

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104865/17

5

Heal in Glasgow on 26 February 2018

Employment Judge: Lucy Wiseman

10

Ms Nicola Hassard

**Claimant
Represented by:
Ms A Buchanan -
Solicitor**

15

North Ayrshire Council

**Respondent
Represented by:
Mr G Mitchell -
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25

The Tribunal decided:-

(i) the complaint of disability discrimination was presented late and it is not just and equitable to allow the claim to proceed;

30

(ii) the complaint of unauthorised deduction from wages was presented in time and

35

(iii) the complaint of unauthorised deduction from wages will proceed to be determined at a Hearing.

40

E.T. Z4 (WR)

REASONS

1. The claimant presented a claim to the Employment Tribunal on 5 October 2017 (S/4104861/17) and a further claim on 6 October 2017 (S/4104865/17).
5 The first claim was subsequently withdrawn and dismissed.
2. The claim is one of disability discrimination in terms of Section 15 Equality Act, it being said the unfavourable treatment was the dismissal of the claimant; and unauthorised deductions from wages.
10
3. The respondent entered a response resisting the claims and asserting the claim had been made late.
4. The Hearing today was a Preliminary Hearing to determine whether the claim
15 had been presented in time, and if not, to consider whether it should be accepted late.
5. The claimant, during the course of her evidence, made reference to a friend (Kirsty Henderson) with whom she had discussed matters. I informed the
20 parties that Kirsty was known to me. I gave the representatives time to seek instructions and they confirmed they had no issue with this.
6. I heard evidence from the claimant and I was referred to a number of documents. I made the following material findings of fact.

25

Findings of fact

7. The claimant qualified as a Teacher in 2008 and from that time has worked
30 as a supply teacher predominantly with the respondent.
8. The respondent offers short term supply work (up to three days); temporary contracts (up to eight days) and longer fixed term contracts.

9. The claimant was offered and accepted a fixed term contract (page 99) commencing on 28 November 2016 and ending on 16 April 2017.

5 10. The offer dated 8 November 2016 (page 99) included the written statement of employment particulars, which provided that:-

10 *“this contract will be for a fixed term commencing on the start date agreed with the employing Service once employment checks are complete and terminating on 16 April 2017, at which time it will automatically expire unless otherwise agreed in writing between you and North Ayrshire Council.”*

15 11. The claimant had an acute panic attack on her way to work on 31 January 2017. The claimant attended her GP and was signed off work with stress and chest pains (page 140). The claimant’s absence continued and she produced Fit Notes to cover her absence up until 30 May 2017 (page 135).

20 12. The claimant contacted the Deputy Head and HR on 31 January 2017 to inform them of her absence.

25 13. The claimant contacted Ms Beth Brown, Payroll Officer, to enquire how much sick pay she would receive. Ms Brown checked the claimant’s length of service on the Information System and noted the start date of the contract was 28 November 2016, and that the claimant had undertaken supply work on a continuous basis (that is, some hours worked each week) since November 2015. The claimant had between 1 – 2 years’ service and, in accordance with the Scottish Negotiating Committee for Teachers (SNCT) terms and conditions, the claimant would be due 2 months full pay and 2 months half pay subject to her being employed.

30

14. The claimant received two months full pay and, on 17 March 2017 (page 141) received a (standard) letter from the respondent informing her that her full

sick allowance had been exhausted and that she would move to half sick pay allowance on 31 March 2017. The letter referred to the half sick pay allowance expiring on 30 May 2017.

5 15. The claimant's fixed term contract came to an end on 16 April 2017. The claimant was no longer an employee.

16. The payroll department was advised by the Education and Youth Employment service, that the claimant's employment, as per her fixed term contract, would be ceasing on 16 April 2017.
10

17. The claimant noticed her April pay (page 154) was approximately £200 less than she had been expecting but she took no action to query this. The May pay (page 155) was approximately half of what she had been expecting and so she phoned payroll to query it. The claimant telephoned on at least two occasions and waited for someone to get back to her to explain the position, but no-one did.
15

18. The claimant contacted the NASUWT trade union and was sent an extract from the SNCT agreement regarding pay entitlements.
20

