EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
E	**AND**	D

HELD AT Swansea **ON** 20 June 2019

EMPLOYMENT JUDGE NW Beard

Representation
For the Claimant: **In Person**
For the Respondent: **Mr Tibbits (Counsel)**

JUDGMENT ON A PRELIMINARY HEARING

JUDGMENT

The judgment of the tribunal is that:-

1. The title of the claim shall be anonymised pursuant to rule 50 of the Employment Tribunal Rules 2013 the claimant shall recorded as E and Respondent as D.

2. It would not be just and equitable to extend time for the presentation of the claimant's claims of discrimination on the grounds of her gender including harassment, and the tribunal has no jurisdiction to hear her claims which were presented after the expiration of the time limits for such claims, and the claimant's claims of sex discrimination are dismissed.

3. It would not be just and equitable to extend time for the presentation of the claimant's claims of discrimination on the grounds of her disability relating to the respondent's failure to make a reasonable adjustment in not providing a lumbar cushion, and the tribunal has no jurisdiction to hear her claims which were presented after the expiration of the time limits for such claims, and the claimant's claim of disability discrimination based on that failure is dismissed.

4. The claimant's claim of disability discrimination that the respondent failed to make a reasonable adjustment by replacing a lumbar cushion

that had gone missing has no reasonable prospect of success and is dismissed.

5. The claimant's claim of disability discrimination that the respondent failed to make a reasonable adjustment by not carrying out a desktop assessment has no reasonable prospect of success and is dismissed.

REASONS

Preliminaries

1. The claimant represented herself and the respondent was represented by counsel. I was provided with a bundle of documents. I took no oral evidence on the basis that I would consider the claimant's case taken at the highest. I heard submissions from both parties, additionally both provided written arguments which I also took into account. The claimant, clearly, found the proceedings stressful and was, on occasion emotional, I allowed a break for the claimant to compose herself and I was prepared to grant further breaks, if necessary. However, the claimant preferred to continue proceedings to a conclusion. The claimant was able to make her arguments and answer questions despite the stressful circumstances.

The Relevant Matters

2. The claimant's claim was presented on 18 April 2018, early conciliation having taken place between 19 February and 19 March 2018. The claimant had been dismissed from employment with the respondent on 5 April 2018; but had already been involved in a disciplinary process which began with her suspension in November 2017.

3. The claimant contends that the treatment that she relies upon as amounting to sex discrimination occurred between October 2012 and June 2014. The claimant contends that the need for a lumbar cushion as a reasonable adjustment or auxiliary aid arose in 2012 or thereabouts. The claimant argues that she provided her own cushion in 2016, the respondent having failed to do so. In respect of the claim relating to a replacement cushion, when it appears hers had been lost, the claimant accepts that this occurred during the time she was suspended from employment between 2017 and 2018. The complaint about a desktop assessment as a reasonable adjustment relates to September/October 2017.

4. The claimant has had significant personal and medical difficulties. She has provided photographic images, some partial, of documents relating to her health. The facts they show include: prescribed medication of a type which is frequently used in the treatment of depression (prescribed up to 28 November 2014); that the claimant was unfit for work in 2014 and 2015; that the claimant was undergoing significant medical testing, including endoscopic examination, scans, and histopathology; that in 2016 the claimant had been examined for musculoskeletal difficulties in the lumbar spine; a diagnosis that the claimant had: acquired hypothyroidism,

fibromyalgia and lumbar disc degeneration. The medical investigations included some when those treating her were concerned that the claimant may have had cancer. The claimant's case is that these conditions ultimately affected her state of mind significantly. In addition to this the claimant was bereaved and lost her mother and this has clearly been a continuing source of distress for the claimant, this too, she argues has impacted upon her.

5. The claimant raised a grievance on 26 June 2014. It is common ground that this grievance sets out the detail of her sex discrimination claims. The claimant having become too ill to work in September 2014, she returned to work in February of 2015. In the period of the claimant's absence the grievance was put in abeyance. Upon her return the grievance was dealt with, however it took until 1 September 2015 for an outcome to be given. In that outcome letter there is a reference to the grievance being raised more than three months after the acts complained of, this is clearly made with reference to the respondent's internal policies. The claimant appealed this decision, she was able to prepare a detailed appeal document. The claimant set out in this document that she had received advice from an employment barrister, it is also clear from that document that the claimant was aware that there were time limits for employment tribunal claims (p103J) and that she had missed the primary time limit.

