Case No: 3331915/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Coghiel	**v**	**London Borough of Islington**

Heard at: Watford **On:** 10 January 2019

Before: Employment Judge Bloch QC

Appearances:

For the Claimant: Mr Robson, Solicitor
For the Respondent: Ms H Connors, In-house Counsel

JUDGMENT having been sent to the parties on 6 March 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By an originating application dated 9 August 2018, the claimant presented claims of unfair dismissal and disability discrimination. Her claims arose out of her summary dismissal for misconduct on 13 October 2014.

2. The original time limit for the claimant's claims to be presented was 12 January 2015. However, the claimant contacted ACAS on 5 January 2015 and was issued with an Early Conciliation Certificate on 5 February 2015. The time limit for her claims (as extended by sections 111(2A) and 217(B) of the Employment Rights Act 1996 ("ERA") and sections 123 (1) and 140(B) of the Equality Act 2010 ("EqA") was therefore the 4 March 2015, meaning that the claimant's claims were submitted more than three years out of time.

3. In her claim form the claimant accepted that the claim was late but said that it was not reasonably practicable for her to present the claims at any time prior to 9 August 2018 because of ill health. The claimant set out her state of health during the period in a witness statement submitted on 1 January 2019 together with a supplementary witness statement and submitted medical evidence, which was in the bundle presented to the tribunal for this hearing, together with a further letter from Chris Baldwin, IPT Therapist and supervisor, dated 9 January 2019 (which was inserted into the bundle at pages 71 to 72).

4. In her witness statement the claimant set out a long history of poor health,

going back to 2017and continuing to the date of the hearing. In particular, she suffered from menopausal symptoms, psychological disorder and back pain which she maintained had an adverse effect on her ability to carry out normal day-to-day activities. The psychological disorder included suicidal thoughts, low moods, period of extreme sadness, mood swings, anxiety, emotional outbursts, tearfulness, forgetfulness and difficulties in making decisions and feelings of hopelessness. She has for some time, until June of this year, been on antidepressants. She referred to her dismissal on 13 October 2014 following a disciplinary hearing on 7 October and that dismissal was said to be on grounds of poor behavior by her towards her colleagues. While she acknowledges that some of her behavior had not been acceptable, she said it was disproportionate for this to result in dismissal. Further, her actions had been related to her disabilities and therefore dismissal was discrimination arising from disability. In her witness statement she gave a detailed account of her ill health, spanning a long period of time - this began prior to her dismissal and continues to date.

5. At paragraph 51 of her statement she referred to an incident on 9 January 2015 when her home was burgled. Jewelry, cash and laptops with all her letters and notes were stolen. She says that this burglary further compounded her psychological illness and caused her further emotional stress. The shock of being burgled resulted in her not feeling safe in her own home and left her experiencing fear, panic, helplessness and insomnia.

6. She goes on to say that in around February 2018 she approached her GP about the possibility of weaning herself off antidepressants which she was able to do over several months with the help of her psychotherapist, Dr Soutter. Although she remained chronically depressed she only felt well enough to deal with lodging a claim in August of 2018 once her head was clear of the antidepressants, which she had been taking for the past 11 years. She went on to refer to an occasion in July 2018 (which she believed to be towards the end of that month) when she heard a news report on her radio pertaining to a menopausal woman who had brought a claim to the Employment Tribunal in Scotland and won. At her next psychotherapy session, she mentioned this case (the “Mandy Davies case”) and discussed the apparent similarities between this case and her own dismissal. After speaking to her therapist, she contacted a solicitor and ACAS by email. Her solicitor rang back after a couple of days and advised her that she had no claim. However, ACAS contacted her by email a few days later and asked her to call them to provide more details.

7. In her evidence before me today (while she initially thought that 18 July was the correct date) she (later in her evidence) thought that she had contacted the solicitor on 1 August and also ACAS on 1 August 2018.

8. Following her call to ACAS she was given an Early Conciliation Certificate and advised to submit a claim, which she did on 9 August 2018.