19. The claimant then spoke with Ms Beth Brown on 20 June, who confirmed that because the claimant's contract had ended on 16 April 2017, she was not entitled to contractual pay after that date. Ms Brown confirmed the claimant had received 6 weeks of statutory sick pay beyond 16 April in error.
25

20. The claimant contacted a Citizens Advice Bureau for advice on or about 11 August. The claimant was advised to submit a formal grievance, and she did this by letter of 13 August 2017 (page 143). The claimant referred to the SNCT agreement and her belief that under the terms of that agreement she remained an employee and therefore entitled to remuneration.
30

21. Ms Young, HR Operations Manager, responded to the letter on 23 August 2017 (page 145). Ms Young confirmed that at the time the claimant became sick, her sick pay entitlement was up to a maximum of two months full pay and two months half pay, while she was within the contract period and continued to be sick. Ms Young confirmed the claimant's contract ended on 5 16 April 2017 and therefore she was no longer entitled to sick pay after that date as her fixed term contract of employment had ended. This was the reason sick pay ceased.
- 10 22. The CAB also put the claimant in touch with ACAS. The claimant told them she had been paid the incorrect amount on 25 May. The CAB/ACAS informed the claimant of the three month time limit for making a claim.
- 15 23. The ACAS early conciliation certificate was produced at page 147 and noted early conciliation notification had been received on 17 August 2017, and the certificate had been issued on 7 September 2017.
- 20 24. The claimant sent the early conciliation certificate to the trade union, NASUWT, and they submitted the claim on her behalf on 6 October 2017.
- 25 25. The claimant had post-natal depression and in the period of 15 years since then, she has had two bad bouts of depression. The claimant visited her GP in December 2015 and a letter from the claimant's GP was produced at page 156. The letter noted the claimant had presented with symptoms of menopause, anxiety and stress, and that she had been prescribed Fluoxetine 20mg daily. The claimant was signed off work for one week, and was then sufficiently fit to return. The claimant received some counselling through occupational health in January 2016 and continued to take Fluoxetine (an anti-depressant).
- 30 26. The claimant was assessed by the mental health nurse in October 2016 and it was agreed the claimant would benefit from psychological input. The claimant was seen by Psychological Services in June 2017.

27. The claimant can be shaky, weepy, lacking in confidence, gets things out of proportion and is unable to plan.

5 **Claimant's submissions**

28. Ms Buchanan noted the claimant had chronic depression and severe anxiety which had affected her since 2007 although she has had only 2/3 severe bouts of depression in that time. The claimant had consulted her GP in
10 November 2015 regarding her depression and had been prescribed Fluoxetine: she had also been referred for psychological support. Ms Buchanan invited me to have regard to the claimant's evidence regarding the impact of her condition.

15 29. The complaint of disability discrimination was brought under section 15 Equality Act, and the unfavourable treatment was the dismissal arising from the failure to renew the fixed term contract which expired on 16 April 2017. Ms Buchanan acknowledged the claimant had a period of three months in which to bring that claim – that is, by 15 July 2017. The claim had been
20 presented late, but it was submitted that it would, in terms of section 123(b) Equality Act, be just and equitable to extend the time limit.

30. Ms Buchanan submitted the tribunal must consider the length and reason for the delay, and adopt a multifactorial approach. Ms Buchanan invited me to
25 have regard to the claimant's health and the impact it had on her ability to manage her day to day affairs. The claimant had been confused regarding the contractual position, and the fact she had been told she would be paid sick pay until 30 May 2017.

30 31. Ms Buchanan also invited me to have regard to the conduct of the respondent when the claimant had tried to clarify the position. The respondent had not issued a correction and it was not until 20 June when the respondent clarified

the position that the claimant understood her employment had ended on 16 April 2017.

