



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs L Cullen

Respondent: The Commissioners for HM Revenue & Customs

Heard at: North Shields **On:** 30 May 2018

Before: Employment Judge Johnson

Representation:

Claimant: In person (accompanied by her husband)

Respondent: Mr A Tinnion of Counsel

JUDGMENT ON PRELIMINARY ISSUE

The claimant's complaint of unlawful disability discrimination was not presented to the Employment Tribunal before the end of the period of three months beginning when the act complained of was done. The Tribunal was not satisfied that it would be just and equitable for time to be extended. The complaints are out of time and the Employment Tribunal does not have jurisdiction to hear them. Those claims are all dismissed.

REASONS

1 This matter came before me this morning for consideration of a single issue, namely whether the claimant's complaints of unlawful disability discrimination are out of time and if so whether it would be just and equitable for time to be extended. The claimant attended in person and was accompanied by her husband. The respondent was represented by Mr Tinnion of counsel. Mr Tinnion prepared a bundle of documents, comprising an A4 ring binder containing a chronology and 66 pages of documents. Neither side called any witness evidence as there was no dispute about those factual matters which form the subject matter of today's hearing.

2 Chronology

The relevant history of these proceedings is set out in the following chronology:-

<u>DATE</u>	<u>DESCRIPTION</u>
5 October 1980	Claimant commences employment with the Civil Service.
9 June 2014	Following her own written application, the claimant partially retires from HMRC by reducing her hours to 19 hours per week.
January 2015	Claimant is diagnosed with psoriatic arthritis.
August 2015	Following a period of sick leave, the claimant returns to work and is transferred against her will to a new section.
14 March 2016	The claimant lodges a grievance relating to her transfer to a new post.
8 August 2016	Grievance meeting.
9 August 2016	Outcome of grievance – grievance rejected. Claimant lodges appeal against grievance outcome.
8 September 2016	Grievance appeal hearing.
13 October 2016	Medical retirement certificate – claimant prevented by ill health from discharging duties of post, such ill health likely to be permanent.
14 October 2016	Claimant’s last day of employment.
17 October 2016	Outcome of grievance appeal. Grievance upheld but appeals manager cannot influence the terms upon which the claimant is granted ill health retirement.
October 2016	The claimant consults/obtains advice from the PCS union. The PCS union recommends that the claimant consults Thompsons Solicitors to represent her.
1 November 2016	E-mail claimant to respondent, “We would like to resolve this matter amicably with HMRC and avoid escalation to an Employment Tribunal if at all possible.”
24 November 2016	Claimant to respondent, “We have resisted going down the legal route through PCS and would ideally like to resolve this amicably with HMRC.”
24 November 2016	Respondent to claimant e-mail, “The internal route for resolving this is exhausted and therefore you will need to consider the remaining options open to you (including as you say the legal route you have resisted thus far).”
10 March 2017	E-mail claimant to respondent seeking reimbursement of salary during sick leave, reconsideration of ill health retirement offer, compensation for early retirement and lost earnings. “My _____ has opened up discussions with PCS and their legal partner, Thompsons.
5 March 2018	Claimant presents claim form ET1 to the Employment Tribunal.

- 3** The claimant's claim is that the ill health which led to her retirement was caused by the discriminatory conduct of the respondent. The claimant seeks compensation based upon a different calculation of her ill health retirement pension so that it takes into account her years of service as a full time employee, rather than only that period of time following her partial retirement in June 2014. The claimant relies upon her successful appeal in the grievance proceedings, which concluded that she should not have been moved post against her will when she returned to work following a period of sickness absence in or about August 2015. Her line manager's insistence that she moved posts amounted to a failure to make reasonable adjustments. The claimant alleges that the stress caused by the changed role caused, aggravated or exacerbated her psoriatic arthritis to the extent that she was no longer able to work.
- 4** The claimant states that the decision to change her role was made in May 2015. If that is the act of discrimination relied upon, then her claim form should have been presented by August 2015 at the latest. If the claimant alleges that the discriminatory conduct continued until she last worked on 15 October 2016, then the claim form should have been presented by not later than 14 January 2017. The claim form was not presented until 5 March 2018. On the claimant's best case, that is some 14 months out of time.
- 5** The claimant's explanation for the delay is twofold. Firstly she maintains that she hoped to negotiate terms of settlement with HMRC without the need for formal legal proceedings. Secondly, she states that she was advised by the PCS union and Thompsons Solicitors that, if terms could not be negotiated to her satisfaction, then any legal proceedings against HMRC should be brought in the County Court by way of a claim for damages for personal injury. The claimant states that, following this professional advice, she decided to pursue a claim for damages for personal injury in the civil courts. However, during the first week in January 2018, she was informed by Thompsons Solicitors that they believed such a claim was unlikely to succeed and that the union could not therefore fund any such litigation. The claimant felt that she was unable to afford the costs of personal injury litigation in the civil courts and was unwilling to expose herself to the risk of an order for costs being made against her.
- 6** As a result of the decision not to pursue the respondent via the civil courts, the claimant decided to issue a claim in the Employment Tribunal seeking compensation for unlawful disability discrimination.
- 7** Mr Cullen is himself an employee of the respondent with some 36 years service. He valiantly sought to persuade me today that the respondent's treatment of his wife was one of the most blatant cases of ill-treatment that he has ever come across. He urged me on the "principles of natural justice" to allow Mrs Cullen's claim to proceed, so that the respondent may be held to account for the way it has treated the claimant.
- 8** Neither the claimant nor her husband challenged Mr Tinnion's chronological sequence of events, as set out in a chronology which appears at the front of the hearing bundle. In particular, both Mr and Mrs Cullen accept and agree that since October 2016 at the latest, they had the benefit of professional assistance