9. At paragraph 55 of her witness statement she said that during the previous four years she had been unable to submit a claim because she was not physically or mentally able to do so. She also believed that she was not medically or financially in a position to take on her former employers.

10. She went on to say that when she heard about the Mandy Davies case in July 2018 she realised from her reading her case that it was not her (the claimant's) fault why she behaved the way she did on 31 March 2014 and it was not her fault that she had been dismissed and that she may in fact have a claim against her former employers. She only considered (she added) the possibility of making such a complaint when she started thinking more clearly following the cessation of her antidepressants and when she heard about the Mandy Davies employment tribunal case on the radio in July 2018. She added (paragraph 57 of her witness statement) that the Mandy Davies case was therefore fundamental in causing her to change her mind about bringing a claim at this late stage.

11. The medical evidence relied upon by the claimant was (principally) a letter by Mr Chris Baldwin, Phycologist, Therapist and Supervisor) who saw the claimant in psychotherapy sessions from 12 December 2014 until 1 April 2016. There was also a letter from Dr Andrew Soutter, who first saw the claimant for an assessment on 5 January 2017, who concluded that she had been able to stop taking antidepressant medication in the last year with an improvement in her ability to manage interpersonal relationships and some recovery of her self-esteem and added:

> "This has now enabled her to contemplate challenging her dismissal from her employment something she would not have been capable of previously at the time of her dismissal or subsequently up until now."

12. He did not explain how he was able to make (the negative part of) that statement given that he first saw the claimant for an assessment only on 5 January 2017(after which she started weekly individual psychotherapy, which would continue until February 2019).

13. In a letter of 9 January 2019 (bundle page 71 to 72) Mr Baldwin concluded by saying (in relation to the period until 1 April 2016 when he saw her) that the claimant rarely left her home and never engaged in any form of clear or assertive communication with anyone else. In his view, the claimant was suffering a debilitating depression to the extent that she lacked the mental and emotional capacity to deal with a conflictual situation. It was not possible for her to even consider making a claim at this point in time and Mr Baldwin believed that trying to do so would have incurred a risk of increasing suicidal ideation and intense emotional stress that she lacked the capacity to tolerate and manage at that particular point in time. He said (as the claimant herself confirmed in cross examination) that the report related only to the period of 12 December 2014 until 1 April 2016, when Mr Baldwin was treating he claimant.

The law

14. The law in this area is very well known. The tribunal may only extend the time limit for presenting an unfair dismissal claim where it is satisfied that it was not reasonably practicable for the claim to be presented in time and that the claim was presented within such further period as the tribunal considers reasonable: Section 111(2)(b) ERA). The burden of proof of establishing that it was not reasonably practicable to present the claim in time is on the claimant. The claimant (by her solicitor Mr Robson) reminded

me that there is case law to indicate that the tribunal should take a "liberal" approach to the section, tending to favour the claimant employee. That said (as submitted by Ms Connors on behalf of the respondent) the liberal approach does not extend to making findings when there is insufficient evidence to do so.

15. In relation to the discrimination claim, the tribunal may only extend the time limit for submitting a discrimination claim where it is satisfied that it is just and equitable to do so: Section 123(1)(b) EqA. The tribunal should have regard to all relevant factors including 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 request 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: see ***British Coal Corporation v Keeble and others*** [1987] IRLR 336 EAT. In the ***Department of Constitutional Affairs v Jones*** [2008] IRLR128 the Court of Appeal emphasised that these factors are a valuable reminder of what may be taken into account. Their relevance depends on the facts of the individual cases and tribunals do not need to consider all the factors in each and every case.

16. The period of delay in this case was very extensive. The claimant bore the burden of justifying delay over (essentially) the whole period. It is quite plain from the claimant's evidence (and the respondents did not seek to challenge this in any fundamental way) that the claimant has suffered from a considerable range of ill-health issues over a long period beginning from before her dismissal up until the present day. That said (as submitted by Ms Connors) the point was not whether or not the claimant was suffering from ill health during that period but rather whether she was so ill as not to be able to present the claim during that time. I shall deal first with the unfair dismissal claim and then with the discrimination claim.

17. In assessing the period of delay, it appeared to be common ground that the period upon which I should focus was that between 5 February 2015, when the claimant obtained her first ACAS certificate, until 9 August 2018 when her claim was presented to the tribunal. No exactness is necessary in this regard but this appears to be a reasonable period upon which to focus in the circumstances of this case.

18. To be more specific the effective date of termination in this case was 13 October 2014 and there was an appeal hearing on 16 December 2014. To put this (again) in chronological sequence, on 5 January 2015, according to the ACAS certificate, the claimant appears to have notified ACAS of her claim. It is right to say that the claimant had, as she told the tribunal, no recollection of having ever contacted ACAS at this stage. She speculated on whether it was someone else who had submitted the notification to ACAS on her behalf. She had checked with her trade union representative, who apparently had no knowledge of it. However, in my judgment it is appropriate to rely on the ACAS document (there being no credibly reason to assume it was wrong) – and it may not be irrelevant that this was the day she first saw Dr Soutter. In my judgment the only safe conclusion I can make is that the claimant did in fact notify ACAS on 5 January 2015.

Thereafter there was the burglary on 9 January and the ACAS certification on 5 February 2015. The claim should therefore have been presented to the tribunal by 4 March 2015.

19. Mr Robson, on behalf of the claimant, made submissions which I shall summarise shortly (much of it is appears in the claimant's witness statement). In brief, he submitted that there was sufficient medical evidence to show that the claimant was simply unable to present her claim form from 2015 up until the date she presented her claim, namely 9 August 2018. He maintained that the claim was itself a strong one, namely one where it appeared that the respondent had imposed a sanction of dismissal on the claimant arising out of her conduct in circumstances where that was beyond the range of reasonable responses of a respondent. In relation to the discrimination case he made particular reference to what he described as the lack of prejudice on the part of the respondent were the claim to be allowed to proceed. Quite obviously the prejudice to his client, the claimant, would be very heavy indeed if the claim were not allowed to proceed. I accept that the "thrust" of the case law is one of competing prejudices and that mere delay, even unreasonably delay, is not the sole factor to be taken into account when considering the just and equitable extension principle.

20. I turn to the submissions made by Ms Connors on behalf of the respondent. She made a general point that the respondent's case was broadly that the claimant might not have been in good health but was well enough to have submitted her claim to the tribunal before August 2018. She made the following particular points:

    21.1 The contact with ACAS in 2015 showed that the claimant was well enough at that stage to present the claim to the tribunal. Indeed, as it appears from an email dated 15 January 2015 (bundle page 70) (with telephone attendance note) there was a discussion between Julian Walshaw of the respondent and Janice Manneion of ACAS. According to that attendance note Ms Manneion summarised the claimant's complaint. She had worked for the Council for 27 years. She forgot a parking permit, had to seek alternative permit and had to join a queue in which she had to wait for some time. She lost her temper, got aggressive and was subsequently dismissed for gross misconduct. The claimant contended mitigating circumstances, namely that she had recently lost her mother and was suffering from depression. The claimant had also sent an email to the manager apologizing to individuals concerned asking for it to be forwarded to the manager. The claimant's position was that the sanction, in all the circumstances, was too harsh. Ms Connors submitted that that information was broadly the same information which appeared in the claim form submitted in August 2018 - and there did not appear to be any debate about that. However, Mr Robson had relied upon the burglary on 9 January 2015 indicating that the claimant may after that date, not have been in a position to file the claim. That said, the only reference to that incident was in paragraph 51 of the claimant's witness statement, quoted above. There was nothing in the medical evidence (to which I was referred) which referred to the psychological effect of the incident of 9 January 2015. Were it the case that there was such a deterioration in the claimant's psychological state on 9

January 2015 one would have expected that to be dealt with in the medical evidence, but it was not.

