



EMPLOYMENT TRIBUNALS

Claimant

Miss C McKay

v

Respondent

Coloplast Limited

Heard at: Norwich (by CVP)

On: 01 June 2021

Before: Employment Judge Postle

Appearances

For the Claimant: Mr M Orton (Friend).

For the Respondent: Mr M Briggs (Solicitor).

JUDGMENT

1. The claimant does not have a disability within the meaning of s.6 of the Equality Act 2010.
2. The claimant's claim for the protected characteristic of sex are out of time and the Tribunal does not exercise its discretion to extend time under s.123(1) of the Equality Act 2010.

REASONS

1. The first part of this open preliminary hearing is to determine whether the claimant has a disability within the meaning of s.6 of the Equality Act 2010 which defines disability as a person who has a disability if they have a physical or mental impairment and the impairment has a substantial and long term adverse effect on a persons ability to carry out normal day to day activities.
2. The Employment Appeal Tribunal requires a Tribunal to look at the evidence by reference to four different questions or conditions as the EAT has termed them:
 - (1) Did the claimant have a mental and/or physical impairment?
 - (2) Did the impairment affect the claimant's ability to carry out normal day to day activities?

- (3) Was the adverse condition substantial?
- (4) Was the adverse condition long term, namely likely to last for more than 12 months?
3. In this Tribunal we have had the benefit of a bundle of documents consisting of 280 pages and we have two impact witness statements from the claimant and we also heard evidence from the claimant.
 4. The claimant's first impact statement unfortunately concentrates largely on the facts of the claimant's case rather than the effect that the claimant's alleged disability of stress, anxiety and depression has on her normal day to day life and it tells the Tribunal little about that impact whereas the second statement does give more detail about the impact for example disturbed sleep, finding it difficult to switch off and being low mood and sleep.
 5. Looking at the GP records the first time that the claimant appears to see the GP about the alleged disabilities is on 10 January 2018 (page 92) where it records the claimant is struggling with life, feeling down and there is reference to the claimant's daughter unfortunately having been sexually assaulted. The claimant was prescribed medication for depression and is signed off work. She visits her GP again on 24 January and the records reveal depressed mood. She sees the GP on 6 February, that records stress, low mood and depressed.
 6. On 18 February the claimant visits her GP and informs her GP that she is thinking of returning to work on a phased return and indeed she does so on 20 February seemingly without problems. Thereafter appears to hold her job down throughout the months right up until November and during that period there seems to have been little impact on the claimant's daily life continues working until a disciplinary investigation meeting on 13 November 2018, goes off shortly thereafter on 16th and began a further period of sickness until her dismissal on 18 April.
 7. One of the difficulties in this case is there is no recorded formal diagnosis of the claimant's condition. The burden of proof is on the claimant to satisfy the Tribunal that she has a disability within the meaning of s.6 and the real test is whether an individual can carry out normal day to day activities not whether they can carry out specialist tasks and that the impairment must have a substantial adverse effect on a persons ability to carry out normal day to day activities. It must be more than minor or trivial.
 8. Looking at the evidence the claimant clearly did have for a short period of time a mental impairment, that does seem to have had limited effect on the claimant's ability to carry out her normal day to day activities but it is clear that having been recorded as depression and low mood in January towards the end of February the claimant was able and fit and ready whatever the claimant may maintain to return to work. Therefore the Tribunal takes the view that such as the condition was, it was not a

substantial condition, it was not an adverse condition which had a long term effect and therefore those questions that the EAT asked us to pose looking at them sequentially and not together tell me that on the balance of probabilities the claimant does not have a disability which satisfies the definition of s.6 of the Equality Act 2010.

9. This is the second part of the preliminary hearing to determine whether the Tribunal should exercise its discretion under what is called the just and equitable principle under s.123 of the Equality Act in relation to the claimant's claims that she suffered sex discrimination and harassment at the hands of Mr David Edwards during the period May 2017 to October 2017 when Mr Edwards was suspended and subsequently dismissed.
10. The burden is on the claimant to persuade a Tribunal that it is just and equitable to extend time and whilst Employment Tribunals have a wide discretion to allow an extension of time under the just and equitable test in s.123 it does not necessarily follow that the exercise of the discretion is a foregone conclusion. Indeed the Court of Appeal made it clear in Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434 CA, that when tribunals consider exercising their discretion under s.123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise that discretion. Quite the reverse, a tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. The onus is therefore on the claimant to convince the Tribunal that it is just and equitable to extend time.
11. However this does not mean that exceptional circumstances are required before the time limit can be extended. In considering its discretion whether to extend time a tribunal may have regard to the checklist contained in s.33 of the Limitation Act 1980 known as the Keeble factors subject to the following observations. A tribunal is not required to go through every factor in the list referred to in Keeble and when considering the just and equitable test the Court of Appeal has stated recently that it was not healthy for the Keeble factors to be taken as the starting point for tribunal's approach to just and equitable extensions and that a rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant including in particular the length and reasons for the delay.
12. Having heard from the claimant and her representative friend Mr Orton I am not so persuaded that I should exercise my discretion. There has been no cogent reasons advanced as to the length of time delaying and the reasons of the delay in this case which are substantial, the claimant makes allegations commencing in May/June 2017 which conclude in October 2017 and the claimant's claim was not presented until 23 April 2019, that is a substantial period of delay. I do not accept that the

reasons for the delay was the claimant was still employed by the respondent and was concerned about the possibility of retribution. It is clear that the claimant issued this claim whilst she was still employed.

13. Furthermore there has simply been no cogent reason as to why such a length of delay has been allowed to elapse. Given that length of delay I am concerned that the cogency of the evidence is likely to be affected by that delay. Furthermore it seems that the claimant made no efforts at all to ascertain her rights during the period when she was alleged to be the subject of harassment by Mr Edwards. Clearly it is incumbent upon a claimant to establish what rights they have and listening to the claimant and her friend advisor it appears that nothing was done in this respect until around December 2018 again some substantial delay after the events complained of.
14. Taking all these matters into account I am therefore not persuaded that this is a case where I should exercise my discretion under the just and equitable principle and therefore the claim under the protected characteristic of sex the Tribunal has no jurisdiction being well out of time.
15. That leaves the claimant with a claim for ordinary unfair dismissal under the Employment Rights Act 1996 which will proceed to a full merits hearing, which I understand has already been listed in March 2022 at Cambridge with the hope that it will be an in person hearing.
16. Employment Judge Postle was advised that the case management for ordinary unfair dismissal had not yet been completed and orders were therefore made which are contained in a separate Case Management Orders document.

Employment Judge Postle

Date:21/6/2021.....

Sent to the parties on:

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For the Tribunal Office