



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms L Coltman**

**and**

**Staff Management Limited t/a  
Active Assistance**

**Heard at:** Reading

**On:** 23 September 2021

**Before:** Employment Judge Vowles (sitting alone)

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr T Sheppard, counsel

**JUDGMENT** having been sent to the parties on 3 November 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. In this case the issues that I have to consider were set out in the Case Management Orders made on 17 March 2021 at paragraph 4.

### Disability

2. The first issue is whether the claimant was at the material time a disabled person within the meaning of s.6 Equality Act 2010 by reason of a back impairment. The material dates are late 2017 to May 2019.
3. So far as disability is concerned that is defined in s.6 of the Equality Act of 2010 and there is also a statutory code of practice entitled Guidance on Matters to be Taken Into Account in Determining Questions Relating to the Definition of Disability produced in 2011 and the relevant elements are these.
4. The Act defines a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his or her ability to carry out normal day to day activities. This means that there are four matters to consider. First of all the person must have an impairment that is either physical or mental. Second, the impairment must have adverse effects which are substantial. Third, the substantial adverse effects must be long term. Fourth, the long term

substantial adverse effects must be effects on normal day to day activities.

5. So far as impairment is concerned in this case it is a physical impairment, that is back pain.
6. The guidance says so far as substantial adverse effect is concerned that the requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than has a minor or trivial effect.
7. So far as long term effects are concerned the Act states that for the purpose of deciding whether a person is disabled a long term effect of an impairment is one which has lasted at least twelve months or where the total period for which it lasts from the time of the first onset is likely to be at least twelve months or which is likely to last for the rest of the life of the person affected.
8. So far as normal day to day activities is concerned at paragraph D3 the guidance says in general day to day activities are things that people do on a regular or daily basis. Examples include shopping, reading and writing, having a conversation or using a telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day to day activities can include general work related activities and study and education related activities such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or a shift pattern.
9. In this case I have been presented with a bundle of documents which has been produced by the parties and in that bundle of documents several of the documents relate to the claimant's back pain problem. At page 169 there is a letter from a clinical specialist physiotherapist dated 23 December 2013 and it says: *"This lady was seen in the lumbar spine pathway with left sided L5 symptoms. In view of this an MRI has taken place and I have discussed the results with surgeon Commander Smith, consultant spinal surgeon. The scan shows a disc bulge at the L5 S1 level which has potential to compromise the left S1 nerve route. Surgeon Commander Smith has kindly agreed to see this lady in clinic to discuss possible options."*
10. That is dated December 2013 and is the only formal diagnosis from medical practitioners since that date in the bundle of documents. I note from the Claimant's evidence that after that, during 2014 she spent seven months cycling in France which leads one to conclude that the back problems were not of any great significant effect during that period.
11. Next in date, at page 194, is an occupational health questionnaire which the claimant completed at work in November 2014. She said that she did have back ache, back injury and disc disorder. She referred to an MRI on her lower back and having physiotherapy and sciatica but she said that she did not have any disabilities which affected her standing, manual handling,

walking, use of hands, bending, stretching or climbing stairs and generally she said she didn't have a disability.

12. At page 206 there is a further occupational health questionnaire which was completed in February 2017. Once again the claimant confirmed she suffered from back ache, back injury and disc disorder and she referred to back problems but she said she did not have any disability and that was an answer to a general question.
13. Then on page 179 the claimant produced in June 2020 a statement concerning her health generally. It is eight paragraphs long over two pages. Only one paragraph relates to her back problem and it says:

“My mobility has been affected by back problems also since I was 18 when I went to A&E with chronic lower back pain. I have musculo-skeletal crookedness in my pelvis which gives me constant pain and discomfort which led to a herniated L5 disc diagnosed by MRI in 2013 ...my day to day activities are adjusted to avoid pain. I experience stiffness and pain in my hips, sciatica, neck pain and headaches, I cannot push loaded trollies in a supermarket as the twisting aggravates my condition as does lack of rest, stress and more awkward activities such as hoovering and gardening activities that involve prolonged weight bearing while twisting. I have regular physiotherapy to manage the symptoms.”

14. At page 182 there is a GP report. On page 184 there is reference to that report. It is a three page report but only one paragraph devoted to the back problem and it states:

*“Ms Coltman is anxious that I highlight within the report how her client’s disruptive behaviour significantly affected her sleep pattern and exacerbated her chronic back pain and evoking tiredness”.*

The GP refers again to that MRI scan on 25 November 2013 and to a referral to the hospital on 4 February 2014 at which he says they proposed that she should be treated conservatively. That is not a clinical diagnosis, it simply repeats what the claimant had read in the report of December 2013 and what she told her GP.

15. Page 187 is a statement by the claimant dated 9 April 2021 and it is headed:

*“Statement for back impairment”.*

*In recent years I have managed the back impairment and reduced the pain symptoms and the risk of further injury with sports massage and physiotherapy. If I do not have regular therapy the muscles in my lower and/or mid usually back become tight and spasm leading to the pain and limited mobility again when the muscles become seized. Surrounding muscles compensate for the spasm muscles and pull my spine and pelvis out of line which causes further problems and drainage if not remedied. It is not something that will be cured. I experience inflammation and permanent soreness in the coccyx. This old injury and recurring symptoms affect both recreational and vocational activities I can do as well as on a daily basis such as hoovering, gardening, exercise, sitting for long periods, standing for long periods, weight bearing. I have trouble with some tasks where I have to use the injured areas to weight bear or where pushing or*

*pulling a weight is involved and engages the affected muscles. I have to shorten these tasks and regularly stop to straighten and stretch my back and give my back muscles a break. Sometimes I have to lie down to relieve the weight on my back and straighten my spine for some minutes after doing a task. I usually experience pain as my spine straightens when I first lie in bed. Lack of adequate rest exacerbates the systems if there is muscular stiffness and pain that feels like weakness in a certain area I avoid certain tasks and if need be seek extra immediate treatment. I stay aware of manual handling techniques to mitigate damage and avoid spontaneous injury from over stressing my chronic old injury both occupationally and in daily life.”*

16. In assessing whether an impairment amounts to a disability a Tribunal should focus on what a person cannot do rather than what they can do. In the claimant's case, particularly as described in that statement that I just read, the claimant it is clear has managed her pain symptoms. She says she does that by massage and physiotherapy. She says she is affected and that she has trouble with some tasks but there is nothing that she cannot do because of her back problems. So she manages with massage and physiotherapy. She says that she attends for physiotherapy at the most two or three times a month but when the pandemic emerged then she was not able to do anything that year. She has had no surgery, she takes no prescription drugs and there has been no medical intervention. As I have said the only medical report on her back goes back to 2013 and she has managed the condition since.
17. At page 189 the claimant produced a statement dated 13 April 2021 which is in detail, runs over two pages and is headed “*Health Overview Statement*”. There is nothing whatsoever in that statement about the claimant's back pain, either past or present. It is all about the condition of depression and anxiety. The claimant gave evidence on oath before me today but she did not add anything significant in her evidence on oath to those documents that I have referred to in the bundle. She had the opportunity to provide any additional medical evidence set out in paragraph 8 of the Case Management Order which was made on 17 March 2021 but she failed to provide anything. There is nothing even from her physiotherapist.
18. It is clear that the claimant suffers from back pain to some extent but, as she said, she manages it by massage and physiotherapy. Any back pain is of course unpleasant and will affect some normal day to day activities but the evidence before me falls well short of showing that her back pain caused substantial adverse effects on the ability to carry out normal day to day activities on a long term basis. It is the claimant's mental health problems which were her main impairment at the material time and that has been conceded already by the respondent as a disability. My finding is that the claimant was not at the material time, that is in 2017 to 2019, a disabled person by reason of a back impairment.

### **Application to strike out**

19. I turn now to the second main issue and that is the respondent's application for strike out of claims which the respondent asserts have been presented after the expiry of time limits and which the Tribunal does not have

jurisdiction to consider.

20. I have taken information from the claimant's list of issues which is at pages 157 to 163 and that list of issues are dealt with individually in the respondent's application for strike out at pages 164 through to 168. I should say I have also taken account of the respondent's skeleton argument and the claimant's skeleton argument and they have both made oral submissions during the course of this hearing.
21. Dealing with the paragraph numbers in the respondent's application for strike out. Paragraph 2 says this: "The claimant commenced early conciliation on 17 August 2019 and the Early Conciliation Certificate was issued on 17 September 2019. Employment Tribunal claims were accepted as presented for all respondents on 17 October 2019 and that was a decision of the Tribunal at the Preliminary Hearing on 17 March 2021. Paragraph 3 says: "Any claims relating to allegations prior to 18 May 2019 are prima facie out of time". Paragraph 4 refers to the List of Issues which are referred to in the body of the application and generally the respondent says in paragraph 5 that they apply for the following claims to be struck out under Rule 37(1)(a) of the Tribunals Rules of Procedure, that is on the basis that because of failure to comply with time limits for presentation of claims then the claims have no reasonable prospect of success because the Tribunal has no jurisdiction to consider them.
22. First of all, paragraph 6 deals with claims under Regulation 30 of the Working Time Regulations 1998 regarding a failure to provide daily rest breaks, weekly rest breaks or adequate breaks during her shifts and it reads as follows:

"The claimant last worked for the respondent on 29 August 2017. Any claim she sought to rely on should have been submitted no later than 28 November 2017. The claims were presented 21 months out of time. The claimant has presented no evidence to demonstrate that it was not reasonably practicable for her to have pursued this claim sooner. The respondent therefore submit that it was reasonably practicable for the claimant to have pursued her claims sooner and within the statutory time limits. The claimant had been able to partake in various internal procedures throughout 2017 and thus there is no suggestion that she was incapacitated to such an extent to be unable to pursue her claims. It is noted that she was only on sick leave for the respondent from 12 December 2017, thus she would have been able to pursue her claim within the statutory time limit."

23. So far as the statutory time limit for Regulation 30 was concerned it says this:

"An Employment Tribunal shall not consider a complaint under this Regulation unless it is presented before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted or in the case of a rest period or leave extending over more than one day the date on which it should have been permitted to begin or as the case may be the payment should have been made or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that

period of three months.”

24. I accept the dates which are set out in paragraph 6 as does the claimant because I asked her about those and she accepted those dates were accurate. I am not persuaded by the claimant’s assertions that her mental health problems meant she was unable to present any of her claims including this one to the Tribunal in time. She has produced no medical evidence to show that she was unfit to do so. Importantly, she clearly was able to take a meaningful part in the disciplinary process from September 2017 to January 2018 including attending an interview on 3 October 2017 and launching an appeal. Additionally, on 9 November 2018 she submitted a 16 page detailed grievance to the respondent. It was well researched and provided details of events and a wide range of relevant legislation was quoted in the grievance. The claimant is an intelligent person well able to conduct her own detailed research on legal issues and other matters.
25. I am also not persuaded that the claimant was not aware of her right to make complaints to an Employment Tribunal regarding these matters under Regulation 30 and other matters. Nor am I persuaded that she was not aware of time limits. She confirmed that she got advice from ACAS and did her own research in December 2017 to January 2018. It is self-evident that she did so because there are extensive references in her grievance and I simply take some quotes. She referred to employment rights stated in working time directives, standing up for employment rights, failure to implement working time directives, failure in implementing the Equality Act, ensuring compliance with all relevant health and safety legislation. She referred to a judicial test in a decision of the House of Lords. She referred to non-compliance with the Equality Act. She referred to definitions of harassment and victimisation and also the definition of disability in the Equality Act and also breach of legal duties under the Health & Safety Act. So it is clear that the claimant was well able to do her own legal research. She said she looked specifically at the Working Time Regulations and if she did so she would have seen that there were time limits in Regulation 30. I find it implausible having spoken to ACAS and done such detailed research she would not have enquired as to how she could enforce her employment rights and know about the existence of the time limits for doing so.
26. The appeal courts have looked at how the test of reasonable practicability should be applied. In the case of Palmer v Southend on Sea Borough Council [1984] ICR 372 the Court of Appeal conducted a general review of the authorities and it said reasonably practicable does not mean “reasonable” which would be too favourable to employees and does not mean physically possible which would be too favourable to employers but means something like “reasonably feasible”. In Asda Stores v Kauser [2007] EAT 0165/07 it was explained that the relevant test is not simply a matter of looking at what is possible but to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done. Where a claimant claims ignorance of his or her right to make a claim, that may make it not reasonably practicable to present a claim but the claimant’s ignorance itself must be reasonable. The test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them and, when a claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay.

That is because a claimant who is aware of his or her rights will generally be taken to have been put on notice as to the time limits.

27. In this case I do not accept that the claimant was not aware of her rights or that she was not aware of the time limits. But even if she was unaware, I find that ignorance in the circumstances I have described to be unreasonable. So far as para 6 of the respondent's application for strike out is concerned, I find that these claims under the Working Time Regulations were presented significantly out of time, that is 21 months late, but that it was reasonably practicable for them to have been presented within the time limit. That means that the Tribunal has no jurisdiction to consider the claims in paragraph 6 of the application and those claims are dismissed.
28. Turning to paragraph 7, claims for breach of contract and unauthorised deduction from wages regarding the non-payment of the National Minimum Wage. I will not read out that paragraph, it covers the same ground as the application under paragraph 6 and again it says that the claimant last worked for the respondent on 29 August 2017 but she exhausted her sick pay entitlement by 29 June 2018 and the claims were presented 20 months out of time. It is the same test here for these claims, that is the not reasonably practicable test under s.23 of the Employment Rights Act 1996 and Regulation 7 of the Employment Tribunal Extension of Jurisdiction Order of 1994. For the same reasons as under paragraph 6 I find that the Tribunal has no jurisdiction to consider these claims. The claimant accepts, as do I, that the dates are correct. The claims were presented 20 months out of time. I find it was, for the same reasons that I mentioned above in respect of paragraph 6, reasonably practicable for these claims to have been presented within the time limit. The Tribunal therefore has no jurisdiction to consider these claims and they are dismissed.
29. Then paragraph 8 relates to the claims for unlawful detriment contrary to s.47B of the Employment Rights Act 1996. Again, the same not reasonably practicable test is set out in s.48 of the Act. The claimant accepts that the dates are correct, as do I. For the same reasons as given above, I find that the respondent is correct that the claims were presented 16 months late and I reject as above the claimant's assertion that they were late because of her mental health. I find that these claims were out of time but it was reasonably practicable to bring the claims within the time limit. The Tribunal has no jurisdiction to consider these claims and they are dismissed.
30. Paragraphs 9, 10 and 11. Paragraph 9 refers to claims for victimisation contrary to s.27 of the Equality Act 2010. Paragraph 10 refers to claims for failure to make reasonable adjustments contrary to s.20-21 of the Equality Act. Paragraph 11 refers to claims for discrimination arising from a disability contrary to s.15 of the Equality Act. In respect of these claims, if they are out of time, the test for the extension of time is different from the paragraphs that I have described previously, paragraphs 6, 7 and 8. The test is, is it just and equitable to extend time? It has a wider scope than the not reasonably practicable test. It allows for more discretion by the Tribunal and I would normally expect a full merits hearing to consider claims for extension of time on the basis of the just and equitable test or claims for there being a continuing course of conduct after hearing all the evidence. I also consider that those matters under paragraphs 9, 10 and 11 are matters

which will be required in any event to be examined, and for evidence to be given on them, in order to determine the constructive unfair dismissal claim at the full merits hearing.

31. I therefore consider the question of whether the claims at paragraphs 9, 10 and 11 are out of time and whether time should be extended under the just and equitable rule or whether they are part of a course of continuing conduct should be a matter for the Employment Tribunal at the full merits hearing already listed on 1-9 December 2021.

**Other Matters**

32. I will now go on to deal with the other matters which I will need to hear some submissions on and that is clarification of the claims in the agreed list of issues, which respondent is the correct respondent in the case and what further Case Management Orders are required for the full merits hearing listed on 1-9 December.

*I confirm that these are my Reasons for the Judgment sent on 3 November 2021 in the case of Miss L Coltman v Staff Management Limited t/a Active Assistance case no. 3324356/2019 and that I have dated the Orders and signed by electronic signature.*

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Employment Judge Vowles

Date: 19 November 2021

Sent to the parties on:

22 November 2021

For the Tribunals Office