



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102965/2017

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Held in Glasgow on 8 February 2019

Employment Judge: Laura Doherty

10 **Ms J Sharkie**

Claimant
Represented by:
Ms L Neil -
Solicitor

15 **Teleperformance Ltd**

Respondent
Represented by:
Mr C Asbury -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgement of the Employment Tribunal is that it is just and equitable to extend time for the presentation of the discrimination claim under section **123 (1) (b)** of the Equality Act 2010 (the EQA) and that the Tribunal has jurisdiction to consider this claim; a Preliminary Hearing will be fixed to consider case management issues arising from the claim.

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REASONS

1. This was a Preliminary Hearing (PH) to consider whether the Tribunal had jurisdiction to consider the claimant's claim of disability discrimination under the EQA, on the basis that the claim was lodged out with the relevant statutory time limit.
2. It is not in issue that the claim is lodged out with the statutory time limit. The claimant was dismissed on 3 March 2017, and the claim was presented on 25 August 2017. ACAS notification was given on 9 August and the ACAS Certificate was issued on 25 August 2017.

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E.T. Z4 (WR)

3. The issue for the Tribunal therefore was whether time should be extended under Section 123 (1) (b) of the EQA to consider the claim, on the grounds that it was just and equitable to do so.
4. The claimant was represented by Ms Neil, solicitor. The claimant was unable to attend in person, but Mr Gerard McMahon who is appointed as her Power of Attorney, appeared on her behalf. The Tribunal heard evidence from Mr McMahon.
5. The respondents were represented by their solicitor, Mr Asbury.
6. Both sides lodged documentary productions. The claimant produced the Power of Attorney in favour of Mr. McMahon, and a medical report from her consultant psychiatrist, Dr Alison Thom.
7. Mr Asbury confirmed there was no challenge to the content of these documents.

Finding in Fact

8. From the information and evidence before it the Tribunal made the following findings in fact.
9. From around 2009 the claimant whose date of birth is 19/03/84, has suffered serious mental health difficulties.
10. In 2009 the claimant had a confirmed mental health diagnosis of schizoaffective disorder. This requires regular medication to control her fluctuations in mood. The claimant regularly requires to attend her Consultant Psychiatrist, Dr Alison Thom, attending approximately every 6 weeks.
11. The claimant is generally well, but her mental health is prone to fluctuate, and when unwell she requires admission to hospital.
12. The claimant's mental health deteriorates significantly when she does not take her prescribed medication. When that occurs, the claimant can become isolated, demonstrates aggression, and experiences episodes of paranoia. The claimant has attempted suicide on 2 occasions.

13. The claimant goes through episodes of not taking her prescribed medication. This impacts adversely on her condition, as it is no longer controlled by medication. The claimant is currently not taking her prescribed medication. The effect of this on her mental health is such that she is currently not fit
5 enough to attend this PH.
14. The claimant has a background of working in Human Resources. Prior to working with the respondents, she held at least one job where she worked in Human Resources.
15. Since her dismissal from the respondent's employment the claimant has
10 obtained a master's degree in Human Resources. This was a two-year degree. As a result of her of health issues, the claimant completed this course in three years.
16. The claimant was employed by the respondents as a Call Centre Operator from January 2017 until 3 March 2017, when she was dismissed.
- 15 17. The respondents dismissed the claimant in a letter dated 3 March 2017. In that letter the claimant was advised of her right to appeal the decision to dismiss, and on 9 March, the claimant wrote a four-page letter of appeal against the decision to dismiss.
18. An appeal hearing was scheduled to take place on 17 April 2017. The
20 claimant emailed the respondents shortly before the commencement of the appeal detailing a number of points she wished to raise at the appeal. These included that the claimant considered her dismissal to be discrimination, not because she believed she was disabled, but because the company said she was. The claimant also complained of a contractual breach of her employee
25 contract and underpinning employment law.
19. The minutes of the appeal meeting note the claimant admitting that her attitude was terrible, but that she believed she was within her rights as she had been unfairly dismissed. They also note that the claimant stated that it was like a '*red rag to a bull*' to her when her well-being was questioned. It was
30 noted that the claimant stated she believed she had been victimised, and she

was labelling it discrimination, and she believed she could get quite a large pay out for that. It is noted that the claimant said she had looked up case law to see what price she could get for it.

20. The minutes of the Appeal Hearing also note the claimant saying that she did not have the length of service for unfair dismissal and the respondents had unfairly dismissed and that discriminated against her and her harassed and victimised her.
21. The claimant wrote to the respondents on 17 April stating that she had a meeting with an employment lawyer at her step father's(legal) practice the following week and she hoped to have the company response to the appeal by then.
22. The respondents did not uphold the claimant's appeal, and the claimant emailed the respondents on 28 April setting out further concerns, and copying this to a number of individuals within the respondents' organisation.
23. The claimant's family in particular her mother and stepfather, are aware of her illness. Her stepfather, Mr McMahon has been in contact with Dr Thom to discuss the claimant's health over the ten-year period when she has been ill on a number of occasions. His experience of the claimant's periods of ill-health is that this is triggered by her stopping taking her medication and relying instead on natural remedies. His experience is that this results in the claimant becoming isolated, aggressive, and on occasion paranoid.
24. The claimant did not advise her mother or stepfather that she had been dismissed in March 2017. As far as her stepfather was aware she was continuing to go to work; when she visited the family home she was wearing what he recognised as her work clothes.
25. Approximately 4 to 6 weeks after the conclusion of the appeal in April 2007, the claimant told her stepfather that she had been dismissed. At this stage the claimant was experiencing a serious episode of ill-health. She was confrontational and aggressive. She was suffering from an episode of

paranoia. She believed that her family had installed cameras in her house and were watching her.

5 26. The claimant discussed the possibility of raising a Tribunal claim with her stepfather, who was a former solicitor of some experience, albeit not in employment law. It was the advice of her stepfather, and her psychiatrist, Dr Thom, that she should not do so at that point because of her serious health issues.

10 27. The claimant went on holiday towards the end of July 2017 with a trusted family friend. She turned around the beginning of August, it appeared to Mr McMahon that she was in a better state of health. The claimant indicated to him that she wished to pursue a claim; he advised her that of all the claim was out of time but he completed the ACAS notification on her behalf on 9 August.

15 28. The claimant was however still suffering from ill health, to the extent that she took a decision to admit herself to Harmyers Hospital on 15 August 2017. She remained in hospital until she was discharged on 6 November.

20 29. During the claimant's time in hospital her capacity to make decisions as regards her welfare was in question, and Dr Thom and Mr McMahon discussed the fact that it would be sensible for the claimant to have a Power of Attorney.

30. Mr McMahon was granted a Power of Attorney for the claimant on 23 January 2018.

25 31. Mr McMahon lodged the ET1 on 25 August, which was the date of receipt of the ACAS certificate. He did so on the basis that he had instructions from the claimant to proceed with the claim, albeit she was in hospital at that point.

32. On 4 October 2017, Mr McMahon, who was then representing the claimant in her legal case, contacted the respondents regarding potential postponement of a Tribunal hearing.

Note on Evidence

33. The Tribunal heard evidence from Mr McMahon, who was found to be an entirely credible and reliable witness. It did not appear to the Tribunal that Mr McMahon sought to embellish or exaggerate the position. He made appropriate concessions in cross examination, accepting that the claimant had an experience in HR, and that she had potentially identified having a discrimination claim shortly after her dismissal, and that she identified this in her letter of appeal and during the course of the appeal hearing. Mr McMahon readily accepted that there are episodes where the claimant is well. It was his evidence that these which coincides with her taking her medication.
34. Mr McMahon's willingness to make appropriate concessions impacted favourably on the Tribunal's assessment of the credibility of his evidence and rendered credible his evidence as to the impact on the claimant's health of her not taking her medical. The Tribunal accepted Mr McMahon's evidence as to the effect this has on the claimant, to the effect that she becomes withdrawn, isolated, aggressive, and sometimes paranoid.

