EMPLOYMENT TRIBUNALS

Claimant: **Ms S Miller**

Respondent: **Velindre University NHS Trust**

Heard at: **Cardiff** **On: 19 November 2018**

Before: **Employment Judge Emery**

Representation:
Claimant: Ms S Harris (Representative)
Respondent: Ms J Williams (Counsel)

PRELIMINARY HEARING JUDGMENT

The applications of the respondent to:

(i) strike out the disability discrimination claim on the basis that it is out of time and it is not just and equitable to extend time and
(ii) strike out the constructive unfair dismissal claim on the basis that it stands no reasonable prospects of success, or
(iii) order the claimant pay a deposit as a precondition for proceeding with her claims

All fail and are dismissed.

REASONS

The Issues

1. This preliminary hearing was listed to determine on the following applications of the respondent:

a. the allegations of disability discrimination are out of time, and it is not just and equitable to extend time
b. the claimant's claim of constructive unfair dismissal stands no prospect of success and should be struck-out, alternatively this claim stands little reasonable prospect of success and the claimant should be ordered to pay a deposit as a precondition of continuing with this claim.

2. The respondent argues that the reason why the constructive dismissal claim stands no, or little, reasonable prospects of success, is because the claimant relies on a 'last straw allegation' – the act of a 3rd party, Occupational Health, which took place on 26 October 2017. Ms Williams for the respondent argues that the act of a 3rd party cannot constitute a repudiatory breach of contract by the employer, and so this claim cannot succeed.

3. At the outset of the hearing, we discussed the constructive dismissal claim. Page 154 of the bundle lists 11 allegations the claimant says amount to repudiatory breaches of her contract, including the last straw allegation. After discussion, Ms Williams confirmed her client's case is:

a. The other 10 of the claimant's allegations if proven to have occurred could potentially amount to repudiatory breaches
b. Of these 10 allegations, the respondent accepts one incident occurred, for which an apology was given. Of the 9 remaining allegations, the respondent does not *"accept the facts associated with these"* allegations
c. These 10 allegations, if they are proven to amount to prior repudiatory breach (or breaches), were affirmed by the claimant
d. The alleged act of OH on 26 October 2017 cannot amount to a repudiatory breach by the respondent, this is the final straw allegation
e. Accordingly the claimant's resignation cannot amount to an act in response to the employer's breach

And as a consequence the constructive dismissal claim cannot succeed.

4. The respondent argued that evidence would be required to determine both applications.

5. The Tribunal's role was confined to determining two applications. In doing so, the Tribunal heard extensive evidence on whether the claimant had affirmed prior breaches, however I heard no evidence or argument on whether the 10 allegations prior to the final straw allegation actually occurred as alleged by the claimant, and as not accepted by the respondent. Ms Williams accepted that, if they occurred, they could amount to repudiatory

breaches. For the purpose of this Judgment I have assumed that the 10 breaches did occur, but this is an issue which will of course need to be determined on evidence at the main Hearing of this case.

6. Of relevance to this application is that the claimant was disabled during the events relevant to this application, as conceded by the respondent during the course of the case. Her disability is Agoraphobia and she also suffers from significant symptoms of depression and anxiety. This has been a long-term condition causing her to be confined to her home and at its worse to her bedroom for significant periods of time, with a significant fear of communicating with the outside world.

Witnesses

7. The Tribunal heard evidence from the claimant who also provided a witness statement. The claimant's partner (MF) also provided a statement, as had Ms H on behalf of the claimant. Ms Williams argued that their evidence was not relevant, but in any event the respondent was not going to challenge their evidence. On this basis the Tribunal did not hear evidence from MF or Ms H. The Tribunal found that the claimant gave evidence truthfully on all matters put to her. The Tribunal also heard evidence from Mrs KW an Assistant Director of the Respondent, whose evidence it also accepted as truthful.

8. The evidence in quotations and italics are from the Judge's typed note of evidence. The quotes are not verbatim but are a detailed summary of answers given by the witness, and only evidence directly relevant to the issues the Tribunal needs to determine has been considered.

The Evidence

9. An employee of the respondent for 17 years, the issues which gave rise to the claimant's concerns at work and which resulted in her resignation commenced when her line manager changed and Mr IR took over as her manager. She says that Mr IR ended an arrangement or agreement which was in place to enable her to work flexibly, as a result of which she made a formal request to work part-time. She says that she became 'scared and upset' (paragraph 2 witness statement) *"because of questions he asked me. He asked me so many questions which only my GP should ask. I had never met this man before and he stripped me down. I was honest and told him everything."* At the end of the meeting the claimant alleges that Mr IR said *"I don't believe you".* The claimant went to see her Union *"because I am scared".* Her Union advised her to put in a complaint, but she did not do so for fear of the consequences.

10. Shortly after this incident with Mr IR, in October 2016 the claimant was suspended from work for an alleged disciplinary offence. Despite, says the

claimant, the respondent knowing she was ill at this time her employer *"would not accept I had an illness. I had worked there for 17 years and when I needed help it was not there. When I did need help I did not have it."* After 3 weeks suspension from work, during which time claimant said she had little or no contact from the respondent, the case against her was dropped on the ground that there was no case to answer. In her evidence, Mrs KW for the respondent accepted that the claimant was not provided with any support, *"she was just told about the employee assistance programme."*

11. The medical evidence suggests that at the end of her suspension the claimant was suffering significant effects of her medical condition. She was signed off from work on grounds of ill-health. In her evidence, which the tribunal accepted, the claimant said that she believed she had been suspended from work for 3 weeks for no good reason and with no contact from her employer, and she did not know who to trust.

12. Ms Williams questioning which followed was to argue that the claimant had "affirmed" any prior breach of contract by participating in the return to work process. The claimant said that she did not resign during this process because she loved her job, she never had a problem at work, she knew the role inside out, and she did not want to walk away from her career.

13. The claimant also made the following point about the sickness absence process that followed. She said that the respondent *"was not believing the OH reports, they were trying to get me back to work, and I needed to get better before going back".* I accepted that this was the claimant's perception at this time.

14. By August 2017 the claimant was in a position to consider a return to work. For her, a return to a safe environment was possible and she had no trust in her line manager. She said that her relationship with HR was fine, but her relationship with Mr IR was not. *"I asked to move [teams] and was told no."* It was put to the claimant that the evidence (page 25, meeting of 29 August 2017) suggested that the issue was she did not want to speak to Mr IR; the claimant argued she had said she had not wanted to work with him. For the respondent, Mrs KW accepted that the claimant had significant issues and would need support to get back to work.

15. The claimant was asked why she had not resigned at this time. She said that she honestly believed she would have been able to work within another team, it was *"a big building, there were so many places I could have worked*", that she had been employed for 17 years, she did not believe she *"was supposed to just walk away".* Mrs KW argued that *"it would have to be tested"* as to whether the claimant could have returned to work with Mr IR, that there may have been *"options for redeployment"* but that *"no discussions about*

redeployment" took place, as the respondent was *"working to get her well"* to return to work.

16. When asked about the alleged last straw, the meeting with OH on 26 October 2017 and why she did not resign straight away the claimant replied that *"every time something happened it was the last straw. But I would go home and fight this, because I knew I had done nothing wrong. I'm not walking away from the job for no reason".*

17. The OH report which followed says that the claimant was not fit for work, suffering from disabling ill-health and she has lost all confidence in herself and her employer (page 136).

18. Ms Harris had started to represent the claimant by September 2017 and sent letters to the respondent; one dated November 2017 (138) says that the claimant won't be attending a meeting on 9 November, it makes reference to ACAS and a potential claim. It was suggested that this correspondence was evidence of the claimant engaging with her employer, evidence of her acceptance of any alleged previous breach by the respondent. The claimant's evidence was that *"you hope and pray that it will improve"* but it did not.

19. The claimant was also asked about her discrimination claims; there are four discrete clams – three occurring between August and October 2016, then a gap until the allegation on 22nd September 2017; her claim was not submitted until April 2018.

20. The claimant was asked why she had not brought claims or contacted ACAS within 3 months of any of these incidents. Her evidence was that she was suffering from significant ill-health, detailed in the medical reports, she was unable to *"communicate with anyone"*, she was confined to one room, that she had a fear of phones during this period. She says that throughout this period she was too unwell to bring a claim.

21. It was suggested that the claimant was seeking some legal advice during this period. The claimant's evidence was that the legal advice she received was limited, while she had spoken to a lawyer she was unable to instruct a lawyer, and the main advice she received was 'do not resign'. In any event she says that the nature of her ill-health meant that it was impossible for her to progress legal claims.

Submissions

22. Ms Williams for the respondent handed up a helpful Skeleton Submission. Dealing first with the point that the disability discrimination allegations were brought out of time, she argued that there were four discrete allegations, in

August, September and October 2016 and September 2017. They were "separate and distinct" and there could be no continuing course of conduct.