and legal advice from the PCS union and their nominated solicitors, Thompsons of Newcastle upon Tyne. Both Mr and Mrs Cullen acknowledged that Thompsons put themselves out and are recognised as, expert litigation lawyers who bring claims on behalf of their trade union client members, damages for personal injuries in the civil courts and in employment tribunal proceedings. As experts in those particular fields, Thompsons will be fully acquainted with the time limits involved in bringing claims in the civil courts for damages for personal injuries (three years) and complaints in the Employment Tribunal (three months).

- 9 It is clear from the items of correspondence referred to in the chronology, that the claimant was aware by 1 November 2016 at the latest that Mrs Cullen could bring a complaint against the respondent in the Employment Tribunal, alleging unlawful disability discrimination. Further reference is made to legal advice in the claimant's e-mail to the respondent dated 10 March 2017.
- 10 I am satisfied from examining those documents and from the concessions very fairly and properly made by Mr and Mrs Cullen, that they were aware throughout that if negotiations with HMRC failed to produce a satisfactory outcome, then legal proceedings could be brought in either the County Court or the Employment Tribunal against HMRC. I am satisfied that both the PCS union and Thompsons would be fully aware of the time limits for bringing proceedings in both the County Court and the Employment Tribunal. I am satisfied that, whilst the claimant remained unwell throughout the relevant period, she was obviously capable of providing instructions to the PCS union and Thompsons either directly or through her husband. I am further satisfied that both the claimant and her husband were capable of understanding the legal principles involved in such claims, including the relevant time limits.
- 11 Mr Cullen insisted before me today that neither he nor the claimant were informed of the time limits in the Employment Tribunal. Neither Mr Tinnion for the respondent nor I could gainsay that statement, and must record that Thompsons and the trade union would undoubtedly have been aware of the time limits and as they had control of any litigation or potential litigation, it was for them to ensure that the claimant was fully informed and that the appropriate time limits were met.
- 12 I accept what the claimant tells me, namely that no claim was either lodged in the civil courts in which the claimant claimed compensation for damages for personal injuries against the respondent. I accept what they tell me, namely that a decision was taken in January 2018 that it would not be worthwhile pursuing such a claim. _____ they had been given no explanation by or on behalf of the claimant as to when or why it was decided by her advisors that the claimant should not present a complaint to the Employment Tribunal.
- 13 One of the factors I take into account today is the claimant's prospects of success in any claim brought to the Employment Tribunal. The claimant alleges that the respondent's insistence that she change roles in August 2015 amounted to a failure to make reasonable adjustments. That allegation appears to have been upheld following the claimant's appeal against the dismissal of her grievance in or about October 2017. That appeal outcome was some 12 months after the claimant's last day of employment. Any discriminatory act on which the

claimant relies must therefore have taken place, before 14 October 2016. The claimant also appears to allege that the respondent's refusal to award her ill health retirement benefits based upon her full length of service rather than that part when she worked part time from 9 June 2014, amounts to some form of unlawful disability discrimination. I have not seen any documentation relating to the respondent's ill health retirement scheme, but from what I have heard today is that the claimant voluntarily applied for partial retirement in June 2014 thereby reducing her hours to 19 hours per week. I strongly suspect that thereafter, any benefits to which the claimant may have been entitled, would be based upon those terms of her contract of employment which were current at the time when any benefit may have become payable. The claimant's case is that because the ill health which caused her to retire was in some way caused by the respondent, then she should be entitled to enhanced benefits based upon her total years of service, working full time. I consider it highly unlikely that the claimant would be able to establish causatively that this was the correct basis of calculation of any entitlement. At best the claimant would only succeed to must recover loss of earnings at the most recent part time rate, up until the date when she would ordinarily have retired.

14 The time limit for bringing a complaint to the Employment Tribunal is set out in section 123 of the Equality Act 2010:

- (1) Proceedings on a complaint within section 120 may not be brought before the end of –
 - (a) the period of three months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.