Claimant's submissions

35. Ms Neil for the claimant, asked the Tribunal to extend time on the grounds of justice and equity under section **123 (1)(b)** of the EQA. She referred to the evidence given by Mr McMahon as to the claimant's state of health, and submitted that the Tribunal should accept this. Ms Neil referred to the case of *The Crown Prosecution Service v Fraser UKEAT2021/2013*, as authority for the proposition that the Tribunal is entitled to take into account mental health issues, in the exercise of this discretion. She also referred to the case of *Bozeat v Telefonica UK UKEAT0398/2*. In the circumstances that case it was held to be just and equitable to extend the time limit.
36. The claimant was too ill to present the claim on time, and there was no Power of Attorney in place to allow Mr McMahon to present it for her within the limitation period. The fact that a Power of Attorney was discussed, with Dr Tom was evidence of the extent to which the claimant was unwell.

Respondent's submissions

37. Mr Asbury submitted that the Tribunal should not extend the time limit on the grounds of justice and equity to consider the claim. He firstly referred to the case of *Robertson v Bexley Community Centre (2003) IRLR 434*, and the Judgment of Lord Justice Auld, to the effect that time limits are strictly exercised in employment cases, and when the Tribunals is asked to exercise discretion to consider a claim out of time on just and equitable grounds, there is no presumption that it should do so. On the contrary, a Tribunal cannot hear a complaint unless the applicant convinces the Tribunal that it is just and equitable to extend time. The exercise of discretion is as the exception rather than the rule.

38. Mr Asbury also referred to the case of *British Coal Corporation v Keeble 1997 IRLR 336*, and the factors which the Tribunal may take into account. Those are:

- (1) the length of and reasons for the delay.
- (2) the extent to which the cogency of the evidence is likely to be affected by the delay.
- (3) the extent to which the parties sued has cooperated with any request for information.
- (4) the promptness with which the plaintiff acted once he or she knew the facts giving rise to the cause of action; and
- (5) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

39. Mr Asbury referred to the fact that the claimant appeared on the face of the documents to be well able to deal with the appeal, and it was accepted that she had identified a claim of discrimination before the appeal, and during the course of the appeal hearing. The claimant was well enough to write to the respondents just before the appeal with a list of the issues she wished to raise, and she had also been able to write to the respondents on 20 April after the appeal outcome. This, he submitted, demonstrated that the claimant was

able to take steps to raise a claim, and there was no reason why she had not done so.

40. Mr Asbury pointed to the fact that the claimant was not admitted to Hairmyres until 15 August, and she had given notification to ACAS six days before that.
5 He submitted it must be assumed that the that the claimant's health was at its worst at the point of her admission, and therefore her health could not explain the fact that she had been unable to raise a claim earlier during the limitation period.

41. Nor did Mr Asbury accept that there could be any suggestion that the lack of
10 a Power of Attorney impacted on the claimant's ability to raise a claim. Mr McMahon was acting for the claimant and was able to raise the ET1 at the point when she was in hospital. He was also able to write to the respondents on 4 October before the Power of Attorney was granted. The Power of Attorney was not necessary to enable Mr McMahon to lodge the claim on the
15 claimant's behalf.

42. It was not reasonable for the claimant to wait for the outcome of the appeal before taking steps to lodge a claim. There was a line of authority to support this proposition, and Mr McMahon referred to the case of *Dedman v British Building and Engineering Appliances Limited 1973 IRLR 379*, *Bodha (Vishnudut) v Hampshire Area Health Authority 1982 ICR 200*, and *Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119*. In any event,
20 there was still six weeks after the appeal outcome, before the limitation period expired.

43. The claimant had a background in HR and had access to legal advice via her
25 stepfather who was an experienced lawyer. She would have been able to obtain legal advice easily, even if she did not know about time limits. Mr Asbury referred to the case of *Hunwicks v Royal Mail Group plc UKEAT/003/07/ZT*, and the Judgment of the Honourable Mr Justice Underhill, at paragraph 9, in support of the proposition that the fact that the claimant
30 may have been unaware of the relevant time limit does not necessarily make

it just and equitable to extend time, particularly where the claimant is a person of some intelligence and education with access to legal advice.

44. Mr Asbury then went through each of the factors referred to in *British Coal Corporation v Keeble & others*. Firstly, there was a delay of 83 days between the expired limitation period and the claim being lodged. The claimant had only worked for the respondents for 2 months. Three of the individuals with whom she had worked had now left. Mr Gilchrist, her manager, had in fact left on 25 August, the day the claim was lodged. Two other members of staff left in May 2018. When Mr Gilchrist left, he would not have thought that the claimant was pursuing a discrimination claim as nothing had been intimated within the relevant time limit. The respondents are entitled to rely on this. The impact of the delay was that there would be an effect on the cogency of the evidence which they could lead.

45. Mr Asbury submitted that the claimant had not acted with promptness. She was aware of the facts which gave rise to her cause of action, she had the opportunity to raise the claim, and she had access to legal advice, and from her own knowledge would have been able to do so but did not do so.

46. Lastly, Mr Asbury asked the Tribunal to take into account the merits of the claim, and he referred to the case of *Lupetti v Wren's Old House Limited 1984 ICR 348*. The claimant had only worked for the respondents for a period of two months. During that time, she had been extremely problematic. The claimant admitted this in correspondence that she had been difficult. There were also admissions to the effect that she resented the respondents enquiring about her wellbeing. Mr Asbury queried what the respondents were meant to do, and he submitted that this was a claim which was bound to fail.

Consideration

47. Section 123 of the Equality Act 2010 provides as follows:

(1) *Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after 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.*

5 48. The claimant was dismissed on 3 March, and therefore in terms of Section
123, subject to any extension which might be created by virtue of compliance
with the ACAS Regulations for Early Conciliation, the limitation period expired
on 2 June. ACAS notification was given on 9 August, and was therefore
given out with the limitation period, and clearly the claim was lodged out with
10 the limitation period on 25 August, the same day as the date of issue of the
ACAS certificate.

49. The Tribunal reminded itself, as submitted by Mr Asbury, that while the
Tribunal can exercise its discretion in order to determine whether or not it
should extend time to consider a claim, time limits are exercised strictly, and
15 the burden is on the claimant to convince the Tribunal that it is just and
equitable to extend time. The exercise of the discretion is therefore the
exception rather than the rule.

50. The Tribunal was satisfied that as a matter of fact the claimant has suffered
from mental health issues since 2009. It accepted the evidence of Mr
20 McMahon as to the effects of the claimant's condition. It also accepted the
evidence of Dr Tom, provided in the medical report lodged by the claimant,
which confirmed the claimant's diagnosis of schizoaffective disorder, and her
evidence to the effect that although the claimant is generally well, her mental
health is prone to fluctuate and when she is unwell has required admission to
25 hospital.

51. Dr Tom's evidence to the effect that the claimant's condition is controlled by
medication lends support to the evidence given by Mr McMahon to the effect
that when the claimant stops taking her medication, this impacts adversely on
her mental state.

30 52. The Tribunal accepted that the claimant had a background in HR, and that
she had identified by the point when she lodged her appeal against dismissal,

that she considered that she had a discrimination claim. The Tribunal was also satisfied that that even if the claimant was unaware of the time limits in presenting such a claim, she had access to legal advice.

53. Mr McMahon who had been a solicitor, was candid in his evidence and that he discussed with the claimant the fact that she may have a claim, albeit he had discouraged her from pursuing this when she first told him that she had been dismissed, approximately 4-6 weeks after she had received the outcome of the appeal.
54. The Tribunal however also accepted that from the time the claimant advised Mr McMahon she had been dismissed, up until end of July/beginning of August when she returned from Ireland, her mental state was very poor.
55. In reaching this conclusion, the Tribunal took into account Mr McMahon's evidence to the effect that not just he, but also Dr Tom who advised the claimant not to raise a claim because of her issues at that stage. This supported the conclusion that notwithstanding the claimant may have had the requisite knowledge, or access to legal advice, the claimant's mental health was such that it presented a barrier to her issuing Tribunal proceedings in the period leading up to the expiry of limitation of the claim in June.
56. Against that background, the Tribunal had regard to the factors identified in *British Coal Corporation v Keeble* which are set out above.
57. The length of the delay in this case is not insignificant: from 2 June to 25 August. The Tribunal was however satisfied that their reason for that delay in presenting the claim was that even if the claimant had been fit to present a claim during the period when she was conducting the appeal, in the period just prior to the expiry of the limitation period, there was a significant impediment to her doing so as a result of her mental health issues. The effects of the claimant's condition during the period after the appeal outcome and before the expiry of the limitation period as described by Mr McMahon in his evidence, which the Tribunal accepted, were considerable; the claimant isolating herself, displaying aggression and suffering paranoia.