- 5 32. The claimant had sought advice from the trade union, but she had not been aware of the time limits for bringing the claim. She had contacted the CAB on 11 August and had been advised to submit a grievance and contact ACAS for early conciliation. The grievance had been sent on 13 August and the early conciliation certificate issued on 7 September. The claimant had, it was submitted, acted quickly once she had been told of the time limits.
- 10 33. The trade union had submitted the claim on 6 October. Ms Buchanan submitted the claimant should not be prejudiced for the fault of an adviser, particularly when the claimant thought time ran from 25 May.
- 15 34. Ms Buchanan next referred to the complaint of unauthorised deduction from wages. The last salary had been paid on 27 April, but the claimant had not appreciated the reason for the shortfall, and thought it was because of pro-rata holidays. The claimant only learned on 25 May that she had not been paid what she believed she was entitled to receive.
- 20 35. Ms Buchanan submitted there was an obligation on the respondent to pay the claimant up to 30 May.
- 25 36. Ms Buchanan submitted it had not been reasonably practicable for the claimant to present the claim in time because she had been ignorant of the position and that ignorance had been reasonable. Additionally, the tribunal should consider the impact of the claimant's health.
- 30 37. Ms Buchanan referred to the following authorities in support of her submission: ***Hutchison v Westward Televisions Ltd 1977 IRLR 69; British Coal v Keeble 1997 IRLR 336; British Transport Police v Norman UKEAT 0348/14; Habinteg Housing Association Ltd v Holleran UKEAT/0274/14;***

Rathakrishnan v Pizza Express Ltd UKEAT/0073/15; Hawkins v Ball & Barclays Bank plc 1996 IRLR 258; Bahous v Pizza Express Ltd UKEAT/0029/11; Marks & Spencer plc v Williams-Ryan 2005 EWCA Civ 470; Palmer v Southend on Sea Borough Council 1984 IRLR 119; Andrews v Kings College Hospital NHS Foundation Trust UKEAT/0614/11 and University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12.

5

10

38. Ms Buchanan invited the Tribunal to allow both complaints to proceed albeit late.

Respondent's submissions

15

20

39. Mr Mitchell referred to the fixed term contract offered to and accepted by the claimant. He referred to the express clause in the contract providing for automatic expiry, and submitted the terms of the contract could not have been clearer. The contract expired on 16 April 2017: the effective date of termination was 16 April 2017. Mr Mitchell questioned why the claimant had not, when seeking advice from Ms Brown or CAB or ACAS, referred to the fact she had a fixed term contract.

25

40. Mr Mitchell noted it was said the act of discrimination was the non renewal of the fixed term contract. He considered the latest this act could have occurred was 15 April 2017 and so the latest date for presenting the claim was 14 July 2017.

30

41. Mr Mitchell referred me to the case of **Norbert Dentressangle Logistics Ltd v Hutton EATS/0011/13** where the EAT had been critical of a tribunal accepting evidence regarding impact of a medical condition on ability to present a claim in time without medical evidence. Mr Mitchell suggested the evidence in this case was of a much lesser degree than in the **Hutton** case. The claimant had had a panic attack, but was still able to take her son to school; she communicated with her friend and the respondent; she attended

occupational health and psychological services; she was signed off as fit to work in May; she undertook two weeks of marking in early June; she took advice from CAB and ACAS and she prepared and presented a grievance.

5 42. Mr Mitchell noted the claimant knew her pay in April was short by about £200, and she could have queried this. The claimant had three months from 27 April to present a claim regarding this alleged deduction. Mr Mitchell submitted there could be no series of deductions where the March, April and May pay slips were different.

10

43. Mr Mitchell submitted the claimant, by 20 June 2017, knew the position in the clearest possible terms. The claimant could have acted on this, but instead there was a long period between 20 June and 17 August when nothing happened.

15

44. Mr Mitchell submitted the claimant's confusion was not a basis for extending the time limit. Mr Mitchell accepted the respondent's standard letter of 17 March (page 141) was not perfect, but suggested the claimant could not rely on this to extend the effective date of termination to 30 May.

20

45. The claimant appeared to accept complaints were presented out of time. Mr Mitchell submitted there was no prejudice to the claimant in not allowing the claim to proceed because there was no valid disability claim. The respondent disputed disability status and the respondent had no knowledge of the disability. Further, there was no series of deductions in circumstances where the April pay was a one off and the May payment was a separate issue of overpayment of SSP.

25

46. Mr Mitchell invited the Tribunal to find the claim was presented late and to not extend the time limit.

30

Discussion and Decision

47. I firstly had regard to the statutory provisions governing time limits. I referred to Section 123 Equality Act which sets out the time limit applicable in the disability discrimination complaint. It provides that proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the tribunal thinks just and equitable.

48. I also referred to Section 23 Employment Rights Act which sets out the time limit applicable in the unauthorised deduction from wages complaint. It provides that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. It also provides that where a complaint is brought about a series of deductions the reference to deduction (above) is to the last deduction in the series.

Disability Discrimination complaint

49. The complaint of disability discrimination was brought under section 15 Equality Act. The unfavourable act was said to be the non-renewal of the fixed term contract resulting in the dismissal of the claimant. The fixed term contract expired automatically on 16 April 2017 and I considered that was the date of the alleged unfavourable act. The claimant had a period of three months from that date – that is, by 15 July – to commence early conciliation or a claim. The claimant did neither within this time limit: early conciliation was commenced on 17 August and the claim was presented on 6 October. The claim was presented late.

50. The claimant invited the Tribunal to exercise its discretion to allow the late claim to proceed. I had regard to the case of **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434** where the Court of Appeal held that a Tribunal cannot hear a (late) complaint unless the appellant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule. The onus is on the

claimant to convince the Tribunal that it is just and equitable to extend the time limit.

51. I also had regard to ***British Coal Corporation v Keeble*** (above) and it is helpful to set out the guidance from that case. It was said by the EAT that in exercising their discretion to allow late claims to proceed, Tribunals may have regard to the checklist contained in section 33 of the Limitation Act as modified by the EAT. Section 33 requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, and in particular the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action.

52. The Court of Appeal in ***Department of Constitutional Affairs v Jones 2008 IRLR 128*** emphasised that these factors are a valuable reminder of what may be taken into account, but their relevance depends on the facts of the individual case, and Tribunals do not need to consider all factors in each and every case.

53. The claimant argued that it would be just and equitable to allow the claim to proceed late because (i) she had only understood in June that her employment had ended and (ii) the impact of her disability.

54. I found the claimant's evidence regarding her knowledge and understanding of the contractual arrangements confusing and contradictory. The claimant's position appeared to be that whilst she understood she had been offered and accepted a fixed term contract, the fixed nature of the contract was negated by her hope and desire it may be extended. I did not doubt that schools may often extend the period of supply work, however, there is no right to an

extension and no guarantee that it will be offered. The fact the claimant hoped her contract would be extended did not impact on the material fact that she was (and knew she was) employed on a fixed term contract from 28 November 2016 until 16 April 2017.

5

55. I also had regard to the fact the claimant has worked as a supply teacher for a number of years and I considered she would be familiar with the different contracts and the fact that once a period of supply has ended, she is “unemployed” until a new supply contract is offered and accepted. This situation was no different.

10

56. The claimant did not, when seeking advice from Ms Brown, the CAB, ACAS and the trade union, inform them she was on a fixed term contract. I accepted the claimant’s assumption that Ms Brown would know of this was reasonable, but the claimant offered no real explanation why she had not considered it important to inform others from whom she was seeking advice.

15

57. I concluded the claimant knew she was employed on a fixed term contract for a period from 28 November 2016 until 16 April 2017, and she knew the contract would automatically terminate on 16 April unless there was written agreement for it to continue. The claimant knew her contract had ended on 16 April 2017 and the fact she hoped the contract would be extended did not alter that position.

20

58. I next considered the issue of the claimant’s health. I noted disability status had not been conceded in this case. I accepted the claimant’s evidence that she has, over the course of a number of years, had bouts of depression, and that the last time she consulted her GP regarding this was December 2015. The claimant was prescribed, and continues to take, an anti-depressant, Fluoxetine. The claimant was signed off as unfit for work from 31 January until the 30 May 2017.

25

30

59. The claimant described the impact of her condition and told the Tribunal that she would feel “shaky”, “more up and down”, “little problems became big one”, “looking for hidden messages in what people said”, “lack of confidence”, “panic attacks”, “could not manage shopping lists or meal plans” and that she would “get weepy”. The claimant accepted organisation and planning difficulties had not been referred to in the GP’s letter or in the report from Occupational Health, and she told the tribunal that “if [I] have something to do my brain gets on with it, but it is very much up and down”.
- 10 60. I was referred to the case of **Norbert Dentressangle Logistics Ltd v Hutton** (above) and I have had regard to the Judgment.
- 15 61. I accepted the claimant’s evidence regarding the impact of her condition, however, I had to balance it with the fact the claimant was sufficiently fit and able to (i) phone Ms Brown to seek advice regarding her sick pay; (ii) phone Ms Brown (and Mark) to query the payment made to her in May; (iii) seek advice from the CAB and, following that advice, submit a grievance; (iv) seek advice from ACAS and, following that advice, commence early conciliation; (v) seek advice from her trade union; (vi) incorporate the information the trade union provided to her regarding the SNCT agreement into her grievance and (vii) attend a meeting and carry out two weeks of marking in June.
- 20 62. There was no dispute regarding the fact the claimant knew, on 20 June, that her employment had ended, and, the reason for the payments in April and May being less than she had expected. I considered the claimant was in a sufficiently fit and able condition as at that date (given she had, in particular, been fit enough to carry out two weeks of exam marking) to understand her position and take action to address it.
- 25 63. The claimant took no action until 11 August when she sought advice from the CAB. I accepted the claimant acted promptly to submit her grievance and start the early conciliation process. However, once the early conciliation
- 30

certificate was issued on 7 September, nothing happened until the claim was presented on 6 October.

5 64. I have had regard to the length of the delay in this case and the fact there appeared to be no reason to explain the claimant's delay in acting after 20 June, or the delay in presenting the claim after the early conciliation certificate had been obtained. I acknowledged there was some delay in responding to the claimant's enquiries in May, but there was no dispute regarding the fact that by 20 June, the claimant's queries had been answered.

10

65. I had regard to the fact that if I allow the case to proceed late, there will be prejudice to the respondent in having to defend a claim and if I do not allow the claim to proceed late, there will be prejudice to the claimant because she will not have an opportunity to argue her discrimination case. The claimant will, however, have an opportunity to proceed with the wages claim if it has been presented on time.

15

66. I decided, having had regard to all of the above factors, not to exercise my discretion to allow the claim to proceed late. I considered the claimant was sufficiently fit and able to take action in June when she received clarification of the position from the respondent. The claimant delayed without good reason and there was a further unexplained delay between the issuing of the early conciliation certificate and the presentation of the claim on the 6th October.

20

25

67. I decided the complaint of disability discrimination has been presented late, and that it would not be just and equitable to allow the claim to proceed late.

68. I next turned to consider the complaint of an unauthorised deduction from wages. The claimant's claim was that she had been told she would receive sick pay of two months' full pay and two months' half pay. She was paid two months' full pay, but did not receive the amount properly payable in April or May.

30

69. I had regard to the case of *Taylorplan Services Ltd v Jackson 1996 IRLR 184* where the EAT set out the correct approach for tribunals to adopt when considering the question of time limits. It was said the Tribunal should ask itself the following questions: (i) is this a complaint relating to one deduction or a series of deductions by the employer; (ii) if a single deduction, what was the date of the payment of wages from which the deduction was made; (iii) if a series of deductions, what was the date of the last deduction; (iv) was the relevant deduction under (ii) or (iii) above within the period of three months prior to the presentation of the claim; (v) if the answer to (iv) is negative, was it reasonably practicable for the complaint to be presented within the relevant three month period; (vi) if the answer to question (v) is in the negative, was the complaint nevertheless presented within a reasonable time.
70. Mr Mitchell invited the Tribunal to find there had not been a series of deductions in this case because the April and May payments had been made up of different elements. I could not accept that submission because the fact the employer advanced different reasons for not paying the sums (allegedly) due does not alter the fact the claim is being made in respect of a series of deductions (**Group 4 Nightspeed Ltd v Gilbert 1997 IRLR 398**).
71. I, having had regard to the questions set out above, concluded the complaint related to a series of deductions, the last of which took place on 25 May 2017. The claimant had a period of three months (on, or by 24 August) in which to commence early conciliation or present a claim. The claimant commenced early conciliation on 17 August 2017.
72. The early conciliation certificate was issued by ACAS on 7 September 2017. The claimant had a period of one month less one day in which to present the claim. The claim was presented on 6 October 2017 and was presented in time.

5 **Employment Judge: Lucy Wiseman**
 Date of Judgment: 07 March 2018
 Entered in register: 08 March 2018
 and copied to parties

10