15 It is clear beyond conjecture that the claimant's claim was presented outside the period of three months beginning with the act complained of. As is set out above, on the claimant's best case, the claim was presented some 14 months after the time limit expired on 13 January 2017. The Tribunal must then decide whether it considers that it is just and equitable to consider the complaint out of time. In considering the claimant's application for extension, the correct approach for the Tribunal to take is to bear in mind that Employment Tribunal time limits are to be enforced strictly and to ask whether a sufficient case has been made out to enable the Tribunal to exercise its discretion in favour of extending time. That is not the same as saying that time should be extended unless a good reason can be shown for not doing so. (**Robertson v Bexley Community Centre [2003] EWCA-Civ-576**). The discretion to extend time is not at large and the time limit will operate to exclude otherwise valid claims unless the claimant can displace it, although this does not mean that the discretion has to be used sparingly. In deciding whether or not it is just and equitable to grant an extension of time, the Tribunal must take care first to consider the reasons why the claim was brought out of time and then the reasons why the claim was not presented sooner than it was. However, the failure to put forward a good reason for not having submitted the claim in time (or sooner) does not necessarily mean time should not be extended – all relevant factors including the balance of prejudice and the merits of the claim must be

considered. (**Rathakrishnan v Peter Express Restaurants Limited [2016] IRLR 278**).

- 16 There are examples where time has been extended when the Tribunal accepted that the claimant was unaware of her rights, or indeed that she had received incorrect advice from her lawyers. (**Hawkins v Ball & Barclays Bank Plc [1996] IRLR 258** and **Chohan v Derby Law Centre [2004] IRLR 685**). In considering the inadequacy or otherwise of legal advice, the Tribunal may take into account the knowledge and experience (or lack of it) displayed by the professional advisor. _____ some of the smaller trade unions or organisations such as the Citizens Advice Bureau may not be expected to have the same level of expertise as the larger trade unions or specialist firms of solicitors.
- 17 Frequently reference is made to the list of criteria contained in section 33 of the Limitation Act 1980, in respect of personal injury claims. The primary limitation period there of course is three years, rather than the three months in the Employment Tribunal. The relevant factors have become known as the **Keeble Factors [1997] IRLR 336:-**
- (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 cooperated within the quest for information;
 - (d) the prominence with which the claimant acted once he or she knew of the facts giving rise to the cause of action;
 - (e) the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.
- 18 Although in the context of the “just and equitable” formula, these factors will frequently serve as useful checklist, there is no legal requirement on the Employment Tribunal to go through such a list in every case, “provided of course that no significant factor had been left out of account by the employment tribunal in exercising its discretion.” (**Southwick London Borough v Afolabi [2003] EWCA-Civ-15**).
- 19 Where a delay in commencing a claim of sex discrimination was due to reliance on incorrect legal advice, an extension may be granted, even though it would not have been granted under the “not reasonably practicable” test which applies to unfair dismissal claims. On the other hand, reliance on that advice from the trade union fell to be immaterial to the question of an extension of time where the time limit had expired before the advice was given. (**Hunwicks v Royal Mail Group Plc UKEAT/0003/07**).
- 20 I am satisfied that this is not a case where the respondent could be said to be guilty of any culpable conduct in terms of having misled or attempted to mislead

the claimant about her entitlement, rights or the possibility of commencing legal proceedings. A somewhat protracted grievance (including appeal) might be said to have been utilised as a means of defeating the claimant's right to bring a complaint in the Employment Tribunal. _____ satisfied from what I have been told today, that there probably still could be a fair trial between these parties of the issues which have been identified as the basis of the claimant's complaints. As a result, the respondent could certainly defend any of these claims, on their merits. I must therefore ask myself what is the prejudice to the claimant in not being able to present her claim to the Employment Tribunal and how is that balanced by any prejudice to the respondent in having to face this complaint so long after the time limit has expired. Mr Cullen's submission to me on behalf of his wife is that if the Tribunal refuses to extend time then the claimant will be left without any remedy whatsoever against HMRC for the way it has treated Mrs Cullen. That of course, is not quite correct. Whilst the claimant appears to have been advised by her solicitors that a claim for damages for personal injuries in the civil courts should not be pursued, the time limit for presenting such a complaint has not yet expired. The claimant may seek to persuade Thompsons or indeed some other lawyers to advance such a claim on her behalf in the civil courts. It is not right to say that, if time is not extended in this Tribunal, then the claimant will not have the right to bring any claim elsewhere. If (as the claimant now appears to suggest) advice given to her by her trade union and lawyers was so poor as to amount to professional negligence, then she may well have a complaint against either or both of them.

- 21 Having received advice from Thompsons in the first week of January 2018, the claimant then failed to present her complaint to the Employment Tribunal until 5 March. That was a further two months after she was made aware that civil proceedings in the County Court were not to be commenced. No explanation has been given for that further delay.
- 22 Having taken all of those factors into account and having paid particular attention to the **Keeble Factors** referred to above, I am not satisfied in this case that it would be just and equitable to extend time so that the claimant's claim would be allowed to proceed in the Employment Tribunal. Time limits are there to be observed. The respondent was entitled to presume that once the time limit has expired, it will not face any legal proceedings relating to its employment of an employee or the termination of that employment. Granting an extension of time is the exception rather than the rule and it must be just and equitable to do so. It is not just and equitable in this case. The claims are out of time and the Employment Tribunal does not have jurisdiction to hear those claims. All of the claims are dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE

19 June 2018

ON

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