Case No: 3334412/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms G Mgbobukwa	**v**	**London Borough of Brent**

Heard at: Watford **On:** 13 July 2020

Before: Employment Judge R Lewis

Appearances:

For the Claimant: Mr M Mensah, Counsel
For the Respondent: Mr C Adjei, Counsel

JUDGMENT having been sent to the parties on 1 September 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was the hearing in October 2019 by Employment Judge Hyams.

2. The claimant remained represented by solicitors until they went off the record on 11 February 2020. It appeared that the case management timetable directed by Judge Hyams was very largely disregarded until shortly before this hearing.

3. I had an agreed bundle of about 240 pages and written submissions from both sides. The claimant produced a number of loose addition documents. It was necessary on at least two occasions to break so that Mr Mensah cold take late instructions.

4. It was evident that Mr Adjei on behalf of the respondent, wanted me to consider whether the claimant met the section 6 test of disability. As a discreet issue that was not in the listing for today and therefore, in accordance with Rules 53 to 56, I could not decide it as such. I considered that my powers were limited to deciding whether the claimant had any reasonable prospect

of success in accordance with Rule 37 of showing she met the test of disability in certain respects.

5. I did not consider myself at liberty to go beyond the bounds of Judge Hyams' listing.

6. The claimant had produced a witness statement dealing with extension of time. Mr Adjei stated that he did not need to cross examine the claimant on it and would deal with it by submission, and Mr Mensah had no additional questions or objection in principle to the matter being dealt with that way. I therefore accepted the witness statement as written evidence, and the claimant was not called.

7. After detailed submissions from both sides I reserved judgment and delivered judgment that afternoon.

8. In the course of my judgment, the claimant, who was present, reacted by producing documents from a file, and it seemed to me right that Mr Mensah should have the opportunity of another adjournment in which to take instructions, as it appeared that I may have said something in giving judgment (not be dictating these reasons) with which the claimant wished to take issue. It seemed to me correct to deal with that matter straight away.

9. In the event…

10. I record, as I told the parties in delivering judgment, that I noted in the conduct of these proceedings an approach on behalf of the claimant which appeared to mirror her conduct of her defence of the XXX case against her during her employment. In particular, she had, to this tribunal, produced potentially relevant documents very late, practically at the last minute on occasion, without regard for the structure of the proceedings, or the burden which that might place on others. While I record these matters, they formed no part of my decision of the outcome of the case.

Unfair dismissal

11. It was common ground that between late July 2017 and the date of her dismissal on 5 June 2018 the claimant had a certificated period of absence. Apart from the first certificate, all absences referred to dizziness, and were signed off by a GP. As Mr Adjei pointed out (140-143) it was the curious practice of the GP to put a line through the word "will" in the sentence of the bottom of each certificate "I will/will not need to assess your fitness for work again at the end of this period." In my judgment, the GP was consistently applying the pen to the word which applied, not striking out the word which he or she disapplied. Therefore, I interpret each certificate, including that of 16 July 2018, which was for three months, as the GP certifying that he or she will need to assess again.

12. Without going into the detailed chronology, which is set out carefully in the grounds of resistance, I accept the during this long absence, the respondent

arranged welfare visits to the claimant's home; and that there were Occupational Health referrals. I accept that it engaged in correspondence with the claimant by email. It was common ground that there was trade union input.

13. The final stages of the claimant's dismissal reached on 9 May 2018 when she attended a Stage 3 meeting, the outcome of which was communicated to her by letter of 5 June (230) which dismissed her with payment in lieu of notice that day.

14. The medical material available to the dismissing officer on 5 June included the final Occupational Health report of 16 February (114) which it turn drew on a letter form the GP of 11 February. The final sick note as stated, was that of 16 July. In addition, the claimant's GP had on 27 April "This is to confirm that I have referred her to the Neurology Clinic for her ongoing dizziness symptoms."

15. On 9 May the claimant had, plainly with professional assistance, written a lengthy argument including a request for a fresh referral to Occupational Health and for postponement until after the neurology appointment (228). In dismissing the claimant, the respondent had set out the burdens on the service, notably the vulnerable children who were the claimant's service users, and the balance of delay and uncertainty (231-233).

16. In my judgment, the respondent in dismissing the claimant had ample unchallenged evidence of ill-health and incapacity for work. There was no counter evidence which stated that the claimant was or shortly would be fit for work, and I reject the claimant's assertion that the fit note of 16 April was a certificate for her to return to work on 16 July. There was no evidence that the claimant could both attain and sustain a return to work.

17. The only question which troubled me about the claimant's dismissal was whether or not the respondent should have postponed the decision, pending a potential fresh Occupational Health referral; and/or updated fit note from the GP; and/or the outcome of the neurology referral.

18. In my judgment, the respondent had any of those options open to it. The question for the tribunal will be not whether it could or should have done those things but whether the failure to do so took the procedure which led to the claimant's dismissal outside of the range of reasonable responses. I do not believe that there is any prospect of that being shown. The matters which I have referred to are in a sense matters of going the extra mile but that it not the test of fairness.

19. **ROBIN MOVE THIS** – There was a short adjournment, after which Mr Mensah said that he had no further documents to show the tribunal and that was the end of the matter.

<u>Disability</u>

20. The claimant relied on three groups of disability. In my judgment, on the medical evidence available, she had no prospect of showing that her eye condition met the test of disability, because the up to date evidence from Occupational Health and the GP was that she had been signed off from the hospital clinic, and had been referred to an optometrist, ie for glasses. In light in particular of schedule 1, paragraph 5, I do not find that the claimant has a reasonable prospect of showing an eye condition which can be addressed by spectacles as constituting a disability.

21. The papers referred to diagnosis of two blood conditions, but there was no evidence that they had any impairment or effect on day to day activities. One was referred to as a benign condition, and the other was one that, according to Mr Adjei's research, caused skin lesions but no other impairment. I consider that there is no prospect of finding that either of those constituted a disability.

22. I accept that the claimant's assertion of a dizziness condition is not appropriate to strike out. I accept that there was evidence which indicated that it had lasted some considerable time and caused the claimant difficulties. It was under investigation at the time of dismissal. (I add for the sake of completeness that in reply to my question the claimant said that the neurology appointment which took place after dismissal did not require any further follow up, from which I take it that having been seen by a neurologist, the claimant was discharged from any further neurological input.

23. The only disability discrimination claims therefore which I permit to proceed are those based on the dizziness.

24. Issue 38(c) was that the claimant's dismissal was discrimination contrary to s.15, ie for long term absence. I accept Mr Adjei's submission, which was that s.15 brings in to play the balancing exercise between the respondent's obligations to its employee, and its obligations to service users, in this case vulnerable children. I note in particular the discussion of the damage on children caused by the claimant's absence (231-233). In my judgment, that claim has likewise no reasonable prospect of success.

25. Mr Adjei submitted that the claims under s.15 and/or s.20 in relation to the early stages of the sickness procedure were out of time (they were issues 3(a), (b) and (c) and 38(a) and (b) at pages 21 to 22). It was agreed that they were out of time, and that time ran at the latest from about midFebruary 2018. Certainly by then the claimant knew that meetings had taken place which she considered she had been unable to attend because of her disability.

26. It was not suggested that there was a continuing act. This hearing proceeded on the basis that these were standalone allegations and that it was just and equitable to extend time. The claimant's witness statement submitted that she was simply unable to deal with these matters due to her health at the time.

27. However, the clear evidence was that at the time in question the claimant had access to support and advice from her union; and that certainly by 9 May, she had advice from an experienced professional (her letter of that day looks very much like it was drafted by a lawyer).

28. Contrary to her own case, the claimant was in the same period well able to communicate on her own behalf, and I note her emails at, for example, 117, 213 and 227. She had all the facts of which she wished to complain available to her, and she at times indeed used the language of reasonable adjustment.

29. In my judgment, these claims are out of time and the claimant has failed to show that it is just and equitable to extend time. They are therefore struck out.

30. At paragraph 37 of her ET1 the claimant set out nine reasonable adjustments which she submitted the respondent failed to make. It was agreed that adjustments (d) to (h) inclusive were adjustments which would not crystallise until the claimant was ready to return to work. They were to do with matters such as flexible hours and venue. However, as the claimant never was certificated fit to return, the issue never arose and the claims are therefore struck out.

31. Reasonable adjustments (a), (b) and (c) were among those struck out above as being out of time, which leaves reasonable adjustment (i), which was the part of the case dealing with dismissal.

32. While I am troubled with the concept of a reasonable adjustment of not dismissing, the claim must fail because it requires evidence that not dismissing the claimant on 5 June 2018 would have overcome her disadvantage. There was no evidence to support the proposition that the claimant would have been fit to return to work thereafter, therefore no evidence to indicate that that adjustment would have overcome any disadvantage.

33. It follows that all the claimant's claims fail and are dismissed.

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Employment Judge R Lewis

10th September 2020

Date: …….

Judgment sent to the parties on

18th September 2020

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For the Tribunal office