



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Ms K D Woodruffe

AND

Marks & Spencer Plc

OPEN PRELIMINARY HEARING

Heard at: London Central

On: 10 January 2020

Before: Employment Judge Adkin

Representation

For the Claimant: Mr M Goldsborough, Solicitor

For the Respondent: Ms K Hosking, of Counsel

REASONS

1. These written reasons are for a judgment given on 10 January 2020 in which I extended time under section 123 of the Equality Act 2010 for the Claimant's claims of race and disability discrimination. Oral reasons were given at that hearing.
2. The Claimant resigned on 2 September 2018, but did not present her claim until 2 August 2019.

Evidence

3. I heard oral evidence from the Claimant supported by a four page witness statement and a bundle of documents comprising twenty six pages including those four pages of evidence. The Claimant was cross examined by Counsel.

The Claimant also answered questions put forward by the Tribunal.

The Law

4. The test I have to apply in this case is whether it is just and equitable to extend time given that it is admitted by the Claimant that her claim was presented late.

The parties are in agreement that I have a wide discretion, I have referred myself to the most recent decision of the Court of Appeal on this discretion which is

Abertawe Bro v Morgannwg University Local Health Board citation 2018 ICR

1196 . The head note dealing with this point reads as follows:

“the employment tribunal had the widest possible discretion under section 123(1) of the Equality Act 2010 to allow proceedings to be brought within such period as it thought just and equitable; that factors which were almost always relevant to consider when exercising any discretion whether to extend time were the length of, and reasons for, the delay and whether the delay had prejudiced the respondent; that there was no justification for reading into the statutory language any requirement that the tribunal had to be satisfied that there was a good reason for the delay, let alone that time could not be extended in the absence of an explanation of the delay from the claimant, although whether there was any explanation or apparent reason for the delay and the nature of any such reason were relevant matters to which the tribunal ought to have regard; that given the width of the discretion given to the employment tribunal there was very limited scope for challenging the tribunal's exercise of its discretion on an appeal”

5. In *Southwark London Borough Council v Afolabi* 2003 ICR 800, CA, the Court of Appeal confirmed that, while the checklist in S.33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly.

Findings of Fact

6. The Claimant's employment commenced on 13 August 2017. The Claimant was diagnosed with depression in May 2018. The GP record notes that she had low mood on 4 July 2018. On 9 July 2018 the Claimant was seen in a clinic and diagnosed with Bell's Palsy. On 6 August correspondence from the Newham Talking Therapies in Vicarage Lane in Stratford indicated that she was due to start a talking treatment therapy for "depression and anxiety due to work related stress". On 6 August 2018 a screen shot from the Claimant's General Practitioner's mobile app records that the Claimant had depression and at that stage may be fit for work. On 24 August 2018 similarly, a GP certificate indicated that she had depression but may be fit for work.

7. On 28 August 2018 there was a meeting where the Claimant says that she was pressurised to resign, although I make no finding about that, this is simply to orientate the claim with the findings of medical history.

8. On 2 September 2018 the Claimant's employment ended with her resignation.

9. On 13 September the Claimant commenced a “coping with worry course” a weekly course in the Vicarage Lane Health Centre. On 8 October a further GP certificate indicated that she had depression and was not fit for work.
10. 1 December 2018 was the date on which she should have presented an ACAS certificate in order to bring a claim in time but did not.
11. On 6 December a further GP certificate indicated depression and the Claimant was not fit for work. A letter on 9 January 2019 from Newham Talking Therapy’s confirmed that she had been enrolled in a cognitive behavioural therapy programme for depression. On 15 January 2019 a GP certificate indicated again that she was still had depression and was not fit for work.
12. On 14 January 2019 the documents indicate that there was still consideration about the doctors of what was originally thought to be Bell’s Palsy but was now been characterised as a form of headache but possibly of atypical facial pain. A further GP certificate for depression indicating not fit for work is dated 4 March 2019.
13. In April 2019 the Claimant saw a solicitor. There was however a further delay which she explained to me in her oral evidence was caused by the need to work through the internal grievance documents and other documents relevant to her claim. She explained and I accept that she found this extraordinarily difficult because it required her to confront events which she found difficult.

14. On 26 April 2019 the Claimant began group therapy. The summary of her medical condition at that stage related to “low mood and depression”. A letter dated 31 July 2019 from Newham Talking Therapies confirmed that the Claimant had attended nine out of ten sessions of group psychological therapy for depression using CBT principles in the period 16 April 2019 to 12 July 2019. This had resulted in a measurable improvement in depression and anxiety over the course of thirteen months from July 2018 to July 2019.
15. The claim was submitted to ACAS and the ACAS issued a certificate on 1 August 2019. The claim was then presented the next day which was 2 August 2019.

Submissions

16. I have heard submissions from both parties.
17. The Claimant’s representative essentially urges on me that I exercise discretion in the Claimant’s favour.
18. The Respondent’s points I shall discuss in more detail.
 - a. First the *length of delay*, the claim is approximately eight months late. I accept that this is significantly outside of the statutory period.
 - b. The second point put forward by the Respondent is that the evidence today of the Claimant’s medical position is limited. I agree with the Respondent’s position that it is unsatisfactory that we do not have a complete picture and it is somewhat unsatisfactory. It seems that a case worker (rather than the solicitor) acting on behalf of the Claimant has carried out the process of assessing which

evidence is relevant and which is not. Having said that I consider that I do have enough evidence today that presents a sufficiently full picture for me to make a decision on whether to exercise my discretion.

- c. Thirdly, it is argued that the Claimant was in a position to go to a solicitor in April 2019 and I acknowledge this but accept the Claimant's evidence that she found it very difficult to go through the process of considering the documents that she needed to consider at that stage. Finally, it is said that the Claimant's solicitors should have at least issued protectively at that stage. I agree that they should have done that. (If this was an unfair dismissal claim a different test would apply and the outcome would very likely have been different following the *Dedman v British Building and Engineering Appliances* line of authorities.) However, the just and equitable jurisdiction gives the Tribunal a wide discretion.

Conclusion

19. I have considered in the circumstances of this case that I should extend time. I have considered various factors that are relevant.

20. *Explanation for the delay* - I consider that I have had in this case an explanation for the delay in relates to the Claimant's state of mind and the Claimant's health and her significant difficulties with depression and anxiety as evidenced by the medical evidence and the therapy that she has undergone. I accept that as a result of her state of mind she found it extraordinarily difficult to

deal with the documentation to provide instructions to her instructing solicitor. It should be clear that I am not determining the question of disability in this decision.

21. While the Respondent has argued, reasonably, that the Claimant's solicitor might have presented a claim protectively, I do not consider that this is fatal to her claim as it might be under the "not reasonably practicable" test under section 111 of the Employment Rights Act 1996.

22. *Strength of the claim* – this may be a relevant factor when deciding whether to extend time. I am simply unable to form any view about the strength of the claim based on the pleadings and the very limited evidence that I have considered.

23. *Promptness* – I have considered the promptness with which the Claimant acted once she knew of the facts giving rise to the course of action. I find that the Claimant did not react promptly once she had seen a solicitor in April 2019. I have taken account, however, of the difficulty that she found in dealing with the substance of her claim and accepted her evidence on this point.

24. *Length of delay* - I accept that some prejudice in this case is caused to the Respondent by having to deal with this matter later than they would otherwise have had to deal with it. On the other hand, I have not been provided evidence from the Respondent of any specific hardship in the circumstances of this case i.e. beyond the ordinary prejudice caused by a delay. I was not told for example that witnesses are not available. There is a grievance which overlaps with the subject matter of the claim. For this reason, there will be contemporaneous documentation which will assist the parties and the Tribunal in understanding what has happened and to some extent will assist the Respondent putting their case forward. I do not

consider that the cogency of the evidence of this case is going to be affected to a very important extent.

25. *Other factors* - I do not consider that it would be just and equitable that a possible error on the part of a case worker regarding the scope of disclosure of medical documents should be visited on the Claimant in these circumstances. I have found that there is enough medical evidence to establish a sufficiently full picture such that the Tribunal is satisfied that the Claimant delayed presenting her claim as a result of her state of mind and specifically depression and anxiety during the material period of delay between 1 December 2018 and 2 August 2019.

26. For all of those reasons and looking at the case broadly I have considered that it is just and equitable to extend.

Employment Judge Adkin

Dated: 4 Jan 2020

Sent to the parties on:

05/02/20

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For the Tribunal Office