EMPLOYMENT TRIBUNALS

Claimant: Ms J Rooney
Respondent: The Turner Home

HELD AT: Liverpool **ON:** 24 & 25 March 2022

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Mr Flood, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

The Tribunal does not have the jurisdiction to consider the claimant's complaint of unlawful discrimination which was presented after the end of the relevant time limit, it was not just and equitable to extend the time limit to the 27 February 2021 and the claims are dismissed.

REASONS

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP video fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
2. This is a preliminary hearing to consider whether the claimant has filed her complaint form within the statutory time limit and if not. Whether it was just and equitable to extend the time limit. The claimant claims of unfair dismissal, disability discrimination and arrears of pay.
3. It is now undisputed between the parties that the statutory time limit expired before the claimant took part in ACAS early conciliation which commenced on the 13 January 2021 until the 24 February 2021, the date of the ACAS certificate. The claim form was received on the 27 February 2021.

4. The hearing was originally listed for 3-hours, but as a number of adjustments were necessary for the claimant, including many breaks and time for her to read documents, it took all day and was adjourned to give the claimant an opportunity to look for additional documents to be produced before oral submissions were given today. It became apparent as the claimant was giving her evidence that she had documents on her phone received and sent to ACAS that may be relevant to the time limit issue. The claimant relied on the documents to answer some of her questions, she was then ordered to disclose all documents and after some had been emailed to the Tribunal and respondent (for the first time) it became apparent when the claimant was answering further questions on cross-examination that there were documents on her phone which had not been disclosed. This afternoon the claimant confirmed there were no additional further documents to those sent to the Tribunal yesterday, which did not assist the claimant was they were largely concerned with early conciliation and the part played by the ACAS conciliator.
5. I sent the parties a note dealing with the law and the legal principles I will be applying in order that the claimant, who is a litigant in person, has the opportunity to make oral representations on the issues before a decision is made. The claimant sent an email to the Tribunal on the 25 March at 14.47 setting out details about her interactions with ACAS and the Citizens Advice Bureau (”CAB”) concerning her appeal against dismissal. The claimant stated she was not made aware of time limits until conversations with the ACAS early conciliator on the 13 January 2021 which I found surprising given the earlier involvement of ACAS when it is usual practice for time limits to be discussed with prospective litigants.
6. The claimant is disabled for the purpose of section 6 of the EqA, she remains in poor health and has been involved in distressing family issues. It was agreed with both parties that as this judgment and reasons will be placed on the public register I will limit references to the claimant’s absences and poor health as the “claimant’s health problems” and distressing family circumstances as “family difficulties” to assist the claimant, who did not rely on either as an explanation for proceedings not being issued within the primary limitation period or such other period afterwards. The evidence before me was that the claimant, whilst her personal circumstances were very distressing due to family difficulties, it did not prevent her from seeking advice, corresponding with the respondent and researching the internet, which is to the claimant’s credit and resilience.

<u>The claimant’s pleadings</u>

7. The Grounds of Complaint are confusing and the claim is badly pleaded by the claimant, who was and remains a litigant in person. Sometime was spent with the claimant clarifying her claims today, in order to ensure I and the respondent understood how she was putting her claims. The claimant, who was employed as a cleaner at the time, includes in the Grounds of Complaint a claim of bullying by a manager [GG] between 2015 to 2018. The claimant’s role changed and she was moved away from that manager to work as a painter/decorator in a different department. The claimant then raises a number of other different complaints that

she was not provided with the materials to carry out the painting/decorating role and a manager/male member of staff was jealous of her. The claimant explained in her Grounds of Complaint that she went on sick leave, did not have enough money on sick pay to pay the rent and asked the respondent to dismiss her "as I needed to claim benefits to help with the rent." Despite setting out the circumstances of her dismissal in her claim form, at today's hearing the claimant attempted to change this version of events and it is clear that her memory of these events may have been affected.

8. The claimant's allegation that she was told her job would be left open when it was not remained constant, and it became apparent that this was the key issue as far as the claimant was concerned as she believed herself to have been unfairly dismissed on the basis that she was not allowed to return to work when she wanted to, a few weeks after dismissal. The claimant claimed damages for a "false promise of a pay rise" that never occurred after she had taken on the role of painter/decorator. Reference was made to her contacting ACAS upon being told her job was no longer open, which the claimant reiterated today, explaining she had taken advice on appealing the decision to dismiss because she did not think it was fair the respondent refused to take her back when it had promised to do so. There was no indication the claimant had taken advice from ACAS concerning a possible disability discrimination complaint, despite her assertion today that she believed discrimination had taken place as far back as 2015.

