CASE NO: 2602768/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss Danielle Mortimer

Respondent: Derby City Council

Heard at: Nottingham **On:** 30 June 2022

Before: Employment Judge Broughton (sitting alone)

Representation
Claimant: In person
Respondent: Ms Brown, Solicitor

JUDGMENT having been sent to the parties on 10 August 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT FOLLOWING AN OPEN ATTENDED PRELIMINARY HEARING

1. The complaint of discrimination which it is alleged took place on 25 June 2021, was brought outside the time limit pursuant to section 123 (1) (a) of the Equality Act 2010 (EqA) however, it was presented within such other period as the Employment Tribunal thinks just and equitable under section 123 (1)(b) EqA. The Tribunal has jurisdiction to hear this complaint and time is extended to allow the claim to be presented on 2 November 2021.

2. Whether the complaints relating to events which pre date 25 June 2021, were brought within time is a matter to be determined at the final hearing.

REASONS

Background

1. The claims are of pregnancy/maternity discrimination brought pursuant to section 18 Equality Act 2010. The complaints relate to the suspension of the Claimant on 5 March 2020, the handling of the suspension, the alleged attempt by Ms Flannery, Head of Service to pursue disciplinary matters against the Claimant, delay in communication of the outcome to the grievance appeal and sending out her grievance appeal outcome letter to the wrong person.

2. At a case management hearing on 3 May 2022, Employment Judge Smith set the case down for today's hearing because the claims had not been presented within the three month time limit prescribed by section 123 (1)(a) Equality Act 2010 (EqA), in that the last alleged act of discrimination took place (on the Claimant's case) on 25 June 2021.

3. There is only one issue to be determined today, namely whether the claim presented by Miss Mortimer on **2 November 2021** was brought within time pursuant to the time limit prescribed within section 123 of the Equality Act 2010, based on the last act being the 25 June 2021.

4. The Respondent is not seeking to address or challenge today the issue of whether the acts (there are a number) prior to 25 June 2021 are acts which fall within Section 123(3)(a) EqA, i.e. conduct extending over a period. Quite sensibly, it is accepted by the Respondent that whether they form such conduct would be a matter better left for determination at the final hearing, if the case is to proceed. For the avoidance of doubt therefore, this hearing and my judgement, does not deal with any of the claims which predate **25 June 2021** and whether those claims are brought in time or not.

ACAS

5. The primary time limit expired on **24 September 2021**. The ACAS early conciliation period started on 27 September 2021, three days outside of the expiry of the primary time limit and thus the parties accept, the period of conciliation cannot extend the time limit for presenting the claim.

6. The claim was not presented until **2 November 2021**. It was therefore presented just over 5½ weeks out of time. The ACAS conciliation process ended on 21 October 2021.

Evidence

7. The Claimant submitted a witness statement and gave evidence under oath. She was cross-examined by the Respondent. The Respondent has not called any witnesses but submitted a number of emails between the Claimant, her Trade Union representative and a member of the Respondent's HR Department, Ms Clarke between 9 July 2021 and 1 September 2021. Those emails were presented in a small bundle of 8 documents which had in turn been extracted from another larger bundle without altering the page numbers. Reference to document numbers in this judgment are to that extracted bundle.

8. The Claimant applied to permit some fit notes to be admitted into evidence that was not disclosed in accordance with the Case Management Orders. It consisted of a fit note from her GP for work related stress for the period 14 October 2021 to 13 December 2021 and 14 December to 14 February 2022. It was therefore on the face of it a relevant document. The Respondent raised no objection and this document was admitted into evidence.

9. I have considered all the documents presented by both parties.

Findings of fact

10. All findings of fact are made on a balance of probabilities and while all the evidence has been considered, this judgment only deals with the findings in respect of the evidence relevant to the determination of the relevant issue.

11. The Claimant delayed in presenting her claim from 24 September to 2 November 2021. The Claimant candidly accepts that her evidence regarding what she knew about time limits and when, is vague. Her explanation is that she simply cannot recall clearly what she was told and when.

12. The Claimant had the support of her Trade Union representative throughout the grievance process and his support was available after 25 June 2021.

13. Her Trade Union representative was present at today's hearing, although he did not present her case for her or assist her in doing so. He sat at the back of the Tribunal.

Time Limits: knowledge

14. The Claimant accepts that there was some discussion with her Trade Union representative about bringing a tribunal claim, although she says it was very brief. She recalled asking him whether she could take the matter forward to tribunal and briefly discussed a tribunal claim. She could not recall clearly when this was however, on balance I find that this is likely to have been sometime in June 2021 because her evidence is that after this brief conversation she told her Trade Union representative that she wanted to have a break from any contact with him and that she told him this on or around 25 June when she had received the appeal outcome letter.

15. The Claimant gave evidence that time limits '*may'* have been mentioned to her during this discussion in June 2021 but she cannot recall what the advice was and refers to the stress that she was under during that period.

16. The Claimant described in her evidence how from 25 June to 24 September 2021 "*the lights were on by no one was there*" when describing her mental state. The Claimant did not visit her GP because she alleges visits were not allowed at the time but she did make contact with her GP, she gave evidence that she believed that this would have been before she received the outcome of the appeal and that a sick note was issued for stress. However, she confirmed under cross examination that she was on maternity leave from 25 June to 3 October 202 (due to return to work on 4 October 2021) and then she took some annual leave,

not sick leave. The fit notes the Claimant disclosed record a period when she was signed off as sick by her GP from **14 October 2021,** which post dates the expiry of the primary time limit. Her evidence, which I accept (and was not challenged) is that she had signed herself off as sick from 11 October 2021.

17. The Claimant confirmed in response to questions I put to her, that she did not during her sick leave from 11 October 2021 take any medication nor was counselling offered to her. She described suffering symptoms of what she described as 'anxiety', she did not leave the house, struggled to sleep and was extremely worried about going back to work and how she could otherwise afford to raise her child. She believes that she was suffering from post-natal depression but there is no medical evidence to support this.

18. Her evidence however is that from the start of her sick leave in October 2021 the stress condition stayed the same, it did not get better or worse. When I therefore enquired why she could not have completed the claim form before 2 November 2021 if she was able to do it at that stage, her explanation was that she thought she was still in time to do it, that she '*misjudged'* the time limit but that also at around this time she began allowing people to help with the care of her child which she had not done before because of the risk of Covid19 .

19.. I find that on the balance of probabilities, prior to the expiry of the primary time limit on 24 September 2021, the Claimant was aware that there were time limits but I accept her evidence under oath, that she was not clear or could not clearly recall what had been said to her about those time limits back in June 2021.

20. The Claimant's own evidence is that from 25 June 2021 she wanted a break from having contact with her Trade Union representative because she was finding the situation stressful and did not even send an email to ask him for clarity over time limits. There were however email exchanges between the Claimant, her Trade Union representative and Sarah Clarke of the Respondent's HR department, in the period between 25 June 2021 and 24 September 2021. These include (p.51) an email dated **14 July 2021** in which Ms Clarke refers to having received an email from the Claimant, requesting paperwork related to the grievance and the outcome letter however, it does not confirm the date the email from the Claimant was received. There is also an email (p.56) from the Claimant directly to Ms Clarke on **1 September 2021** raising an issue about accessing the Egress system (Ms Brown explained that this was an email system the Respondent uses to send confidential or large documents) because the Claimant wanted copies of documents from the grievance investigation. The Claimant gave evidence that the documents she had asked for were provided she believes on 1 September 2021, which would appear to be consistent with the emails disclosed because there are no emails disclosed by either party which indicate that the Claimant was still chasing for the documents after 1 September 2021.

21. The Claimant's Union representative, Mr Rennocks was also in contact with the Respondent on 12 July 2021 and 1 September 2021 and his emails indicate clearly that this had followed on from some contact he had with the Claimant (p.51)

22. The Claimant complains that when she read the contents of the grievance investigation and what had been said about her; " *I shut down*", The Claimant in response to a question I put to her however, confirmed that she had seen these documents before, when she received the outcome letter on 25 June 2021 however her laptop had broken hence why she made asked for them again. However, she alleges that she had missed certain things the first time she had read the documents and reading them again "*bought everything back*" and caused further upset and anxiety.

23. The Claimant confirmed in response to a question I put to her that she did not speak to ACAS about time limits and she did not recall speaking to her Union representative during the period of Acas early conciliation .

24. There was no attempt before 24 September 2021 by the Claimant to obtain further clarification from her Trade Union representative about time limits and nor did the Claimant ask ACAS or contact any other body such as the CAB, to make enquiries.

25. The Claimant I find is clearly an intelligent and articulate individual. She was able to present her case today before this Tribunal without representation including making reference to an EAT authority in support of her case.

Health

26. There is no medical evidence of a stress condition before 14 October 2021. There was no fit note from her GP until 14 October 2021.

27. While I accept her oral evidence that reviewing the grievance investigation documents was upsetting for her, she was able to start the ACAS early conciliation process on 27 September 2021. Therefore regardless of how upset she may have been, I am not satisfied that the upset this caused her (not least because she had sight of the same documents previously in June) had such an impact on her health that she was not able to contact ACAS prior to 27 September 2021 and within the 3 month time limit.

28. I am not satisfied on the Claimant's own evidence that her health prevented her from contacting ACAS within 3 months of the last alleged act, of submitting her claim or from contacting her Trade Union representative, even if just by email, to obtain clarify on how to issue a claim and what the applicable time limits are .

29.. In terms of the period from 11 to 17 October 2021, which is outside the primary time limit, the Claimant was absent from work for a period with work related stress however, there is no supporting medical report. The

Claimant describes not being able to leave the house and struggling to sleep but I am not satisfied on the limited evidence about her health, that it prevented her from making enquiries about time limits or submitting a claim, taking into account her ability to chase the Respondent for documents in July and September 2021.

30. The ACAS conciliation period ended on 21 October 2021. The Claimant still took until 2 November 2021 to present her claim. The Claimant's evidence is that from October/November to December 2021, the symptoms of her stress did not materially change. The Claimant fails to adequately explain however why she was able to submit a claim on 2 November 2021 while still suffering from stress, but unable to do so earlier when absent on sick leave for the same health problem which had not changed or improved during that period.

The Law

31. Section 123 Equality Act 2010 deals with the time limits in which a claim must be presented and provides as follows:

(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.

(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 treat as occurring when the person in question decided on it

Extension of time: Just and Equitable

32. In ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*****,** the Court of Appeal stated that when Employment Tribunal is consider exercising the discretion under what is now section 123(1)(b) EqA, there is no presumption that they should do so. This does not mean, however, that exceptional circumstances are required before the time limit can be extended on just and equitable grounds

33. The provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases: **British Coal Corporation v Keeble [1997] IRLR 336**, may be relevant; *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 party sued had co-operated with any requests for information, the promptness with which the Claimant*

acted once they knew of the possibility of taking action, the steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

34. Court of Appeal in ***Southwark London Borough Council v Afolabi 2003 ICR 800, CA***, confirmed that, while the checklist in S.33 of the Limitation Act 1980 provides a useful guide for Tribunals, it need not be adhered to slavishly.

35. ***Department of Constitutional Affairs v Jones 2008 IRLR 128, CA*****,** the factors referred to by the EAT in are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases.

36. ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2001] EWCA Civ 23***: The best approach for a Tribunal in considering the exercise of the discretion is to assess all the facts in the particular case that it considers relevant, including the particular length and reasons for the delay.

37. ***Pathan v South London Islamic Centre [2014] UKEAT 0312***: The EAT held that the Tribunal will err if it focuses solely on whether the claimant ought to have submitted the claim in time and the Tribunal must weigh up the relative prejudice that extending time would cause the respondent in the claim.

38. ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*****.** The Court of Appeal held that the discretion under S.123 EqA for an employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant.

Submissions

Claimant's submissions

39. The Claimant made oral submissions. She referred to how long she had tried to have a child and the extent of the upset caused by the suspension and the impact of the stress during the time she was on maternity leave, how she felt very alone and without support. She referred to the circumstances of and trauma around the birth of her child. She referred to how when her appeal was not upheld, she felt a '*shell of myself'* and stopped taking care of herself and that she had not realised that her claim was out of time because her '*head was a mess'*. That her job with he Respondent was to work to deadlines all the time but she was stressed. She could have obtained notes from her midwife about the extent of her stress but submits did not realise she could use these.

40. The Claimant referred to the EAT case of ***Norbert Distressingly Logistics Ltd v Mr Graham Hutton UKEATS/0011/13/BI*** The facts of this case are in summary that the Tribunal had accepted it was not reasonably practicable for a claimant to begin proceedings within 3 months of his dismissal, despite the fact he had entered into detailed email correspondence, and pursued a grievance in respect of related matters during that time, because it was prepared to accept his evidence that he simply became unable to function properly and could not bring himself to do it. It held that it was reasonable for him to delay a further 6 weeks beyond the initial period on the basis it accepted his evidence that he put in an application to the Employment Tribunal as soon as he felt able to do so. This case was not one in which there was any question of ignorance of time limits. The issue was purely one of capability in the sense of mental capability. There was no medical evidence specifically directed to showing that the claimant could not mentally bring himself to enter a complaint. There was only the claimant's oral evidence. Although reservations were expressed, the Appeal Tribunal held that the conclusion was one of fact, and that (the ET having seen and assessed the Claimant) it could not be said to be perverse and must stand.

41. The Judge in the ***Norbert*** was persuaded by the claimant's oral evidence that the claimant was not functioning at all during the relevant period. It was a decision based very much on the facts of that particular case.

Respondent Submissions

42. The Respondent produced a written skeleton argument and made oral submissions.

43. The Respondent referred me to the cases of: **Olufunso Adedeji v University Hospitals Birmingham NHS Foundations Trust [2021] EWCA Civ (para 37); Bexley Community Centre v Community Centre [2003] EWCA Civ 576; Department of Constitutional Affairs V Jones [2008] IRLR 128; Miss M Hunwicks v Royal Mail Group Plc UKEAT/0003/07.**

44. With respect to the **Hunwicks case,** Ms Brown referred to this as support for the proposition that mere ignorance of time limits does not amount to a factor sufficient to justify the exceptional step of extending time. In that case the mistake in the advice provided by the Trade Union had no causative effect, as the time limit had already expired and the Tribunal had in that case found "*no basis for the exercise of discretion in her favour".*

45. Ms Brown in oral submissions, referred to how broad the discretion to extend time is and that the Tribunal should avoid rigidly adhering to the 'Keeble' factors. Ms Brown however submits that exercising the discretion should be the exceptional and there is nothing in the Claimant's application which is exceptional. The Claimant did not have to wait she submits, until the outcome letter in June 2021, she could have contacted ACAS prior to that . The Union representative could have instigated the

claim on her behalf. Ms Brown submits that the Claimant was able to make contact with the Respondent in July and September 2021 and despite saying she wanted no contact with her Union from 25 June 2021, the emails show that she was in contact with him. Ms Brown accepted however that she had not put this last point to the Claimant..

46. In conclusion Ms Brown submitted that it is not clear if the Claimant's evidence is that she misjudged the time limit but if she did that is not a sufficient excuse because she had the benefit of legal representation from her Union and if she says she was unaware of the deadline, then pursuant to **Miss M Hunwicks v Royal Mail Group Plc UKEAT/0003/07** this is not sufficient.

47. Ms Brown made no submissions about any prejudice the Respondent may suffer as a result of extending time to allow the claims to proceed, the merits of the claim or sought to argue that a fair trial was no longer possible.

Analysis and conclusions

48. The Claimant was able to represent herself during today's hearing. She was able to consider the relevance and application of an EAT decision of to her case. The Claimant presented as an intelligent and articulate individual, with the ability to research and present her case.

49. The Claimant had access to Trade Union support throughout the relevant period, including in particular the period prior to the 3 month time limit starting to run and throughout the following 3 month period.

50. The Claimant was I find on her oral evidence, suffering from work related stress from 11 October 2021 (when she signed herself off sick). However, she remained able in July and early September 2021 to communicate with the Respondent and her Trade Union representative to arrange for access to documents relating to the grievance process.

51. The Claimant has not produced medical evidence from her GP about the impact of the stress condition. While no doubt anxious and stressed, I am not satisfied that the effects on her health was such that she was not able to obtain further clarity about time limits at any time during the period from 25 June 2021 up to the date she finally submitted the claim. I am satisfied that throughout that period she was well enough to seek further advice about time limits, to contact ACAS and to submit her claim.

52. I do not accept that she has provided a good reason for not being able to take steps to inform herself about time limits and to then present her claim in time. I do not accept that her health was so impaired that she could not make further enquiries about the time limits or issue her claim. I also do not accept that her ignorance of the time limits was reasonable. The Claimant was someone who in her in job worked to time limits, she therefore had an appreciation of deadlines and was able to organise herself to meet them.

53. While I accept her evidence that she could not recall what had been said about time limits by her Union Representative, I do not consider that her ignorance of time limits was in the circumstances reasonable.

54. With respect to the length of and reasons for the delay, the delay is not insignificant at just over 5 ½ weeks

55. Ms. Brown has not sought to argue however that the cogency of the evidence is likely to be affected by the delay.

56. The Claimant complains of the extent to which the Respondent had co-operated with requests for information, however although there was an issue with accessing the investigation evidence, the Claimant does not allege that she had not had access to the information previously on 25 June 2021 or that she had it prior to the expiry of the time limit . Although she maintains that she had not property considered it, she was aware of the evidence her colleagues had given, as was her Trade Union representative, by 25 June 2021.

57. The Claimant had access to Trade Union support and advice about how to issue a claim and time limits, she did not act promptly to seek further clarity about time limits although I accept she was uncertain or could not recall what had been said to her.

58. If the discretion to extend time was not exercised the Claimant would be denied the ability to pursue claims which as is evident from her evidence today, are clearly important to her and caused her significant upset and distress.

59. Ms Brown in her submissions does not assert that the allegations of discrimination, have no or little reasonable prospect of success. She did not invite me to consider the merits of the claims.

60. The Respondent does not seek to argue that extending time would make a fair trial not possible, and indeed I do not consider that it would. The majority of the Claimant's complaints have I understand, been investigated already as part of the grievance process.

61. Ms Brown does not assert that the Respondent would suffer any prejudice if the time limit was extended. Ms Brown made no submissions whatsoever in terms of any prejudice the Respondent would suffer, in her written or oral submissions. While the delay is not insignificant, it is not so long that it could be assumed that it would cause any prejudice in terms of cogency of evidence or the quality of the recollection of witnesses and Ms Brown never addressed such a possibility in her submissions, perhaps because there had been an internal investigation during which witness statements had been taken.

62. I am mindful however that some prejudice will always be caused to an employer if an extension of time is granted, given that the case would

otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that.

63. Although I am not satisfied that the Claimant's ill health prevented her from submitting the claim within time and I am not satisfied that her ignorance of the time limits was reasonable, nonetheless as held in ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*****,** there is no justification for reading into the statutory language that a tribunal has to be satisfied that there was a good reason for the delay before it can conclude that it is just and equitable to extend time. As put by His Honour Judge Shanks;

"25. …As discussed above, the discretion given by section 123(1) of the Equality Act to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard."

64. The Claimant's reasons for the delay I do not accept are good ones, however I also weigh into the balance that the Respondent pleads no prejudice whatsoever if the discretion were to be exercised or challenges the merits of the allegations of discrimination on the grounds of pregnancy/maternity leave.

65. I consider therefore that on balance, taking all the factors I have referred to above into account, it would be just and equitable to extend time to allow the claim, to be presented on 2 November 2021.

66. There was some confusion over dates regarding the birth of the Claimant's son . The Claimant's evidence was that she gave birth on 17 October, and I accepted on her evidence that that would have been a traumatic event. She put that event forward as an explanation for the delay. She was kept in hospital an extra day, although it was recommended that she stayed for two. Although there was an absence of medical evidence and no clear evidence from the Claimant in terms of the length of her recovery, there would I accepted as a matter of common sense have been a period of recovery from such a traumatic experience and also from the operation that she required. That period I estimated, in the absence of any medical evidence and any sort of common-sense approach, would be at least around about one week. I referred when delivering my oral judgment to excluding the period from 17 October from the birth of her son to around 25 October, about a week later, from consideration of the time in which she could have brought a claim, to allow for her recovery. However, the birth of her son was 2020 and not 2021. Ms Brown quite correctly brought that to my attention when delivering my oral judgment. I addressed that and corrected my oral judgment and explained to the parties that it made no difference to my decision. Discounting the impact of events in 2020, my decision remained

that there was no reason good reason why the Claimant could not have issued her claim in time. The decision to extend time was based on other factors, not least the lack of prejudice pleaded by the Respondent.

67. I would add that given the lack of a good reason for the delay from the Claimant, had the Respondent pleaded some material prejudice, the outcome may well have been different.

68. The Tribunal has the jurisdiction to determine the claim pursuant to section 123 (1)(b) EqA.

69. For the avoidance of doubt, whether the complaints relating to events which pre date 25 June 2021, were brought within time is a matter to be determined at the final hearing. This judgment does not address the time limit in respect of events which predate the last complaint of the 25 June 2021.

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Employment Judge R Broughton

Date 9 September 2022

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE