



EMPLOYMENT TRIBUNALS

Claimant: Ms Sarah Latham
Respondent: Department of Work and Pensions
Heard at: Swansea **On:** 16th September 2019
Before: Employment Judge R Powell (sitting alone)

Representation:
Claimant: In person
Respondent: Ms J Williams, of counsel

JUDGMENT

The Judgment of the tribunal is:

The time for presentation of the claims of unfair dismissal and disability discrimination is extended to the 25th March 2019.

REASONS

1. The judgment in the case was given orally on the 19th September 2019 and case management orders were sent to the parties shortly thereafter. A request for written reasons was lodged with the tribunal but due to a combination of factors, in large part my own delay, these reasons are provided much later than I would have wished.
2. This Preliminary Hearing was directed by Employment Judge Havard in an Order dated 24 June 2019 and the issues for determination at this hearing were agreed:

(1) whether or not any part of the claim had been presented out of the time limit and whether there should be an extension of time, if so;

(2) whether the Claimant was disabled within the meaning of the Equality Act 2010.

The second of those issues had been resolved and I note that it is accepted by the Respondent that the Claimant had the protected characteristic of disability.

3. I have before me an agreed bundle which runs to some 40 numbered pages and thereafter a set of the Claimant's medical records. I also have a witness statement from the Claimant who gave evidence and was cross examined.
4. Before considering the evidence, I put the dispute between the parties in its uncontentious context.
5. The Claimant commenced her employment in August 2008 working as a Fraud Investigator with the Respondent. In approximately February 2017 the claimant raised allegations about a colleague's behaviour towards her. I note the account set out in the ET1 of the claimant's grievance against that colleague and a subsequent counter grievance against the claimant.
6. The relationship between the claimant and the respondent deteriorated to the extent that, by 29 May 2018, the Claimant resigned without notice and that is the effective date of termination for the purposes of Section 111 of the Employment Rights Act. It is also the last occasion on which an act of disability discrimination could have occurred for the purposes of Section 123 of the Equality Act 2010.
7. On 31 May 2018 the Claimant contacted ACAS and commenced Early Conciliation. That period of conciliation continued until 29 June 2018 as can be seen from page 1 in the bundle. It is agreed by the parties that "the clock stopped" for 29 days and thus the expiry of the time limit was extended to 26 September 2018.
8. It is also agreed that the claim form was received on 25 March 2019; six months after the last date for a timely presentation of the claim.
9. The basis upon which the Claimant says that it was not reasonably practicable for her to present the claim within the period, and that time should be extended to 25 March for both the unfair dismissal and the Equality Act claim, is essentially the history of her mental health in conjunction with certain points set out in her witness statement.

10. It is pertinent then to align elements of the factual matrix with the Claimant's medical records.
11. The Claimant has a history of some difficulties with mental health. It is not pertinent to rehearse most of that history in this judgment. Prior to 2016 there was no indication in the medical records of an association between her mental health and work-related matters. The first such indication is dated 21 September of that year and the record says "ongoing stress re: possible house repossession, feels unable to return to work, finding work stressful".
12. The Claimant's medical records then, so far as we are concerned, are silent until 10 November 2017 wherein the Claimant's diagnosis of anxiety and depression is recorded and said that the Citalopram medication was no longer effective. The Claimant was; "having suicidal thoughts, not taking any action, it was a very stressful time at home with financial and family worries as well as problems at work". She had had help with CBT with coping techniques. The record then says; "works full time and wants to be busy to keep her mind off things."
13. On 1 December 2017 a medical certificate was issued confirming the claimant was unfit for work. It and was renewed up until the Claimant's return on 28 February 2018.
14. The medical notes of 1 December described the Claimant's condition as having worsened; "that she had attempted an overdose and was suffering a lot of stress in work at present". It states that the Claimant was self-medicating non- prescription medicine and then notes that the Claimant wished to cease to take Citalopram and move on to Sertraline.
15. The next medical record is that of 8 December 2017, which stated that the Claimant "had a med 3, she will seek legal advice regarding harassment issues and the patient was reportedly harassed by a colleague at work but also reported was involved in signing a contract which involved accepting debt. Has been having thoughts of self-harm but only when thinks about work".
16. The next entry is two weeks later on 21 December 2017 and that describes the medication of Sertraline 50mg and then adds "a remarkable improvement, full of energy, great eye contact and clearly upbeat about things, followed advice given regarding seeking help from police for reported workplace harassment, remedial actions taken on evidence presented to police, workplace environment has been much better and conducive to patient working and has been hoping to get back in the middle of January."

17. The next entry is on 17 January 2018, the diagnosis was the same, the medication the same and a second med 3 certificate was issued; "Patient quite anxious over requesting an extension for med 3, went to great lengths to explain what is a complex set of circumstances at work, dynamics with colleagues and bosses complicated and strained. Overall the situation is improving, psychologically more bright and upbeat. Had a few critical meetings with regards to work and feel that can't do day to day job with those looming in the background". There is no record on the notes that I have of any other reference or consideration of the Claimant's mental health.
18. The next record that relates to work at all is 11 May 2018, but that states "really tight chest, went to work but her boss said she needs to go to doctors." That is the last reference to the claimant's work with the respondent, she resigned later on in May 2018. So far as the medical records show, there is no further reference to medication or a medication review.
19. The Respondent has brought to my attention that on 20 September 2018 the Claimant had started working in a launderette and a further entry on 1 February 2019 which records; "last couple of months on and off (this is with the neck pain) works in launderette so lots of lifting also RTA (road traffic accident) in November but no pins and needles". That is the entirety of the medical evidence that is before me and, as the Respondent has pointed out, there is no witness statement from the doctor to express an opinion as to whether or not the degree of mental impairment noted above was sufficient to prevent the Claimant from formulating and submitting a claim form before the 25th March 2019.
20. In the context of the above the Claimant's evidence, relevant to the issue before me, is as follows, at paragraph 2 of her statement the Claimant said; "getting up from bed, washing, taking care of myself, preparing a meal or having no interest in any previous hobbies, no interest in anything at all, taking a shower most people do daily without taking a second's hesitation? No matter how hard I try I can't explain the chaos that roams around your head like a toddler throwing a tantrum".
21. She then went to say; "kept ignoring my body and mind when it was on the verge of expiring until eventually I ended up rock bottom, I couldn't leave my bed, let alone my house" and she goes on to say there was no logic to this and how it was hard to explain. More specifically she stated in paragraph 4; "my anxiety increased from approx August 2018 adding to the numerous letters and phone calls stating that my family home was going to be repossessed due to no salary therefore I couldn't pay the bills and more importantly I was going to lose everything I had worked hard for, consequently I had no choice than to sell my home. In December 18 it was

then I wanted to end it all, I had no wish nor want to live with my thoughts being perceived as a failure, so submitting completing an ET1 was the last thing on my mind.” She then stated in oral evidence that she attempted self-harming and to commit suicide by cutting her wrists.

22. At paragraph 8 she goes on; “I had convinced myself, how would a Tribunal take my claim seriously, as I worked for the DWP. It was I who had resigned from a well-paid career, I perceived that and watched U-tube videos such as medium.com”. Her statement continues in like manner.
23. Towards the end of her statement, just after the last comments relating to the Department of Works and Pensions’ conduct and attitude towards other staff, she said; “therefore added to my already anxious state of mind I felt I could not “take on” or submit my ET1 on time as based on my own experience and the statistics held”, which I have taken to be the statistics set out in the statement.
24. The last paragraph stated; “it was with my partner’s support, after several months of discussion, that encouraged me to stand up to the Department of Work and Pensions”.

Analysis

25. The relevant statutes state as follows:

111 Complaints to employment tribunal.

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

123 Time limits

(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 3 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.

26. The Claimant's foundation for her applications to extend the time for presentation of her claims are, in my Judgment, more than simple mental health because in the course of cross examination it was apparent that the Claimant had not researched the time limit for presenting claims. She stated in cross examination that the first time she became aware that there was a time limit for presenting a Tribunal claim was during the hearing in front of Employment Judge Havard on 20 June 2019.
27. I also note that the Claimant had been able to contact ACAS within 2 days of the termination of her employment, that she had asked ACAS to try and conciliate with the Respondent and the period of conciliation had been 29 days. I also note that ACAS is a primary source of information for litigants in person about how to prepare for a Tribunal. I also take judicial note from dealing with these matters before, that if one googles Employment Tribunal two of the immediate entries are www.gov.uk and the "frequently asked questions" both of which highlight the relevant time limits.
28. Any person who was in a position to research matters relating to the Department of Work and Pensions and was able to contact ACAS to commence conciliation would equally have been able, with reasonable diligence, to identify the time limits for the presentation of a claim.
29. As the Claimant was capable of seeking to conciliate through ACAS she clearly had an intent to bring a claim, she has accepted she knew the facts relating to the content of her claim, so she knew all that she needed in order to prepare a claim form.
30. However, I also accept that following the ACAS conciliation, in August 2018 the Claimant was approached by her mortgage company who stated that if she did not make her outstanding mortgage payments, she was at risk of having her home repossessed. The claimant was unemployed at that time and I accept this had an adverse effect upon her mental health; one which endured.
31. The case law for the purposes of a Section 111(1)(a) states that, when looking at the 3 month period as a whole, ordinarily the focus will often be

on the last few weeks when determining whether it was not reasonable for a person to take the necessary action in the three month period.¹

32. The last part of the period we are concerned with is August and September 2019. I have taken into account that there is no direct medical evidence in relation to that period and I have taken into account the fact that it is for the Claimant to prove her case.
33. I have taken into account that the Claimant has on a previous occasion suffered increase in her anxiety and depression in relation to possible house repossession. Whilst the Claimant bears the burden of proof and the medical evidence is imperfect, or at times simply absent, I do not consider that absence to represent persuasive evidence that the Claimant has been dishonest with the Tribunal. On the balance of probabilities I accept that because of the onset of the circumstances described in paragraph 4 of the Claimant's statement, which I find to be more likely than not to be true, that the Claimant was impaired by reason of her mental health in the last month or so prior to the last date for presentation of her claim.
34. For those reasons, I have concluded that it would not have been reasonably practicable, in the sense of being feasible², for the Claimant to have presented her claim in that period. Equally, the Claimant's evidence has explained her delay, up to the same point in time, for the purposes of Section 123 of the Equality Act 2010³.
35. This takes me on then to the aspects of the case where there is a greater commonality between the Equality Act and the Employment Rights Act; "such further reasonable period" for Section 111(1)(b) and whether it is "just and equitable" to extend time under Section 123.
36. The Claimant describes her health as being consistently poor. I have already read out paragraph 5 which refers to the period in December 2018, but thereafter the Claimant's evidence, unless I read across from paragraph 2, is quiet upon the point of her mental health as are the medical notes. What is present in the Claimant's statement is set out in paragraph 8, which I will paraphrase, is her fear of bringing a claim for which she felt she might not be taken seriously, which is echoed in paragraphs 51 and 52; that she could not take on the burden of Tribunal proceedings, without the support of her partner after several months discussion.
37. The claim was presented in March 2019, in my Judgment "several months of discussion" must refer to the period January, February and March of

¹ *Schultz v Esso Petroleum Ltd* [1999] 3 All ER 338, [1999] IRLR 488: "Although the overall period is to be considered, 'attention will in the ordinary way focus upon the closing rather than the early stages'.

² *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, CA. at 384, 385.

³ *Edomobi v La Retraite RC Girls School* UKEAT/0180/16

2019, which would tie in with the Claimant reaching a particular low point in her health in December 2018 and then, to some extent, recovering.

38. The issue then becomes complicated from the Claimant's point of view by the fact that she was able to start to work in the family launderette. I accept it was not consistently the same number of hours per week but, when I asked about an average, she said up to 10 hours a week. I accept that part time manual work in the family business is a factor which is indictive of the claimant's health. However, manual labour and working with one 's family is not indicative a particular level of mental health. I have concluded that this evidence does not contradict the claimant's evidence of suffering mental health problems at the relevant time.
39. At this time, I find that the Claimant was unaware of the time limits. For the reasons I have already stated, I do not find that an acceptable reason for the delay and so the issues that I have to decide are whether or not the Claimant can persuade me⁴ that it is just and equitable, or reasonable, to extend time for a further period on two interrelated grounds which arise from her from her evidence; (1) her mental impairment and (2) her willingness or courage to commence proceedings.
40. I note that on the Claimant's statement her mental health problems did not prevent her from investigating matters and looking at other people's cases as so far as they were published on the internet. I note that she has described dealing with aspects of the repossession proceedings and, as put in cross-examination, she had to attend a hearing in April 2019 about her home shortly after presenting her claim to the Employment Tribunal.
41. I must then try and balance these elements and try and reach an assessment of the degree to which each of those elements was the cause of the delay post December 2018 and answer the question; at what point do I consider it would have been reasonable for the Claimant to be able to present her claim?
42. I have found this difficult to decide because there is not a clear case. I have been invited to consider the Claimant was perhaps dishonest in her evidence. I am more inclined to think that the Claimant was, partly through her nerves in giving evidence and partly perhaps through a degree of inadvertent exaggeration has given a picture of *consistent* difficulty whereas I have reached the conclusion that it is more likely that there were peaks and troughs in her mental health during the relevant period. But otherwise I found the claimant to be a reliable witness.

⁴ Robertson v Bexley Community Centre [2003] EWCA Civ 576, [2003] IRLR 434, at para 25 and Department of Constitutional Affairs v Jones [2007] EWCA Civ 894, [2008] IRLR 128, at paras 14–15.

43. Before reaching any final statement on that with regards to the disability discrimination claim, I consider the *Keeble*⁵ criteria.
44. The first consideration is the cause for the delay. I have addressed the factual matrix on delay which I will not repeat.
45. The second consideration is the degree to which the Claimant acted promptly after she became aware of the facts. Again, I have addressed that above and one can see that in May/June 2018 the Claimant was able to act promptly.
46. The third consideration is the degree to which the Claimant was inhibited by the provision of information from the Respondent and that does not seem to have any factual part to play in this decision.
47. Penultimately, then is the issue of relative prejudice. On the one part the Claimant would be deprived of the right to bring her claim which is clearly prejudicial. On the other is the effect of delay upon the Respondent's witnesses. Ms Williams states that it is inevitable that due to the passage of time there will be degradation of the witnesses' recollection; this claim, had it been presented in September 2018, would not for instance have this Preliminary Hearing extending time between the presentation and the possible date for a final hearing as well as the 6 months between September 2018 and March 2019. I balance that with what I know of the Respondent's internal investigations from the Claimant's ET1. I note that an internal investigation was conducted into the conduct of the individual accused of harassing the Claimant and a grievance process completed. That another grievance process was undertaken arising from the individual's complaint against the Claimant. That the Respondent was on notice by 31 May 2018 that there was a potential claim being brought against it, so to some degree the Respondent is probably in a better position than many employers would be at this juncture because it has the records of interviews with relevant staff and it has been on notice of the potential claim for some time.
48. I then turn to the merits of the discrimination claim, this being only relevant to the Section 123 issue.
49. The Claimant has articulated three complaints before me today.
50. The first is based on the Respondent's decision to make the Claimant work alone. That decision was taken on advice given to the Respondent by Occupational Health Assist which advised that the Claimant should work away from her former colleagues not just the person about whom she complained because of perception that their opinions of her, as well as the involvement of the colleague, would be detrimental to her health.

⁵ British Coal Corpn v Keeble [1997] IRLR 336, at para 8.

51. Her complaint is that the Respondent should not have followed that advice and had discriminated against her by failing to make a reasonable adjustment. That is an arguable but not a strong claim.
52. The second is that the Respondent allowed the fellow employee to present a grievance against the Claimant after her grievance had been upheld against him in circumstances where the Respondent should have been inhibiting contact between them.
53. I do not pretend to examine the merits in any detail, but it would seem unusual if one employee were to be debarred from presenting a grievance so long as it had, on the papers, sufficient merit.
54. This claim have some prospects, but it is certainly less strong than most that I see on a day to day basis.
55. The third claim is based on an error by the respondent in referring to the Claimant by the wrong name in one item of correspondence.
56. Again, it is not, on the first blush, apparent how an error of that sort is said to be less favourable treatment on the grounds of, or relating to, the Claimant's disability.
57. The last two considerations the former weighing in favour of the claimant, the later in favour of the respondent do not have a determinative effect upon my Judgment but I have taken all of the above into account.
58. Returning to the issue; whether it is just and equitable to extend time to 25 March 2019 or whether a reasonable further period for the Claimant to have presented the claim extended to 25 March, I have reached the conclusion. applying the burden of proof, that it was not practicable for the Claimant to have presented on a date earlier than 25 March 2019.
59. In essence the Claimant has, despite Ms Williams forensic representations, persuaded me that the combined circumstances of the ongoing mortgage problems and mental health problems, which I consider exacerbated the anxiety she expressed about presenting the claim, are sufficient to discharge the burden of proof upon her.
60. I make it clear that if the Claimant had come before me and said "I lacked the courage or the confidence to present the claim", in isolation, I would not have upheld her application. It is the combination of her continued medical condition of anxiety and its effect upon her; exacerbating the claimant's reaction to the pressure of litigation which has led me to conclude, despite the absence of direct corroborative medical evidence, that the claims should

be considered to be in time for both purposes of Section 111 and Section 123.

61. I therefore extend time for the presentation of both claims.

Employment Judge R Powell
Dated: 20 March 2020

JUDGMENT SENT TO THE PARTIES ON

.....28 March 2020.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS