



EMPLOYMENT TRIBUNALS

Claimant: Ms M Fernandes
Respondent: Department for Work and Pensions
Heard at: East London Hearing Centre
On: 17 March 2022
Before: Employment Judge Burgher

Representation

For the Claimant: Ms J Twomey (Counsel)
For the Respondent: Ms S Garner (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was A by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT ON PRELIMINARY ISSUES

1 At the relevant time, the Claimant was disabled for the purposes of section 6 of the Equality Act 2010 by reason of:

- 1.1** Lower back pain. The Respondent accepts that sciatica is either a cause or symptom of the Claimant's lower back pain.
- 1.2** Depression and anxiety.

2 The Claimant no longer maintains that she is disabled by reason of migraines.

3 The Claimant's complaints that the Respondent has failed to make reasonable adjustments pursuant to sections 20 and 21 of the Equality Act 2010 in respect of the Claimant working from home for 22 July 2020 has been

presented outside the 3 month time limit and it is not just and equitable to extend time. The Claimant's claim in this regard is therefore dismissed.

4 The Claimant's complaints for indirect disability discrimination under section 19 of the Equality Act 2010, insofar as she refers to the PCP of being required to work from home, has been presented outside the 3 month time limit and it is not just and equitable to extend time. The Claimant's claim in this regard is therefore dismissed.

5 The Claimant's complaints in respect of section 44 of the Employment Rights Act 1996 have been presented in time and therefore the Tribunal has jurisdiction to consider them.

REASONS

1. The issues for me to determine at this hearing are:
 - 1.1 What the Claimant's disabilities are. The Respondent accepted that the Claimant was disabled by reason of depression and separately back pain. It accepted that sciatica was either a cause or symptom of back pain. The Respondent did not accept that the Claimant was disabled by reason of anxiety. The Claimant no longer sought to rely on migraines as a separate disability.
 - 1.2 Whether the Claimant's claims relating to indirect disability discrimination were presented in time;
 - 1.3 Whether the Claimant's claims that the Respondent failed to make reasonable adjustments were presented in time; and
 - 1.4 Whether the Claimant's complaints in respect of health and safety detriment were presented in time.
2. The Claimant gave evidence on her own behalf and was subject to cross-examination and questions from the Tribunal. I was also referred to relevant pages in an agreed hearing bundle.
3. The claim was submitted on 14 April 2021, and the Grounds of Complaint were substantively amended and served on 13 December 2021, following the Case Management Order made by EJ Russell on 15 November 2021. The ET3 and Grounds of Response were filed on 25 May 2021.
4. I was informed that the Claimant has now submitted a further Tribunal claim on 30 January 2022 (claim number 3200427/2022), which she seeks to consolidate with this claim. I am informed that that claim further alleges ongoing failure to make reasonable adjustments and indirect disability discrimination as well as a further claim of discrimination due to something arising due to disability concerning events since this claim was filed on 14 April 2021.

5. The further claim was not for me to consider at this hearing and the Respondent had not yet responded to it. I concluded that the issues in that claim must be addressed separately first, the conclusions formed in this matter could inform the progress of the additional claim whether by consolidation or otherwise.

Facts

6. I have found the following relevant facts.

7. The Claimant is employed as a Universal Credit Agent and commenced working for the Respondent on 26 January 2006. The Claimant is still employed by the Respondent.

8. On 6 November 2019, the Claimant returned to work from maternity leave to a role and was not provided with a special chair that was previously provided to her to use on account of her back pain. The Claimant was involved in a road accident on 24 November 2019 and was off work until December 2019.

9. Following an Occupational Health assessment, it was agreed on 23 January 2020 that the Claimant would be referred for an ergonomic furniture assessment (EFA). No EFA took place before the Claimant commenced special leave on 10 March 2020 to undertake childcare responsibilities arising from COVID lockdown. The Claimant's special leave was extended to account for the fact that her son was medically vulnerable.

10. On 22 July 2020, the Claimant was designated as working from home, instead of special leave. As the Claimant's son was medically vulnerable she was not required to attend the office at all. The Claimant was provided with a surface pro laptop to be able to work from home.

11. Around this time, the Claimant intimated to Alan Bowley, deputy manager, that an EFA was necessary to provide her with appropriate furniture to work from home. However, from 4 August 2020, the Claimant's ability to work from home was undermined by not being able to use the Smart Card to facilitate remote access to the Respondent's system. The Claimant sought to contact the Respondent's IT system to resolve this. It was subsequently suggested that the Claimant attend the office to resolve this. The Claimant was reluctant to do so due to fears relating to contracting COVID and her medically vulnerable son. To no avail.

12. During this period the Claimant was able to access the internet from home and make and receive telephone calls. She was also undertaking some duties as a Trade Union Health and Safety Representative when they arose from time to time.

13. The Claimant's baby son was hospitalised for 5 days with breathing difficulties at the end of September 2020 which necessitated a further period of absence.

14. The Claimant's line manager, Lara Olukotun, sought to contact the Claimant from September 2020 to seek to resolve the Smart Card issues for the Claimant to be able to work. The Claimant alleges that the manner, frequency and context of

Ms Olukotun's contact with her amounted to detriment following raising health and safety concerns of returning to work in the COVID pandemic pursuant to section 44 of the Employment Rights Act 1996. The Claimant alleges that during this period Ms Olukotun also threatened to remove the Claimant's arrangement to work from home.

15. The Claimant was signed off work by her GP with 'work related anxiety' from 27 November 2020 to 1 January 2021. Before me, the Claimant's medical documentation and impact statement evidencing anxiety at the relevant time is sparse. However, the occupational health report dated 17 February 2021 states that:

"A well validated mental health evaluation conducted today with [the Claimant] has indicated severe anxiety and depression"

16. When questioned on her anxiety, as distinct from depression, the Claimant stated that there were medical records extending back evidencing this. These records were not provided because, apparently, they could not be redacted in time for the hearing.

17. The Claimant stated that she has suffered with anxiety on a daily basis for a number of years and she struggles with constant fear that bad things will happen. She stated that she has suicidal thoughts and her fears are debilitating resulting in her thinking that small things will have bad consequences. She referenced the medication she receives for depression as relevant to her anxiety as well.

18. Whilst there is limited documentary evidence provided to support the Claimant's oral evidence, I accept what she has said in this regard.

19. The Claimant wrote a number of emails to Ms Olukotun expressing concerns, including outlining some of her legal entitlements on 10, 26 November 2020 and 1 December 2020.

20. Whilst off work in December 2020, the Claimant wrote to express her concern that the EFA had not been completed in order for her to work from home. She requested an EFA to be undertaken.

21. Ms Olukotun responded on 6 January 2021 stating:

"When your access to the system has been resolved, you will be required to complete a personal DSE homeworking assessment which will identify any adjustments / work station equipment that you may require. This is completed via the TARAHS application which is accessed when you are back online. Any adjustments / equipment / furniture that you may need to support you are arranged following completion of this assessment."

22. Ms Olukotun was concerned that the Claimant's Smart Card issue was unresolved and again invited the Claimant to attend the office and indicated that the Claimant would be placed on special leave without pay from 19 January 2021 if the matter was not resolved by then.

23. The Claimant submitted a grievance on 12 January 2021 and was signed off for sickness on the same date. The Claimant's sick leave was subsequently extended and she remained off sick, contacted ACAS and commenced proceedings.

24. The Claimant contacted ACAS on two occasions. The first ACAS certificate number, R109162/21/49 had an EC notification date 2 February 2021 and an EC Certificate date of 12 March 2021. The second ACAS certificate number, R122350/21/85 had an EC notification date 16 March 2021 and an EC certificate date 16 March 2021. This certificate number is used in the ET1.

25. The Claimant issued her claim to the Tribunal on 14 April 2021.

26. The Claimant witness statement stated that she was unaware of the time limits for bringing Employment Tribunal claims before late 2021, and that she could not have issued her claims earlier as she lacked the knowledge and confidence to commence a claim without assistance. Her self-confidence was often very low and she suffered with depression and anxiety throughout the period. The Claimant was also shielding her medically vulnerable son from March 2020. He was hospitalised at the end of September 2020 and still ill until November 2020. The Claimant was also the sole carer of 3 children, two of school age, who were not attending school and had to be home schooled because of the Covid Pandemic.

27. At the same time, the Claimant states that she was performing her Trade Union Health and Safety Representative duties even though she could not access the Respondent's systems to do other work.

Law

Disability

28. Section 6 of the Equality Act 2010 states:

- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

29. When considering disability, it is necessary for the Claimant to establish that she was disabled at the relevant time. Whilst evidence of condition after the relevant time can be used to imply disability at an earlier period, all the evidence should be considered.

30. As mentioned in the factual findings above, the medical evidence and impact statement is sparse in evidencing anxiety as a separate disability. However, I accept the Claimant's oral evidence and conclude that the Claimant has suffered with anxiety for a number of years, this has a debilitating effect on her day-to-day activities and she has medication to lessen these adverse effects.

31. I therefore conclude that the Claimant is disabled by reason of anxiety and as such was disabled in this respect at the relevant time period for the claim.

Time limits

Equality Act complaints

32. Section 123 of the Equality Act 2010 states:

123 Time limits

- (1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 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.
- (2) ...
- (3) For the purposes of this section—
 - (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.

33. The Tribunal’s discretion to extend time is wide but Auld LJ observed in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 at [25]:

“there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule”.

34. In the same context Sedley LJ remarked in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 at [31] and [32] that there is “no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised” and that whether to grant an extension “is not a question of either policy or law” but “of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it”.

Conclusions

35. The ET1 was presented on 14 April 2021. EC notifications were received by ACAS on 2 February 2021 and 16 March 2021 and the ACAS certificates were issued on 12 March 2021 and 16 March 2021.

36. If the earlier EC Certificate is relied on the date of the last act for the claim would be 3 November 2020, and the Claimant would have to give reasons as to why it was not reasonably practicable (s.44 ERA claim) to bring the claim by 12 April 2021, or why jurisdiction should be extended on just and equitable grounds (for the EqA claims) relied upon by the Claimant.

37. If the second EC Certificate is relied on, as per the ET1, the claim was issued within the 'one month plus one day' window prior to the date of the last act which would be 17 December 2020. I use this date as for the purpose of considering the time limits.

38. Ms J Twomey referred me to the 4 page list of issues [pages 75 – 78] of the bundle in the context of time limits. Discussion ensued to clarify the PCP's the Claimant sought to rely on. The focus of the Claimant's claims for reasonable adjustments and indirect discrimination was being required to work from home without appropriate office equipment and not sourcing the necessary equipment with sufficient urgency. It seemed that the Claimant was seeking to elide the PCP with the adjustment sought. In any event, the Claimant's section 44 ERA claim is predicated, somewhat contradictorily to the disability discrimination complaints, not on a requirement to work from home but to attend the office contrary to the Claimant's health and safety concerns. I consider this contradiction as part of the determination of the time limit issues.

39. The case of Matuszowicz v Kingston Upon Hull City Council [2009] ICR 45 was referred to as how a Respondent might reasonably have been expected to make the adjustments should be viewed. The Tribunal is charged with determining when the Respondent might reasonably have been expected to make the necessary reasonable adjustments, and that date should be the start date for bringing the claim.

40. In any event, the case as pleaded, is not one of reasonable adjustments followed by repeated refusals that amounted to conduct extending over a period (s.123(3)(a)) as held in the case of Cast v Croydon College [1998] IRLR 318.

41. Reasonable adjustments are adjustments that will enable the Claimant to do the job or allow her to remain in employment. It is evident that, from 4 August 2020, the reason the Claimant was unable to do her job was the Smart Card access, not lack of suitable furniture. Therefore, the Claimant would not have been able to undertake her role at home at the time even had the required furniture been provided for the PCP to be engaged. The Smart Card issue, which was relevant to the section 44 ERA claim was the barrier to employment from 4 August 2020 and as such the furniture PCP claims were academic until the Smart Card computer access was resolved. The Claimant's PCP claims therefore, on the face of it, have little reasonable prospects of success.

42. The Claimant was designated as working from home on 22 July 2020. From 4 August 2020 the Claimant was unable to undertake her main duties due to the Smart Card access difficulties which are connected to the Claimant's section 44 ERA detriment complaints. The Smart Card access was not resolved before the Claimant commenced sick leave on 12 January 2021. In view of the failure to provide an EFA earlier in the year in relation to working in the office, I conclude that the period 22 July

2020 to 4 August 2020 was a reasonable period, for the purposes of section 123(4)(b) EqA, for the Respondent to act. I therefore consider that the last act for the time limit in relation to providing furniture and equipment for the Claimant ended on 4 August 2020. The Claimant therefore should have contacted ACAS by 3 November 2020.

43. The Claimant has therefore presented her disability discrimination complaints out of time.

44. When considering whether it is just and equitable to extend time for the Claimant's PCP related disability discrimination complaints I have considered and balanced the following:

- 44.1 The length of delay in bringing the claim;
- 44.2 The Claimant's ill-health, depression and anxiety;
- 44.3 Her parental responsibilities and poor health of her baby son;
- 44.4 Her stated lack of knowledge of ET time limits;
- 44.5 Her ability to access internet;
- 44.6 Her role as a Trade Union Health and Safety representative;
- 44.7 Her emails complaining and reiterating her rights and potential action of 10 and 26 November 2020 and 1 December 2020;
- 44.8 The contradiction between the PCP requiring the Claimant to work from home without equipment against being required to attend the office (section 44 claim);

45. The Claimant contacted ACAS on two occasions and subsequently presented her claim on 14 April 2021. I conclude that in the circumstances and given the matters she was raising in her emails and in her grievance, she ought reasonably to have enquired about the time limits before she stated that she did.

46. The Claimant remains employed and brings complaints relating to PCP equipment matters occurring after her return to work, in June 2021, following sickness absence.

47. In view of balancing the above factors the Claimant has not convinced me that it is just and equitable to extend time for her reasonable adjustments and indirect disability discrimination complaints. The balance of prejudice favours the Respondent in not being put to the cost and time of having to defend dated claims against a current employee which, given the intervening Smart Card access issues, have little reasonable prospects of success. These claims are therefore dismissed due to the Tribunal not having jurisdiction to consider them.

Section 44 Employment Rights Act complaints

48. Section 48 of the Employment Rights Act 1996 states:

An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44, 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G

- (2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
- (3) An employment tribunal shall not consider a complaint under this section unless it is presented—
 - (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
 - (b) 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.
- (4) For the purposes of subsection (3)—
 - (a) where an act extends over a period, the “date of the act” means the last day of that period, and
 - (b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.
- (4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).
- (5) In this section and section 49 any reference to the employer includes—
 - (a) where a person complains that he has been subjected to a detriment in contravention of section 47A, the principal (within the meaning of section 63A(3)).
 - (b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.]]
- (6) In this section and section 49 the following have the same meaning as in the Agency Workers Regulations 2010 (S.I. 2010/93)—
 - “agency worker”;
 - “hirer”;
 - “temporary work agency”.

49. In relation to the Employment Rights Act time limit provisions, the issue is whether it was reasonably practicable to have presented the claim in time.

50. I consider the guidance in the case of Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, CA per May LJ at paragraph 35 in respect of the test of reasonable practicability. This is also construed as assessing what is reasonably feasible or what is reasonably capable of being done. I am aware that there are numerous factors that a Tribunal can properly consider when determining whether it is reasonably feasible.

51. When considering whether it is reasonably feasible to have been done, modern methods of obtaining information and communication mean ignorance of the law is no excuse.

52. On the pleadings, I conclude that the Claimant's claims against Ms Olukotun are part of an alleged series of similar acts or failures from September 2020 until the Claimant left was threatened with being placed on special leave on 19 January 2021. The Claimant's claims in this regard are therefore in time and the Tribunal has jurisdiction to consider them.

Employment Judge Burgher
Date: 30 March 2022