EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100387/2017

Held in Glasgow on 9 and 10 September 2019

Employment Judge R Gall

Mrs V Wilson	**Claimant**
Greater Pollock Citizens Advice Bureau	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim of discrimination, the protected characteristic being said to be that of disability, was not presented to the Employment Tribunal within the time specified under the Equality Act 2010 for the presentation of such a claim. It is not considered just and equitable to extend time to permit the claim of discrimination, the protected characteristic being said to be disability, to proceed.

As stated at the hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the hearing itself or by written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the hearing. The following sets out what was said, after adjournment, at conclusion of the hearing. It is provided for the convenience of parties.

REASONS

E.T. Z4 (WR)

1. This PH was set down to consider 2 fundamental issues as preliminary matters.

   (i) Was the claim for discrimination time-barred?

   (ii) Was the claimant at the relevant time disabled in terms of the Equality Act 2010?

2. At the outset of the PH I discussed with parties the the best and most efficient way of proceeding with this PH. The view was reached that my suggested course was acceptable to parties. I suggested that I would hear submissions in relation to whether the claim was time-barred not. I would then hear evidence from the claimant and any other relevant witnesses as to facts which were said to support whether or not it was just and equitable to extend time to enable the claim to proceed. If, having held those submissions and that evidence, I determined either that the claimant been presented in time or that it had been presented out of time but would be permitted to proceed on the basis of that being just and equitable, the PH would then move on to deal with evidence in relation to whether the claimant was disabled at the relevant time.

3. I therefore heard submissions from parties on whether the claim was time-barred. I then heard evidence from the claimant on facts which she said made it just and equitable to extend time to permit the claim to proceed if it was viewed by me as being timebarred. I had no evidence from the respondents in relation to that matter. I therefore assessed the evidence of the claimant as tested by cross-examination, together with the productions lodged by the claimant as spoken to by her in evidence.

4. I firstly look therefore at whether the claim for discrimination was time-barred.

5. The claimant was not present at work from a date in July 2016 when she was suspended. Her dismissal was in October 2016. She applied to ACAS for the Early Conciliation Certificate on 10 January 2017. The ACAS Early Conciliation Certificate was issued on 7 March 2017. This was followed up by presentation of the claim to the Employment Tribunal on 5 March 2017.

6. Any acts of discrimination alleged, bar one being that of the location of the desk, ceased when the claimant's attendance at work ceased in July 2016. The claimant maintained that the determination of her desk was a discriminatory act and that her desk remained in place throughout the period of suspension and indeed until her dismissal. The act of discrimination therefore it continued until that time. The claim was therefore lodged in time.

7. It should be said that the claimant also has a claim of unfair dismissal. That claim is accepted by the respondents as having been lodged in time.

8. To support her argument that the discrimination continued, the claimant founded upon the location of the desk not having changed. Although she was not physically back at work she said that she could have come back for a period of 2 days prior to dismissal after her grievance handling and suspension had ended. She did not however return.

9. The respondents said that there had been no discriminatory act. I did not hear evidence on that as this was not a point of relevance at the PH. Taking it therefore for the purposes of the PH that there had been discriminatory behaviour, the respondents said in relation to the desk that it had been put in place in November 2015. The act therefore occurred at that point. It was not a continuing act. The claimant been presented well out with time. If the tribunal took the view that the decision to locate the desk as it was was an act repeated each day and therefore was a continuing act, the claimant had not experienced any discrimination after the time when she was suspended. That was in July 2016. Again therefore the respondents position was that the claim was out of time.

10. I did not accept Mr McMenamin's argument that in assessing time the period of suspension should be "quashed" or ignored. No legal basis for that proposition was advanced. He argued at one point that this was a loophole in the spirit of the law. I did not see that as being the case. Time passed and it is appropriate have regard to that time in assessing whether the claim is in time or not. Any argument as to the impact of the claimant being suspended

is more relevant in my view to the question of extension of time under the just and equitable principle.

11. As I saw it, whether there was in effect an "live" act of discrimination at date of dismissal depended upon whether I took the view that the decision to locate the desk in a particular area constituted an act extending over a period or was an act with continuing consequences.

12. This is a difficult area of law. Neither party referred me to any cases. In my view the relevant cases comprise Hendricks v Commissioner of police for the Metropolis, 2003 IRLR 96, Barclays Bank plc v Couper and others 1990 one ICR 208, life are v Brighton and Sussex University hospitals trust 2006 EWCA C IV one 548, Sue given v Harringay Health Authority 1992 IRLR 4 one 6, was to v London Fire and civil defence authority 1995 UK/VAT/334/93, as he is v FTE 2010 EWCA C IV 304 and he'll v Brighton and Sussex University hospitals NHS trust VAT 0342/16.

13. Those cases confirm that it is important that the Tribunal does not get bound up in a decision as to whether there is a policy regime in determining whether there was a continuing act or an act with continuing consequences. It as necessary and appropriate for the Tribunal to view the position on an overall basis.

14. I was satisfied that what had occurred here was a decision made as to where the desk occupied by the claimant was to be located. That had continuing daily consequences for the claimant in that she was to sit at that desk each day. No decision was however Reid each time the claimant appeared in the office that this should be her desk. It was not pled that she had asked for reconsideration of this decision. It was not pled that she had asked for a move. This was said to have occurred when submissions were made. The respondents disputed that it had occurred. It was not however played that the decision was, as Mr McMenamin put it, "refreshed".

15. I concluded therefore that the decision in relation to the location of the desk was a decision made in November 2015. It had consequences. The right to claim however commenced in November 2015.

16. If I considered that there was a continuing act. It ceased in my view when the claimant was not at work from January 2016 onwards.

17. Neither of these views the claim was brought out of time.

18. As mentioned above, I heard evidence as to the facts said to support the view that it was just and equitable for time to be extended. I realised and sent to parties that some of the evidence in that regard would potentially relate to the health of the claimant. That evidence was led and I was taken to medical records to a degree. I heard the evidence of the claimant's health in that context rather than in the context of whether she was disabled under the Equality Act 2010.

19. In considering whether it is just and equitable to extend time the onus is upon the claimant to persuade the Tribunal that is so. An extension of time is said in the case of Robertson v Bexley Heath to be the exception rather than the rule. The case of bro Morgannwg University v Morgan as authority for the view that the tribunal does not need a good reason for failure to present the claimant time in order to extend time on the basis of it being just and equitable to do that. It is important for the tribunal to consider the matter in the round and to consider whatever facts are put forward end of said to support there being an extension of time.

20. I had regard to the relative prejudice if an extension of time was granted on the one hand and if it was not granted on the other hand. If an extension of time was granted, the respondents would face a claim. There is a time limit under the statute. Time limits are therefore a purpose. There is however a basis on which time can be extended. There might be prejudice to the respondents from the equality of evidence now available. That however in my view has occurred due to delays and conduct of litigation rather than in the period of delay in presentation of the claim. If time is not extended then the claimant would not be able to make a claim of disability discrimination. She would still have her claim of unfair dismissal. There would undoubtedly however be prejudice in that the claim could not proceed insofar as it constituted a claim of discrimination.

21. I had regard to the question of what knowledge of the claimant had as to existence of Employment Tribunals and the provisions for presentation of a claim. I also had regard to the steps taken by the claimant to try to ascertain her rights and of the time period taken to proceed with a claim once the claimant was aware of those rights.

22. In this case, the claimant was formally a volunteer with Citizens Advice Bureau. She accepted in evidence that she that she may well have been aware of Employment Tribunal rules. She had had training or employment law matters and had provided advice upon them. There was an expert adviser to whom she referred cases. She is sufficient knowledge however to provide advice in relation to some matters and remedies available as a result of the training which she had received. She said however that she could not remember what that training was. There was no counter evidence as to the nature or extent of training in general for advisers or volunteers within CA be or the claimant in particular. The claimant was overweight of the existence of Employment Tribunals and of the existence of ACAS. She knew that it was possible to bring an employment tribunal claim.

23. The claimant give evidence about her illness which was that of depression. She spoke as to visiting the doctor regularly and as to taking medication. I recognise that the claimant had what appeared from the doctors notes and from our own evidence to be severe depression and anxiety at this point. She did not however describe any particular symptoms which give me any information as to it not been possible for her to proceed with Employment Tribunal claim. She held down a job until she was suspended in July 2016. She pursued a grievance in relation to the desk. She took that to appeal. She participated fully in her disciplinary hearing and subsequently in her appeal. She said that she was concerned not to rock the boat and wanted to keep her job. She regarded October as being the critical date, when her employment had ended.

24. On the claimant's evidence, she checked the position as to what remedies she might have in mid-November of 2016. She became aware by at the latest end of November that a claimant to the Employment Tribunal was possible

and that a 3 month time limit applied. She sought in January to obtain legal representation by making contact with the Law Society and by speaking to various solicitors. Through a combination of solicitors been busy and not taking legal aid work, she was unable to obtain a solicitor. She presented the details to ACAS on 10 January 2017 as mentioned as a preliminary step to pursuing her claim to Employment Tribunal.

25. I did not accept Mr McMenamin's submission that there was a difference in terms of approach between pursuing a claim of unfair dismissal and the time limit associated with it and pursuing a claim of disability discrimination. His argument was that dismissal occurred and that the clock started then. A discrimination claim however, he argued, what the other way round in that the date of presentation of the application to ACAS for an "Early Conciliation Certificate" was considered and the 3 month period prior to that was then examined to see whether the act of discrimination fell within that time. It seemed to me that this all amounted to the same position in that the clock starts ticking from the date an act of discrimination is carried out and also from the date dismissal occurs. If there are continuing act then later alleged discriminatory acts are of relevance. Either way however the 3 month period applies in both instances of alleged unfair dismissal and alleged discrimination.

26. In considering the evidence and submissions, I had careful regard to the impact which refusal to extend time would cause in that no claim of disability discrimination would be possible. I was conscious that the claimant thought that she had from time of dismissal to pursue her claim both of disability discrimination and unfair dismissal. Much of evidence however was directed to her position that suspension round the clock down unknown to her. It seemed to me that that position was inconsistent with her position that a claim only arose in October on her dismissal.

27. I had regard to the evidence I heard as to the health of the claimant during the period within which a claim might be possible.

28. I had regard to the role which the claimant had with CB and the knowledge she had. This was not a case where the claimant said that she was entirely ignorant of the existence of Employment Tribunals or of provisions as to making a claim. It seemed to me likely that she was aware of time limits but thought that she had time within which to make a claim.

29. As to her health, the claimant had participated in the grievance and appeal. She had also participated in the disciplinary process and indeed the appeal at that point. Should be prepared to rock the boat by way of the grievance and appeal and also by arguing that she should not be dismissed and appealing against dismissal.

30. On balance I was not persuaded by the claimant that it was just and equitable to extend time to enable her to proceed with a claim of discrimination.

31. The claimant had an awareness of employment provisions albeit in a period prior to events which led to this case. She was aware however of the need for specialist advice in this area. She had taken steps to protect a position notwithstanding her illness. She had not taken steps to investigate the possibility of a claim after November 2016 or indeed after suspension. She had been unhappy with the outcome of the grievance and its appeal. She did not know at that point that she would be suspended or dismissed but had taken no steps to intimate or proceed with a claim of discrimination.

32. My view is therefore that the claim of discrimination is time-barred and is at an end. I appreciate that the respondents dispute that the claimant was disabled at the relevant time. It is not necessary however to go into that element given the view I have reached on timebar. The claim of unfair dismissal can of course proceed and it is appropriate to consider arrangements for case management PH in relation to that ground of claim.

R Gall
Employment Judge

10 September 2019
Date of Judgment

Date sent to parties **12 September 2019**