



# EMPLOYMENT TRIBUNALS

**Claimant** Miss A Petch

**Respondent:** Department for Work and Pensions

**HELD AT:** Leeds

**ON:** 19 August 2019  
28 August 2019  
(reserved Judgment in chambers)

**BEFORE:** Employment Judge Cox

**Representation:**

**Claimant:** Mrs Cakali, solicitor

**Respondent:** Miss Checa-Dover, counsel

## RESERVED JUDGMENT

1. All allegations other than that of failure to meet the duty to make reasonable adjustments in relation to the recording of disciplinary hearings have been brought outside the statutory time limit and not within such other period as the Tribunal thinks just and equitable.
2. The Tribunal has no jurisdiction to consider those allegations and they are dismissed.

## REASONS

1. The Claimant alleges that she is disabled because of arthritis and depression. In her original claim, she alleged direct disability discrimination, discrimination arising from disability, breach of the duty to make reasonable adjustments and unfair dismissal and claimed “other payments”. She subsequently withdrew all allegations other than breach of the duty to make reasonable adjustments and they were dismissed.
2. The reasonable adjustments allegations were clarified to some extent at a Preliminary Hearing on 21 December 2018 and further clarified at the Preliminary Hearing on 19 August 2019. The Respondent accepted that one of those allegations, relating to the recording of disciplinary hearings in the period from 19 December 2017 to 25 May 2018, might be capable of amounting to conduct extending over a period and that the issue of whether the Tribunal had jurisdiction to consider that claim would need to be decided if necessary at the full Hearing. That allegation is the subject of a separate Deposit Order.
3. The Claimant’s remaining allegations are as follows:
  - a. That in the period from 4 October to 7 November 2017 (when the Claimant was suspended from work) the Respondent failed to make reasonable adjustments to its practice of not reimbursing the cost of accommodation and food for overnight stays on work business, including business in Hull.
  - b. That by the end of January 2018 at the latest the Respondent had breached its duty to provide the following auxiliary aids: a desk with adjustable height; a chair with a headrest, lumbar support and arms with adjustable height; a footstool with adjustable height; a lightweight laptop computer; speech recognition software; literacy support software; and mind mapping software;
4. The Claimant contacted ACAS under early conciliation procedure on 29 March 2018 and an early conciliation certificate was issued on 13 May 2018 by email. The claim was presented on 3 August 2018.
5. According to Section 123(1) of the Equality Act 2010 (EqA), a claim may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable.
6. The allegation in paragraph 3(a) should therefore have been brought by 6 February 2018. The extension of time limits to allow for early conciliation provided by Section 140B EqA does not apply to this allegation because the early conciliation process did not begin until after the time limit had already expired. This claim has therefore been brought around six months out of time.

7. In relation to the allegation in paragraph 3(b), as a result of the application of Section 140B(2) EqA the time for bringing the claim was extended by 45 days from 30 April to 14 June 2018. (The further extension provided for in Section 140B(4) did not apply because the extended time limit did not expire in the period ending one month after the early conciliation certificate was issued on 13 May.) This claim has therefore been brought around 7 weeks out of time.
8. The Tribunal therefore needed to decide whether the claims had been brought within a just and equitable period.

### **Factual background**

9. The Claimant gave evidence on the timing of her claim. She was a union member for the whole of her period of employment with the Respondent and had access to the union's advice. She was familiar with the Tribunal process to some degree because she had made a claim of failure to make reasonable adjustments against a different employer in 2014.
10. The Claimant was clear that she had given the Respondent a very detailed report on what adjustments she needed by 23 June 2017, shortly after she started working for the Respondent. She was disappointed that the adjustments were not put in place at once but, as this was her first job in a while and she wanted to try to make it work, she did not object initially. By August/September 2017, however, she decided to raise the matter with the Respondent, along with allegations of bullying. On 19 and 20 October 2017 she committed the acts that ultimately led to her dismissal. On 7 November she was suspended from work as part of the disciplinary process. She was invited to an investigatory interview in the context of the disciplinary investigation into her conduct on 19 December 2017. The Claimant accepts that some adjustments for his disabilities were put in place in March 2018 but these did not resolve matters to her satisfaction and she raised a formal grievance on 9 March 2018. On 9 March 2018 she attended a disciplinary meeting. On 26 March 2018 she was dismissed for gross misconduct.
11. On the union's advice, the Claimant contacted ACAS to start the early conciliation process. She made that contact on 29 March 2018. The early conciliation process ended on 13 May 2018. She then needed to think about the impact bringing a claim would have on her mental health as she was already very distressed at losing her job. She appealed against her dismissal and on 25 May 2018 she attended the appeal hearing. On 7 June the Respondent wrote to her to confirm that her appeal had been unsuccessful.
12. At some point before bringing her claim to the Tribunal on 3 August 2018 the Claimant obtained legal advice from the solicitors who are now her representatives in this litigation. Neither she nor her representative at the

Preliminary Hearing could tell the Tribunal when she first obtained advice from them.

13. The parties asked the Tribunal also to consider as relevant evidence a short section of a report by Dr Petto, a consultant psychiatrist, based on an examination he made of the Claimant on 20 March 2019. This report was obtained mainly for the purposes of her allegation that she was also disabled as a result of post-traumatic stress disorder. Dr Petto was asked to consider whether she had that condition and whether that condition or her depression had impaired her judgement on 19 and 20 October 2017, when she did the acts that led to her dismissal for gross misconduct. His view was that, despite any worsening of her mental health that might have been caused by any alleged failure to make reasonable adjustments, she had the necessary decision-making capacity to follow the Respondent's rules of conduct and procedure. The Claimant has suffered from depression for several years before she began working for the Respondent, but Dr Petto assessed that the disciplinary process which followed the October 2017 events had worsened her depression by approximately 70 to 90% compared with the level of depression she was experiencing before she joined the Respondent.

#### **Assessment of “just and equitable” criterion for extension**

14. The Court of Appeal has emphasised in Robertson v Bexley Community Centre trading as Leisure Link (2003) IRLR 434 that there is no presumption that a Tribunal should exercise its discretion to allow a late claim. It is for the Claimant to convince the Tribunal that it is just and equitable to extend time. The exercise of that discretion is the exception rather than the rule.
15. The Tribunal considered the reasons for the Claimant's delay in bringing her claim. For the Claimant it was submitted that an extension should be granted because the Claimant has been suffering from poor mental health. The Tribunal accepts that the Claimant has had chronic depression for some time and that this was significantly exacerbated, as Dr Petto confirmed, by the disciplinary process and her dismissal. The disciplinary process did not, however, prevent the Claimant from speaking to her union, bringing a formal grievance about the Respondent's failure to make reasonable adjustments, contacting ACAS within three days of her dismissal in March and bringing an appeal against her dismissal. From the minutes of the appeal meeting, which the Tribunal saw, it is clear that the Claimant took a full part in that meeting. Even taking into account the Claimant's need to consider the impact on her mental health of bringing a claim, the Tribunal does not accept that her mental ill-health explains her delay in presenting her claim.
16. It was also submitted on the Claimant's behalf that she could not process her union's advice. The evidence the Claimant gave did not support that submission: she did not say she could not process the advice her union was giving her.

17. It was submitted that the Claimant, as a litigant in person, could not reasonably be expected to understand when time starts to run for the purposes of a claim of failure to meet the duty to make adjustments. The Tribunal accepts that the statutory provisions in Section 123(3)(b) and (4) EqA that define when an omission, such as a failure to make adjustments, occurs are complex. In the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something when they do an act inconsistent with doing it or, if they do not do an inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it. The Tribunal considers, however, that a lay person would understand and anticipate the effect of these provisions, which is effectively to ask the question: if this employer were going to make adjustments, would it reasonably have done so by now? If it would, it has breached its duty. The Claimant's evidence was that she expected the adjustments in paragraph 3(b) to be in place soon after she joined the Respondent in June 2017. Even proceeding on the basis of the Claimant's representative's concession that the Respondent had not breached its duty to make those adjustments until the end of January 2018, the Claimant did not bring her claim for a further seven months.
18. The Claimant's representative submitted that she acted promptly when she became aware what the time limit was for bringing her claim. Again, this was not supported by the Claimant's evidence on her knowledge of the time limit for reasonable adjustments claims, which was unclear and unconvincing. She initially said that she was not aware that there was a three-month time limit for bringing a claim of failure to make reasonable adjustments at all. The Tribunal does not consider that evidence credible, given the Claimant's earlier experience of bringing a similar claim, her access to advice from her union and her participation in the early conciliation process. Later in her evidence she said that she was told by her union that the claim would be in time because there was "continuing action" and by her solicitor that her claim would be in time because of the extension for early conciliation. The Tribunal is unclear from the Claimant's evidence whether this advice related to the time limits for the Claimant's other claims of direct disability discrimination and discrimination arising from disability or the claim of failure to make reasonable adjustments. Because the Claimant's evidence was so unclear and sketchy on what she was told and by whom, the Tribunal is not satisfied that any delay in the bringing of the claim can be attributed to the timing or accuracy of any advice she received about time limits.
19. The Tribunal has considered the length of the delay in bringing these claims, which is six months for the allegation in paragraph 3(a) and seven weeks for the allegation in paragraph 3(b). Although the former delay is clearly more substantial, the latter delay is still significant in the context of these allegations. For both these allegations, the Tribunal hearing the claim would need to make detailed findings of fact on whether, when and how the Claimant was put at a disadvantage in the context of things said and done since her employment began

in June 2017, a period at least two-and-a-half years before the likely date of any Hearing. The Tribunal is satisfied that the cogency of the evidence of all witnesses is likely to be substantially affected even by the shorter period of delay in bringing these claims.

### **Conclusion**

20. In conclusion, the Claimant has not satisfied the Tribunal that she has presented her claim within a further just and equitable period in relation to these allegations and they are therefore dismissed, on the basis that the Tribunal does not have jurisdiction to hear them.

Employment Judge Cox  
Date: 28 August 2019