EMPLOYMENT TRIBUNALS

Claimant Mr J Bywater

Respondent: Cummins Turbo Technologies UK Ltd

HELD AT: Leeds **ON:** 26 February 2020

BEFORE: Employment Judge D N Jones

REPRESENTATION:

Claimant: Mr S Coates, Solicitor
Respondent: Mr R Thomas, Counsel

JUDGMENT

1. The claim for unfair dismissal was not presented within the time limit specified in section 111 of the Employment Rights Act 1996 (ERA). The Claimant has not established that it was not reasonably practicable to present it before the end of the period of three months (and any relevant early conciliation period) beginning with the effective date of termination or within such further period as would have been reasonable. The complaint of unfair dismissal is dismissed.

2. The complaint of disability discrimination was not presented within the time limits specified in section 123 of the Equality Act 2010 (EqA). It was presented after the period of three months of the last act to which the complaint related and it is not just an equitable to consider it. The complaints of unlawful disability discrimination are dismissed.

REASONS

Introduction and the Legal Principles

1. The Claimant was dismissed following a meeting on 6 November 2017. The effective date of termination was on 7 November 2017 and the Claimant received three months' pay in lieu of notice. Nearly two years later, on 11 October 2019, the Claimant presented complaints to the Tribunal of unfair dismissal and disability discrimination under sections 13, 15, 19, 20 and 21 of the EqA.
2. For the purposes of the unfair dismissal claim the primary period within which to bring a complaint would be by 6 February 2018 unless it was not reasonably practicable to have presented the claim within that time and it was presented within a reasonable period thereafter, see section 111(2) of the ERA.
3. In respect of the disability discrimination complaints the primary period within which to present a claim would have been 7 March 2018. That is because the complaints of discrimination extended to criticism of the handling and determination of an appeal against the decision to dismiss. That occurred on 8 December 2017. By section 123(1) of the EqA such proceedings may not be brought after the end of the period of 3 months starting with the date to which the complaint relates or such other period as the Tribunal considers to be just and equitable. By section 123(3)(a) of the EqA conduct extending over a period is to be treated as occurring at the end of the period.
4. The claim for discrimination could therefore only be pursued if the Tribunal determined it had been presented within such other period that was just and equitable in all the circumstances. It is common ground that the claims were presented 20 and 19 months respectively beyond the primary three-month time period.
5. The parties' representatives cited a number of legal authorities in respect of the respective statutory provisions. There was no dispute about the applicable law and I have had regard to the principles established in those cases in the analysis below.

Evidence

6. The Tribunal heard evidence from the Claimant and the parties submitted a bundle of documents for 122 pages.

Background/Findings of fact

7. The Claimant had worked for the Respondent for 44 years from 15 October 1973 and, at the time of his dismissal, he was an advanced product design engineer. As a result of a road traffic accident in 1977, the Claimant has had longstanding health conditions which he had managed over the years. He wore a splint on the right leg, was unable to balance on that limb alone and had neurological pain in the shin area. He suffered from pain in the right knee. He had right hip pain for many years. On 2 August 2016 he had a total hip replacement. The Claimant was absent from work following that surgery and never returned to work.
8. He was referred by the Respondent to its occupational health advisors, Prohms. On 6 April 2017 Ms J Broad, occupational health nurse, provided an opinion that it was unlikely that the Claimant would be able to return to his usual duties. At that time, he had difficulty standing for longer than 30 minutes and walked with the aid of a stick. He had constant pain in the upper thigh, hip and groin. Ms Broad

referred the Claimant for an assessment by an occupational health physician, Dr Dann.

9. Dr Dann advised the Respondent in a letter dated 5 May 2017. She explained that the Claimant could not stand for a prolonged period without significant discomfort in the right side, for only about 20 minutes. She considered him fit for work but in an amended capacity. She stated that he stood in his present role for significantly longer than 20 minutes. That role involved moving from the concept of an idea to the testing and manufacture of the product. This was a desk and bench based job which involved much time standing. Dr Dann therefore suggested adaptations including a desk based role with access to a perch stool for times when the Claimant was required to stand. She recommended access to a lift because of difficulties with stairs. She stated that the limited ability to stand was a permanent feature and would therefore require permanent adaptations.

10. On 15 May 2017 the Claimant attended at a meeting with his managers to discuss Dr Dann's report and to consider options to facilitate his return. The Claimant said in his evidence that the plan of proposed duties had been prepared in advance and that it was unsuitable because it would have involved significant walking and standing. According to the note of the meeting the Claimant agreed the work plan but said he was not happy with the assessment of the company doctor. He said there had not been a thorough test of physical strength. In his evidence the Claimant agreed with the second part of that note but not that he had agreed to the work plan.

11. On 12 June 2017 the human resources advisor, Ms Barker, sent to the Claimant ill-health retirement procedures and forms to compile. Had the Claimant been accepted for medical retirement he would have received a beneficial financial package.

12. On 22 June 2017 Ms Barker wrote to the Claimant's General Practitioner (GP). She included an amended job profile which had been discussed at the earlier meeting and informed the GP, Dr Bolton, of the opinion of the company doctor. She posed a number of questions and asked whether he agreed with the occupational health physician.

13. On 21 August 2017 Dr Bolton, the Claimant's GP, replied. He expressed the opinion that the Claimant was not medically well enough to be at work. He stated that the Claimant walked permanently with a stick, was in constant pain and that, following his hip replacement, the recovery had plateaued and he was not as mobile as previously. He considered that the Claimant was less able to sit at a bench and move parts for any given time and that, given his existing medical condition, he would not be able to carry out the amended duties described in the letter. His opinion was that claimant would never be able to return to work, with or without amendments. This opinion was forwarded to Dr Dann, but she maintained the view which she had expressed in her report.

14. On 29 August 2017 the Claimant attended a meeting to discuss his ill-health retirement. He was informed that the Respondent would not support it because of the offer of adjusted duties which was supported by Dr Dann.

15. On 29 September 2017 Ms Barker invited the Claimant to a meeting to discuss his future with the Respondent. He was told there were essentially two options; a return to work under the amended duties set out in the plan, as supported by the company doctor, or bringing his employment to an end because he did not wish to return on the altered duties.

16. The meeting took place on 6 November 2017. The Claimant expressed the opinion that he was not physically or mentally fit enough to return to work to the adjusted plan. The Respondent confirmed its position as set out in the letter of 29 September 2017 as regards to the two options. The note of the meeting records concerns of the Claimant, as later expressed in a letter of 7 November 2017. He took issue with the report of Dr Dann which conflicted with his own GP and complained that Dr Dann had not undertaken a physical examination.

17. On 9 November 2017 Mr Carr, manager of advanced engineering, wrote to the Claimant and informed him that his employment was terminated as of 7 November 2017 because he did not wish to return on the duties, as amended, which had been supported by the company doctor. He was paid in lieu of notice.

18. On 22 November 2017 solicitors wrote to the Respondent on behalf of the Claimant, appealing the decision. They stated that the Claimant disagreed with the decision to terminate his employment and having excluded him from a round of voluntary redundancies in March of that year. They suggested that the only fair solution was to reinstate the Claimant and for an independent specialist doctor to prepare a report as to the Claimant's suitability to undertake any of the proposed tasks.

19. The appeal hearing took place on 27 November 2017 before Mr Clark, director, with Ms Davison, HR partner. After the appeal hearing but before making the decision, Ms Davison spoke to Dr Dann on 29 November 2017. An email dated 30 November 2017 from Ms Davison to Dr Dann records her understanding of the discussion which included consideration of employment tribunals and the need to follow adequate procedures. In respect to a query of the medical examination, Ms Davidson noted that Dr Dann felt the examination of the Claimant was in line with how an employee would normally be assessed.

20. In an email of 1 December 2017 Dr Dann replied. She stated that she was not aware that the discussion had been intended to be specifically about Mr Bywater but expected a general discussion about procedures. At the time of the discussion she had not considered Mr Bywater's case notes. Having had the opportunity to look at them after the discussion, she strongly advised a second opinion be obtained from an occupational health consultant to confirm the advice on a final decision. This was partly because of the Claimant's dissatisfaction and also the fact that six months had elapsed since he had been seen. She confirmed she had not examined the Claimant but, as was common practice, had relied upon an assessment from Rachel Lawrence as part of the multi-disciplinary team. She expressed concern that Ms Lawrence's assessment took place in January and hers in May and the advice was now 10 months old. She said the complaint from the claimant, which she had just found out about, should be forwarded for her to deal with.

21. On 8 December 2017, Mr Clark and Ms Davison wrote to the Claimant and dismissed his appeal. The reasons given were that they had followed the long-term absence procedure and they were satisfied all necessary amendments to the role had been made to allow the Claimant to return.

22. On 25 January 2018 the Claimant made a subject access request to the Respondent for all emails in which his name was mentioned, from 1 May 2016 to that date, all medical records from the start of his employment to that date, all recorded telephone calls from 1 November 2016 to that date and all employment records from the start of his employment. On 20 February 2018 the Respondent

provided a copy of the personnel file and some medical sick notes. The Claimant was asked to clarify what data he was asking for given the breadth of the request, pointing out that a data controller's duty was to carry out a search which was reasonable and proportionate. The Claimant replied on 22 February 2018 but did not reduce it. Further correspondence ensued and on 28 February 2018 the Claimant was informed that it was not possible to filter the search and that requests had been undertaken under the name of John or Bywater or JB or his employer ID but it had returned 72 million hits between 1 May 2016 and 25 January 2018. There was then a search against particular email addresses of the four managers including HR advisors which had returned 81,518 hits. A further request was made to identify the nature and subject matter of the information sought. The Claimant replied on 1 March 2018 and narrowed his request by asking for medical records and emails containing the name John Bywater in the body of the email. Further documents were sent to the Claimant on 18 April 2018.

23. On 9 May 2018 the occupational health advisers, Prohms, sent to the Claimant a copy of a letter, dated 5 May 2018, from Dr Dann to her colleague which set out her comments about the assessments she and Ms Lawrence had undertaken. (This followed a data subject request to Prohms). Dr Dann referred to the meeting with Ms Davison on 29 November 2017 which she had mistakenly thought was to be a review of the respondent's policies and not specific to the Claimant. At the meeting it became apparent that it was about the Claimant. Dr Dann stated that she had advised Ms Davison that it would be good practice to review the Claimant as the assessment had been undertaken six months previously. Afterwards, she had reviewed her notes and discovered that Ms Lawrence's examination had been in January 2017. She made reference to the email Ms Davison's had sent on 30 November 2017 stating that they would not be requesting a further assessment and that they would be relying on the earlier recommendations of Dr Dann. She wrote, "*I responded on 1st December again strongly recommending that a second occupational health opinion should be sought to confirm the guidance on which to base a decision and advised of the 10 month gap since the physiotherapy review*".

24. On 18 May 2018 the Claimant made a further data subject request to Dr Dann. On 13 July 2018 the Claimant repeated his request for data in an email to the Respondent. On 8 June 2018 the Claimant's solicitors wrote to Ms Davison. They stated that the Claimant had repeatedly raised concerns about Dr Dann's report and his capacity to work. They pointed out that there had been no proper assessment and that the Respondent had ignored the opinion of the Claimant's GP. They referred to the letter which had been disclosed from Prohms of Dr Dann, dated 5 May 2018 and, specifically, that Dr Dann had "strongly recommended" a second occupational health report be obtained. The solicitors alleged that the Claimant had been dismissed recklessly and negligently. They invited proposals to resolve matters to avoid legal action. They quantified the cost of the Claimant's loss as £40,000, being the value ill-health retirement would have generated.

