THE EMPLOYMENT TRIBUNALS

PRIVATE PRELIMINARY HEARING

Claimant: **Miss T Laverick**

Respondent: **EE Limited**

Heard at: **North Shields Hearing Centre** **On:** **Tuesday 15 October 2019**

Before: **Employment Judge SA Shore**

Claimant: **Mr J Barker, Solicitor**
Respondent: **Mrs S Profitt, Solicitor**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant meets the definition of "disabled person" contained in section 6 of the Equality Act 2010 (EqA).

2. The claimant's claim of failure to make reasonable adjustments contrary to section 20 of the EqA is struck out because it was not presented within the period of three months less one day of the last act or omission complained of and I do not find it would be just and equitable to extend the time limit.

REASONS

BACKGROUND

1. By a claim form presented to the tribunal on 8 April 2019, the claimant brought claims of unfair dismissal and disability discrimination. The forms of disability discrimination claimed were failure to make reasonable adjustments and discrimination arising from disability. The case came before Employment Judge Shepherd on 6 June 2019 at a telephone private preliminary hearing at which orders were made requiring the claimant to prepare further particulars of her

claim and for an amended response to be prepared by the respondent. The case came back before Employment Judge Johnson on 16 August 2019 for a further telephone private preliminary hearing at which the Judge discussed the case with the representatives for the parties (the same solicitors as have been before me today). The claimant agreed to withdraw her claim of discrimination arising from disability and Judge Johnson ordered the case to be listed for a public preliminary hearing to determine if the claimant meets the definition of "disabled person" contained within section 6 of the EqA and whether her claim of failure to make reasonable adjustments was presented within the appropriate time limit. The parties had prepared an agreed bundle, which included an impact statement by the claimant.

HEARING AND EVIDENCE

2. The claimant gave evidence from an impact statement dated 15 October 2019 [21-24]. Because the impact statement deals with extremely sensitive matters, I will not describe those matters in these reasons, as the parties are well aware of what they are.

3. The claimant's evidence in chief was that she suffered a traumatic experience in 1999 which adversely affected her mental health. She says that since that date, she has had intermittent bouts of ill health, which have been exacerbated by circumstances that have arisen from time to time.

4. I do not consider that I have to repeat those circumstances in these reasons, as it is not necessary or relevant to do so given the nature of the decision that I had to make. I made a full note of the discussions, evidence and submissions in the case and I have only produced those parts of the evidence, discussions and submissions that are relevant to my judgment as set out in these reasons.

5. Mr Proffit cross-examined the claimant at some length on her medical history, mainly by reference to the GP records that she had produced [25-55] from 2000 to 2019.

CLOSING SUBMISSIONS - RESPONDENT

6. Mr Profitt submitted that the respondent's case is that the claimant's reasonable adjustments claim crystallised in or around summer or autumn 2018 and, as such, is out of time. The respondent's secondary point is that the claimant did not appear to have a diagnosis in relation to the medical condition that she claims to have had at all material times, and that the evidence shows that the issues she has experienced are grief reactions to adverse life events.

7. It was submitted that the burden for proving disability lies squarely with the claimant (**Kapadia v London Borough of Lambeth [2000] EWCA Civ B1**)

8. It was also submitted that grief reactions to adverse life events may be distinguished from mental impairments where they do not substantially impair a claimant's ability to carry out normal day to day activities for twelve months or more (**J v DLA Piper UK LLP UKEAT/0263/09/RN**).

9. Section 123(4) of the EqA provides that, in the absence of evidence to the contrary:

> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> > *(a) when P does an act inconsistent with doing it, or*
> > *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

10. The clock starts ticking in a reasonable adjustments claim when there is a deliberate or negligent omission as of a given date. The given date is the date in which the employer, had he been acting reasonably, would have made the reasonable adjustments (**Matusozowicz v Kingston Upon Hull City Council [2009] EWCA Civ 22**).

11. It was submitted that the claimant had not discharged the burden on her to prove that she had the mental impairment alleged and reference was made to eleven notes in the GP record that evidenced the cause of symptoms being family and work pressure.

12. It was submitted that any symptoms that post-dated the events of the claim in June 2018 should be discounted and that the entries made in GP records are exactly the kind envisaged in **J v DLA Piper**. It was submitted that the claimant's evidence of the impact on her alleged disability on her ability to carry out normal day to day activities was inadequate.

13. The adjustments sought in respect of the alleged provision criterion or practice (PCP) in June 2018 concerned the requirement of the claimant to take on the management of a second team and the failure to the respondent to support or assist her in that task, or to remove the additional managerial burden on her. The claimant's case was that she objected to the additional burden on her and that the respondent provided some level of support for a time, but ultimately, it failed and the claimant continued to manage the team.

14. It was submitted that following **Matusozowicz**, as far as the respondent made any failure in relation to the PCP, the given date was in or about autumn 2018. The cut-off date for the claimant was 19 December 2018 (day A on her ACAS EC certificate was 18 March 2018). The claimant had presented no evidence as to why it would be just and equitable to extend time.

15. The claimant's apparent case was that the state of affairs that she had complained about concerning the additional management burden on her eventually led to her dismissal, but such a case makes no sense at all and does not affect the limitation date for the purposes of a reasonable adjustments claim.

16. It was submitted that, on the claimant's own case, she deliberately authorised her team to use a working practice that led to her dismissal. It was submitted that this is an entirely different situation to making errors because of being overworked. In conclusion, Mr Profitt reminded me of the words of Lord Justice

Underhill in **CLFIS (UK) Limited v Reynolds [2015] EWCA Civ 439** that "over complicated analysis is a real problem in the discrimination field and Ockham's Razor should be applied as far as possible." It was submitted that a proper application of Ockham's Razor gives rise to the finding in the claimant's period of ill health by intrinsically and temporally linked to the kind of grief reactions to adverse life events envisaged by **J v DLA Piper**.

CLOSING SUBMISSIONS – CLAIMANT

16. Mr Barker submitted that I should look at the guidance produced by the Secretary of State in 2011 and the guidance in schedule 1 of the EqA. The claimant's case is simple. Unlike the claimant in **J v DLA Piper**, this claimant has a diagnosis of mental health issues going back to the event in 1999. Whatever else has happened, from at least 2012, the claimant was regularly taking medication and her unchallenged evidence was that if she did not take the medication, she would not be able to cope.

17. The examples given in the GP's record that when she is having a bad time, she can't get out of bed. She is tearful. Medication assists. It was submitted that this case can be distinguished from **J v DLA Piper** and that the 2011 guidance at sections C5-C11 (particularly C6) is very relevant.

18. On the issue of time, Mr Barker submitted that the respondent's point is correct if one looks at the date of crystallisation. But that misses the point of the actual case. The claimant's case is about the absence of support or that support was given and then pulled away led to a deterioration of her symptoms. It is incorrect for the respondent to say that the claimant's claim doesn't make sense because the claimant instructed her team to perform a process that led to her dismissal. She accepts that the process was not authorised and the state of her mental health at that time was a material factor in her dismissal. It would be just and equitable to extend time. The absence of reasonable adjustments was a significant factor leading to her dismissal. Her mental health is a salient part of her unfair dismissal claim.

DECISION

19. I distinguish the facts in this case from the facts in the case of **J v DLA Piper**. After the traumatic event that the claimant suffered in 1999, she has a long history of appointments with her GP at which she was prescribed medication for depression and anxiety. It is unfortunate that there was no medical report, but looking at the case in the round, it is obvious to me that the claimant had a significant mental impairment for long periods between 2012 and 2018. It may not have been given a consistent name, but it was clearly present. It is not necessary to put a medical "badge" on the impairment. Her impact statement, which was not really challenged, was consistent as to the effect of the impairment, set out facts from which I conclude on the balance of probabilities, that the claimant was, at all material times, a person who comes within the definition of section 6 of the EQA. I made that decision on the evidence and after looking at the 2011 guidance, particularly section C6.

20. The principles on extensions of time on a just and equitable basis are best set out in **Robertson v Bexley Community Centre [2003] EWCA Civ 576**. In paragraph 25 of that judgment Auld LJ stated that:

> "It is also of importance to know that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an appeal tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the appeal tribunal if it were deciding the issue of first instance would have formed a different view. As I have already indicated, such an appeal should only succeed where the appeal tribunal can identify an error or principle of law making the decision of the tribunal below plainly in this respect."

21. I find that the claimant's claim of disability discrimination is entirely separable from her claim of unfair dismissal. The claim of failure to make reasonable adjustments is a claim for remedy arising out of the consequences of the failure to make those adjustments. Case law is clear that the point that crystallisation occurs is the date upon which the respondent could or should have made the adjustments. That date was in June or July 2018 and the claimant should have therefore instigated ACAS early conciliation by September or October 2018. She did not do so until March 2019 and therefore her claim is out of time on the face of it.

22. The discretion to grant an extension of time under the "just and equitable formula" had been held to be as wide as that given to the civil courts by section 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions. Under that section, the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (*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 co-operated with any requests for information; (*d*) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

23. I find that the claimant was well aware of the potential claim for failure to make reasonable adjustments that she had because she complained about the alleged failure almost contemporaneously. She was supported by her trade union. The delay was one of many months. Addressing the matters listed in section 33, I make the following findings:

23.1. The delay was of several months and no reasonable explanation for the delay was given;
23.2. The cogency of the evidence is unlikely to have been affected by the delay;
23.3. There was no material delay by the respondent in producing information;
23.4. The claimant did not act with any real promptness, as she did not apply to amend the claim until a preliminary hearing, and;
23.5. The claimant was advised by her trade union throughout.

24. In exercising my discretion, I have to consider that the respondent would face the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence. The claimant would lose the opportunity to add a head of claim to an already substantial claim.

25. The same principles apply in the just and equitable arena to those in the reasonably practicable arena in respect of the claimant's ignorance of the law.

26. When considering whether to grant an extension of time under the 'just and equitable' principles, the fault of the claimant is a relevant factor to be taken into account. The claimant was at fault.

27. It is necessary for me, when exercising my discretion, to identify the cause of the claimant's failure to bring the claim in time. In **Accurist Watches Ltd v Wadher UKEAT/0102/09/MAA**, Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents (para 16). What a tribunal is not entitled to do, however, is to make assumptions in the claimant's favour on contentious factual matters that are relevant to the exercise of the discretion; as the burden is on the claimant to show that it would be just and equitable to extend time, where a contentious matter is relied on there must be some evidential basis for it. In this case, the claimant brought no evidence of the effect of her disability had on her ability to bring a claim in time.

28. When balancing the factors for and against the exercise of my discretion in the claimant's favour, I find the fact of the delay and the reasons put forward for the delay together tip the balance in favour of the respondent and I therefore decline to extend time, as I do not find it just and equitable to do so. The Tribunal therefore does not have jurisdiction to hear the claimant's claim of failure to make reasonable adjustments contrary to sections 20 and 21 EqA and that claim is struck out.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE SHORE ON
20 November 2019

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