6. It is common ground that the claimant only took 9 days sickness absence from the time when she returned to work in February 2015 and her suspension in November 2017.

Submissions

7. The claimant's submissions referred to the discretionary just and equitable extension of time in discrimination cases. She relied on the decision in ***Galilee v Commissioner of the Police for the Metropolis***. The claimant made reference to what she described as "new evidence" this was that the alleged discriminator had been told to re-write another employee's annual appraisal.

8. Her further argument on equity and justice was that discrimination would be covered up. and justice will not have been done.

9. The claimant also referred to ***Norbert Dentressangle Logistics Limited v Hutton*** in that case the claimant's evidence that he could not face doing anything as he was "not functioning" was accepted: he was unable to leave his home for a time it was held that it was not reasonably practicable for the claimant to have presented the claim in time the EAT upheld that decision.

10. The claimant argued that it would not be just and equitable to hear any of her claim without all facts going back to 2003 being considered. The claimant's submission was that her former manager, who had been moved to work HR had, in concert with others in HR, targeted the claimant from

the time of her grievance. This targeting included the handling of her grievance and her dismissal.

11. The claimant complains that the respondent took over 2 years to conclude the grievance process despite, under policy being required to deal with grievances expediently.

12. The claimant also argues that because she had raised the grievance and escalated it to the then CEO after its conclusion that demonstrates a reason for a cover up and targeting her for dismissal.

13. The claimant referred me to ***Robinson v Fairhill Medical Practice*** where the EAT overturned a strike out judgment of a disability discrimination claim. The basis of the decision was that fault on the part of a legal adviser should not to be held against a claimant. She argued that she relied on D conclusion that she had not brought her grievance until more than three months after the treatment she complained of. The claimant submitted that she relied on this advice because of "not functioning properly".

14. The claimant contends that there was a continuing act because she sent an email to the then CEO. She contends that the CEO would have spoken to HR about it. She relies on this as a further reason for her being singled out.

15. She considers that a further example of the "continuing act" is evidenced by the fact that the respondent applied for a judgement to be made against to recoup £845.90 & £60 costs. She names a number of individuals involved in the decisions about pursuing this county court matter, and argues that because these individuals work together, and one is related to a person whom she brought a grievance against it is evidence of a continuing victimisation.

16. (I should indicate that the claimant has not brought a technical claim of victimisation although she does use the word in its colloquial sense in her ET1 application). The claimant then set out a series of assertions that other named individuals were guilty of various kinds of misconduct but had not been dismissed.

17. Mr Tibbits' submissions on behalf of the respondent, were that the claims of sex discrimination and reasonable adjustments were clearly outside the primary time limit. He referred me to ***Robertson*** (below) and indicated that I could take guidance from rule 33 of the CPR. He argued that the evidence before me provided no proper explanation for the late presentation of the claim, because whatever the claimant's disability, illnesses and other factors affecting the claimant they had come to an end by February 2015 when she returned to work. By December 2015 the claimant had the result of the respondent's view on her grievance and therefore would have a full evidential picture of her position. He argued that she was able to prepare a detailed appeal against the first stage

outcome in September 2015. Further, he argued that it was clear from the appeal that the claimant was taking advice and would have been aware of tribunal time limits at that stage if not before. He argues that the respondent would be prejudiced, firstly because the passage of time would interfere with the ability of witnesses to give accurate evidence but more importantly obtaining documentary evidence from that period would be difficult. He argued that balanced against the prejudice to the claimant that was important, the claimant still had claims to pursue against the respondent she was not losing the entirety of her complaints.

18. In regard to the strike out application Mr Tibbits' position was that, as a matter of law these complaints could not succeed. In respect of the claim for a desk assessment he argued that ***Tarbuck*** is applicable. The claim is for an adjustment, assessments, reports and investigations are not adjustments. With regard to the replacing of the lumbar cushion his argument was that the claimant was suspended, the provision of the cushion would not have assisted her in working. Therefore, he contends, the adjustment is not one it is reasonable for the respondent to have to make at that point in time.

The Law

19. The Equality Act provides:

19.1. Section 20 deals with the Duty to make adjustments and provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, 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, to take such steps as it is reasonable to have to take to avoid the disadvantage.

1.1. Section 123 deals with Time limits

(1)---------- 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.
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(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 treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

20. In ***Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664*** it was held that there was no requirement to consult an employee about reasonable adjustments. In my judgment the judgment sets out clearly that the duty is to make an adjustment not to explore the means or approach to making an adjustment. The breach of the duty cannot therefore occur because the employer has failed to take a step which would identify an adjustment.

21. In respect of time limits, in respect of discrimination claims. It is clear that some of the omissions complained of occurred more than 3 months before the presentation of the claim. We are required to consider first whether the incidents constitute an act or omission extending over time. We have to judge whether there is a continuing act as set out in ***Hendricks v Metropolitan Police Comr. [2002] EWCA Civ 1686, [2003] 1 All ER 654*.** The claimant needs to establish a nexus between the various events. That nexus does not necessarily mean that the same individuals are involved in each event or that the events follow on from a specific policy. The nexus must, however, be established by demonstrating that there is a state of affairs in existence throughout that period, a connection whereby for instance a particular workplace culture is shown. If there is no continuing act or omission we have to consider whether it is just and equitable to extend time for the presentation of the claim. In deciding whether it is just and equitable we are required to apply the decision in ***Robertson v Bexley Community Centre [2003] IRLR***. That case makes it clear that there is no presumption that the tribunal should exercise its discretion to extend time. The onus is always on the claimant to convince the tribunal to do so. Auld LJ indicates that the exercise of the discretion is the exception rather than the rule.

22. In addition, when deciding whether it is just and equitable to extend time, a tribunal must consider the explanation given by the claimant or any inferences that can properly be drawn from the facts which show an explanation as to why the claim was not made at an earlier stage see ***Abertawe Bro Morgannwg University Local Health Board -v- Morgan [2018] EWCA Civ 640.***

23. In respect of strike out I am to apply the Employment Tribunal Rules of Procedure 2013 and in particular rules 37 which (in so far as relevant) provides:

37. (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;*
> *----------*
> *(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.*

24. I remind myself what function I undertake at this stage. I am required to decide that, in relation to the various statutory requirements, the claimant has either no or alternatively little reasonable prospect of establishing her claims. I take account of what was said in ***Ezsias v North Glamorgan NHS Trust*** [2007] 4 All ER 940 by Maurice Kay LJ

> *"(T)hat what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success"*

25. That test relates to the question of whether there is "no" reasonable prospect of success it is an indication that there is a very substantial hurdle to cross for strike out to be made, indeed as is often said depriving an individual of an opportunity to present a case in full is a draconian step. In terms, therefore, any prospect of success which is not "merely fanciful" is sufficient for me to refuse to strike out.

26. In **Van Rensburg v Royal Borough of Kingston-upon-Thames and Ors** UKEAT/0096/07 the local authority respondent sought an order under rule 20 of Schedule 1 to the 2004 Regulations that the claimant be required to pay a deposit. This was in fact as an alternative to striking out the claims altogether under rule 18(7), the application for which was refused. Rule 20(1) is as follows:

> *"At a pre-hearing review if an employment judge considers that the contentions put forward by any party in relation to a matter required to be determined by a tribunal have little prospect of success, the employment judge may make an order against a party requiring the party to pay a deposit of an amount not exceeding £500* (now £1000) *as a condition of being permitted to continue to take part in the proceedings in relation to that matter."*

27. Elias P, as he then was, considered the language of rule 20(1) to be clear. He saw no reason to limit the words "the matter to be determined" to legal matters only. If that had been the draughtsman's intention, the rule would, he suggested, surely have been differently formulated so as to render the intention clear. Elias P continued at paragraphs 24-27:

> *"24. I am reinforced in this view by the fact that there is a more draconian rule under rule 18(7)(b) which empowers a Tribunal to strike out a claim or any part of it on the grounds that it is scandalous or*

vexatious or has no reasonable prospect of success. In the recent decision in the Court of Appeal, North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 Maurice Kay LJ, with whose judgment Ward and Moore-Bick LJJ concurred, recognised that in principle – albeit that the cases would be very exceptional – it would be possible for a claim to be struck out pursuant to this rule even where the facts were in dispute.

25. Maurice Kay LJ gave as an example a case where the facts as asserted by the applicant were totally consistent with the undisputed contemporaneous documentation. It is also to be noted that in that case the Employment Tribunal had, prior to making the strike out order, indicated that subject to the question of means the case would be an appropriate one for a deposit to be made. No such order was in the event made because the strike-out order disposed of the case altogether. However, the Court of Appeal noted that the possibility of a deposit under rule 20 remained open and they made it plain that that would have to be considered afresh by a tribunal, but they were not 'indicating any view of the ultimate merits of this case one way or the other'. The Court was clearly acting on the assumption that the power to order a deposit could in principle be exercised where the Tribunal had doubts about the inherent likelihood of the claim succeeding.

26. Ezsias then demonstrates that disputes over matters of fact, including a provisional assessment of credibility, can in an exceptional case be taken into consideration even when a strike-out is considered pursuant to rule 18(7). It would be very surprising that the power of the Tribunal to order the very much more limited sanction of a small deposit to not allow for a similar assessment, particularly since in each case the tribunal would be assessing the prospects of success, albeit to different standards.

27. Moreover, the test of little prospect of success in rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success founded in rule 18(7). It follows that a Tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim or response."

28. I am clear therefore that just because there is a dispute of evidence, I am not prevented from deciding in appropriate circumstances that the case has no prospect of success. However, such a case would need to be very clear cut. I am also aware of the caution I should exercise in dealing with a preliminary issue. In this regard I keep in mind the Judgment of Lord Hope in ***SCA Packaging Ltd v. Boyle*** [2009] UKHL 37; [2009] IRLR 746

> *It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly. This is in keeping with the overriding aim of the tribunal system. It was set up to take issues away from the ordinary courts so that they could be dealt with by a specialist tribunal as quickly and simply as possible. As Lord Scarman said in* ***Tilling v Whiteman [1980] AC 1****, 25, preliminary points of law are too often treacherous short cuts. Even more so where the points to be decided are a mixture of fact and law. That the power to hold a prehearing exists is not in doubt: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SR 2005/150), Schedule 1, rule 18. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in* ***National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School [1995] ICR 317, 323****. The essential criterion for deciding whether or not to hold a prehearing is whether, as it was put by Lindsay J in* ***CJ O'Shea Construction Ltd v Bassi [1998] ICR 1130, 1140****, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute.*

Analysis

29. Mr Tibbits is clearly correct when he argues that the claims of sex discrimination and disability discrimination based on a failure to make reasonable adjustments were outside the primary time limit.

30. The claimant's overarching argument for a just and equitable extension was that discrimination would be covered up. and justice will not have been done. This may apply in any case alleging discrimination which is not

brought in time. It is common when that happens for all the evidence in the case to be heard in order to make a decision based on "all the circumstances". However, in my judgment such an approach is not appropriate in this case for the reasons I set out below.

31. The claimant has been aware of her employment rights for some considerable time, including those relating to the existence of time limits. Whilst there might be good reason for delay in presenting claims at the time when she was unwell and absent from work, in my judgment, that reason does not extend to the time when the claimant returned to work. By December 2015 the claimant knew the respondent's view on her grievance and would have had all the evidence to bring a claim. The claimant was fully able to prepare a detailed appeal against the outcome to her grievance given in September 2015.

32. The claimant's argument that she was, in effect, misled by the respondent's approach does not survive scrutiny of the document upon which she relies. Firstly the claimant's reference to ***Robinson v Fairhill Medical Practice*** is distinguishable in any event, reference there was to a fault of a legal adviser. The respondent was not the claimant's legal adviser, nor in the document was it purporting to relate its decision to employment tribunal proceedings. I do not accept that the claimant was "not functioning" at that time. In any event there was no reason why a functioning or even a non-functioning individual should have read the respondent's letter as relating to tribunal time limits, it was clearly referring to internal policies.

33. At the heart of the claimant's approach has been her argument that there has been a conspiracy against her. This argument relates to individuals who she argues, must have had some level of involvement in the discrimination against her. The "new evidence" relied upon to support this, that the alleged discriminator had been told to re-write another employee's annual appraisal. In my my judgment, on any reading, this information seems entirely unconnected with claims of discrimination related to the claimant's disability. The claimant was not able to explain to me the connection other than it was tied up with the various individuals that she named as connected to a person who had an "axe to grind against the claimant. In my judgment this argument is fanciful. The claimant was not able to point to any specific involvement other than general HR advice, in any event the decision making was by individual managers and not the HR department.

34. The claimant argued that it would not be just and equitable to hear any of her claim without all facts going back to 2003 being considered. Such a hearing at the tribunal would involve an inordinate amount of evidence which could only tangentially be connected to her claim. As such this would be disproportionate to the claim and out of line with the overriding objective. On that basis I do not consider that assists the claimant. In my judgment it tends the opposite way, the claimant was aware of her rights

and if she believed that this was the situation it would be all the more reason for her to bring a claim at a much earlier stage.

35. The claimant's complaint that the respondent took over 2 years to conclude the grievance process is of some substance. However, the claimant ignores the fact that the grievance was put on hold for the period where she was absent from work, some six months. Also, the claimant had the result of that grievance in 2016. In my judgment the failure to bring a claim after that result is not explicable on the basis of the claimant's health and therefore whatever the delay it is not sufficient for me to conclude that the claimant should be permitted to bring her claims out of time.

36. The claimant contends that there was a continuing act because she sent an email to the then CEO. I have no doubt that the CEO would have spoken to HR about the issues the claimant the claimant raised. However, that is a far cry from stating that HR in dealing with the claimant on the issues that led to her dismissal was continuing an act of sex discrimination in 2012/14 or disability discrimination in 2016. The factual claim is, in my judgment, fanciful. The claimant was unable to advance any specific argument other than that HR was pursuing the alleged vendetta against her.

37. The further example given of a "continuing act" is the respondent's application for a judgement against the claimant. The claimant attended a preliminary hearing where the issues in her case were discussed, victimisation was not included amongst those claims. This application for judgment cannot, in my judgment, be said to be a continuation of sex or disability discrimination connected to the earlier complaints. Those complaints involve specific individuals and particular circumstances, there is simply no nexus between the treatment of the different occasions. Based on these conclusions in my judgment there was no possibility that there was an act of discrimination extended over a period up to and including dismissal.

38. There is clear prejudice to the respondent if the claimant were permitted to pursue these claims. The time since events occurred would put witnesses in difficulty in giving reliable evidence. Documentary evidence from so long ago is more difficult to obtain. The prejudice to the claimant is that she cannot bring those old claims. However, the claimant is not prevented from the other claims she sets out and which are not subject to this application. In my judgment the balance of prejudice clearly falls in the respondent's favour.

39. Mr Tibbits' application to strike out the claims for reasonable adjustments were based on matters of law. The claim for a desk assessment falls on the principles set out in ***Tarbuck***. Assessments, reports and investigations are not adjustments within the meaning of the legislation, they are ways in which adjustments might be found. I agree with Mr Tibbits' argument on this the claimant's claim has no reasonable prospect of succeeding. With regard to replacing the lumbar cushion, the

claimant was suspended at that time. The duty to provide a cushion if it arose, would be on the claimant's return to work. It was not an adjustment at that time which would mean that the claimant could work, the suspension was what prevented her from working not the absence of a cushion. The adjustment argued for is not one that it would be reasonable for the respondent to have to make at that point in time.

40. As a result of my conclusions above I consider that:

40.1. It would not be just and equitable to extend time for the presentation of the claimant's claims of discrimination on the grounds of her gender including harassment, and the tribunal has no jurisdiction to hear her claims which were presented after the expiration of the time limits for such claims, and the claimant's claims of sex discrimination are dismissed.

40.2. It would not be just and equitable to extend time for the presentation of the claimant's claims of discrimination on the grounds of her disability relating to the respondent's failure to make a reasonable adjustment in not providing a lumbar cushion, and the tribunal has no jurisdiction to hear her claims which were presented after the expiration of the time limits for such claims, and the claimant's claim of disability discrimination based on that failure is dismissed.

40.3. The claimant's claim of disability discrimination that the respondent failed to make a reasonable adjustment by replacing a lumbar cushion that had gone missing has no reasonable prospect of success and is dismissed.

40.4. The claimant's claim of disability discrimination that the respondent failed to make a reasonable adjustment by not carrying out a desktop assessment has no reasonable prospect of success and is dismissed.

41. The claimant contended, and the respondent did not demur that this is a claim which should be anonymised. The claimant will be disclosing significant medical information at the hearing of her claims, and indeed some are disclosed in this judgment. I consider that the balance of rights which I have to establish falls in favour of the claimant. Her right to privacy outweighs the EU convention rights under articles 6 and 10. The title of the claim shall be anonymised pursuant to rule 50 of the Employment Tribunal Rules 2013 the claimant shall recorded as E and Respondent as D.

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Employment Judge Beard
Date: 18 July 2019

Judgment sent to Parties on

Case No. 1600581/2018

_____18 July 2019_____