Case No: 2301674/2021

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
sitting alone

BETWEEN:

Ms D Atkinson

Claimant

and

London Borough of Lewisham

Respondent

ON: **18 August 2022**

Appearances:
For the Claimant: **Mr M Withers, Counsel**
For the Respondent: **Mr O Isaacs, Counsel**

RESERVED JUDGMENT ON PRELIMINARY ISSUE

The claims of disability discrimination were submitted out of time in circumstances where it is not just and equitable to extend the relevant time limit and are therefore dismissed.

The claim of unfair dismissal will continue. A case management discussion is ordered below.

REASONS

1. In this matter the claimant complains that she was unfairly dismissed and subjected to disability discrimination by her former employer the respondent. This hearing was listed to determine whether the claims of disability discrimination which the parties agree were submitted out of time, should nonetheless be permitted to proceed on the basis that it is just and equitable in all the circumstances. The parties agree that the claim of unfair dismissal was submitted in time.

2. The claimant is disabled by reason of multiple sclerosis. After discussion and agreement with the parties, appropriate adjustments were made to the hearing in light of the impact of that condition upon the claimant. This extended the length of the hearing and consequently my decision was reserved.

Evidence & Submissions

3. I heard evidence from the claimant on this preliminary issue and also considered a bundle of relevant documents.

4. Counsel for both parties made oral submissions supplementing their written submissions on the conclusion of the evidence.

Relevant Law

5. Any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the Equality Act 2010). To facilitate early conciliation by ACAS, that primary time limit may be extended by different periods of time depending on when conciliation was commenced.

6. The burden is on the claimant to convince the Tribunal that the discretion to extend time should be exercised (Robertson v Bexley Community Centre [2003] IRLR 434). In deciding whether to do so, the Tribunal has a very wide discretion and is entitled to consider anything it considers relevant subject to the principle that there are good public policy reasons why time limits appear in our legislation and they should be exercised strictly in employment cases. When Tribunals consider whether to exercise the discretion on just and equitable grounds there is no presumption that they should do so.

7. Lord Justice Underhill in the Court of Appeal has confirmed that the best approach for a Tribunal in considering the exercise of this discretion is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of, and the reasons for, the delay (Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23).

8. Where there is a series of distinct acts of alleged discrimination the time limit begins to run when each act is completed, whereas if there is conduct extending over a period the time limit begins at the end of that period (section 123(3)(a)). (This is distinct from an act with continuing consequences where time runs from the date of the act as above.)

Findings of Fact

9. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

10. The claimant commenced employment with the respondent in April 2010. At the time of the termination of her employment she was a Programme Manager. She is educated, intelligent and articulate.

11. In 2019 the claimant was diagnosed with multiple sclerosis. This can cause a wide range of symptoms presenting as both physical and mental impairments. She has relapsing remitting MS meaning that there are times when her symptoms worsen, followed by a level of recovery. She describes herself as having good and bad days but of course the condition never goes away entirely and certain triggers, which includes stress, can either bring on the symptoms and/or make those symptoms worse. The respondent accepts that the claimant is disabled and was at all times relevant to her claims.

12. The claimant joined Unite, the union, in 2019 in response to a conversation with her manager in which concerns were raised regarding her performance. She discussed that issue specifically with the union at that time and from that point had access to the union website and their general services for members which undoubtedly would at least to some extent extend to legal issues arising in the workplace. She was generally aware that her union could support her in Tribunal matters.

13. The claimant was absent from work due to MS symptoms from early August 2019 until 6 January 2020 when she returned to work full-time. She remained at work until her employment terminated.

14. The evidence before me as to the claimant's medical position during the relevant time period included a medical report by the claimant's consultant neurologist prepared in April 2020, based on two detailed neuropsychological assessments the previous month. This confirmed that her condition was broadly well-maintained and that she functioned at expected levels or above on all measures of cognitive functioning examined. Further that she sustained a high level of cognitive functioning across various domains including attention and concentration although she was advised that her attention may fluctuate when tired and that she should try to balance her workload and the working day with ample short breaks. The claimant did say that these tests do not reflect real life conditions particularly in stressful situations. Whilst I accept that to some degree, they do nonetheless give a medically assessed and relevant insight into her level of capacity at that time.

15. The claimant's GP records from March 2020 to May 2021 make no reference to any deterioration in the claimant's cognitive function or any side effects to medication.

16. On 10 March 2020 the claimant submitted a seven-page, well drafted and detailed grievance regarding her treatment at work since February 2019. This grievance was drafted by her without union assistance and included a reference to the respondent's duty to make reasonable adjustments on account of her disability.

17. The claimant attended a lengthy grievance hearing in July 2020. Although supported by her union representative, having had a number of conversations with him beforehand, the claimant presented her own case at the hearing. She was familiar with a very significant amount of associated paperwork to which she wanted refer in detail but was stopped by the grievance chair.

18. The grievance outcome was sent to the claimant on 3 August 2020.

19. On 17 August 2020 the claimant submitted a 19-page appeal with a detailed critique of the decision made and the process followed. She made numerous references to various legal obligations that she said the respondent had breached including references to the Equality Act, ACAS codes of practice and reasonable adjustments to which she said she was entitled 'by law'.

20. In September 2020 another restructure of the respondent commenced.

21. On 1 December 2020 the grievance appeal was heard. Again the claimant was supported by the union but she presented her arguments herself.

22. The claimant was notified by letter dated 8 December 2020 (sent by email) that the original outcome of her grievance was upheld.

23. The claimant's GP's notes show that on 20 January 2021 she reported to the nurse that she was 'being treated badly at work and may lodge a complaint'. The claimant's evidence was that what she meant by that was a complaint to senior people within the respondent organisation which she subsequently did. I accept the claimant's evidence in this regard. If the note had said she was considering lodging a 'claim', I might have found otherwise.

24. On 6 February 2021 the claimant's employment terminated due to redundancy.

25. The claimant contacted ACAS on 19 April 2021 and the relevant early conciliation certificate was issued on 21 April 2021.

26. The claimant submitted her claim form to the Tribunal on 6 May 2021.

27. The claimant's evidence regarding when she first took legal advice regarding her employment position was not very clear and to some extent contradictory. It is apparent however that she had taken such advice on more than one occasion before mid-March 2021.

28. The claimant's evidence was that no one ever raised the issue of time limits for submitting a claim to the Tribunal with her and she did not come across that in her own research.

Discussion & Conclusion

29. As stated above, the parties agree that the discrimination claims were submitted out of time. How far out of time they were depends upon whether they are claims about distinct acts at different times or conduct extending over a period that ended on conclusion of the grievance process.

30. As the time limit issue has been taken as a preliminary point, I have not had the benefit of hearing all the evidence as would more typically be the case when determining whether it is just and equitable to extend time. For the purposes of this decision, therefore, I work on the basis that the latest time could have expired was conclusion of the grievance process and the claim was almost exactly two months out of time - a not insignificant period of time.

31. There are a number of relevant factors to consider in deciding if it is just and equitable to extend time in the claimant's favour.

32. I am extremely sympathetic to the claimant's health situation and recognise the very significant impact her condition has, and had, on her. Notwithstanding that she attended work from January 2020 until termination of her employment as well as fully participating in person in a very detailed - and no doubt stressful - two stage grievance process. Even taking into account the nature of her disability, she clearly was at the relevant time - even if intermittently - able to research and formulate complex concepts. The language used in her grievance submitted in July 2020 shows that by then she had more than a passing understanding of her legal protections.

33. Furthermore, the claimant was not acting in isolation. She had the benefit of union membership from 2019 with engagement with her representative from at least summer 2020. In addition, she instructed solicitors specifically with regard to her employment situation at the very latest in the first quarter of 2021.

34. Clearly there is a significant prejudice to the claimant if she is not allowed to pursue her claim of disability discrimination. I do not accept the respondent's argument that because she has quantified injury to feelings at £12,000, that is the only measure of prejudice to her. There is undoubtedly a non-financial value, potentially a significant one, to any claimant of having their complaint heard and adjudicated on by an independent panel. Success at the Tribunal is not only measurable by any financial compensation awarded. I do accept, however, that in contrast there is a significant additional cost that the respondent will be put to if the discrimination claims proceed. The parties' best estimate is that it would require an additional nine days of Tribunal hearing and a significant additional amount of documentary evidence (1,000+ pages). To that the claimant says if the claim had been submitted in time the respondent would have had to deal with this additional cost, but it was not put in time and therefore this is an avoidable additional cost.

35. The respondent also says that they would be severely prejudiced if the claims are allowed to continue because a number of their relevant witnesses

have now left employment and as the claims do not sit on all fours with the allegations made in the grievance, they would have to call at least some of those witnesses possibly under witness order and therefore 'blind'. That is of course possible. It is also possible - and perhaps probable - that those witnesses would be willing to attend voluntarily. At the moment the respondent simply does not know. I do not find this therefore to be persuasive as to prejudice faced by the respondent if the extension of time is granted.

36. Overall, however, I find the parties to be equally prejudiced if the decision goes against them and prejudice is not therefore not determinative of whether the discretion should be exercised.

37. The key issues to look at are the length of and reasons for the delay. As stated above I am working on the basis of a 2 month delay.

38. The claimant relies upon the fact of the grievance process as a reason for the delay. The grievance was lodged on 10 March 2020 and the appeal outcome was communicated to the claimant on 8 December 2020. It is well established that the fact that a claimant instigates a grievance and that grievance take some time to conclude, does not in itself extend time in the claimant's favour. Equally, it is not completely irrelevant that a grievance has been filed. In the circumstances facing all employers in 2020 I do not consider that the respondent took an inordinate amount of time to deal with the grievance, particularly given the amount of detail included in it.

39. The greater significance of the grievance is what it tells us about the claimant's ability to analyse and present complex information - both factual and legal - and to attend, particularly in the first instance, a lengthy and no doubt stressful hearing and acquit herself well. There is no doubt that the grievance and the grievance appeal documents show that at that time the claimant was very able to deal with matters of this nature, carry out research and present her case extremely professionally and to a very high standard.

40. The claimant does say however that because of her medical condition she was only able to deal with a certain amount at any one time. In effect just because she was able to deal with the grievance so well does not mean that she was able to also grapple with whether she had a valid employment claim and how she should go about presenting that and manage any time limits in that respect. Further, the claimant says that she was dealing with the fact that she was subject to a redundancy process which was also running from September 2020 ultimately resulting in her termination in February 2021

41. I note, however, that there would have been significant periods between March and December 2020 when her work on the grievance had been done and she was waiting for the respondent to come back to her with a response. Further, that process came to an end on 8 December 2020 and it was made very clear to the claimant that there were no further steps she could take with regard to that internal process.

42. It is also relevant to take into account not only the efforts made by the claimant to establish her position with regard to perhaps bringing a Tribunal claim, but what efforts she could have made. Her evidence was vague in respect of exactly what advice she sought and received from her union representative and her legal representatives. To some extent this was understandable given everything that she was dealing with at the time. What I find extremely surprising, however, is the lack of specificity as to when she instructed her legal team (who are still representing her today) as this must clearly be the most straightforward matter of record on their own files and confirming that would not involve waiving or breaching privilege.

43. Even if I give the claimant the benefit of the doubt up until mid-March 2021, her own evidence is that at that stage she was able to take time to collate her papers and take full advice. I accept that circumstances were difficult and it can take time to obtain approval from insurers to proceed with legal matters but there remains an unexplained delay from mid-March 2021 through to the claimant contacting ACAS on 19 April 2021 and, once the conciliation certificate was issued on 21 April 2021, submitting her claim form on 6 May 2021.

44. Taking all of these matters into account, I do not find that it would be just and equitable to extend time in favour of the claimant. Notwithstanding her undoubted health issues, she had access to advice from 2019, she was clearly very able to research complicated matters herself and present those matters both orally and in writing as well of course as working full time throughout this period. She had the ability to put her claim in in time and the necessary support to do so. Therefore, the Tribunal does not have jurisdiction to hear the claims of disability discrimination and they are dismissed.

45. The claim of unfair dismissal will proceed to be listed for 5 days. Dates will be sent to parties in due course.

46. A provisional case management discussion has been listed for 1 February 2023. If the parties are able to agree directions and avoid the need for that hearing they shall please do so and notify the Tribunal as soon as possible.

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Employment Judge K Andrews
Date: 23 September 2022