EMPLOYMENT TRIBUNALS

Claimant: Ms G Radford

Respondent: Hospital and Home Education

Heard at: Nottingham Employment Tribunal **On:** 31 July 2023

Before: Employment Judge McTigue sitting alone

Representation
Claimant: In person
Respondent: Ms McFadyen, Solicitor

JUDGMENT having been sent to the parties on 10 August 2023 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:

REASONS

Introduction

1. The claimant was employed as a teaching assistant by the respondent, Hospital and Home Education. The respondent provides education to young people in hospital. She commenced employment with the respondent on 20 April 2020 and resigned from her position on 8 September 2021. ACAS was notified using the early conciliation procedure on 31 August 2022. ACAS issued an early conciliation certificate on 8 September 2022.

2. The claimant initially lodged her ET1 on 3 October 2022 but it was rejected at the vetting stage (on 7 October 2022) as the names of the prospective respondent on the ET1 and the ACAS certificate did not match. Following reconsideration, the claim was accepted. The date of acceptance was 15 November 2022.

Claims, Issues and History of the Proceedings

3. The claimant brought claims for disability discrimination and unfair dismissal in her ET1, although she did not specifically identify in her pleadings what types of disability discrimination she was alleging.

4. There have already been two preliminary hearings in respect of these proceedings. The first took place on 24 February 2021 before my colleague EJ Ahmed. On that date, the claimant's representative, Mr Joseph from Selwyns Law, wrote to the tribunal to say that he was unaware of the telephone preliminary hearing. That hearing was adjourned.

5. The second preliminary hearing took place on 3 May 2023 before my colleague EJ Heap. At that hearing, Mr Joseph confirmed that the claimant was not relying on any category of automatically unfair dismissal for which no minimum service is required. It was also not in dispute between the parties that the claim had been presented some considerable period out of time and that the issue of jurisdiction needed to be determined at an open preliminary hearing. EJ Heap directed that an open preliminary hearing be listed to deal with several matters, the first being:

    5.1. To determine whether all or any of the claim should be struck out under Rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") if the Tribunal has no jurisdiction to entertain the claim if the Claimant has issued proceedings outside the relevant statutory time limits and there is no basis on which to extend time.

6. EJ Heap also stated:

    > "As I understand it the claimant relies on not being able to issue the claim form earlier given her health and so there will need to be disclosure of relevant medical notes and records although there is agreement that those only need to relate to the period after the effective date of termination of employment (or earlier depending upon the dates of discrimination complained of) up to the date on which the claim form was accepted by the tribunal (i.e. 15 November 2022)."

7. EJ Heap made an order that, by no later than 10 May 2023, the claimant must confirm to the respondent and the tribunal whether she was continuing with her complaint of unfair dismissal and that, by no later than 24 May 2023, she was to send the respondent and the tribunal completed tables setting out the basis of the complaints of discrimination that she sought to advance.

8. On 15 June 2023 the claimant's representative emailed the Tribunal to confirm that the complaint of unfair dismissal claim was withdrawn and stated that the claim was being presented as one of discrimination arising from a disability and a failure to make reasonable adjustments.

Procedure, documents and evidence heard

9. The claimant's representative, Mr Joseph, emailed the Tribunal on 30 July 2023 at 15.48. This was the day before the hearing and a Sunday. His email stated:

    > "I was supposed to be representing my client, Gina during the hearing but I am somewhat ill at present and unable to go out.
    >
    > I therefore don't have time to be able to send the bundles as requested by the tribunal. Could I please ask that you print out the bundles for the tribunal? My client does not have the facilities to print them.

Please ensure the judge has my skeleton argument and reads it prior to the hearing to give my client a fair chance of getting her case heard. She suffers from anxiety and depression."

Mr Joseph did not provide any medical evidence to the Tribunal in his respect of his illness or its likely duration. He also did not make any application for a postponement in his email to the Tribunal or make a request for the hearing to be converted to CVP. The Tribunal attempted to make contact with Mr Joseph on the morning of the hearing to ascertain his position in relation to these matters but was unsuccessful.

10. I reminded myself of the overriding objective. In order to ensure that the claimant was on an equal footing, I ensured that the claimant had access to the bundle of documents. She had a laptop with her, and she was able to look at the bundle of documents via her laptop. She was also able to access the bundle of documents when giving evidence. I explained to the claimant the purpose of today's hearing and its possible consequences for her. The claimant indicated that she was happy to proceed and that she understood that her claim might be struck out following depending upon the outcome of the hearing. In light of the claimant's health conditions, I checked whether she required any adjustments in respect of the hearing. She indicated that she did not but I reminded her that if she needed a break for any reason whatsoever, she could simply ask and arrangements would be put in place

11. Both the claimant and respondent provided the tribunal with written skeleton arguments. Both made submissions. In addition, the claimant had prepared a witness statement, dated 23 June 2023. The claimant gave evidence to the tribunal and was cross examined. There was a bundle of 105 pages. In terms of the bundle, unfortunately Mr Joseph had not sought to agree the bundle with the respondent prior to the hearing. This resulted in the respondent having to add their extra documentation to the bundle at the start of the hearing. I was also supplied with a number of additional documents from the claimant including a note of a call to the NHS 111 service and a note of therapy she had received Trent Psychological Services.

12. Although there was little medical evidence before the tribunal, the claimant stated that she had supplied all medical evidence relevant to the issues of the hearing and this was contained in the bundle. As the claimant's representative was not present, I gave the claimant 45 minutes of time in order to familiarise herself with the bundle of documents. I was prepared to offer her more time, but she indicated that 45 minutes was sufficient.

Fact-findings

13. The claimant commenced employment on 20 April 2020. On 16 September 2020 she tested positive for Covid.

14. The claimant was signed off and absent from work on the following dates:
    14.1. From 21 September 2020 to 16 October 2020 for post covid fatigue
    14.2. From 16 November 2020 to 29 November 2020 for post covid fatigue/depression
    14.3. From 30 November 2020 to 3 December 2020 for post covid fatigue/depression.

14.4. From 3 December 2020 to 16 December 2020 for post covid fatigue/depression

15. In or around December 2020 the claimant joined a Trade Union and sought advice from both ACAS and the Equality Advisory Support Service.

16. On 15 December 2020 the attended an informal welfare meeting regarding her absence as part of the respondent's Absence Management Procedure. Adjustments were made to the claimant's work and she returned to work in January 2021.

17. The claimant was receiving assistance from her Trade Union in respect if the matters contained in her pleadings from around December 2020 until August 2022.

18. Following an incident involving a patient in May 2021, it was suspected that the claimant had accessed confidential patient information via the NHS computer database. The claimant was called to an establishing the facts meeting in respect of this incident. That meeting took place on 10 June 2021.

19. The claimant was due to attend a disciplinary meeting on 22 July 2021 and 2 September 2021 but, for various reasons, these meetings did not proceed.

20. The claimant was absent from work on the following dates due to sickness:

20.1. 24 to 28 May 2021
20.2. 11 June 2021
20.3. 6 to 7 September 2021.

21. In early September 2021, the claimant informed the respondent that she had secured alternative employment and requested that she be allowed to leave her employment without serving her contractual four week notice period. The respondent agreed. The claimant's effective date of termination was 8 September 2021.

22. The claimant started work with a new employer at the end of September 2021. That job was tutoring young people Maths and English and she worked between 35 to 37 hours a week. She taught students on a one-to-one basis and her work involved using a computer. She could also use a computer to access teaching materials online.

23. She was signed off work due to anxiety and depression whilst working for her new employer from 29 November 2021 to 28 December 2021. She resigned from her work with her new employer in January 2022.

24. In respect of this claim, ACAS was notified using the early conciliation procedure on 31 August 2022. ACAS issued an early conciliation certificate on 8 September 2022.

Law

25. Rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

26. I now turns my attention to the law relevant to the time limit issues. Section 123 of the Equality Act 2010 provides:

(1) Subject to sections 140A and 104B 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.

27. The 3-month period allowed by section 123(1)(a) is extended by the legislation governing the effect of Early Conciliation (see section 140B of EA Act 2010). The period from the day after "Day A" (the day early conciliation commences) until "Day B" (the day the Early Conciliation certificate is received or deemed to be received by the claimant) does not count towards the 3-month period, and the claimant always has at least one month after Day B to make a claim. In this case the claimant's claim form does not benefit from that section as her claim was already out of time when ACAS was notified.

28. There is no presumption that time will be extended. In respect of this, I note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre [2003] IRLR 434**:- **"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so." (para 23) "…the 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." (para 25). 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. The words "just and equitable" give the Tribunal a broad discretion in deciding whether to extend the time allowed for making a claim. A summary of the case law and was given by the EAT in **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283** per HHJ Peter Clark:

> **11. A useful starting point is the judgment of Smith J in British Coal Corpn v Keeble [1997] IRLR 336. That was a case concerned with the just and equitable extension of time question in the context of a sex discrimination claim. Smith J, sitting with members, in allowing the employers' appeal and remitting the just and equitable extension question to the employment tribunal, suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980, the provision for extension of time in personal injury cases. The first of those factors, as Mr Peacock emphasised in the present appeal, is the length of and reasons for the delay in bringing that claim.**
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> **12. However, as the Court of Appeal made clear in Southwark London Borough Council v Afolabi [2003] ICR 800, in deciding the just and equitable extension question, a tribunal is not required to go through the matters listed in section 33(3) of the Limitation Act 1980, provided that no significant factor is omitted. That principle was more recently reinforced in a different context by the Court of Appeal in Neary v Governing Body of St Albans Girls' School [2010] ICR 473, where the leading judgment was given by Smith LJ. There, it was held that a line of appeal tribunal authority requiring a tribunal to consider the factors in the CPR, rule 3.9(1), as it then was, when deciding whether or not to grant relief from sanction following non-compliance with an unless order, was incorrect. Following Afolabi it is sufficient that all relevant factors are considered.**
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> **13. Section 33(3) of the 1980 Act does not in terms refer to the balance of prejudice between the parties in granting or refusing an extension of time. However, Smith J referred to the balance of prejudice in Keeble, para 8, to which Mr Peacock has referred me. That, it seems to me, is consistent with the approach of the Court of Appeal in the section 33 personal injury case of Dale v British Coal Corpn, where Stuart-Smith LJ opined that, although not mentioned in section 33(3), it is relevant to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. That passage neatly brings together the two factors which, Mr Dutton submits, were not, but ought to have been, considered by this tribunal in the proper exercise of its discretion: prejudice and merits. I shall return to those factors in due course.**

> **14. What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see Hutchison v Westward Television Ltd [1977] ICR 279) involves a multi-factoral approach. No single factor is determinative.**

30. The Court of Appeal considered the discretion afforded to Tribunals in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** at paragraphs 18 and 19, per Leggatt LJ:

> **18. First, 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 these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. […]**
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> **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).**

31. Underhill LJ commented in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, that a rigid adherence to any checklist of factors (such as the list in section 33 of the Limitation Act 1980) 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".**

32. The lack of evidence from the Claimant about any delay is a relevant factor to consider in deciding whether or not to exercise discretion, but a not necessarily decisive one as seen in the Employment Appeal Tribunal's decision in **Owen v Network Rail Infrastructure Ltd [2023] EAT 106.**

Submissions

33. Both the claimant and respondent made submissions. The respondent submitted that it appeared the claimant's case was that the discriminatory treatment she was subjected to was connected to the meetings arranged for 15 December 2020 and 10 June 2021, and a lack of adjustments made in relation to those meetings. The respondent submitted that the claimant's effective date for submitting her claim to the Employment Tribunal was earlier than her effective date of termination. The respondent said that time therefore ran from either:

    33.1. The date the claimant attended the welfare meeting under the Absence Management Procedure. This was 15 December 2020.
    33.2. The date the claimant attended the establishing the facts meeting. This was 10 June 2021.

    The alternative position was that time ran from the claimant's effective date of termination on 8 September 2021. The respondent also submitted that that the claimant was supported for large periods of time by her Trade Union and later on by legal representation from Selwyns Law. The respondent submitted that despite this, the claim was significantly out of time.

34. The claimant submitted that the reason her claim was not submitted earlier was because of her mental health and the manner in which it affected her. She stated that she did not realise until sometime after leaving the employ of the respondent, the impact that their treatment had on her.

Conclusions

35. It is apparent to me that, as currently pleaded, it is the claimant's case that the alleged discriminatory treatment she was subjected to was connected to the meetings arranged for 15 December 2020 and 10 June 2021 and a lack of adjustments in relation to those meetings. The claimant would therefore certainly have been aware that she had a potential claim for discrimination against the respondent in June 2021. It is also apparent that she received support and advice from her Trade Union from December 2020 until the end of August 2022.

36. The claimant states that the reason her complaint was not made in time was because of her mental health. She stated it was some time after leaving the employ of the respondent, that she realised the impact that their treatment had on her. I do not accept that point. Whilst the claimant may not have appreciated the full extent to which she was affected the acts of the employer, it is plainly apparent that she was aware of the acts of her employer at the relevant times. She attended both relevant meetings in person and so had first-hand knowledge of the respondent's acts.

37. There is insufficient evidence that the claimant's mental health would have prevented her from commencing employment tribunal proceedings. She was performing in cognitively demanding work with no significant periods of ill health from January 2021 until 29 November 2021. Even after leaving the employ of the respondent, her new job involved tutoring young people Maths and English. In her new job, she taught students on a one-to-one basis and her work involved using a computer. She could use a computer to access the internet and so could have contacted ACAS and completed the ET1 form from

the middle of June 2021 onwards. The medical evidence before the Tribunal did not demonstrate that the claimant's physical or mental health was so impaired that she could not complete those tasks within the statutory time limit.

38. I am satisfied that, based on the claimant's pleadings, the time limit for presenting this case runs from the date of the establishing the facts meeting i.e. 10 June 2021. If I am wrong on that, the claimant's best position would be that time runs from the date of her effective date of termination i.e. 8 September 2021. Either of those dates means that this claim is not days out of time, it is considerably out of time. I have carefully considered the prejudice that would be suffered to the respondent if an extension of time were allowed and balanced that against the prejudice that would be suffered by the claimant if she were not able to bring her case. Taking these factors into account, I do not consider it just and equitable to extend time in all the circumstances. The claim is dismissed under Rule 37(1)(1) as it has no reasonable prospect of success. This is because the Tribunal has no jurisdiction to entertain the claim as the Claimant has issued proceedings outside the relevant statutory time limit and there is no basis on which to extend time.

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Employment Judge McTigue

Date 18 August 2023

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE