



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs Sharon Chamberlain

AND

Respondent

First Light Southwest Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin

ON

23 February 2022

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person, assisted by her partner Mr N Thompson

For the Respondent: Did Not attend – Written Representations Only

JUDGMENT

The judgment of the tribunal is that:

- 1. The claimant was a disabled person at all material times; and**
- 2. The claimant's claim was presented out of time and is dismissed.**

REASONS

1. The claimant has presented a claim alleging disability discrimination, which is limited to a claim asserting a failure by the respondent to make a reasonable adjustments. This is the judgment following a preliminary hearing to determine (i) whether the claimant was a disabled person at the material times, and (ii) whether the claimant's claim was presented out of time.
2. I have heard evidence from the claimant. The respondent did not attend, but it did provide detailed written representations. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
3. The respondent First Light Southwest Limited is a registered charity which provides services to the victims of domestic abuse. The claimant Mrs Sharon Chamberlain was born on 30 June 1969 and was employed by the respondent on a fixed term contract for 18 months from 22 June 2020. She resigned her employment on 28 January 2021. She was

- employed as an Helpline Adviser and worked a five-day week for 37.5 hours from Monday to Friday. She carried out an office-based role taking calls from service users.
4. The impairment upon which the claimant relies for the purposes of her disability discrimination claim is a benign brain tumour. The claimant first started suffering significant symptoms from April 2020. These included a loss of balance; headaches; affected hearing including tinnitus; exhaustion; sickness and nausea; and an inability to concentrate when reading and watching television or videos. In August 2020 the brain tumour was diagnosed, but as a benign tumour, and there was no diagnosis of cancer. The claimant was prescribed cyclizine for this condition, which only had limited effect, and she now takes Cinnarizine as well. There was no prospect of the tumour disappearing on its own and the claimant continues to suffer from this impairment which continues to have the above effect on her normal day-to-day activities.
 5. This impairment also affected the claimant's ability to carry out her normal duties with the respondent at work. The parties agreed that it would help the claimant not to have to work more than two consecutive days in the office, and although they had a normal requirement for the claimant to work five days each week, an adjustment was agreed whereby the claimant could work from home on Wednesdays. This adjustment was put in place on 9, 16 and 23 September 2020.
 6. Unfortunately, following a dispute involving other members of staff, the respondent notified the claimant that it was no longer able to allow that adjustment. The claimant was informed before 30 September 2020 that she could no longer work at home on Wednesdays, and that she was required to attend the office for the full week. The claimant knew that the agreed adjustment had been removed by 30 September 2020.
 7. The claimant was then away from work on certified sickness absence for most of October 2020. On her return at the end of October 2020 she applied to work for reduced hours namely 30 hours per week. The respondent agreed to 15 hours per week which she worked for November 2020, December 2020, and until 28 January 2021 when she resigned. Meanwhile, during January 2021, the claimant and her partner Mr Thompson were ill with Covid.
 8. Meanwhile the claimant felt aggrieved about her reduced hours and she had sought advice from Citizens Advice during November 2020 or possibly early December 2020. Citizens Advice advised the claimant about potential Employment Tribunal proceedings in that they advised that she was required to obtain a certificate from ACAS before issuing Tribunal proceedings. The claimant does not recall being informed of any time limit. However, the claimant and her partner had access to the Internet and access to the various websites which do give further information about the relevant time limits.
 9. I accept that the claimant was unwell on occasions, both through the condition of her brain tumour and subsequently with Covid, but the claimant has not presented any medical evidence to the effect that she was precluded or prevented from issuing these tribunal proceedings within time as a result of any medical condition. This includes the period from late January 2021 and after the termination of her employment until the claimant commenced the Early Conciliation process with ACAS on 17 February 2021 (Day A). ACAS issued the Early Conciliation Certificate on 19 March 2021 (Day B). The claimant presented these proceedings on 11 April 2021.
 10. Having established the above facts, I now apply the law.
 11. The claimant alleges discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges a failure by the respondent to comply with its duty to make adjustments.
 12. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person. In addition, paragraph 6(1) of Part 1 Schedule 1 EqA provides that Cancer, HIV infection and multiple sclerosis are each a disability.

13. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
14. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
15. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
16. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
17. I have considered the cases of Environment Agency v Rowan [2008] IRLR 20 EAT; Archibald v Fife Council [2004] IRLR 651 HL; Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288 CA; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; and Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23
18. The Claimant's Disability:
19. There has been some debate between the parties as to whether the claimant's brain tumour (which is benign) is effectively a cancer and therefore a deemed disability within paragraph 6(1) of Part 1 Schedule 1 EqA. The respondent has reduced extracts from various websites, including NHS and Macmillan Cancer websites, to the effect that this form of benign tumour is not cancerous. I accept that argument and I find that it is not a deemed disability for the purposes of paragraph 6(1) of Part 1 Schedule 1 EqA.
20. However, I have no hesitation in concluding that the claimant was a disabled person at all material times for the following reasons. She has suffered from a physical impairment, namely the benign brain tumour, for a continuous period of time until its diagnosis in August 2020. This includes suffering symptoms with effect from April 2020 which had a significant adverse effect on the claimant's ability to carry out normal day-to-day activities (including concentration and mobility). The effects were significant because they were more than

- minor or trivial. The condition was long-term because at the time of the alleged discrimination in September 2020 it had been in place for at least six months, and given that there was no suggestion that the tumour would disappear on its own, and has remained as a matter-of-fact until now, it is obvious to conclude even at that stage that it was likely to last for 12 months or more.
21. In short therefore the claimant suffered from a physical impairment at the material times which had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. I therefore conclude that she was a disabled person all material times.
 22. Claim Presented Out of Time:
 23. The claimant was aware that the respondent was refusing to make the reasonable adjustment of which she complains by 27 September 2020. Applying Matuszowicz v Kingston upon Hull City Council and Abertawe Bro Morgannwg University Local Health Board v Morgan, time for presenting proceedings starts to run on this date when the claimant accepts that the respondent had made it clear to her that it no longer intended to make the reasonable adjustment of which she complains. The claimant commenced the Early Conciliation process with ACAS on 17 February 2021 (Day A). ACAS issued the Early Conciliation Certificate on 19 March 2021 (Day B). The claimant presented these proceedings on 11 April 2021. The effect of the Early Conciliation provisions is that a claim relating to any matter arising before 18 November 2020 has been presented out of time. The claimant's claim was therefore presented approximately seven weeks out of time.
 24. The claimant has not put forward any cogent grounds to explain the delay, nor to suggest that it would be just and equitable to extend the time limit. I accept that the claimant was unwell on occasions, both through the condition of her brain tumour and subsequently with Covid, but the claimant has not presented any medical evidence to the effect that she was precluded or prevented from issuing these tribunal proceedings within time as a result of any medical condition. It is also clear that she was able to seek advice from Citizens Advice, and speak to ACAS, within the relevant time limit. She also had access to the Internet and relevant information concerning issuing Tribunal proceedings on the required time limits.
 25. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are 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 parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
 26. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) 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". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."
 27. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] ... It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list ... [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."
 28. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time

- limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds 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 discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
29. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
 30. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."
 31. With regard to the balance of prejudice between the parties, on balance I conclude that it is not just and equitable to extend time. Applying Robertson v Bexley Community Service, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule. The claimant has been unable to convince me that it would be just and equitable to do so. Equally, applying Abertawe Bro Morgannwg University Local Health Board v Morgan, a tribunal will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was, and the claimant has not done this.
 32. Accordingly, I conclude that the claim was presented out of time, that it is not just and equitable to extend time, and the claimant's claim for disability discrimination is therefore dismissed
 33. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 9; a concise identification of the relevant law is at paragraphs 11 to 17; how that law has been applied to those findings in order to decide the issues is at paragraphs 18 to 32.

Employment Judge N J Roper
Date: 23 February 2022

Judgment sent to parties: 28 February 2022

FOR THE TRIBUNAL OFFICE