21.2 As indicated above the evidence of Mr Baldwin (from his own knowledge) was limited to the period from 12 December 2014 until 1 April 2016 and the evidence of Dr Soutter referred to above was not from his own personal knowledge before 5 January 2017 when he first saw the claimant. Further, his statement that the claimant had not been capable previously of challenging her dismissal is put in the most general of terms. It was suggested to the claimant by Ms Connors that this is merely a reflection of what the claimant must have told the doctor but the claimant suggested that this might have been based upon medical notes. The problem is that one cannot know and any further conclusions in this regard would be speculative.

21.3 The second point relied upon by Ms Connors was that on her own evidence the claimant's health had improved by February 2018 to the extent that she then began to wean herself off antidepressants. She confirmed in her evidence that the reason for her taking the step was because her health was improving and that she was "off meds" by June 2018. Accordingly, on her own evidence, it would seem that she would have been capable of presenting the claim to the tribunal on or shortly after June 2018.

21.4 Ms Connors third point related to the period from July/August 2018 until 9 August 2018. In my judgment the evidence was too unclear in this regard. It seems that in her revised version of events the claimant believed that she had contacted the solicitors and ACAS only in late July or probably 1 August and there does not seem to be any particular delay or culpable delay thereafter.

21.5 A powerful point made by Ms Connors, based upon the evidence of the claimant, was that the real reason for the claimant having delayed bringing her claim was not so much ill health but her belief in July 2018 that her case was stronger than she might previously have believed. In my judgment that was not an unfair characterization of the claimant's evidence. In her witness statement (referred to above) she said that she only considered the possibility of making such a complaint after hearing about the Mandy Davies case. When one considers the notification of ACAS on 5 January 2015 this cannot be right. Even if the claimant had forgotten about her contact with ACAS (as I have found) it seems that the news of the Mandy Davies case was in reality an encouragement to the claimant to pursue a claim rather than causing her (for the first time) to realise that there was a possibility of making such a claim. Further, it is right to recall that the basis of the application by the claimant to extend time was not ignorance of her rights or wrong legal advice but rather her ill health.

21.6 At paragraph 57 of her witness statement the claimant reiterated that news of the Mandy Davis case was fundamental in causing her to change her mind about bringing a claim at that late stage. As a result of this knowledge she made enquiries to ACAS and obtained

advice about her situation and subsequently put in a claim to the employment tribunal.

21.7 In her evidence before the tribunal, the claimant characterised her reasons for not bringing the claim initially as being considerations of cost and because she did not think she had a realistic claim or that she did not think about it.

21.8 In all these circumstances I concluded that the real cause of the delay was those factors (referred to in the immediately preceding sub-paragraph) rather than ill health preventing her during (substantially) the entirety of the period in question from presenting her claim to the tribunal. That said, I can see that at least for some of the period in question, ill health may well have played a contributory (but in my judgment subordinate) role.

21.9 I should add that in my judgment the medical evidence produced on behalf of the claimant was not of the strength and specificity that one would have expected when the claimant was faced having to show her inability to present the claim over the entirety of the period referred to above. In particularly (but not exclusively) I refer to the evidence concerning periods of time of which the medical practitioner (at least on the face of it – and in any event, not explained to the contrary) appeared to have no personal knowledge and rather general (seemingly unsupported or at least not clearly supported) statements concerning the claimant being unable to present her claim over a long period of time. I did not find these statements (in such terms) particularly persuasive.

21.10 In all the circumstances I concluded that the claimant had not discharged the onus of showing that it was not practicable for her to present the claim before 9 August 2018.

21.11 Dealing with the matter in stages my conclusion is (having regard in particular to the evidence regarding the ACAS notification on 5 January 2015 that she could have brought the claim by the required date, namely 4 March 2015. In any event, if I am wrong in that regard, I am quite satisfied that that she could reasonably have brought the claim before 9 August 2018, for the reasons submitted by Ms Connors.

21.12 Turning to the discrimination claim, plainly the approach of the tribunal is rather different than in relation to the unfair dismissal claim. The just and equitable statutory test is a much more flexible one and (as I have indicated) at the heart of the application for an extension of time is the question of competing prejudices. I entirely accept that for the claimant not to be able to bring her claim at all before the tribunal is a substantial prejudice. In relation to the further prejudice relied upon by her, namely that being able to bring the claim would give her “closure”, it was clear from the evidence that this is something of a two-edged sword. It is clear to me that the bringing of the claim may be a source of considerable anxiety to the claimant both in its preparation stages and at the hearing. The

hearing today was plainly something which the claimant found distressing and one can only expect that to pursue the claim itself before the tribunal will be at least as, if not more, distressing. I therefore regard that point as an "either way" factor. The strongest point made by Mr Robson on behalf of the claimant was that there was no real evidence of prejudice to the respondent if time was extended to allow the discrimination claim to be presented. Mr Robson also referred to the merits of the claim. In regard to the merits of the claim I can say no more than the claim on the face of the claim form appears to be an arguable claim but I cannot, at this stage, merely on that basis, (and to be fair Mr Robson did not request me to do so) form a view on the merits of the claim. Perhaps the strongest point relied upon by Mr Robson was the absence of any specific evidence of prejudice as regards the respondent. This was dealt with in paragraph 17 of Ms Connors' written submissions. She stated that if the claim were allowed to proceed, the respondent's ability to defend the claim would be prejudiced by the substantial delay (over three years) since the alleged discrimination, as a result of which witness's memories will have faded, relevant documentary evidence may not be available. She added that the HR Officer in post at the time of the dismissal is no longer employed by the respondent.

21.13 I have found this part of the case the most difficult. It seems to me to be simplistic to assume that in an unfair dismissal claim the entirety of the defence of the claim would be located in the documentation surrounding the dismissal back in 2015. Inevitably (as Ms Connors urged upon me) oral evidence will need to be given in relation to the circumstances of the dismissal, the reason for the imposition of the sanction of dismissal and, indeed, in relation to an earlier warning given to the claimant in regard to her behavior which was (according to the respondent) a factor taken into account in deciding to dismiss her. However, more pertinently, given that the competing prejudice point is of particular significance in relation to the discrimination claim, there is an issue (raised in the response to the claim) regarding the existence of the relevant disability at the time in question, namely 2014. While it is right (as Ms Connors submits) that the dismissal letter itself refers to depression having been suffered by the claimant for many years prior to the dismissal, that in my judgment, is a far cry from itself resolving the issue of whether the claimant was at the relevant time disabled within the meaning of s.6 of the Equality Act 2010. Further, there is bound to be an issue as to the extent (if any) to which the various officials of the respondent had knowledge (or should have known) of the claimant's disability within the technical meaning of that word.

21.14 I have no doubt that it will be considerably more difficult now (and more particularly at the end of this year, assuming the case, according to current listing indications, would probably not be heard before the end of 2019) for the respondent's witnesses to be able to bring to mind all the relevant evidence. While evidence will in the usual way be committed to witness statements, nonetheless, cross-examination will no doubt test the recollection of the witnesses at the

time of the full merits hearing in regard to the question of disability and their alleged knowledge of that disability as well as all the events surrounding the dismissal claim.

21.15 In my judgment the difficulty of recollecting evidence at this stage (and at the end of 2019) and producing all relevant documents (which I accept may (as contended by Ms Connors) extend beyond the disciplinary file) constitute a substantial potential prejudice to the respondent.

21.16 Looking at all the relevant factors, including (especially) the length of the delay and (as I have found at paragraph 21.7 and 21.8 above, the principal reasons for that delay, the effect on cogency of evidence and the other factors to which I have referred to above (referred to ***British Coal v Keeble*** [1997] IRLR. 336) in my judgment it would not be just and equitable to extend time to enable the claimant to bring the disability discrimination case presented to the tribunal on 9 August 2018.

21.17 Accordingly, the claims contained in the claim form are both struck out.

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Employment Judge Bloch QC

Date:18 March 2019

Judgment sent to the parties on

.....10.04.19.....

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For the Tribunal office