58. The Tribunal also took into account the extent to which the cogency of the evidence is likely to be affected by the delay. In this regard, it is relevant for the Tribunal to take into account the period between the expiry of the limitation period and the claim being lodged, as opposed to the overall delay in these proceedings. While one of the witnesses had left the respondents employment by the time the claim was lodged, the Tribunal was not persuaded that a delay from June to August, while it may have some impact, was likely to have a significant impact on witnesses recall of events or the cogency of the evidence the respondents could lead. Nor was the Tribunal persuaded that the fact that a witness for the respondents had left the respondent's employment in August 2017 was likely to impact significantly on his recollection of events.
59. The Tribunal was satisfied that the claimant was aware of the facts which gave rise to the cause of action, and that she did not seek legal advice in this case.
60. The Tribunal also took into account Mr Asbury's submission to the effect that the claimant was admitted to hospital shortly after the submission of the ACAS notification, and it was to be presumed that this was her worst episode of mental health, and therefore her ill health could not explain why she had not submitted the claim earlier.
61. The Tribunal took into account the fact that the claimant's mental health deteriorated to the extent that she required to be admitted to hospital after she submitted her ACAS notification, however this was not in the Tribunal's view a reason to conclude that her ill health had not been the reason why she had been unable to lodge the claim earlier during the limitation period. The fact that the claimant was admitted to hospital for a period of almost three months on 15th August tended in the Tribunal's view, to support the conclusion that her mental state was likely to have interfered with her ability to pursue her claim at an earlier stage.
62. Lastly the Tribunal considered Mr Asbury's submission as to merits of the case.

63. Ms Neil's position in relation to this was that what Mr Asbury cast as matters which meant the claim would inevitably fail, were the factors which the claimant relied on in support of her claim.

5 64. It appeared to the Tribunal that it cannot be said there is no triable issue in this case. The respondents relied on the claimant's behaviour, and the fact that she refused to accept enquiries as to her wellbeing. The claimant on the other hand states that she became confrontational due to her mental health issues, and the reason for her dismissal was her health affecting her ability to perform her duties. Against these competing positions the Tribunal could not
10 determine at this stage, absent any factual enquiry, that this was a case which was bound to fail, and this was not a factor which it took into account when considering whether to exercise discretion to extend time.

15 65. The Tribunal looked at all the factors present in this case. Those were that albeit there is a degree of prejudice to the respondents as a result of the delay which may impact to some extent (although given the length of the delay it is unlikely to be significant), on the cogency of the witness evidence; that fact that the claimant considered just after her dismissal that she had a discrimination claim; she was able to lodge and conduct an appeal; and had access to legal advice.

20 66. The Tribunal however also took into account that the reason for that delay was the claimant's serious mental ill health in the period leading up to the expiry of the limitation period, which was a significant barrier to her to lodging her claim. This it seemed to the Tribunal was a factor to which had to be balanced alongside the other factors set out above, and the result of that
25 balancing exercise was that the Tribunal concluded that it was a just and equitable exercise of its discretion to extend time under Section **123(1)(b)** of the Equality Act to allow the claim. The effect of that conclusion is that the Tribunal has jurisdiction to consider the claim.

67. A PH to consider case management issues will now be listed.

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Employment Judge

Laura Doherty

10 **Date of Judgment**

20 February 2019

**Entered in register
and copied to parties**

21 February 2019

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