had ended with immediate effect on 23 October 2017.

19. The Claimant took some steps to obtain advice. Shortly before her resignation the Claimant contacted her trade union, the RCN. At that stage the Claimant was looking for representation internally. This was refused because she was already at stage 2 of the absence management process.

20. Shortly after she resigned, she spoke to an organisation that she knew only as *Equality and Diversity*. She was unable to describe exactly what the organisation is or its full name. It is clear that it provides some level of advice and assistance in relation to equality and diversity issues arising out of employment situations. At around this time the Claimant also spoke to ACAS. Through her dealings with those organisations she learned for the first time that she could in principle bring a discrimination claim in the employment tribunal and that there was a three month time limit which ran from the date of termination.

21. However, those advisers were under the illusion that the Claimant had resigned on notice effective on 20 November 2016. There is no evidence that they saw the letter of resignation and indeed the Claimant did not have it to show them. It was a manuscript letter which she had posted to the Respondent and there is no evidence that she kept a copy. Nor is there any evidence that they were shown the Respondent's letter of 7 December 2018

22. On 6 December 2017 the Claimant sent the Respondent a very detailed letter of grievance. She received considerable assistance with the drafting of the letter from *Equality and Diversity*. However, there is a lengthy factual narrative which reflected the Claimant's instructions to the adviser. A grievance hearing was convened on 22 December 2017 and a grievance outcome letter promulgated on 29 January 2018.

23. The Claimant spoke to her solicitors, Lawson West, on 17 January 2017. The only evidence of what she instructed them that is before the tribunal is contained at paragraphs 17 and 19 of the Claimant's statement (that she told them that she had resigned on notice on 23 October 2017 to expire on 20 November 2017), together with the factual content of the ET1 and statement of claim which it is fair to assume originates from the Claimant. Ms Varney cross-examined the Claimant about those sections of the statement dealing with the instructions she had given to her solicitor. Mr Bidnell-Edwards, objected and asserted privilege in relation to any further consideration of the instructions and discussions between the Claimant and her solicitors. The tribunal therefore does not know what other instructions the Claimant gave her solicitors, what documents she showed what instructions they asked of her or what documents they asked to see. Ms Varney did not press further into those matters and did not argue that privilege had been waived.

24. Under the pressure of cross-examination the Claimant did try to explain the late presentation of her claim by reference to mental health problems during the limitation period. There was no medical evidence specifically commenting upon the impact of the Claimant's mental health upon her ability to lodge a claim in time. I readily accept that during the limitation period the Claimant was suffering from some mental health problems. She was, as she had been for many years, taking citalopram. The GP notes suggest that anxiety was at the fore of this mental health problem, that there were feelings of stress and I have no difficulty in accepting also, from the Claimant's evidence, that she had a degree of low mood. However, for the reasons given in my analysis I do not accept that the mental health problems were a significant barrier to presenting a claim in time.

Early Conciliation and Presentation of claim

25. Day A for the purposes of Early Conciliation was 12 February 2018. Day B was 12 March 2018. The claim was presented on 11 April 2018.

Brief statement of law

26. The applicable statutory provisions appear at s.123 and 140B Equality Act 2010. The tribunal has considered these carefully. They are not set out here since there is no controversy about what the applicable provisions are and it is agreed all around that the claim has been presented out of time.

27. In assessing whether or not it is just and equitable to extend time the tribunal may be assisted by the following factors (that have their origins in the Limitation Act 1980), see *British Coal Corporation v Keeble* [1997] IRLR 336:

    27.1. the length of, and the reasons for, the delay on the part of the claimant;
    27.2. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced is likely to be less cogent than if the action had been brought within time;
    27.3. the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests for information or inspection;

27.4. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
27.5. the extent to which the claimant acted promptly and reasonably once he knew whether or not the act or omission of the respondent might be capable at that time of giving rise to an action for damages;
27.6. the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received;
27.7. the balance of prejudice.

28. The burden of proof is on the Claimant to satisfy the tribunal that it is just and equitable to extend time: *Robertson v Bexley Community Centre* [2003] IRLR 434.

29. Where the Claimant's advisor is at fault that is a relevant factor. Generally, the fault of an advisor should not be visited on the claimant. The advisor's culpability should not generally be treated as the Claimant's culpability (see e.g. *Virdi v Commissioner of the Police for the Metropolis* [2007] IRLR 24 [34 – 36, 40]; *Chohan v Derby Law Centre* [2004] IRLR 685 [18 – 19]).

Conclusions on just and equitable

30. I think this was a finely balanced case but, on balance, I do not think it would be just and equitable to extend time. I think many of the factors identified in *Keeble* are relevant here and having analysed and weighed them I decline to extend time. The key factors in the balance are, in my view, the following ones.

- *Length of the delay*

31. Time ran from 25 October 2017 at the latest. The primary time limit expired on 24 January 2018. The Claimant did not contact ACAS until after the primary time limit had expired and therefore time spent in Early Conciliation did not 'stop the clock' or otherwise extend time. When the claim was presented on 4 April 2018 it was over two months out of time.

32. The primary limitation period is just three months long and so a two month delay is far from trivial or unimportant. I do recognise, however, that one of those months was spent in early conciliation (between Day A and Day B) and I think it right to take a more benign view of that period of delay even though it did not as a matter of law or fact 'stop the clock'.

- *Reason for the delay*

33. The Claimant was under the misapprehension that she had resigned on notice. If she had been right about that, then the claim would have been in time.

34. At the front of my mind, I take into account the fact that the Claimant is a lay-person who was not well-versed in employment law. While I accept that she made a genuine error, not all genuine errors are reasonable errors and I do not think that this was a reasonable error to make. There was culpability on the Claimant's part:

    34.1. The letter or resignation is clear. In it, the Claimant said that she was resigning with immediate effect and even to a lay person far the most obvious interpretation of that is that it means what it says.

34.2. The Respondent's letter of 7 December 2017 is very clear that it considered that the Claimant had resigned with immediate effect and was no longer an employee from 23 October 2017.

34.3. The Claimant thought that she would be employed until 20 November 2017 because she had a Fit-note from her GP. However, *after* obtaining and giving the Respondent the fit note she resigned with immediate effect. In any event the fit note only ran until 10 November 2017 so it is unclear why the fit note was thought to extend employment to 20 November 2017.

35. I wish to be very clear that the Claimant's case has been presented on the basis that this was her error and not on the basis that her advisers were at fault. Mr Bidnell-Edwards submitted that the Claimant had reported an incorrect understanding of the facts to everybody. There is no evidence before me showing to what extent if any the advisers probed the Claimant in relation to the circumstances of her resignation, what documents they asked of her and what documents she showed them. During evidence, Mr Bidnell-Edwards asserted privilege in relation to the instructions that the Claimant gave to her solicitors beyond the limited matters revealed in her witness statement. In closing submissions Mr Bidnell-Edwards submitted that the Respondent's letter of 7 December 2017 had been disclosed for this hearing by the Respondent's solicitor and not by the Claimant's. I asked him what the significance of that was and he said it implied that the Claimant's solicitors did not have it and in turn that this meant the Claimant had not shown it to them (he accepted however that the Claimant had it – that was her own evidence). This was to make the point that the Claimant's solicitors could not have been aware of the EDT. The sum total is that there is no basis on which I could properly conclude, on the information that has been placed before me, that the Claimant's advisors or any of them, were at fault and indeed that is avowedly not how her case has been run today.

- *the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or inspection*

36. I think this is an important factor in this case. The Respondent responded very swiftly to the Claimant's complaint of early December 2017 and in terms, by its letter of 7 December 2017, that made clear that the Claimant's employment had terminated summarily not on notice.

37. The Respondent also dealt with the Claimant's lengthy and detailed grievance of 6 December 2017 in an impressively fulsome way and within a timescale that I think was very reasonable in the circumstances. The Claimant was no longer an employee (so some employers would not have dealt with the grievance at all) and the period of time during which the grievance was dealt with spanned the Christmas period. A grievance hearing was convened on 22 December 2017 and the outcome letter is dated 29 January 2018. In the meantime a certain amount of investigation must have been undertaken. This letter repeated the relevant information bearing on the date of termination originally contained in the letter of 7 December 2017.

- *the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action*

38. The Claimant was not under a disability in the sense meant in the Limitation Act 1980, i.e., lacking mental capacity. However, ill-health can be a relevant factor even if it stops well short of mental incapacity.

39. I do accept that the Claimant had ongoing mental health problems during the limitation period. However, it is a question of degree and the task I have is to try and assess whether or not the mental health problems were a significant barrier to presenting the claim in time for any reason. Firstly, there is no medical evidence specifically dealing with that issue. So secondly I am left to draw conclusions from such material as there is before me. During the limitation period the Claimant was well enough to seek advice from three different sources. She also sought advice from a fourth source (RCN) shortly before her resignation. The resignation letter itself is drafted pretty clearly and cogently. There is a further letter that the tribunal has not seen that asserts a right to sick pay and holiday pay. There is a detailed grievance letter which the Claimant had assistance with drafting but it contains a lengthy narrative that she confirmed in evidence came from her instructions to *Equality and Diversity*. The Grounds of Claim attached to the ET1 also include a detailed description of the complaint. The Claimant did not, in her witness statement, seek to explain the late submission of her claim on mental health issues, although she notably did so in her oral evidence. Looking at the evidence before me in the round, on balance, I do not think the mental health problems can have been a significant barrier to understanding facts, giving instructions, taking advice, producing documents, being motivated to do something about the employment problems or any matters of that sort. I therefore do not think the mental health problems played any significant role in the late presentation of the claim.

- *the extent to which the claimant acted promptly and reasonably*
- *the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received*

40. The Claimant did act promptly in obtaining advice. The evidence is very sparse such that I cannot tell whether she acted reasonably in her interactions with her advisors, for instance by responding to any questions they may have asked to probe the effective date of termination and/or by giving them any documents that they may have requested. Nor can I tell whether she sought or received any advice about when the effective date of termination was. Privilege has been asserted in relation to the interaction with solicitors. It seems clear that the Claimant was advised that time ran from 20 November 2017 on the basis that that was the EDT. However, the quality of that advice (whether it was negligent or not) depends entirely on the detail of the interaction between the Claimant and the advisors which the tribunal has not been made privy to.

41. I stress that the case has been presented squarely on the basis that the error was the Claimant's and not her advisors.

- *the balance of prejudice.*

42. There is no doubt that if time is not extended the Claimant will not be able to pursue her claims and will suffer that, significant, prejudice – that is always so if time is not extended. The delay was relatively short so I doubt that it has caused any real forensic prejudice to the Respondent (i.e., made it more difficult to defend the claim than it would have been if the claim had been presented in time). If time is extended then obviously the Respondent will be put to the cost, effort and risk of defending the claims – that is always so if time is extended.

43. Taking all the above matters into account on balance I do not think it would be just and equitable to extend time.

Was the Claimant a disabled person?

44. Since I have decided that time should not be extended, there is no jurisdiction to hear the discrimination claims and the issue of whether the Claimant was a disabled person does not arise.

Second application to amend

45. In closing submissions Mr Bidnell-Edwards applied to add a claim for wrongful dismissal. This application was opposed so I reminded myself of the guidance of the EAT in *Selkent Bus v Moore* [1996] ICR 836, in summary the main issues to weigh are: the nature of the amendment; the timing and manner of the application; time-limits; and the balance of hardship.

46. In my view, and departing from Ms Varney, while this application did add a new cause of action (breach of contract) it was basically a relabelling of the facts and claims already pleaded. The narrative of the original grounds of complaint refer several times to the Claimant being forced to resign and the amended grounds of complaint complained in terms of constructive (discriminatory) dismissal.

47. The timing and manner of the application did leave something to be desired. It was made without notice in closing submissions at the PH and followed an earlier, without notice, application in the same PH. The application itself was made orally and there was no written draft of the proposed amendment.

48. Upon an application to amend the Claimant does not necessarily need to persuade the tribunal that the test for extending time that would apply if the matter were raised as a new claim rather than as an amendment to an existing claim, is met (*TGWU v Safeway Stores PLC,* unreported, UKEAT/0092/07). If the matter which it is sought to be added by amendment is a mere relabelling or otherwise very closely connected to the subject matter of the claim then time limits might not be a factor or significant factor at all. However, the weight to be given to time limits rather depends on the case and the circumstances. In this case, even if the claim of breach of contract had been included in the claim form when originally presented, it would have been out of time. That, in my judgment, is an important consideration that makes time-limits weigh heavily here. All the more so because none of the existing pleaded claim can proceed in light of my assessment above of what is just and equitable.

49. Time for a wrongful dismissal claim ran from 25 October 2017. The primary limitation period was three months commencing on that date (art 7, Extension of Jurisdiction (E&W) Order 1994) subject to any extension of time (pursuant to art 7(c)). In my view it was reasonably practicable to present a claim during the limitation period. Although the Claimant was ignorant of an important fact (that she had resigned without notice and that time therefore ran from 25 October 2017 not 20 November 2017) that was not reasonable ignorance. It was a genuine but culpable error for the reasons set out above and she could reasonably have been expected to have appreciated that she had resigned summarily.

50. The balance of hardship is as described above when considering the balance of prejudice under the just and equitable test.

51. On balance, taking into account the above factors, I refuse the second application to amend.

Withdrawal of wages claim

52. In closing submission Mr Bidnell-Edwards withdrew the wages complaint (which related to alleged unpaid holiday pay). The claim had been based on a misunderstanding of how holiday pay entitlement accrues.

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Employment Judge Dyal

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Date 12.11.2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS