EMPLOYMENT TRIBUNALS

Claimant:	**Mrs H Yates**
Respondent:	**1. Aviva Life & Pensions UK Ltd**
	2. Aviva Employment Services Ltd
Heard at:	**Leeds On: 12 December 2019**
Before:	**Employment Judge Davies**

Representation

Appellant:	In person with assistance from Mr Yates
Respondent:	Mr C Ridley (solicitor)

JUDGMENT having been given to the parties on 12 December 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant brings complaints of disability discrimination, unfair dismissal, unauthorised deduction from wages, breach of contract, and for pay in lieu of accrued holiday. There was some doubt about who her employer is or was, so Aviva Life & Pensions UK Ltd and Aviva Employment Services Ltd were both Respondents to the claims.
2. EJ Maidment listed this preliminary hearing to decide whether the Claimant remained in employment and, if not, on what date her employment terminated. If any issue about time limits arose, that was to be determined.
3. The Claimant represented herself with assistance from Mr Yates. She had also produced written submissions, with assistance from the Citizens Advice Bureau. Mr Ridley represented the Respondents. I was provided with an agreed file of documents. I heard evidence from the Claimant and Mr Yates on her behalf. For the Respondents I heard evidence from Mrs Chester

Issues

4. The issues to be decided were:
   - 4.1 Is the Claimant still employed by either Respondent?
   - 4.2 If not, did her employment end in 2004 or 2019 and on what date?

4.3 If the Claimant was dismissed in 2004, is it just and equitable to extend time for her to bring her discrimination claims?

4.4 Was it reasonably practicable for her to bring her other claims within three months of the matters complained of and, if not, did she bring them within a reasonable period?

Findings of fact

5. The Claimant started work for Aviva in October 2001. She had ill-health as a result of asthma and depression and she started a period of sickness absence in April 2003 after which she never returned to work. A dispute arose about her sick pay and she brought employment tribunal proceedings towards the end of 2003. Those proceedings were settled with a COT3 settlement agreement and the Claimant was paid £7,500 net in settlement of her claim. The COT3 agreement recorded that she agreed that the terms relating to her sick pay entitlement set out in the Respondent's sickness and sick pay policy "applied to her continued employment with the Respondent with immediate effect."

6. The COT3 recorded a settlement of the Claimant's claim for sick pay up to that point. It was not a guarantee of, or an undertaking to provide, future employment. The reference to the Respondent's sick pay policy was a confirmation about how sick pay would be paid in the future, given that at that time the Claimant's employment was continuing. The Claimant appears now to rely on the settlement as somehow safeguarding her employment. It did not have that effect.

7. The Respondent's case is that later in 2004, when the Claimant remained off work on sick leave, she was assessed for sickness and accident benefit in accordance with the Respondent's usual process. Sickness and accident benefit is an insured benefit payable to people who are not fit for work. The Respondent says that the Claimant's employment terminated on 29 August 2004, when she was assessed as eligible for that benefit and it started to be paid to her. That is now 15 years ago and the relevant records have for the most part been destroyed by the Respondent. I heard evidence from Mrs Chester about what the usual processes were. She also drew my attention to some documents from the time and since, and to the relevant scheme rules. The relevant scheme rules make clear that it is a condition of receipt of the benefit that the person's employment terminates. Mrs Chester said that although she did not know personally whether the process had been followed in the Claimant's case, there was a detailed process for assessing someone medically, having discussions with them and signing them up for sickness and accident benefit. For the benefit the Claimant received, the process entails explaining to them that their employment is going to be terminated and then the individual signing documents agreeing to that termination. Mrs Chester's expectation was that the process would have been followed in the Claimant's case

8. The Claimant's evidence was that this process was not followed: nobody spoke to her about sickness and accident benefit, she did not have any conversations or discussions about it, she did not think she had had medical assessments and there was never any discussion of her employment being terminated as a condition of her receiving the benefit.

9. I was shown at the Claimant's payslips. From 2003 to January 2004 the sums paid to her gradually reduced to almost nothing. That was the time when she brought her previous employment tribunal claim. A payment was made to her in respect of the

deductions in 2003, after the COT3 was signed in January 2004. The payslips show that the Claimant was then paid £238 in March 2004, but in May, June and July 2004 she was effectively paid nil. In August 2004 she was paid almost £1000 and that continued to be the position after August 2004. I asked her why she thought she was suddenly being paid these significant sums from August 2004 onwards, if there had been no discussion or consideration of sickness and accident benefit with her. She said that she assumed it was the payment of long-term sickness pay. I asked her why she had not complained about not being paid sick pay in May, June and July 2004 if that was the case. She said that she had assumed that this must have been covered in the lump sum that she was paid as a result of her COT3 settlement. I did not think that was plausible, particularly since the COT3 dealt expressly with how she would be paid in future. At the end of 2003 the Claimant had taken the trouble to bring employment tribunal proceedings because of not being paid the correct rate of sick pay. It did not find it plausible that if she genuinely believed the payments from August 2004 were simply long-term sick pay, she would not have queried why she had been paid nothing for May, June and July. If she did not believe this was simply the payment of long-term sick pay, it was not plausible that she suddenly started receiving significant monthly payments in August 2004, on her case out of the blue, and did nothing to query why.