23. The burden is on the claimant to establish that it is just and equitable to extend time; per Robertson v Bexley Community Centre EWCA Civ 576 (paragraphs 24-25) it is for the claimant to convince the employment tribunal that it is just and equitable to extend time.

24. Ms Williams accepted that by October 2017 the claimant was on sick leave following her suspension; but she was not off work during the 1st two alleged incidents, she had contact with the union, she had chosen not to make a complaint, and there was no evidence that the claimant was too ill to bring a claim at this time. Ms Williams accepted that during the period the claimant was suspended and undergoing disciplinary process, it was difficult for her to bring these claims. But what isn't clear is what the claimant was doing thereafter. While the respondent accepts that on the face of it the claimant was suffering ill-health between September 2017 and April 2018, she had tried to get legal assistance, she was receiving assistance from Ms Harris, and there was no evidence why she could not bring these claims in time.

25. In addition, there was significant prejudice to the respondent – the events in the disability discrimination claim go back 20 months and this is bound to have an effect on the accuracy of memories. Against this, Ms Williams conceded that many of the discrimination issues are relevant to the claimant's constructive dismissal complaint, being allegations of repudiatory breach of contract by the employer, which would be required to be dealt with in any event.

26. Regarding the 2nd application, to strike out the constructive dismissal claim alternatively order a deposit as it precondition for it continuing. Ms Williams referred to Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978, paragraph 42: Ms Williams summarised the respondent's argument as follows: where you have a cumulative breach of trust and confidence argument, if prior breaches are effectively affirmed by the claimant, there is a requirement for a genuine "last straw". If there is a last straw the previously affirmed breaches can be revived and the whole course of conduct considered. However, if the final straw is not a breach by the employer, the previous conduct cannot be revived; the claimant cannot use an allegation of a breach by an outside party (in this case OH) to resign. In this case, Ms Williams argued it was clear that by attending OH meetings, sickness absence meetings, and engaging with her employer, the claimant was affirming any alleged prior breaches. The claimant was not obliged to attend the meetings, she was able to make a rational decision to do so, and she clearly wanted engagement with her employer.

27. Ms Williams accepted that the claimant's state of mind was a factor to take into account. She accepted that the claimant became very upset and ill because of her suspension. But it was equally clear from the evidence that the claimant wanted to continue to engage with her employer, despite the alleged breaches of her contract of employment.

28. Ms Williams argued that, if this was not a claim where there were no reasonable prospects of success, it was clearly a case where there was little reasonable prospect, and a deposit should be ordered.

29. For the claimant Ms Harris made a brief submission pointing out that the claimant was unable to make any kind of decision at all during her period of ill-health, for the majority of the period she was unable to get out of bed.

The Law

30. If a discrimination claim is made out of time, the Tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (*section 123(1)(b), EqA 2010*).

31. The Tribunal noted that the Limitation Act 1980 s.33 sets out factors which the tribunal may consider, but is not obliged to take into account (although it should not omit any significant factor).

    a. the length of and reasons for the delay.
    b. The extent to which the cogency of the evidence is likely to be affected by the delay.
    c. The extent to which the party sued had co-operated with any requests for information.
    d. The promptness with which the claimant acted once they knew of the possibility of taking action.
    e. The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

32. Employment Tribunal Rules
    a. Strikeout - Rule 37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
        (a) that it … has no reasonable prospect of success

    b. Deposit Order – Rule 39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party")

to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

Decision

Are the claims of disability discrimination are out of time, if so should time be extended?

33. The Tribunal did not hear any evidence or questions from the respondent as to whether the claims of disability discrimination relate to several separate incidents which are not linked as a course of continuing conduct or whether they are linked. The Tribunal noted that one allegation relates to a failure to make reasonable adjustments in relation to the claimant's working pattern; that an issue about her return to work and her working pattern appeared to have been unresolved at the date of her resignation. On the face of it, it is apparent that the last pleaded act alleged against the respondent took place on 22 September 2017. This allegation occurred 6 months prior to the claimant issuing her claim, and accordingly the Tribunal proceeded on the assumption that the claimant's disability discrimination allegations were not continuing acts, and were therefore brought out of time. However, the nature of the allegations of discrimination, whether they are interrelated and whether there was in fact any continuing course of conduct may be an issue of relevance at the main hearing; for the avoidance of doubt the Tribunal at this Preliminary Hearing made no findings of fact on this point.

34. Is it just and equitable to extend time? In concluding that it was just and equitable to do so, the Tribunal determined as follows:

    a. The claimant was suffering significant ill-health from the date she was suspended from work up to her resignation and thereafter to the date she submitted her Employment Tribunal claim. The Tribunal accepted that the claimant was unable to progress a legal claim before the date she did because of her agoraphobia and the significant symptoms of stress and depression she was experiencing; she was not able to make phone calls or leave her home for lengthy periods. She submitted her claim, the Tribunal found, at the earliest reasonable opportunity her health enabled her to do so.

    b. The claimant was trying hard to resolve issues at work; the evidence the Tribunal heard suggested that the claimant wanted to make steps to return to a job with the respondent, but a significant issue was that she had no trust in her former manager. On the respondent's evidence at tribunal, it appears that redeployment may have been an option, however it does not appears to have been an option discussed with the claimant. Given the claimant's limited ability to

cope during the period of her employment, the tribunal considered that the claimant was acting reasonably in focussing on seeing if she could retain a role within the respondent and only resigning when she believed that this was impossible; given her limited health at this time it was reasonable not to focus on a legal claim.

c. The claimant in any event attempted to receive legal advice; she received some telephone advice to the effect that she should not resign. However she was unable to formally instruct solicitors and those who she did approach were not in sight of all material on which to provide legal advice. Instead, the claimant relied on the assistance of a non-legally qualified adviser who may not have been aware of the complex nature of time limits in employment tribunal claims.

d. While the Tribunal accepted that the parties may be disadvantaged because of the length of time between the first three incidents and the claim being made, because there may be some difficulty with recollection, these are factual matters which in any event require to be explored in relation to the claimant's claim of constructive unfair dismissal, and so evidence will be heard on these issues in any event. For example, one alleged act of discrimination is a failure to make reasonable adjustments to the claimant's working pattern; this is also an issue to be determined in the constructive dismissal claim.

<u>Should the constructive dismissal claim be struck out on the ground it stands no reasonable prospect of success?</u>

35. The Tribunal determined that the constructive dismissal claim was not one which stands no reasonable prospects of success, for the following reasons:

a. It is apparent that the claimant's 'last straw' was the act of Occupational Health on 26 October 2017.

b. It is arguable that this act was not the act of the employer (although the tribunal did not make a determination as to whether this was in fact the case, as this is properly an issue to be determined at the main Hearing).

c. It was not the case on the evidence I heard that the claimant had affirmed the prior alleged breaches of contract. On many, the Tribunal heard no evidence at all. In relation to the argument that the claimant had affirmed prior breaches by participating in a managing attendance process after her suspension was lifted, the Tribunal did not accept that this was the case. The Tribunal accepted that the claimant had significant doubts whether she could trust the

respondent, but that she was not willing to leave her job without trying to resolve the issues which had caused her to lose trust in her employer, and it was for this reason that she continued a dialogue with her employer.

d. In any event, it was expressly the case that the claimant was not affirming the prior conduct by the respondent; throughout the process she was requesting that matters had gone wrong were put right. She was seeking to be removed from Mr IR's team; she was alleging via her representative that she was concerned about "unfounded suspension" and threating legal proceedings; she was alleging bullying conduct; she was alleging that she is disabled and that the respondent was ruining her health (pages 108, 114-5, 116-7). The Tribunal did not accept that these were the actions of an employee affirming the employer's prior acts.

e. Even if the last straw (OH 26 October 2017) was not the act of the employer, it is arguable that the claimant resigned in consequence to all prior breaches and not just the last straw alleged breach. The Tribunal did not accept that a resignation in response to the earlier breaches as well as the last straw breach meant that the claim stands no reasonable prospects of success. The claimant had not affirmed the prior breaches (or had not affirmed the breaches on which the Tribunal heard evidence) and the Tribunal found that the claimant had not affirmed any of the alleged breaches by not resigning on an earlier date.

<u>Should the claimant be ordered to pay a deposit on the basis that the constructive dismissal claim stands little reasonable prospect of success?</u>

36. For the reasons set out above at paragraph 35, the Tribunal determined that it could not be said that the constructive dismissal claim stands little reasonable prospects of success.

37. Following conclusion of the Hearing, directions were made which are set out in a separate Case Management Order.

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Employment Judge Emery
Dated: **13 January 2019**

JUDGMENT SENT TO THE PARTIES ON

……25 January 2019…….

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS