EMPLOYMENT TRIBUNALS

Claimant: Miss A Henry

Respondent: Leeds Community Healthcare NHS Trust

Heard: in public by CVP **On:** 29 August 2024

Before: Employment Judge Ayre, sitting alone

Representation

Claimant: Ms Sophie David, counsel
Respondent: Miss J Whiteley, solicitor advocate

JUDGMENT AT PRELIMINARY HEARING

The claim was presented in time and the Tribunal has jurisdiction to hear it.

REASONS

Background

1. The claimant was employed by the respondent from 1 November 2021 until 31 August 2023. She issued this claim in the Employment Tribunal on 7 February 2024 following a period of early conciliation that started on 29 November 2023 and ended on 10 January 2024. The claimant alleges that the respondent failed to make

reasonable adjustments for her dyslexia and autism. The respondent admits that the claimant was disabled.

2. There was a Preliminary Hearing on 11th July. At that hearing there was a discussion about the claim and the issues that will need to be determined. It was clarified that the only claim being brought is one of failure to make reasonable adjustments. In summary, the claimant alleges that the respondent failed to provide her with auxiliary aids recommended by Access to Work, and applied the following PCPS:

    1. Requiring her to carry out her contractual role and duties; and

    2. Requiring her to carry out her contractual role and duties using the equi8ment and software provided.

3. The claimant says that as a result she was unable to fulfil her contractual role and duties, and that the respondent should have made the following adjustments:

    1. Obtaining the equipment recommended by Access to Work;

    2. Providing the claimant with training to use the equipment to enable her to carry out her role; and

    3. Complying with other recommendations of Access to Work including strategy coaching and disability awareness for her colleagues.

Today's hearing

4. The question to be considered at today's hearing was whether the Tribunal has jurisdiction to hear the claims as they have been presented outside of the primary time limit. Given the date upon which the claimant started early conciliation, any complaint about something that happened before **30 August 2023** may not have been brought in time.

5. The issues for the Tribunal to determine today were the following:

    1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

    2. If not, was there conduct extending over a period?

    3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

    4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? Specifically:

        i. Why were the complaints not made to the Tribunal in time?

ii. Is it just and equitable in all the circumstances to extend time?

6. There was a bundle of documents running to 157 pages. I heard evidence from the claimant and submissions from both parties.

Findings of fact

7. The claimant was employed by the respondent from 1 November 2021 until 31 August 2023. The claimant is disabled due to autism and dyslexia and disclosed her disability to the respondent at the start of her employment.

8. On 6 April 2022 the claimant attended an Access to Work assessment. Access to Work produced a report dated 7 April recommending equipment, subscription services, training and coaching as adjustments for the claimant. Access to Work wrote to the respondent on 8 April 2022 informing the respondent that it had 13 weeks to implement the Access to Work recommendations and indicating that Access to Work would pay for the adjustments.

9. The respondent did not implement Access to Work's recommendations. The claimant initially tried to work without the adjustments, but this caused her to become stressed and exhausted. As she told the Tribunal in evidence, she had to run twice as fast just to keep up.

10. In November 2022 the claimant became unwell and began a period of sickness absence. Her GP and occupational health both advised that she could not return to work until the adjustments recommended by Access to Work were put in place.

11. Despite this advice, the respondent still failed to put them into place.

12. On 13 January 2023 the claimant raised a grievance. The respondent delayed in responding to the grievance, and a grievance hearing did not take place until 6 July 2023.

13. On 20 June 2023 the claimant resigned with notice. The respondent encouraged her to reconsider her resignation and also to consider an alternative role with them. The claimant took some time to consider the position and decided not to withdraw her resignation.

14. On 6 July 2023 a grievance hearing finally took place. After the hearing the claimant was informed on 12 July that her grievance was being upheld and that she was being placed on medical suspension. She did not return to work after that date and her employment terminated on 31 August 2023.

15. The claimant first took advice from her trade union Unison in December 2022 or January 2023. She was erroneously advised by the union representative that she did not have a legal claim.

16. The claimant was aware of the Equality Act and of her right to have reasonable

adjustments by this time, as she mentioned them in her grievance, and had previously had adjustments put in place for her. She was not however aware of the time limit for bringing a claim in the Employment Tribunal.

17. Having received advice from her union that she did not have a legal claim, the claimant accepted that advice and it was not until August 2023, when a friend told her that she thought she may have a claim, that the claimant approached a solicitor for legal advice.

18. She contacted a solicitor who, on 10 August 2023, advised her to contact her trade union about bringing a claim. He also advised her about time limits and the need to go through early conciliation before starting proceedings in the Employment Tribunal. The claimant followed that advice and contacted her trade union again.

19. On 24 August, two weeks after receiving the advice from a solicitor, the claimant completed a 'case form' and sent it to Unison. As a result of her disability the claimant struggles to complete forms. It therefore took her some time to complete the form and collate all the necessary documents. In the circumstances, the period of time that it took her to complete the forms and send everything off to the trade union was not unreasonable.

20. On 2 September 2023 the claimant sent all the necessary documents to Unison. From that time onwards she relied on the trade union to progress her claim in a timely manner.

21. Unison delayed in processing the documents and in issuing proceedings. The claimant chased the trade union in early October, and on 29 November early conciliation started.

The Law

22. Time limits for bringing discrimination claims are set out in section 123 of the Equality Act 2010, with the relevant provisions being the following:

> "*(1) ….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.*
>
> *….*
>
> *(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.*

(c) 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 treasonably have been expected to do it."

23. Tribunals have a wide discretion as to whether to extend time, in discrimination claims. There is however no principle or assumption that a Tribunal should exercise that discretion: ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434*****.** The burden of proving that it would be just and equitable to extend time rests with the claimant.

24. More recently, in ***Jones v Secretary of State for Health and Social Care [2024] EWCA Civ 1568*** the Court of Appeal found that an Employment Tribunal had acted perversely when it decided it would not be just and equitable to extend time in a race discrimination complaint. The Court of Appeal held that the Tribunal should have set out in its decision the extent of the claimant's delay in issuing proceedings and the reasons for the delay. The Court also found that the Tribunal should have made findings about whether the delay had prejudiced the respondent and that a highly relevant factor was that the respondent had sought to hide information which could have caused the claimant to consider that he had a valid discrimination claim.

25. When ***Jones v Secretary of State for Health and Social Care [2024] EAT 2*** was before the EAT, His Honour Judge Tayler commented that:

"*30. It remains a common practice for those who assert that the primary time limit should not be extended to rely on the comments of Auld LJ at paragraph 25 of* ***Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576, [2003] IRLR 434,*** *that time limits in the Employment Tribunal are "exercised strictly" in employment cases and that a decision to extend time is the "exception rather than the rule" as if they were principles of law. Where these comments are referred to out of context, this practice should cease. Paragraph 25 must be seen in the context of paragraphs 23 and 24".*

26. That finding was not overturned on appeal.

27. Whilst, in cases involving the question whether it was reasonable practicable to present a claim in time, incorrect advice from an advisor or a misunderstanding of the law is unlikely to 'save' a late claim, the position is different in discrimination claims where the 'just and equitable' test applies to applications for an extension of time.

28. In ***Hawkins v Ball and anor [1996] IRLR 258*** the EAT upheld the decision of an Employment Tribunal to extend time in a discrimination claim where the claimant had received incorrect legal advice. A similar approach was taken in ***British Coal Corporation v Keeble and ors [1997] IRLR 336*** where claimants received incorrect advice from their trade union.

29. Factors that are relevant when considering whether to extend time can include:

    1. The length of and reasons for the delay in presenting the claim;
    2. The extent to which the cogency of the evidence is likely to be affected by the delay;
    3. The extent to which the respondent cooperated with any requests for information;
    4. How quickly the claimant acted when she knew of the facts giving rise to the claim; and
    5. The steps taken by the claimant to obtain professional advice once she knew of the possibility of taking action.

30. Time limits for presenting claims are a jurisdictional issue (***Rodgers v Bodfari (Transport) Ltd 1973 325 NIRC***) and if a claim is out of time, the Tribunal must not hear it.

Conclusions

31. I have reached the following conclusions having considered carefully the evidence before me, the submissions of all parties and the relevant legal principles.

32.. The burden is on the claimant to persuade the Tribunal that it would be just and equitable to extend time. She has discharged that burden for the reasons set out below.

33. I have considered first of all the length of the claimant's delay in presenting her claim. I find that, in accordance with section 123(4) of the Equality Act 2010 time begins to run from the date upon which the respondent did an act that was inconsistent with the making of reasonable adjustments. That was the 12July 2023 when it notified the claimant that she was being put on medical suspension. By putting the claimant on medical suspension the respondent was indicating clearly that it would not make the reasonable adjustments.

34. I do not accept the respondent's submission that time runs from July 2022, 13 weeks after the Access to Work report recommended that adjustments be implemented. To accept that argument would be to give an employer who delays in making adjustments or has an ongoing failure to make reasonable adjustments a 'get out of jail free' card. That cannot be right, just or equitable.

35. Time therefore runs from 12 July 2023, and the primary time limit expired on 11 October 2023. The claimant began early conciliation on 29 November 2023, 49 days late. The length of the delay in this case was therefore 7 weeks.

36. I find that the reasons for the delay were:

    1. The claimant struggled due to her disabilities to complete the necessary forms to get trade union advice;
    2. Incorrect advice from the claimant's trade union in January 2023;
    3. The claimant's choice to pursue an internal grievance before issuing proceedings; and
    4. Delays on the part of her trade union between September and November 2023.

37. The claimant cannot in my view be criticised for waiting a month to chase up her trade union in September 2023. As a lay person she was entitled to assume that once she had put the case in the hands of professional advisors those advisors would progress the claim in a timely manner.

38. I have then considered the extent to which the cogency of the evidence is likely to be affected by the delay in issuing proceedings. I do not accept that the cogency of the evidence is likely to be affected at all by a delay of just 7 weeks. This is not a case which is likely to turn on witness evidence. Rather the key evidence will be the documentary evidence in the form of the Access to Work Report and the grievance outcome letter. It is difficult to see how the respondent is going to be able to explain away its failure to make reasonable adjustments through the giving of oral evidence, given that it admitted in the grievance outcome that it had failed to make adjustments. In any event, 7 weeks is not a significant delay that is likely to affect witness recollection of events.

39. I have also considered the extent to which the respondent cooperated with any requests for information. There was no evidence before me today of the respondent failing to cooperate with requests for information by the claimant. This is however a case which is marked by persistent delay on the part of the respondent – both in the making of adjustments, or rather the failure to do so, and in the handling of the grievance. It would not be just and equitable for the claimant to be penalised for the respondent's delays.

40. Nor would it be just and equitable for the claimant to be penalised for seeking to resolve matters internally, through the grievance process, before going to Tribunal. The claimant to her credit tried to work without adjustments until November 2022, and then again to return to work once she knew that her sick pay would be reduced. Although she did take some time to issue proceedings, after becoming aware of the respondent's failure to make the adjustments the claimant took what many may consider to be the correct step of raising a grievance before issuing legal proceedings.

41. The claimant also took steps to take appropriate advice, both from her trade union and from a solicitor, and acted at all times in accordance with that advice. In discrimination claims, the mistakes of an advisor cannot always be laid at the door of a party, and where a delay is due to poor advice or inaction on the part of an advisor, that does not prevent a just and equitable extension of time.

42. In considering whether it would be just and equitable to extend time, I also take account of the merits of the claim. This is, on the face of it, a claim with good prospects of success as the respondent has accepted in the grievance outcome that it failed to make reasonable adjustments. It would not be just and equitable for the claimant to be prevented from bringing a strong claim due to a delay in presenting that claim, or for the respondent to have a windfall were the claim to be found to be out of time.

43. The balance of prejudice in this case also favours extending time. To refuse an extension would prevent the claimant pursing a complaint which on the face of it has merits. To grant an extension would not prevent the respondent from defending the claim but would merely prevent it from having a 'windfall' defence.

44. For these reasons I am satisfied that in this case it would be just and equitable to extend time. I therefore find that the Tribunal does have jurisdiction to hear this claim. The respondent's application for strike out on the ground that the claim has no reasonable prospect of success because it is made out of time fails and is dismissed.

_____
Employment Judge Ayre

Date: 6 February 2025

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