9. In the Grounds of Response the respondent referenced the sickness absences taken by the claimant; 30 December 2019 to 16 March 2020, 19 March 2020 to 3 August 2020 and 7 August 2020 to 5 October 2020 when the claimant was dismissed for capability, the claimant's GP having written to the respondent stating she was not fit for work. The claimant asked to return to work on the 2 November 2020, which was refused and the claimant (who was no longer an employee) was allowed to appeal, and at the appeal meeting indicated she did not want her job back but wanted payment of damages.

<u>Preliminary hearings</u>

10. A preliminary hearing took place on the 30 June 2021 and the issue of time limits was discussed together with the claimant's disability status, which was disputed. The claimant relied on depression, anxiety and PTSD which have since been concede by the respondent as disabilities under section 6 of the Equality Act 20210 ("EqA"). The case management summary recorded the claimant's claim concerned bullying by a manager before September 2018 when she changed her role to a painter/decorator, following which the claimant complained that she was required to work alongside a "jealous" colleague and that there was not sufficient supplies and materials. The unlawful deduction of wages/breach of contract claim was also discussed, and all the money claims including unfair dismissal, were withdrawn and dismissed in a Judgment sent to the parties on the 18 January 2022 following the second preliminary hearing held on the 10 January 2022. All that remained was the claimant's disability discrimination complaints.

Further information provided by the claimant

11. By the time of the second preliminary hearing the claimant had provided a lengthy document by way of an email sent on 4 August 2021 that included a calculation damages from June 2016 to October 2020 referencing "work related stress" together with injury to feelings and future loss of earnings year by year. The claimant went into great detail about the allegations concerning the manager who bullied her, the transition to painter/decorator including an allegation that a colleague banged on the window which she found to be intimidating. The complaint started in January 2016 through to October 2020, and the details are extensive, the majority of which were not included in the original Grounds of Complaint or raised by the claimant at the first preliminary hearing. Eight people were named, and a further two colleagues as witnesses. The further information ran to 13-pages which did not clarify the claims and read more like a witness statement detailing every complaint the claimant had thought of throughout her employment, a number of which were not raised or suggested in the original Grounds of Complaint and to which the respondent objected as the claimant had not sought the Tribunal's leave to amend.

12. With reference to the dismissal the claimant repeated she was not well enough to return to work having been signed off by the GP since December 2019 and approached HR because she was "struggling financially" and behind on her rent. The claimant alleges today it was suggested she left on a "temporary basis" and would need to be offered other jobs first. The claimant requested a letter dismissing her in order that she could claim Universal Credit and housing benefit, which she was sent together with a cover letter stating she would be welcomed back "in a heartbeat." The claimant did not agree the contents of the dismissal letter, and her GP "advised that it was not a good idea for me to return [to work]" when she had difficulties getting benefits and informed the respondent of this. On the 10 November 2020 the claimant asked to return to work for 16 hour per week, and was told on the 18 November 2020 the role of painter/decorator was no longer needed because of Covid 19 outbreak, the death of a number of residents and the respondent was in financial difficulties as a result. At this hearing today the claimant maintained that despite the GP's advice that she was not well enough to work, she was well-enough to work and in the past had attended work when a fit note confirming she was not well had been submitted by her. The claimant did not state her dismissal and the respondent's subsequent refusal to re-engage her was an act of disability discrimination.

13. The claimant recorded that she made contact with ACAS on the 19 November 2020 and informed the respondent she was submitting an appeal to the unfair dismissal. The claimant explained that the reason for her "lateness" for issuing these proceedings was that she only became aware her role of painter/decorator was "permanently closed" on the 18 November 2020, which made no sense. Once the claimant believed she had been unfairly dismissed she was on notice as to time limits, details of which were easily discoverable on the internet, through the CAB and ACAS. As the claimant has withdrawn the unfair dismissal complaint the fact she issued her unfair dismissal out of time and subsequently withdrew it was not a deciding factor in relation to the disability discrimination complaints, where the test is different.

14. The respondent filed draft amended Grounds of Resistance dated 11 October 2021.

Claimant's email sent on 1 July 2021 explaining the late claim

15. In an email sent on the 1 July 2020 the claimant explained why her claim had been submitted late that ran to 7-pages which included a reiteration of the claims she had expanded in the 4 August 2021 email together with additional complaints, which the respondent objected to.

The claimant's oral evidence

16. The Tribunal heard evidence from the claimant under affirmation. Her evidence was confusing, incoherent and contradictory as to why the time limit had been missed, and she was unable to offer any reason for failing to take action in relation to the allegations concerning the alleged behaviour of previous managers. In cross examination the claimant was taken to her email sent to Tom Bernard on the 1 February 2022 where she sets out the dates of the alleged discriminatory incidents that were further clarified at this hearing as follows;

16.1 23 June 2016 to 27 August 2018 that included a number of allegations concerning alleged bullying by GG towards members of staff for which GG was suspended and dismissed, and the claimant moved to another department. The last act was 27 August 2018 and I accept Mr Flood's submission that the respondent would be "severely" prejudiced if this claim was allowed to proceed as GG had been out of the business for some time, the allegations went as far back as 2016, and witnesses (if any) would either have left employment as a result of the effect of Covid19, their memories would be impaired and contemporaneous evidence was no longer available. In short, the respondent would effectively be defending the claims with "one arm tied behind its back."

16.2 In September 2018 after the claimant started her new role as painter/decorator managed by EB who gave her no structure, bills for materials were unpaid by the respondent and when EB was off on holiday the claimant could not carry out painting jobs at a height without his help. She alleged EB showed "signs of jealousy" if a male member of staff talked to her, and other people in the organisation alleged she was having an affair with him and another man at the time. The claimant alleged EB had spoken to her in anger on the 3 and 31 January 2019, 5 March, and 17 June 2019 when EB slammed a door, threw materials and did not talk to the claimant.

16.3 With reference to EB nothing further was alleged between 17 June 2019 and 2 June 2020 (the date provided by the claimant in her further information) when he allegedly knocked loudly on a window . The problem for the claimant was that as at the 2 June 2020 she was absent from work, the GP having provided a Med3, confirmed the position in the GP records, and this was accepted by the claimant under cross-examination, albeit reluctantly. The claimant was also taken to the letter dated 31 March 2021 dealing with her appeal against dismissal that set out all her dates of absence from 30 December 2019 through

to 5 October 2020, that included 20 March 2020 to 19 July 2020 as sick leave, which was not disputed by the claimant. Mr Flood described the 2 June 2020 as "chronologically homeless" and it was clear to me the claimant had difficulty in recollecting when the alleged incident took place, and this underlines the prejudicial effect of the claimant's delay in issuing discrimination proceedings, the lack of cogency of her evidence, and the prejudice caused to the respondent when defending a claim presented so late.

16.4 Turning to the allegations concerning the respondent's failure to provide the claimant with painting equipment, I struggle to see how this can be a disability discrimination complaint brought under section 15, even had the last alleged act occurred 3-months before the claimant took part in ACAS early conciliation, which on the claimant's account it had not. This must be right given the claimant's ongoing lengthy absences. The claimant was unable to detail this allegation and provide specific dates and explain the causal connection as a basis of her disability claim.

16.5 The same point arises in respect of the claimant's allegation that she was "classed as maintenance" because EB was described as "maintenance" by EW from HR on the 26 April 2020, and further, on 12 October 2020 EW from HR did not answer the claimant's phone call because EW was upset after an argument with her partner, allegations which appeared to be unconnected to disability discrimination given the claimant worked as a painter/decorator in what could be described as "maintenance."

17. The claimant confirmed to the Tribunal the last discriminatory act she relied upon was 26 March and possibly, the 25 June 2020. Mr Flood, in oral submissions, invited the Tribunal to read the medical records, which I have done. It is not easy to establish the dates of the record from the shared files, but it is clear from the 2018 records GG and the claimant were friends, the claimant was suffering from anxiety and depression, "work have been v supportive wrt recent and have switched her role to painting/decorating and away from her prev manager…" and reference was made to external pressures away from work including neighbours. On the 3 January 2019 the GP record confirmed GG had been suspended and the claimant moved departments, which the claimant stated under cross-examination this was the case, and GG had been dismissed for bullying employees. In the March 2020 GP records the claimant's anxiety over the Covid 19 pandemic was referenced, and in the GP record entered on 22 April 2020 she was described as "struggling" with "chronic anxiety that waves and wanes" and felt she was a non-essential worker. By the 1 June 2020 the claimant had started interpersonal therapy and a MED3 was issued for a month until 30 June 2020, when the claimant was "asking for longer off work." The claimant's evidence that she was at work during this period and disability discrimination had taken place was mistaken, and it is clear the claimant's recollection faulty.

18. The GP record entered on the 13 August 2020 records "tried rtw and lasted the morning has tendered resignation would have to work notice requesting new note". A MED3 was issued. In the GP record entered on 21 September 2020 the claimant was described as suffering from "mild anxiety and depressive disorder" and requested from the GP a letter "to state she is not well enough to do her current job role this will enable work to finish pt's job and she can claim UC [Universal Credit] adv will do letter…"

19. The final GP record in the sequence, which is undated but may have taken place on 23 November 2020 according to the claimant's evidence the appointment took place after the claimant was told her role was no longer open, the claimant continued to be described as suffering from "mild anxiety and depressive disorder" and feeling "very upset when approached work last week as was told that job has not in fact been kept open…has been in touch with ACAS and intends to appeal this decision…also struggling financially…she only has issues with colleagues such as bulling and intimidating behaviour feels HR not resolved her previous work issues…" A MED3 was issued signing the claimant not fit for work from 23 November 2020 to 21 February 2021 underlining the fact that whilst the claimant wanted to return to work she was not fit enough, even if her position had been left open.

The law and conclusion

20. The time limit within which claims to the employment tribunal must be brought is set out at section 123 of the Equality Act 2010 which at the relevant time provided: "(1) … 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. […] (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." It is undisputed the statutory time limit expired before the claimant took part in ACAS early conciliation which commenced on the 13 January 2021 until the 24 February 2021, the date of the certificate.

Extending the Time Limit – "Just and Equitable" Test

21. Whilst s.123(1)(b) EQA allows a Tribunal to consider a complaint out of time where it is just and equitable to do so, there is no presumption that the Tribunal should exercise its discretion to extend time. Furthermore, a Tribunal should not extend a time limit unless the Claimant can demonstrate that it is just and equitable to do so as confirmed in the Employment Appeal Tribunal case of *Robertson v Bexley Community Centre [2003] IRLR 434*. Ms Rooney has not demonstrated it was just and equitable to extend time in the particular circumstances of her case taking into account that the exercise of discretion should be the exception rather than the rule. This approach was approved by the Court of Appeal in *Department of Constitutional Affairs v Jones [2008] IRLR 128.*

22. I referred the parties to *British Coal Corporation v Keeble [1997] IRLR 336*, where the Employment Appeal Tribunal indicated that the Tribunal's discretion is as wide as that of civil courts under section 33 of the Limitation Act 1980. It is accepted by both parties that there is no legal obligation to go through the list (*Southwark London Borough v Afolosi [2003] IRLR 220*) and the Tribunal is entitled to consider anything that it deems to be relevant (*Hutchinson v Westwood Television Ltd [1977] IRLR 69]).* I have worked through the relevant

aspects of the list set out in *Keeble* as a framework to ensure none of the relevant matters were omitted.

The prejudice each party would suffer if the extension was refused.

23. The balance of prejudice lay in the respondent's favour. The delay has prejudiced the respondent in respect of matters such as investigation and obtaining evidence relating to all of the complaints, particularly those against GG who is no longer employed by the respondent, against whom the complaints to back to 2015/2016.

The length and reasons for delay

24. The length of the delay is excessive, and the claimant has been unable to provide a coherent reason for it. The claimant's ill-health or family circumstance were not the reason according to evidence given by the claimant, who was unable to attribute any act on her part to the delay which she maintains she was ignorant of until entering early conciliation and speaking with the early conciliation officer in January 2021. I took the view the claimant was mistaken in her recollection, and had she discussed disability discrimination with ACAS in or around the 19 November 2020 as she maintains, ACAS would have advised on the statutory time limit and it was apparent so late in the day that the claimant was already out of time. I concluded the claimant's recollection was confused, and her conversation with ACAS (according to the GP record and contemporaneous documentation) concerned unfair dismissal and an appeal with no reference to disability discrimination until early conciliation by which the time the claimant had made it clear at appeal stage she did not intend to work for the respondent even if offered, and was seeking damages from the respondent.

25. It is important for the claimant when she is seeking an extension of time to provide an explanation for the delay, and she has not provided a coherent explanation. There was a suggestion ACAS had advised her incorrectly on the 19 November 2020, but there was no evidence before me to that effect. I concluded the claimant had not undertaken ACAS early conciliation and issue proceedings within the relevant statutory period extended because she did not believe disability discrimination had taken place i.e. in oral evidence the claimant conceded GG had been suspended and dismissed for bullying employees in the plural. It is a matter of logic GG's actions were not exclusively aimed at the claimant because she was disabled if other employees were bullied at the same time, and GG was suspended and dismissed for this.

The extent to which the cogency of the evidence is likely to be affected by the delay.

26. I accepted Mr Flood's submission that the cogency of the evidence has been severely been affected by the substantial delay. This is supported by the respondent's difficulties in understanding the case it has to meet and the claimant's difficulties in pinpointing some of the dates of the alleged discrimination.

27. Prior to oral submissions, I sent the parties details of the case law I may rely upon, and included the EAT decision in *Secretary of State for Justice v Mr Alan Johnson* [2022] EAT 1 and the Court of Appeal decision in *Adedeji v University Hospitals*

Birmingham NHS Trust [2021] EWCA Civ 23 where Underhill LJ at paragraphs 31 to 32 considered whether an employment tribunal in analysing a claim that had been submitted a matter of days outside the statutory time limit was entitled to take into account the fact that allowing an extension of time would result in consideration of matters that had happened a considerable time before the submission of the claim, because the claim included complaints that went back over a considerable period of time. I took the view the principles were relevant in connection with the claimant's claims, including the historical claims going back to 2015/2016 through to 2020 involving different people including a manager who had been dismissed some time ago, where in the words of Underhill LJ at para 31. "…the substance of the claim concerned events which had occurred long before the formal act complained of, and that the evidence of those events was likely to be less good than if a claim about them had been brought nearer the time…Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less undesirable in principle. **As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago** [my emphasis]. On the facts of this case the Judge clearly had in mind both the respects in which the events of late 2016 were historic…and she also had in mind the fact that the Appellant could have complained of them in their own right as soon as they occurred or in May... She does not, rightly, treat this factor as decisive: in fact, as I read it, she placed more weight on the absence of any good reason for the delay. But what matters is that she was entitled to take it into account." I have analysed and taken into account the claims as recorded above and their effect on the exercise of my overall discretion, concluding the cogency of the evidence to be provided by both the claimant and respondent's witness and contemporaneous documentation was likely to be severely affected by the delay not of days but years and months on the part of the claimant.

<u>The promptness with which the Claimant had acted once she knew of the possibility of taking action, and the steps taken by the Claimant to obtain professional legal advice once he knew of the possibility of taking action.</u>

28. The claimant did not act promptly, even if I were to take into account the existence of an appeal against the dismissal as argued by the claimant. If the claimant's own account was to be believed, she was informed in early January 2021 of the time limits. In the email sent by the claimant to the Tribunal the claimant wrote "I contacted ACAS 13/01/2021 as I still hadn't received an appeal date from the Respondent and that is the date I was told to issue a certificate and a Conciliator David Jones would be calling myself to go through the process. It was when speaking with David Jones, I was only then made aware that I was late with my claim as there is a three-month time limit." Early conciliation took place between 13 January 2021 until the 24 February 2021, the date of the certificate. The claim form was received on the 27 February 2021, despite the claimant being made aware of the time limit issues on 13 January 2021 it still took her over three-weeks to issue proceedings dealing with events that allegedly occurred between 2015/2016 through to mid-2020.

29. The Tribunal has a wide discretion to consider whether it is just and equitable to extend time in discrimination cases. It can take a wide range of factors into account all. The EAT in British Coal Corporation –v- Keeble and others (1997) IRLR 336 which is a case involving claimants bringing sex discrimination claims in respect of voluntary redundancy payments, which were a year over time, suggested that Tribunals would be assisted if they considered the factors listed in Section 33 of the Limitation Act 1980. I have also considered the prejudice which each party would suffer as a result of the decision reached, and recognise that the claimant will feel herself to have been prejudiced if she is unable to take her claim forward, and the respondent will feel prejudice if the case proceeds to trial. Given the passage of time and the claimant's own poor recollection of the dates and detail of her allegations, taking into account the balance of prejudice and the right for the parties to have a fair hearing. the respondent was caused greater prejudice than the claimant due to the lengthy delay, fading memories and the fact that key witnesses had left their employment with it some time ago.

30. I have also taken into account the fact the claimant appears to have a weak case on paper that has no reasonable prospect of success, there is no arguable case on the possibility of a continuing act and the cogency of the evidence is likely to be affected by the delay, concluding that it was not just and equitable to extend the time limit in which to lodge proceedings. In conclusion, the Tribunal does not have the jurisdiction to consider the claimant's complaint of unlawful discrimination which was presented after the end of the relevant time limit, it was not just and equitable to extend the time limit to the 27 February 2021 and the claims are dismissed.

Employment Judge Shotter 30.3.22

JUDGMENT & REASONS SENT TO THE PARTIES ON

24 May 2022

FOR THE TRIBUNAL OFFICE