10. I also considered it highly unlikely that the Claimant would have been awarded this valuable benefit without a proper process being followed. It may be that some steps were missed - there may not have been all the meetings and discussions - but the evidence shows that the Claimant regularly had medical reviews after August 2004 to confirm her continued eligibility, and I find that she must have had a medical assessment to decide whether she was eligible for the benefit in the first place. Further, I find on the balance of probabilities that she must have signed documents confirming her agreement to receive the benefit on the terms on which it was payable. That must have included agreement that her employment would be terminated.

11. I have mentioned that the Claimant has a mistaken view that the COT3 settlement gave her some protection as far as her employment was concerned. When she was asked about it in evidence she said that she thought that the scheme rules did not apply to her as hers was a special case. She may mistakenly have thought that she could argue that termination did not mean termination in her case because of the COT3 settlement, or it may be that she did not trouble too much about it because her focus at that time was on receiving the payments and that took place. But I find that on the balance of probabilities she knew that these were payments of sickness and accident benefit, she was told and understood that her employment was terminated in August 2004, and she was aware that that was the basis on which the sickness and accident benefit was being awarded.

12. In reaching that view I have had regard to the documents produced by the parties. The Respondents produced a screenshot indicating that a P45 had been issued to the Claimant. The Claimant's evidence is that she did not receive one. She has obviously carefully kept a number of documents, and I believe her when she says that if she had received a P45 she is likely to have kept it and been able to produce it. It may be that for some reason, even if the P45 was issued, the Claimant did not receive it. She did, however, receive payslips. The payslip for September 2004 expressly refers to her as being a "leaver"; it makes clear that her PAYE code has

been changed because she is a leaver; and it includes a payment for accrued holiday. Those aspects of the payslip, which the Claimant did receive, pointed to the fact that her employment had been terminated. She did not question the payslip at the time.

13. The Claimant also received some letters to do with her pension in or about August 2004 and those included reference to a date of leaving service of 29 August 2004. She then received annual pension benefit statements and each of those said that the date she had left her money purchase pensionable service was 29 August 2004. The Claimant told me that she did not really read those.

14. There was no dispute that the Claimant had a copy of the sickness and accident benefit scheme rules by March 2012 at the latest. As I have indicated, those rules say in terms that a condition of receiving the benefit is that the person's employment has terminated. I did not find it plausible when the Claimant said that she did not really look at the rules and had not carefully studied them. She was subject to regular medical examinations to confirm whether she remained eligible for the benefit through the subsequent at 15 years and there were questions raised about her eligibility at various points. I found it very unlikely that she would not have checked the rules and checked what requirements she needed to satisfy to remain eligible for benefit. Again, in reaching that view I took into account the Claimant's approach in challenging the sick pay in 2003 and in these proceedings. She strikes me as someone who takes care to understand what her entitlements are and to pursue them if she thinks she is not receiving them.

15. I am satisfied that the Claimant also received a letter in February 2015 when there was a change to the way her sickness and accident benefit payments were paid, because they were no longer to be taxed. The second paragraph of that letter said, "As you will be aware Aviva is currently making payments to you following the termination of your employment with Aviva on the grounds of ill-health on the basis that there was no foreseeable return to work because of your health." The Claimant did not take any steps to challenge or question the reference to the fact that her employment had been terminated.

16. I did not find that anything that has happened over the 15 years the Claimant has been in receipt of the benefit was inconsistent with her employment having terminated in 2004. She received payslips, but that was because it was Aviva that administered the benefit scheme and it needed to provide her with a payslip from the payroll to show her what she was getting. Those payslips referred to the sickness and accident benefit ("SAB") payroll and they included a different tax code from her previous payslips. They did not include any reference to her job title. The Claimant also received P60s. Mrs Chester explained that that was only until 2016, because the benefit payments were taxed and the Claimant was entitled to have a statement of her income and what tax had been paid. Because Aviva was responsible for administering the payments it was for Aviva to provide P60s. Mrs Chester pointed out that since the change to the tax arrangements in 2015, no further P60s have been provided.

17. I have mentioned that the Claimant had regular medical reviews. Those were administered by the Aviva HR department. It was the HR Department that requested medical reports and that dealt with that process. Mrs Chester explained that Aviva

has four different sickness and accident benefit schemes, each of which has different rules. For some of them (like the Claimant's) it is a requirement that the person is not an employee and for others it is a requirement that the person is an employee. The medical professionals assessing the recipients do not necessarily know which scheme the person they are assessing is on. Mrs Chesters said that in that context it was not possible to read too much into comments made by medical assessors about whether the person was an employee or not. I agree. There are comments going both ways throughout the medical documents. Some suggest that the Claimant remained an employee and some suggest that she did not. Those documents do not particularly assist me. It is also right that HR were sometimes seeking advice on a "return to work" for the Claimant. However, Mrs Chester said that they were seeking advice on *any* return to work with *any* employer and that that was because that was the eligibility test under the scheme rules. I accept her evidence.

18. On 25 March 2019, after a medical review at which she was found to be fit to return to some form of work, a decision was taken to cease paying the Claimant under the scheme. She received a letter telling her that her payments would be terminated. The letter made reference to the fact that when she entered into the scheme her employment had been terminated. At that stage the Claimant took issue with the suggestion that her employment had been terminated. She contacted ACAS on 9 May 2019, a certificate was issued on 9 June 2019, and she lodged this employment tribunal claim on 28 June 2019.

Legal Principles

19. In her written submissions the Claimant referred to some legal cases that deal with situations where there is doubt about whether notice has been given or received. I have made a finding of fact that the Claimant's employment was terminated in August 2004 with her knowledge and agreement. The situation is therefore different from the cases referred to in the written submissions and they do not help me.

20. There are time limits for bringing employment tribunal claims. Generally, claims must be presented within three months (plus early conciliation extension) of the thing being complained about. The tribunal can extend time if certain conditions are met. For claims of unfair dismissal, breach of contract, unauthorised deduction from wages and failure to pay accrued holiday pay, if the claim was not brought in time, the Claimant must satisfy the tribunal that it was not reasonably practicable to bring the claim within the time limit. Reasonably practicable means something between "reasonable" and "physically possible." It is a question of fact for the tribunal whether it was reasonably practicable for the complaint to be brought in time and there is a range of factors that may be relevant: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, CA. If the tribunal finds that it was not reasonably practicable for the claim to be brought in time, it must then consider whether it was brought within a reasonable period thereafter. This requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for the proceedings to be instituted, having regard to the strong public interest in claims being brought promptly, and against a background where the primary time limit is three months.

21. For a complaint of disability discrimination, the test for extending time is different. The question is whether it is "just and equitable" and the tribunal has a wide

discretion to do what it thinks is just and equitable in the circumstances. The factors that are to be considered by the civil courts under s 33 of the Limitation Act 1980 in determining whether to extend time in personal injury actions may provide a helpful checklist: see *Southwark London Borough Council v Afolabi* [2003] IRLR 220, CA. 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.

Application of the law to the issues

22. For the reasons explained in detail in the findings of fact above, the Claimant's employment was terminated with her agreement and knowledge on 29 August 2004.

23. Time for bringing each of these claims started to run then, and they are all therefore very substantially out of time. I turn to the question whether the time limits should be extended.

24. For the disability discrimination claim, the question is whether the claim was brought within a period that I consider just and equitable. I must take into account all the relevant factors and circumstances, including the reasons for the delay, the impact on the evidence and the prejudice to each side from allowing or refusing an extension of time. I have found that the Claimant knew that her employment had terminated in 2004, but she did not take any action about that until sickness and accident benefit payments were stopped 15 years later. The Claimant has not given any other explanation for the delay, apart from the assertion that she did not know her employment had been terminated, which I have rejected. That delay obviously has a huge impact on the evidence. The records have for the most part been destroyed and I am told that the people who might have been able to give evidence have also for the most part left Aviva's employment. That would significantly prejudice the Respondents in being able to defend the claim if I extend the time limit. On the other hand, obviously if I do not extend time there will be real prejudice to the Claimant, because she will not be able to advance her complaint of disability discrimination at all. Balancing all the relevant factors, I find that the prejudice to the Respondent will be much greater, because it will be facing claims 15 years after the event and with little or no ability to defend those claims on the basis of documentary evidence or evidence from witnesses who were there at the time, in circumstances where there is no satisfactory explanation for the delay.

25. For the remaining claims, the first question is whether it was reasonably practicable to present the claims in time. I find that it was reasonably practicable to present each claim in time, because I have found that the Claimant knew about the termination of her employment in August 2004. She had previously brought tribunal proceedings, with legal assistance, so she clearly knew that she could do so and how to go about it. No other reason preventing her from bringing the claims was identified. In those circumstances, it was reasonably practicable to present claims of unfair dismissal, breach of contract, unauthorised deduction from wages and for failure to pay accrued

holiday pay, within the relevant time limits. It is not therefore necessary to consider whether the claims were presented within a reasonable period. The Tribunal cannot extend time and does not have jurisdiction to hear the claims.

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Employment Judge Davies
7 January 2020