



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111735/2019 (V)

Held via Cloud Video Platform (CVP) on 23 September 2020

Employment Judge: M Sutherland

5 **Elaine Pascoe**

**Claimant
Represented by:
Mr D Liguori -
Relative**

10 **Hospedia Limited**

**Respondent
Represented by:
Mr N MacDougall -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claims for disability discrimination were presented outside the time limit and accordingly those claims are dismissed.

REASONS

1. On 17 October 2019 the Claimant lodged complaints of disability
20 discrimination but the type of discrimination being alleged was unclear. At a
case management preliminary hearing on 7 February 2020 the Claimant
advised that she was bringing a complaint of unfavourable treatment because
of something arising in consequence of her disability under Section 15 of the
Equality Act 2010 ('EA 2010') and failure to comply with a duty to make
25 reasonable adjustments under Section 20 EA 2010. At the case management
preliminary hearing the Claimant advised that she was not bringing a claim
for constructive dismissal in respect of her resignation. The Respondent
accepted that the Claimant was disabled by reason of insulin-dependent Type
1 diabetes but denied disability discrimination.

30 2. The act amounting to unfavourable treatment was an alleged remark made
by an HR representative on 30 April 2019 to the effect that she would be as
well staying home and knitting. In her Agenda to the case management

preliminary hearing the Claimant stated that the comment was made in response to her having advised HR that she would be unable to perform her new role following the restructure because of her medical condition. The Respondent denies that a discriminatory remark was made an HR representative who was at the time engaged in redundancy consultation by telephone with the Claimant in the presence of Ron Williams, Head of Operations.

3. The alleged provision, criterion or practice ('PCP') was the requirement undertake physical lifting in her new role following the restructure; the application of that PCP place her at the alleged substantial disadvantage of being unable to perform the new role. In her Agenda to the case management preliminary hearing the Claimant advised that allowing her to continue in her existing role (with colleagues undertaking the physical lifting) amounted to a reasonable adjustment. The Respondent denies any failure to make reasonable adjustments and advises that the purpose of the two consultation meetings was to consider reasonable adjustments and/or identify suitable alternative employment but the Claimant declined to do so because she had found another role and wanted her redundancy pay.

4. Parties were in agreement that the new role was proposed and discussed as part of the restructuring consultation exercise which concluded on 30 April 2019. At the case management preliminary hearing the Claimant advised that the alleged failure to make reasonable adjustments arose on or before 30 April 2019. Having explained to the Claimant the terms of Section 123 (4) regarding the date of a failure to act, parties continued to be in agreement that the date of the failure to make reasonable adjustments occurred on or before 30 April 2019.

5. Parties were in agreement that the claims had been brought 2 ½ months after expiry of the primary time limit of 3 months for bringing such claims and the issue to be determined at today's hearing was whether the claims were brought within a period that the tribunal thinks just and equitable.

6. The Claimant was represented by her son-in-law Mr David Liguori who is not legally qualified but provided able representation. The Respondent was

represented by Mr N MacDougall, Advocate. Both representatives are thanked for the respectful and appropriate manner in which they conducted themselves.

- 5 7. The Claimant gave evidence on her own behalf and also called her son-in-law Mr David Liguori and her husband Mr Douglas John Pascoe as witnesses. The Respondent did not call any witnesses. Although no order for witness statements had been issued the Claimant and her witnesses had prepared witness statements. Parties agreed that the witness statements were to stand as the evidence in chief of the witnesses and were read by the tribunal rather
10 being read aloud by the witnesses. Each witness declared under oath that their contents were true and accurate.
8. Parties had preprepared a joint bundle of documents.
9. Both parties gave oral submissions. Following discussion, it was agreed that the Respondent would give their submissions first to allow the Claimant
15 whose representative was not legally qualified an opportunity to consider and respond accordingly.
10. At the end of the hearing and as directed by prior case management opportunity was taken to discuss further procedure in the event that it was determined that the claims were brought within in time. Following discussion,
20 it was agreed that in the event that it was determined that the claims were brought in time a 3-day remote hearing by CVP before a full panel with recourse to witness statements would be listed.

Findings of Fact

- 25 11. The Claimant was employed by the Respondent as an Area Financial Controller from 14 October 2010 until her resignation effective 11 June 2019. In about February 2019 the Respondent proposed a restructure of the business which affected the Claimant's role. The Respondent then held two consultation meetings with the Claimant the first of which occurred in March 2019 and the second of which occurred on 30 April 2019.

12. At the time of the incidents of 30 April 2019 the Claimant believed that these incidents amounted to disability discrimination. The Claimant did not seek legal advice at any time regarding these incidents. Prior to her resignation the Claimant had conveyed to her husband and to her son-in-law the issues she was facing at work which she considered amounted to disability discrimination. The Claimant and her husband also state that he was a direct witness to the phone call on 30 April 2019 at which the alleged discriminatory remarks were made.
13. The Claimant has insulin-dependent Type 1 diabetes. Stress and anxiety has a significant impact on the Claimant's blood sugar levels. The Claimant's management of her diabetes in the period between April and October 2019 was suboptimal. The Claimant wears a blood sugar monitor which generates fortnightly average blood sugar readings. Her target blood sugar level is 4 – 9 mmol/L. When her blood sugar level is under control it normally averages 8.6 mmol/L. In the fortnight prior to 30 April 2019 the Claimant's average blood sugar was 12.3 mmol/L. During the period between 30 April 2019 and 17 October 2019 the Claimant's fortnightly average blood sugar fluctuated from a high of 13.5 mmol/L (in the fortnight commencing 18 May 2019) to a low of 10.4 mmol/L (in the fortnight commencing 3 September 2019). These readings are only average readings and the individual readings fluctuated from under 10 to over 15 mmol/L.
14. In May 2019 the Claimant submitted an online written application for a new job. She attended an interview for that new job on about 28 May 2019 and was appointed to that role.
15. Following the incidents on 30 April 2019 the Claimant was not off sick and continued to attend work until her employment terminated on 11 June 2019. On 11 June 2019 the Claimant submitted a detailed letter of resignation extending to 2 pages and which explained why she considered that she had been discriminated against on grounds of her disability.
16. Around mid-July 2019 the Claimant contacted ACAS and established that a claim for disability discrimination required to be made to an employment tribunal within a 3-month timescale. The Claimant did not take prior steps to

5 establish this. The Claimant also asked her son-in-law to assist her in progressing her claim for disability discrimination. In the first few months after her dismissal, her son-in-law made a number of attempts to complete the online ET1 claim on her behalf. Her son was able to and did access her previous written complaints (her grievance and resignation). Whenever her son-in-law sought further detail regarding her claim from the Claimant she would become upset and had difficulty providing that additional information. The Claimant felt stressed and anxious and as a consequence upset, nauseous and tired whenever she tried to recall everything that had happened at work.

10 17. The Claimant started work at her new job on 15 July 2019. The Claimant was not off sick from this new job in the period to 17 October 2019. The work is significantly different from her previous role being less demanding and less well paid.

15 18. On 14 August 2019 the Claimant with the help of her son-in-law commenced ACAS early conciliation. As part of that process of early conciliation the Claimant provided details about the nature of her complaints of disability discrimination again with the help of her son-in-law. In the fortnight when ACAS was contacted her average blood sugar level was 12.4 mmol/L. The Claimant engaged in an attempt to resolve the dispute with the assistance of ACAS and her son-in-law. That attempt was unsuccessful and on 14 September 2019 the Claimant received the ACAS Early Conciliation Certificate. Upon receipt of the certificate she understood that the process of early conciliation had concluded and that she needed to institute employment tribunal proceedings. In the fortnight the ACAS certificate was received her average blood sugar level was 10.4 mmol/L rising to an average of 12.6 mmol/L the fortnight commencing 17 September 2019.

20 19. The Claimant attends a hospital diabetes clinic for review and to assist with the management for her diabetes. She did not attend in the period April to October 2019. (She next attended on 4 December 2019.)

25 20. In mid-October 2019 the Claimant completed the ET1 claim with the assistance of her son-in-law which was then lodged with the Employment

Tribunal on 17 October 2019. The relevant details of her claim are in broadly similar terms to her letter of resignation.

Observations on the evidence

21. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event, etc was more likely than not, then the Tribunal is satisfied that the event did occur.
22. The Claimant stated that she was physically and mentally unable (despite the assistance of her son-in-law) to complete and present the claim form with the necessary information until October 2019. It is considered more likely than not that the Claimant (with the assistance of her son-in-law) was both mentally and physically capable of completing and presenting the ET1 claim form with the necessary information throughout the primary limitation period ending 30 July and subsequently having regard to the following facts.
23. At the case management preliminary hearing the Claimant was advised of the need to provide medical evidence dealing with the state of her physical and mental health at the relevant time (i.e. between April and October 2019). At the preliminary hearing the Claimant did not provide any medical evidence from her GP regarding her physical or mental health in the relevant period. The claimant instead provided a brief note prepared by her diabetic consultant who saw her in December 2019 but did not see her during the relevant period. The brief note, prepared in February 2020 at her request, noted “the considerable stress she has been placed under due to various issues at her previous workplace with Hospedia. I gather she is going through a tribunal process. This has left her physically and mentally exhausted...Stress has a significant impact on blood sugar results and I note a recent measure of diabetes management is sub-optimal”. The note did not provide a medical opinion on the state of her physical and mental health in the period between April 2019 to October 2019. The Claimant provided copies of print outs from her blood sugar monitor for the relevant period which showed that her blood sugar levels were higher than average during the relevant period.

24. Whilst it is accepted that the Claimant was suffering from stress and anxiety (which had a negative impact on her blood sugar levels) from April 2019 until October 2019 this did not prevent her from attending work until her resignation on 11 June 2019; did not prevent her from writing a detailed letter of resignation in June 2019; did not prevent her from identifying and making a written application for alternative employment in May 2019; did not prevent her from attending work to perform that new role from 15 July 2019 onwards; and did not prevent her from providing ACAS with details about the nature of her complaints on 14 August 2019.
25. Having regard to the above it is considered more likely than not that the Claimant (with the assistance of her son-in-law) was both mentally and physically capable of completing and presenting the ET1 claim form with the necessary information throughout the primary limitation period ending 30 July and subsequently.

15 **The Law**

26. Section 123(1) of the Equality Act 2010 ('EA 2010') provides a complaint of discrimination "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".
27. Section 123(3) of EA 2010 provides that "(a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it. (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—(a)when P does an act inconsistent with doing it, or (b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."
28. Section 140B of EA 2010 provides that the primary time limit under Section 123(1)(a) is extended if ACAS early conciliation is commenced during that period.
29. The onus is on the claimant to convince the Tribunal that it is just and equitable to extend the time limit. The exercise of the discretion is the

exception rather than the rule (*Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA*).

30. In exercising their discretion to allow late claims to proceed, Tribunals may have regard the following factors: the prejudice that each party would suffer as a result of the decision reached; the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action; and the potential merits of the claim (*British Coal Corporation v Keeble [1997] IRLR 336 EAT; Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278 EAT*).
31. These factors are not exhaustive and further do no need to be considered in every case (*Department of Constitutional Affairs v Jones 2008 IRLR 128, Court of Appeal*). However, two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (*Southwark London Borough Council v Afolabi 2003 ICR 800, CA*) (for example, by preventing or inhibiting it from investigating the claim while matters are fresh).

Respondent's Submissions

32. The Respondent's submissions were in summary as follows –
- a. Where ACAS early conciliation commences after the primary time limit it does not extend that time limit
 - b. There is no presumption that an extension will be granted; the onus is upon the Claimant
 - c. The Claimant was aware of her rights and how to raise a claim within the primary limitation period

- d. The Claimant was clearly capable of engaging with the process by at least mid-August 2019 given her commencement of early conciliation
- e. The claim as currently plead does not disclose a claim for discrimination arising or for failure to make reasonable adjustments making it impossible to assess the merits of her claim
- f. A delay of 2 ½ months after the primary time limit is significant when the primary time limit is 3 months

Claimant's Submissions

33. The Claimant's submissions were in summary as follows –
- a. The 5 ½ month period from April 2019 until October 2019 was an externally difficult period for the Claimant
- b. She performed a new job in that period out of financial necessity and as a distraction
- c. A number of attempts were made to complete the claim form, but she became too upset to provide additional information and was not physically or mentally able to do so

Discussion and decision

34. The date of the acts to which the complaint relates was 30 April 2019. ACAS early conciliation was commenced on 14 August 2019 which was after the primary time limit of 3 months. The claim was presented on 17 October 2019 which was in a period of 5 ½ months (2 ½ months after the primary time limit of 3 months).
35. If the claim is allowed to proceed there will be prejudice to the Respondent in having to defend a claim, but the Respondent would still be able to defend that claim. If the claim is not allowed to proceed the Claimant will not be able to pursue her claim for discrimination.

36. It was accepted that the cogency of the evidence is unlikely to be affected by the delay although the Respondent will require to make further investigations following necessary amendment of her claim.
37. It was accepted that there were no requests for information from the Respondent.
38. At the time of the incidents of 30 April 2019 the Claimant believed that these incidents amounted to disability discrimination. Around mid-July 2019 the Claimant established that a claim for disability discrimination required to be made to an employment tribunal within 3 months of the discrimination. The Claimant had not taken prior steps to establish her rights or how to pursue them. At the hearing the Claimant accepted that she was not relying upon ignorance of her rights or how and when to pursue them but rather that she was physically and mentally unable to prepare and present her claim until October 2019.
39. On balance of probability it was found that the Claimant (with the assistance of her son-in-law) was both mentally and physically capable of completing and presenting the ET1 claim form with the necessary information within the primary limitation period and subsequently. (Indeed, the relevant details of her claim are in broadly similar terms to her letter of resignation issued on 11 June 2019). For at least 3 months (from about mid-July until mid-October 2019) Claimant delayed preparing and lodging her employment tribunal claim without good reason. The length of that delay is not insignificant when compared with the primary time limit of 3 months starting on 30 April 2019.
40. It is not possible to assess the merits of the claim which is disputed and accordingly there is no basis upon which it can be said to having good prospects of success such that this ought to weigh in the balance. The Claim as currently plead does not set out a claim for discrimination arising because it does not articulate that her unfavourable treatment was because of something arising in consequence of her diabetes (rather than because of her diabetes itself). Further the claim as currently plead does not set out a claim for failure to make reasonable adjustments because it does not articulate the reasonable adjustment. Although the Claimant is a litigant in person the

Respondent is entitled to fair notice of the basis of her claim. Whilst further detail is provided in her Agenda regarding these issues this would require to be addressed by way of amendment if the claim was allowed to proceed. The terms of this amendment would then require to be investigated by the Respondent to allow them to adjust in response.

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41. Weighing up the length of delay in presenting the claim without good reason, the absence of a stateable claim as currently plead, against the loss of opportunity to pursue what is likely to be a stateable claim for discrimination following amendment but whose prospects are unknown, where the cogency of evidence is unlikely to be affected but which would require further investigation by the Respondent to allow them to adjust in response, it is considered on balance not just and equitable to extend the time limit to include the date of lodging on 17 October 2019. Accordingly, the claim for discrimination was presented late and the tribunal does not have jurisdiction to her claim.

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Employment Judge: Michelle Sutherland
Date of Judgment: 28 September 2020
Entered in register: 05 October 2020
and copied to parties

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