**Case Number:** 3334167/2018 (V)

# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| Ms A Smith | v | Luton and Dunstable NHS Foundation Trust |

**Heard at**: Watford, by CVP **On**: 29 June 2020

**Before**: Employment Judge Hyams, sitting alone

**Appearances:**

**For the Claimant:** In person
**For the Respondent:** Ms Elizabeth Grace, of counsel

# RESERVED JUDGMENT

It is just and equitable to permit the claimant to make her claim of disability discrimination, contrary to section 39 of the Equality Act 2010. Accordingly, the tribunal has jurisdiction to hear that claim.

# REASONS

### Introduction; the issue listed to be determined at the hearing of 29 June 2020

1 The hearing which took place before me on 29 June 2020 was for the determination of the question whether time should be extended for making the claim, which had plainly been made outside the primary time limit for doing so. The claim was about the withdrawal of an offer of employment made by the respondent to the claimant, who is a qualified midwife and whose epilepsy was the cause of a recommendation by an occupational health adviser of such limitations on the claimant's employment that the respondent withdrew the offer. The claimant's epilepsy is a condition which is a disability within the meaning of

the Equality Act 2010 ("EqA 2010"), albeit that with medication its effects can be reduced, often (it appears) markedly.

2 The claim was the subject of a preliminary hearing conducted by Employment Judge Alliott on 2 September 2019, and this hearing was listed then. The time limit issue was stated in the following (slightly oddly numbered) subparagraphs of paragraph 5 of the case management summary of that hearing:

> "4.1 The job offer to the claimant was withdrawn in a telephone conversation held on or about 12 February 2018. As such, the three month primary limitation period for the presentation of her claim would have expired on 11 May 2018. However, the 11 May 2018 was during the time between the ACAS notification and the date on the ACAS certificate. Accordingly, the claimant had a further month to present her claim after 28 May 2018. Consequently, I calculate that the claimant's claim had to have been presented by 27 June 2018.
>
> 4.2 The claim form was presented on 14 October 2018, some three months and seventeen days late.
>
> 4.3 Accordingly, I have agreed to the respondent's request that there be an open preliminary hearing to determine whether it would be just and equitable to extend time for the presentation of the claim."

**The evidence which I heard**

3 I heard oral evidence from the claimant, whom Ms Grace cross-examined at length and in depth. I had before me a bundle containing 127 pages. I make my findings of fact below, after referring to the applicable law.

**The "just and equitable" test in section 123 of the EqA 2010**

4 Section 123(1) of the EqA 2010 provides:

> "(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."

5 The factors to be taken into account in determining what is "just and equitable" for that purpose are the subject of much case law. *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 contains (in paragraph 31) the following helpful comment of Sedley LJ:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing employment tribunal proceedings, and Auld LJ is not to be read as having said in *Robertson* [i.e. *Robertson v Bexley Community Centre* [2003] IRLR 434] that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it."

6 *British Coal Corporation v Keeble* [1997] IRLR 336 makes it clear that the factors relevant when applying section 33 of the Limitation Act 1980 are to be applied in determining whether it is just and equitable to permit a claim to be made outside the primary time limit of three months (extended, if it is commenced before that period of three months ends, by any period of what is now called "early conciliation", i.e. by reason of section 140B of the EqA 2010). Ms Grace submitted that the apparent weakness of the claim should be taken into account. In considering whether I should consider the merits of the claim, I referred myself to the following passage in paragraph 8-94.1 of volume 2 of the *White Book*:

> "The discretion conferred on the court by s.33 requires that the court must have regard to all the circumstances of the case (s.33(3)). This entitles the judge to take account of the ultimate prospects of success, and it has been emphasised in *Davis v Jacobs* [1999] Lloyd's Rep. Med. 72, CA that it is incumbent on the judge to take great care when deciding to do so; the judge must specifically take care that all matters which might be taken into account are in fact considered."

7 The factors that were referred to in *Keeble* as being relevant (taken from section 33(3) of the Limitation Act 1980) are these:

> "(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 cooperated with any requests for information;
>
> (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
>
> (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

8 Where a claim of unfair dismissal is made out of time, the test of reasonable practicability rather than whether it is just and equitable to extend time applies. In the context of a late claim of unfair dismissal the decision of the Court of Appeal in *Schultz v Esso Petroleum Ltd* [1999] ICR 1202, [1999] IRLR 488 shows that (as stated in the headnote to the ICR report):

> "where illness was relied on, although its effects had to be assessed in relation to the overall period of limitation, the weight to be attached to a period of disabling illness varied according to whether it occurred in the earlier weeks or the far more critical weeks leading up to the expiry of the limitation period".

9 I saw no reason why that statement of principle should not be applied also where a claim of discrimination contrary to the EqA 2010 is made out of time, and much reason why it should be so applied. I therefore applied it here.

**My findings of fact about the reasons why the claimant did not make her claim until 14 October 2018**

10 The claimant's evidence was that she had suffered a dramatic downturn in her mental health after she received confirmation (which she had by then been expecting) in February 2018 of the withdrawal of the job offer that had been made in October 2017. As the claimant put it in the details of her claim (at the bottom of page 16 of the hearing bundle; any reference below to a page is to a page of that bundle):

> "In April/May 2018, after 18 months seizure free, I had several seizures and an admission to Accident and emergency. I have so struggled immensely with anxiety since this incident."

11 The claimant's witness statement went into much more detail than those two sentences. In the first three full paragraphs on page 45, she said this:

> "I had become nervous of everything. I could not make decisions and was questioning all my previous decisions, ie applying for the job in Luton. This led to being disorganised with personal administration for fear of it being bad news, or something I had done wrong or was rejected from. This includes my correspondence with ACAS and leads me to explain why my claim is out of date. I began communication in April 2018 and received an email which I did not read or certainly understand, explaining that it was now my responsibility to proceed. I believed until October, that I was waiting to hear from ACAS and was not required to do anything.
>
> I had signed up to become a volunteer with a children's charity in April 2018, in an attempt to overcome some anxiety. I also signed up to a charity trek in November 2018 and this children's charity was going to be my fund raising goal. But I was so nervous and too anxious to go until the beginning of September 2018. Even when I started going, I was a complete nervous wreck

and even too nervous to make anyone a drink. I did not recognise the strong, confident professional I had been when I applied for the job. In many ways, this highlighted the feeling of failure. I was only there once a week in a volunteer capacity. Talking to mums, playing with children. But feeling like a failure because although I was being encouraged to apply for a job there, I was too anxious to do so. (When I eventually found this courage to apply in March 2019, I attended for an interview and had an overwhelming sense of panic that I was just going to be laughed at. This is not normal and not a reaction I have previously experienced but an adverse effect of what occurred in Luton)

During the aftermath of the job offer withdrawal, I was struggling. I honestly do not know how I survived the summer of 2018 and ACAS/Luton and this tribunal could not have been further from my mind. They were the reasons my mind was in such turmoil but I lost all sense of responsibility and reality."

12 The following passage at the end of page 45 and the top of page 46 was equally important:

"The effects of this perceived discrimination could have been devastating. I sought help before they were. I had reached a low and knew I needed help. I walk over a bridge; renowned for people attempting suicide; to get to my home. Every time I crossed the bridge, I contemplated how difficult life was, and that I could understand suicide. I am not saying I was suicidal but I do not believe I was far from the thoughts. I felt alone, hopeless and had no self belief in my ability to change my future. I had been full of self belief before, but if the world is not accepting, it doesn't make any difference. I believed others had so much power to decide your fate whether its lawful or not.

I went to the GP. I got a referral to IAPT (Improving Access to Psychological Therapies)
I spoke with my closest friend.
17th August 2018 was my toughest day.
On the 18th August 2018, I was walking over said bridge and my mind was forced to adjust. There was a man threatening to jump. All of a sudden, I was faced with his decision (emergency services were in attendance) as if it were mine. The force of the feeling I got was overwhelming; Nothing is so bad. Everything can get better- unless it ends.

He did not jump.

From that day, I walked (I had a trek to train for), I talked with my friend, I attended an IAPT course and over the next 2 months, my mental health began to improve. I continued to be unemployed and feel unemployable, but I had a little hope. I still felt inadequate and as though I was likely to fail anything I tried. I even wanted to postpone my charity trek as I thought I was not good enough. I was afraid of making the wrong decision and felt as though I may not be welcome on the trip. I of course used other true excuses; a possible

ear infection and a small skin surgery but omitted the real truth. I emailed the company but postponing was not possible so I needed to find my self belief.

I slowly became more organised and in touch with reality. In October 2018, I believed I had not heard from ACAS. I soon realised I had; in May 2018; and had not realised due to my mental health issues. As soon as I discovered this, I emailed ACAS and immediately submitted my claim."

13 There were copies of the claimant's relevant medical records in the bundle. They had been disclosed in compliance with one of the case management orders made by Judge Alliott and the claimant thought that they were sufficient in that regard. However, during the hearing before me, she realised that there were emails between her and ACAS which she had not disclosed, and she disclosed one from ACAS to her dated 18 April 2018, which was 10 days before the early conciliation period formally commenced (as was clear from the early conciliation certificate at page 18) and which showed that ACAS at that time sent her a link to a number of internet web pages which would have shown her that she needed to make a claim at the latest within the period of 3 months from the date of the withdrawal of the job offer, extended by any early conciliation period.

14 As for the medical records, they included (at page 54) the records of the claimant's consultations with (the claimant said) a nurse at the GP practice attended by the claimant, on 17 and 28 August 2018. The record of the first of those consultations started in this way:

"Broke down into tears on entering room. Very distressed and tearful. Not been coping for last few days. Not wanting to leave the house, feels useless and not functioning. Applied for midwifery job in Luton and was offered it in februrary [sic]. Went to Occy health and after this told not offered job due to epilepsy. ... Doesn't wish to burden friends with her mood and has kept away [from] them. Live alone. No job currently. Worried about money. Has epilepsy, last [seizure] was in May. Spoke with epilepsy SN at the time and increased meds back up as had reduced them. Does't [sic] feel like talking to anyone, no [confidence] and self esteem low. Wonders if meds cause low mood or maybe should change them? But too inert to do anything about it currently. Reluctant to take antidepressant as just more medication. Agreed to referral to IAPT. No psychosis, no suicidal ideation, *** would be protective factor."

15 I could not understand why there were any redactions in the notes, but there were some, one of which was the three asterisks in that passage. The diagnosis of "Mixed anxiety and depressive disorder (New Episode)" was recorded as having been made on 17 August 2018.

16 The record of the consultation of 28 August 2018 was at the top of page 54, and was in these terms:

"Attended for review of mental health.

Feeling much better this week. Has joined a gym, getting out for walks, all things she loves but not felt able to do. Talked with her ******* and ******* Feeling more positive. Felt her turning point was seeing some one trying to jump off bridge the other week and realised nothing was as bad as that in her life and wanting now to take small steps forward. Not heard from IAPT as yet. No plans for future employment and considering volunteer work to help others as well as her own confidence and self esteem. Does worry about future seizures. NO suicidal thoughts or psychosis. Well kempt good eye contact, few tears.

Plan
Agreement of care plan Advised to consider taking what IAPT offer to help deal with past issues as clearly still lingering. Will come back if begins to feel low again. Declined further appt."

17 Ms Grace pressed the claimant hard in cross-examination by reference to that passage, suggesting to her that she (the claimant) was by the end of August well enough to take action, and pointing out that the claimant was (as was shown by the documentary evidence at page 105) on 28 August 2018 able to email the manager of an organisation called "Willowslull", which the claimant described in evidence as a respite hospice, in the following terms:

"Hi Jo
I Hope you're well.
I had a phone call from Jackie last week about coming to fill out the DBS form to be able to volunteer? When would be convenient for you?
Kind regards
Alison smith"

18 The claimant said that the record of the nurse of the consultation of 17 August 2018 was inaccurate in saying that she (the claimant) had been not coping only for the last "few days". The claimant said that she had told the nurse that she (the claimant) had not been coping for "many months" and that the nurse's record was inaccurate. In fact, it plainly was, as it referred to the claimant being offered the job in "februrary", when it was offered in October and then withdrawn in February. Partly as a result, but also recognising that a busy GPs' practice nurse may well make errors in a note of a consultation, I did not set any store on the use of the words "last few days" in that note. What the claimant said about that period in cross-examination was (according to my notes of the hearing):

"[M]y mental health reached a crisis in August but I had a lot of low points from March onwards leading up to that. I was desperate for months."

19 It appeared to me as a matter of common sense, i.e. on a balance of probabilities, that the claimant's recovery from a "New Episode" of "Mixed anxiety and depressive disorder" (as diagnosed on 17 August 2018; see paragraph 15 above) was unlikely to be complete in a week. I said that to Ms Grace, and the claimant subsequently said specifically that her recovery after 17 August 2018 was slow.

20 When it was put to the claimant that she was able to approach ACAS in April 2018, so that by implication she could have started the claim then, or at least within time, the claimant said these things (according to my notes, slightly tidied up):

> "I was intermittently functioning; I was flitting and not functioning fully; I was completing some tasks and not others. If I had thought my responsibility was not over I would have continued; I thought I was waiting to hear from ACAS: I did not think the ball was in my court.
>
> It was an error on my part.
>
> I was not able to check until October when my mind was back in the room so to speak; it was only then that I bothered to check; until that point I cannot explain why I did some tasks and not others; it was most certainly not because I was not pursuing this [i.e. this claim]."

21 I accepted all of the claimant's oral evidence, despite seeing that she is plainly very intelligent and could have been seeking to (as it was put to her by Ms Grace in cross-examination) "over-egg the pudding". In my view, the claimant was plainly doing her best to tell the truth, and was not over-egging the pudding. The delay after the consultation with the nurse on 28 August 2018 to the presentation of the claim was just under 7 weeks. Even the nurse who recorded that the claimant was feeling "much better this week" (see paragraph 16 above) did not record that the claimant was now better: the nurse recorded in the same passage that the claimant's "past issues" were "clearly still lingering". Only a week and a few days before, the same nurse had recorded (see paragraph 14 above) that the claimant "[does not] feel like talking to anyone, no confidence and self esteem low". The nurse also recorded (see also paragraph 14 above) that the claimant was at that time "Not wanting to leave the house, feels useless and not functioning." The nurse further recorded (see paragraph 14 above):

> "Wonders if meds cause low mood or maybe should change them? But too inert to do anything about it currently."

22 Given those factors, I accepted the claimant's evidence that

22.1 she had (as I record in paragraph 12 above she wrote in her witness statement) "[only] slowly [become] more organised and in touch with reality" after 17 August 2018,

22.2 she had not realised that she had heard from ACAS "due to [her] mental health issues", and

22.3 "[as] soon as [she] discovered this, [she] emailed ACAS and immediately submitted [her] claim."

## The respondent's submissions

23 Ms Grace put before me a written skeleton argument and she supplemented it with oral submissions. In paragraph 18 of her skeleton argument, she said this:

> "R's position is that the [claimant's witness] statement and accompanying evidence provided by C does not support the exercise of the court's discretion."

24 In paragraph 27 of her skeleton argument, Ms Grace said this:

> "C does not explain why she was perfectly able to correspond in April, but not able to read an email at any point between May and October, beyond stating that she was suffering with nervousness and anxiety."

25 Among other things, Ms Grace also submitted in paragraph 31 of her skeleton argument that

> "on the basis of the evidence provided, C had not sought any help whatsoever from her GP or any other medical professional in the period between late August and early October. This does not resonate with C's own account that she did not know how she survived the summer of 2018, particularly given that C is a medical professional and knows the value of seeking help when it is needed."

26 On the question of prejudice to the respondent, Ms Grace submitted this in paragraph 33 of her skeleton argument:

> "While R's employees will be able to comment on the documentary evidence, and the reality that it was simply not feasible for R to employ C until her epilepsy was well-controlled, their memory of C is likely to be impeded greatly: each of them only met her once. Therefore, in a case of this nature, a delay of over 3 months is to be afforded more weight than it would be in a case where the employer has been interacting with a claimant over a number of years."

**My conclusion on the issue of whether it is just and equitable to extend time for the making of the claim**

27 Not all of the factors referred to in *Keeble* were material. What were of most importance in my view were the reasons for the delay and the extent to which the cogency of the evidence would be affected by the delay.

28 I found the claimant's statement of the reasons for the delay to be accurate and (contrary to Ms Grace's submissions) that there was a factual basis which could justify the conclusion that it would be just and equitable to extend time.

29 As for prejudice to the respondent, while it is true that there is currently before the tribunal a claim of direct discrimination because of the claimant's disability, I rather

doubted that that would be the main focus of the case if it were permitted to proceed to trial. Rather, it seemed to me that the claim is for the most part about the question whether (as Judge Alliott said in paragraph 4.11 of the case management summary, at page 34) the withdrawal of the job offer was "a proportionate means of achieving a legitimate aim". If it proceeds to trial, that question will need to be determined objectively and by reference to factors which are highly likely to have been recorded. In any event, in my view such prejudice to the respondent as would be caused by permitting the claim to proceed is not such as to require the conclusion that it is not just and equitable to extend time.

30 Weighing up the various factors and considering the claimant's explanation, taking into account the fact that the claimant had what was classified by a relevant health professional as depression and anxiety during August 2018, and bearing in mind that the claimant moved swiftly once she realised in October 2018 that she had received the final communication from ACAS that she needed and that she needed to make her claim, I concluded that it was just and equitable to extend time for the making of that claim.

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Employment Judge Hyams

Date: 1 July 2020

Sent to the parties on:19/8/20

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For the Tribunal Office