



EMPLOYMENT TRIBUNALS

Victoria Rixon

V

University Hospitals Plymouth NHS Trust

Heard at: Southampton (video hearing)

On: 08 February 2023

Before: Employment Judge Housego

Appearances

For the Claimant: in person

For the Respondent: Camille Ibbotson, of Counsel

JUDGMENT

1. The Claimant's claims were all filed out of time.
2. It is just and equitable to extend time for some of the claims.
3. The remainder of the claims are struck out.
4. The detail of the remaining claims is in a Case Management Order of even date.

REASONS

1. This hearing was listed at the request of the Respondent at a Case Management Hearing which took place on 14 December 2022. The Respondent seeks to strike out the Claims as out of time, and if not struck out for deposit orders to be made, asserting that the claims have little reasonable prospect of success.
2. The time limit for lodging claims is 3 months from the incident complained of, unless the act is part of a sequence extending into that period. The period is lengthened by the Acas early conciliation period. In this case the claim was filed on 22 March 2022. The last date that was in time was 15 December 2021 (this is agreed). Time can be extended if it is just and equitable to do so¹.

¹ S123(1)(b) of the Equality Act 2010.

3. There is much case law on this topic, but this culminates in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23. The guidance is 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 (as Holland J notes) “the length of, and the reasons for, the delay”.”

4. Matters such as the prejudice to the Respondent and the likely strength of the claim are also part of the balance to be struck.
5. While time limits are there for a purpose and are enforced, there is a public interest in discrimination claims being heard. While Claimants are expected to comply with the time limit, where they do not the Judge has to make value judgment whether it is fair to extend time. That also involves consideration of the Respondent's position. The Claimant's case is taken at its highest in assessing fairness.
6. The Claimant is acting in person, and her claim form contains a lengthy narrative without setting out the nature of her claim other than that it is a disability discrimination claim arising from her diabetes. The Respondent accepts that this is a disability. No date has been given for the date it accepts that it knew, or should have known, of it. The Claimant says this was on receipt of an occupational health report when she returned to work, that report being dated 22 May 2020.
7. In his Case Management Order of 14 December 2022 EJ Roper set out with precision the claims made by the Claimant. The Claimant corrected one point, to her credit – at 2.1.8 it was not Clare Southby who was connected with the request to extend sick pay. That was a case put to senior management and decided by people whose identities were not known to her, but who were unconnected with any other matter. She accepted that it was not a matter about which she could have complaint. The Respondent has a sickness absence policy, and a procedure through which it can be exceeded, that procedure was followed, and while disappointed at the outcome the Claimant accepts that it was not a matter of unlawful disability discrimination.
8. The claims fall into a variety of categories. They are intertwined with the Claimant's circumstances. Narrating them causes the Claimant distress, understandably, and it is not easy for her to untangle and identify matters which may fall into sections of the Equality Act 2010 from other matters.
9. In summary, the Claimant's account is that she was a fit healthy enthusiastic and competent midwife. She ran marathons and trained regularly so as to keep fit. She had a happy marriage and a growing family, eventually numbering 4 children. She had gestational diabetes. Her diabetes ebbed and flowed and altered. She has had spells as an inpatient as a result of it. Her sickness absence increased - rather started, as she had no significant absence before she had diabetes. She did not get occupational health reports or risk assessments as she wished. She was caught up in a bullying accusation, which she felt was not well handled but was eventually concluded in her favour. She was put on to stage 2 of the absence process without having been through stage 1. Her line manager Clare Southby was

involved in many of these matters. In particular the Claimant had problems with her diet (trying a low carbohydrate diet) and managing hypoglycaemic episodes. She needed breaks to attend to her needs, but the culture was not to take contractual breaks. She was moved away from the hospital to an outside role, but felt lone working was a risk she should not be taking. Ultimately, she raised three grievances, and then got help from an RCN trade union representative. She was then thinking about a Tribunal claim, but the representative said she should first exhaust internal procedures. When this took a long time, she decided to contact Acas, of which she knew from a role outside work. By now it was late 2021. The stress of all the matters affecting her had led to a marital breakdown, and she found it hard to cope with that, with the children, and with managing her diabetes. Eventually she ignored her RCN representative and filed the claim herself. She returned to work when her sick pay stopped, but then had a new manager. The new manager is a nurse and understood diabetes and work became manageable again. Previous managers had been midwives, without the depth of understanding of the new manager. That manager has recently been replaced and the Claimant is worried that things may again go downhill.

10. From this simplified summary (the claim form runs to many pages) it is clear that all the matters listed in the Case Management Order (as corrected by the Claimant) are out of time. The Claimant accepted this during the hearing. There were a series of matters, but they all ceased by 15 December 2022. An extra matter is mentioned for the first time in paragraph 44 of the Claimant's witness statement, but as it is not in the pleadings and no application was made to amend, I do not take that matter into account. (It makes no difference for it relates to breaks, and I found it just and equitable to extend time for this claim.)
11. The matters where I find it just and equitable to extend time relate to the issues of not being able to take breaks, and about lone working.
12. I observe that claims relating to the absence of risk assessments or occupational health reports are not detriments. The absence of them may make it easier for a Claimant to show that reasonable adjustments were not made, for example, but the absence of the risk assessment is not of itself discriminatory. Contractual sick pay above SSP is an advantage to a person unable to work. The NHs sick pay scheme is generous. Many, but not all, people who are away from work have illnesses or conditions which qualify as disabilities (as opposed to, for example, a seriously broken leg from which a full recovery is eventually made). It is not disability discrimination if an employer does not exceed a contractual sick pay entitlement for those whose absence is disability related. There would have to be some extra reason making it so. The Claimant, very fairly, does not say that there is such a factor. Asking someone who is signed off from work to attend a meeting about their circumstances and prognosis is not disability discrimination if they are reasonably able to attend such a meeting. There is no reason to think that the Claimant was medically unfit to attend such a meeting. One of the items (2.1.5) is that Claire Herbert talked the Claimant out of resigning and permitted her to retract that resignation. This does not appear to be a detriment, as the Claimant is still in her employment, recently happily.
13. Accordingly, these claims do not appear strong, and that is a factor in whether it is just and equitable to extend time for them to continue.

14. The claims are made against a variety of different people about different things. There is nothing of a sequence about them. Many are substantially out of time. Save for two matters I strike out the claims as out of time it not being just and equitable to extend time.
15. The two matters I consider to be different are the matter of breaks and of working alone in the community.
16. The Claimant has always said that her diabetes requires careful management. She needs breaks to administer medication, to eat, to go to the toilet and so on. She has always said that she was denied her contractual breaks. It matters not that this may have been by a variety of people. It would (is the Claimant's case) have been a reasonable adjustment to ensure that she was able to take at the least the breaks to which she was entitled.
17. The Claimant says that lone working was not appropriate for her and that it was a failure to make a reasonable adjustment to transfer her to such work.
18. Both these claims are out of time. The working in the community allegation dates from August 2021 and so is about 4 months out of time. The issue of breaks extended until September 2021. (I observed after the hearing that it may be that there is another episode alleged on 24 February 2022 which would bring this within time. The chart of sickness absence shows the Claimant away from work from 06 June 2022 – 19 August 2022 and from 05 December 2021 but does not give a return date. As I permit this allegation to proceed it makes no difference, other than that the Claimant's witness statement will need to be precise, and the Respondent's amended Grounds of Resistance will need to cover the issue of breaks from 22 May 2020 onwards.)
19. The reasons given for the delay are reasonable ones. It was reasonable of the Claimant to file a grievance about the matters of which she now complains. It was reasonable of her to expect to wait until it was concluded before she decided whether to bring a claim. When it was not dealt with swiftly it was reasonable of her to ask for advice from the RCN. Her evidence (given on affirmation and which I accept was truthful) was that she was told that she must exhaust internal procedures before issuing a claim. It was reasonable of her to rely on what the RCN told her. She had every reason to think that they were giving her sound advice. It was reasonable of her to think, after a while, that she would sound out Acas, which she knew from previous experience in a voluntary organisation was a source of sound free advice. In addition, her evidence is that her mental state was far from her normal capable self. I accept that evidence. Her diabetes was very troubling, she had a marital breakdown and a family of four children to care for. She was not thinking as she would normally, and her ability to take any action was greatly impaired.
20. The Respondent has followed processes throughout, and there should be a documentary record of most matters. The staff involved with the Claimant are still in post and able to give evidence.

21. Accordingly, the length of the delays was not over long, and there were good reasons for it. The Respondent is unlikely to suffer significant prejudice other than the need to defend a claim that otherwise would be struck out as out of time.

22. In a separate case management order I gave directions, agreed by the parties.

Employment Judge Housego

Dated: 08 February 2023

Sent to the parties: 01 March 2023

For the Tribunal