25. The Respondent instructed solicitors who replied in a letter dated 8 August 2018. They rejected the allegations and maintained that the dismissal had been as explained by the Respondent, having taken Dr Dann's opinion. The Respondent's solicitors said they had reviewed the search parameters in respect of the subject access request and suggested an additional search using the term Bywater in both the body of the email and the subject title. This was to be undertaken in respect of Ms Davison mailbox and by reference to the date of 1 December 2017. The email was not disclosed by the Respondent until 16 September 2019. This had been

after the Claimant had submitted a complaint to the Information Commissioner's Office, which had informed the Claimant that they had written to the Respondent and invited it to review its position about disclosure of the email of 1 December 2017. By that stage the Claimant was already in possession of the email, because it had been disclosed by Prohms on 25 July 2019. This had followed a series of requests from the Claimant. In addition, on 30 May 2019, the Claimant specifically asked for the email of the 1 December 2017, in a letter to the Respondent's solicitors. They replied to say they would take instructions.

26. In September 2018, the Claimant's legal file was sent to new solicitors, as he had been informed by Mr Coombes, his former solicitor, that he could not help him any further. In October and November 2018, two firms of solicitors declined to take on the claim and it was rejected by legal expenses insurers.

27. The Claimant spent a period overseas, in Spain, from Christmas 2018 to April 2019. He contacted a firm of solicitors in July 2019, but they were not able to take the case because of pressure of work. He approached his current solicitors in early September 2019 and they agreed to take the case, on 6 September 2019. On that day the matter was submitted for early conciliation. The claim was issued on 11 October 2019.

Analysis and conclusions

Unfair dismissal

28. The Claimant places heavy reliance upon the Respondent's failure to disclose the email of 1 December 2017. He contends that this was deliberately withheld and only when it came into his possession did he appreciate the strength of his claims. Mr Coates described it in submissions as the 'silver bullet'. This is the principal explanation for why he had not issued his claim within the normal timeframe, together with difficulties he had encountered in finding a solicitor who would take on his case.

29. The question for my determination, applying the statutory provisions set out in the introduction, is whether it was not reasonably practicable for the Claimant to have presented his complaint of unfair dismissal by 6 February 2018. He has not persuaded me it was not.

30. His complaint about the dismissal was summarised in his former solicitors' letter to the Respondent on 22 November 2017, which predated the appeal. That letter spelt out the circumstances of the Claimant's health and emphasised the recent opinion of his GP, that he would never be able to return to work with or without adjustments. It criticised the advice from Prohms, upon which the Respondent's managers had based the decision. It made the point that the Claimant was almost certainly a disabled person under the EqA. The solicitor stated that Dr Dann had seen the Claimant in a meeting which lasted for only 11 minutes and without any examination or detailed knowledge of his medical history. These complaints about the unfairness of the decision-making process are as pertinent to the claim now as they were shortly after the dismissal.

31. There was no reason a claim could not, with reasonable practicability, have been issued and pursued with these arguments within the normal time limit. In his evidence the Claimant said he was not aware of the three-month time limit, although he had been aware of the existence of employment tribunals. In this respect I found the Claimant's evidence unreliable. He said that Mr Coombes, his former solicitor, had not agreed to retain the case in the summer of 2017 because

he did not handle tribunal claims. This could not have been correct. Mr Coombes is a specialist in employment tribunal claims and appears regularly and frequently in this tribunal. He was advising the Claimant at this critical time and corresponding with the Respondent. I find it highly unlikely that a solicitor who specialised in this type of litigation would have failed to advise the Claimant about time limits in employment tribunals. It is probable the Claimant was aware of the time limit.

32. I appreciate that the Claimant did not know then, that in her enquiries for determining the appeal, Ms Davison had approached Dr Dann about the procedures the respondent had taken and that Dr Dann had strongly recommended that a further medical opinion should be sought to consider whether the Claimant could return to work with adjustments. That would be a significant factor for the tribunal to take into account under section 98 of the ERA, both as to the reason for the dismissal, which would include the decision to dismiss the appeal, and its procedural fairness. However, the fact that the Claimant subsequently discovered evidence which enhanced his prospects of success does not establish it had not been reasonably practicable to present his case within time. Even if he could not have afforded legal representation or engaged a solicitor on other terms, such as by way of a conditional success fee, the Claimant could have submitted his own claim. He is intelligent and educated. Many parties are unrepresented in the employment tribunals and there is extensive advice and guidance available online to assist.

33. The course chosen by the Claimant to ascertain evidence to assist his case was by way of making requests for personal data under the General Data Protection Regulations (GDPR) from the Respondent and their occupational health advisors. Ms Thomas made two submissions in that respect. Firstly, the applications were not made until shortly before the normal time limit for bringing an unfair dismissal case had expired. She pointed out that the timeframe for compliance with the request would have been more than three months after the dismissal. That point might have had more force, if an early data subject request would have led to the disclosure of email of 1 December 2017. Given the lengthy and tortuous history over 18 months before it was provided, an earlier application would have been unlikely to bear fruit. Secondly, the tribunal's procedures provide for the disclosure of relevant evidence, both by way of documentary exchange and, if necessary by an order for a witness to attend to given evidence. I agree with Ms Thomas that the Claimant could have taken advantage of these procedures to obtain evidence in support of his claims by presenting his case by 6 February 2018. They are more extensive and speeder than the rights of access to information under the GDPR, not least because they are not limited to disclosure of personal data.

34. In conclusion the Claimant had sufficient information and access to expert advice to have enabled him, with reasonable practicability, within the normal timescale to have submitted his claim.

Disability discrimination

35. It is accepted that the Claimant was a disabled person and this was known to the Respondent.

36. The Claimant alleges that the Respondent contrived a false and artificial ground to dismiss him to avoid paying an ill health retirement pension. He says he was unfit to work in any capacity, a position endorsed by his doctor and that, by a specious reliance on the occupational health advisor's report, the Respondent proposed adjustments to his work they knew he could not have achieved. The consequence

was, he says, that the Respondent terminated his employment for his refusal to return on adjusted duties. In addition, his complaint is that there was a failure to make proper adjustments by allowing him 6 months to a year to recover whereupon he could have returned to an adjusted desk job, of which he says there were many.

37. The first of these claims is advanced as direct discrimination under section 13 of the EqA or as discrimination arising from his disability under section 15 of the EqA. The second is indirect discrimination under section 19 or breach of the duty to make adjustments under sections 20 and 21.

38. In submissions Mr Coates recognised the claim under section 15 might be difficult to advance if the unfavourable treatment was the refusal to retire the Claimant with the benefit of an ill health pension. On reflection, it seems to me that the claim could be advanced under section 15, if the unfavourable treatment were the decision to terminate the Claimant's employment in the way it was. If the Claimant is correct about the motivations of the Respondent for dismissing, such a dismissal would have been because of something, namely his entitlement to an ill health pension which arose because of his inability to work, which in turn was due to his disability. Although such a claim involves a series of causative links, that is permissible, see **Pnaiser v NHS England [2016] IRLR 170**. It would be more attractive than a claim under section 13 because, as Ms Thomas demonstrated by use of hypothetical comparators, that is severely limited by the inclusion of the Claimant's capabilities, under section 23.

39. The considerations under section 33 (3) of the Limitation Act 1980 in personal injury claims are valuable in addressing the just and equitable jurisdiction for discrimination cases.

40. The length of the delay is 19 months. I am prepared to accept the conduct complained of extended over a period, but the end of that period was upon notification that the appeal against dismissal had been rejected on 8 December 2017. The primary 3 month time limit would have expired on 7 March 2018. The claim was issued on 11 October 2019. 19 months is a substantial delay when measured against the primary time limit Parliament has selected of 3 months.

41. The reasons for the delay are as summarised in paragraph 28 and as set out in the background above. In respect of the failure to disclose the email of 1 December 2017, I recognise that unfocussed data subject requests can create problems of finding needles in haystacks and a narrower request might have created a different outcome. That said, the number of alleged hits on the searched words seems inordinately large, 72 million, and I share the Claimant's scepticism as to its accuracy. Even taking a generous view of the Respondent's stated difficulties in this initial period, there was no satisfactory answer for not having disclosed the email of 1 December 217 after it had been expressly identified in Dr Dann's letter of 5 May 2018. The sender, recipient and date of the communication were then known. The withholding of the document from August 2018 until its disclosure on 16 September 2019, without good reason, was unacceptable.

42. However, I am not satisfied the Claimant's explanation for the delay was a good justification for not issuing the claim until October 2019. The Claimant and Mr Coates suggest that having a copy of the email of 1 December 2017 was critical. I do not agree. Mr Coates said that the letter of 5 May 2018 merely said that Dr Dann spoke with Rachel Lawrence, did not say what conclusions were reached and that the medical opinions were 10 months old. That is not a proper reflection of the letter. The letter of 5 May 2018 includes the date Ms Lawrence saw the

Claimant and the fact that until December 2017 Dr Dann had mistakenly assumed Ms Lawrence's examination had been in May 2017, just before she met the Claimant, when in fact it had been in January 2017. It includes a detailed account of her discussion with Ms Davison on 29 November 2017 and her strong recommendation that a second occupational health opinion be sought; a recommendation Dr Dann said she sent on 1 December 2017 in reply to the email from Ms Davison of 30 November 2017. The letter of 5 May 2018 is detailed and contains additional explanation of the history and sequence of events than was in the email.

43. I recognise that the email was direct evidence of the communication. However, the fact that the relevant substance was contained in Dr Dann's letter of 5 May 2018 is clear from the letter sent to Ms Davison by Mr Coombes, the claimant's former solicitor, on 8 June 2018. Most pertinently, Mr Coombes wrote, "*I note that you would be relying on the original assessment despite Dr Dann contacting you the next day to 'strongly recommend' that a second occupational health report was done, which recklessly or negligently it was not. Our client estimates that the company's negligence to properly assess him to retire on the grounds of ill health lost him £40,000*". The claimant knew that the decision to dismiss the appeal was sent 8 days after Dr Dann's strong recommendation and that the appeal decision had been deferred, following the meeting on 27 November 2017, because Ms Davison had said they wished to make some further enquires. These were the further enquiries and the respondent did not act upon the advice of Dr Dann.

44. Had the Claimant issued a claim in the summer of 2018 he could have obtained an order for disclosure of the original document in the proceedings and, if necessary, a witness order against Dr Dann for her to attend to give evidence about her advice. I would have expected any employment lawyer to have provided that type of advice to a client. The Claimant had solicitors at that time.

45. The remainder of the delay, after Mr Coombes ceased to act for the claimant in August 2018, was attributable to the claimant's attempts to obtain a copy of the email, which I have considered, and the attempts to find another solicitor to take on his case. A number of solicitors considered the request but did not agree to act. I find it inconceivable that none of them would have advised the claimant about the difficulty arising from time limits. He spent nearly 5 months overseas and did not progress his claim between December 2018 and April 2019.

46. In summary, by 9 May 2018 the Claimant knew that Dr Dann had strongly recommended a second opinion to review the medical evidence upon which the dismissal was based and that this had been before the decision to dismiss the appeal had been communicated to him.

47. A delay in bringing proceedings will usually adversely affect the quality of the evidence. Memories fade with the passage of time and are less reliable. Rarely do contemporaneous records provide a complete answer because they usually need putting into context. Miss Thomas said that although the witnesses of the respondent are still employed, one is currently overseas. That is the human resources advisor Ms Barker, who was involved in the case up until the meeting on 6 November 2017, whereupon two other human resource advisors took part in the dismissal and appeals process.

48. I did not regard the effect of the delay on the cogency of the evidence in this case as significant as it is in many, although it is clearly a factor. The essential feature of this case which requires explanation is the reason those who rejected the appeal

did so, having received the strong recommendation from Dr Dann to obtain a second opinion. Although that decision was now over two years ago, it is likely that the decision makers will be able to recall it. No explanation about that aspect of the case has been set out in the response or at the hearing and it has not been suggested it is because of an inability to recall the reasons for not following Dr Dann's advice. That is less than satisfactory.

49. In addition to the complaints the Claimant has made about the suppression of the email of 1 December 2019, which he says has contributed to the delay and which I have addressed above, he also complained about a costs' warning from the solicitors of the Respondent, which made reference to them having obtained a successful costs order in another case for £170,000 and to the fact that capital assets such as his home could be taken into account. This was obviously designed to deter the Claimant but it is extravagant, given the inability of the Respondent to explain its rejection of Dr Dann's advice of 1 December 2017 and its failure to disclose the identified email for over a year. The Claimant was not a litigant in person at this stage and he would doubtless have been advised by Mr Coates of the Tribunal's powers in respect of costs and any hyperbole in the letter would be put into its proper context.

50. The just and equitable considerations include the respective prejudice, or hardship, to the parties of a decision to allow or not allow the case to proceed respectively. I do not consider there is any significant hardship to the Claimant in not being able to pursue his claim for breach of the duty to make reasonable adjustments, because I do not regard it as a strong claim. He has consistently said that he wished to receive a medical retirement and he relied upon his GP's opinion that he would not be able to return to work even with adaptations. His former solicitors made that clear in their letters in November 2017 and August 2018. In the dismissal and appeal hearings the Claimant rejected the suggestion that any adjustments would be possible. Paragraph 4 of his claim form stated that he remained unfit to work until his 65th birthday when "as planned" he retired. His claim for reasonable adjustments is that the respondent should have maintained his employment whilst he was off sick for a further 6 to 12 months, by which time adjustments could have been made to rehabilitate him into the workplace. That would have been after his 65th birthday.

51. The history creates a difficulty for such a claim. It is incompatible with the position the claimant had consistently advanced, with reliance on his GP's opinion, that he could not return. It amounts to saying his employer should have rejected what he had repeatedly said to them, against his wishes and the medical advice he relied upon. I cannot see that would have been an adjustment the Respondent could or should reasonably have made at the time.

52. The comparative hardship to the respondent of allowing the reasonable adjustments claim to proceed is significant, by way of cost and resource in defending a claim with poor prospects.

53. In respect of the remainder of the claim with respect to the termination of employment which denied the claimant the right to an ill health retirement, the hardship of the decision to the respective parties is more finely balanced. As considered above, the most appropriate legal framework would be section 15 of the EqA, although that would require a careful assessment of causation on factual findings which are presently unclear. The claimant would face the difficulty of explaining the inconsistency as to whether he wanted an ill health retirement in late 2017 or wished to stay in employment for another year, to await physical recovery

to allow a rehabilitation. This is the contradiction between the reasonable adjustment claim and the section 15 claim.

54. On the other hand, the Respondent has not conducted itself well, in respect of the failure to disclosure the 1 December 2017 email and its evasiveness in respect of why it ignored its own expert's advice when dismissing the appeal.

55. I recognise the hardship to both sides; to the claimant in not being able to pursue a claim which has prospects of success, at least on the information presently available, and the hardship to the respondent of having to defend a claim which could reasonably have been brought a year earlier, with the difficulties such delay brings, the consequential cost and resource.

56. Although more finely balanced than the reasonable adjustments claim, I am not satisfied that it is just and equitable to allow the extension of time in respect of the rest of the claim for discrimination. The delay is long, the claim could properly have been brought much earlier, at least by a year, the claimant had the benefit of legal advice and he has failed to progress it when the necessary information came to his attention.

Employment Judge D N Jones

Date 16 April 2020