



## EMPLOYMENT TRIBUNALS

Miss. C. Rawlinson

Health Education England (1)  
General Pharmaceutical Council (2)  
York Teaching Hospital NHS  
Foundation Trust (3)

v

**Heard by CVP**

**On: 4 December 2020**

**Before:**

**Employment Judge Wedderspoon**

**Representation:**

**Claimant:**

**In Person**

**Respondents:**

**Mr. Wright, Solicitor (1)**

**Mr. Lawrence, Counsel (2)**

**Miss. Smith, Counsel (3)**

## JUDGMENT

1. The Claimant's discrimination complaints have been brought outside the primary limitation period.
2. In all the circumstances it is just and equitable to extend time.

## REASONS

1. By claim form dated 24 June 2020 the Claimant brought disability discrimination complaints against all three respondents.
2. This case has already been subject to two Preliminary Hearings to identify claims and issues against each respective respondent. The case was listed for a preliminary hearing to determine whether the claimant's complaints were brought in time and if not, whether time should be extended pursuant to the just and equitable discretion.

3. An agreed bundle of 234 pages was provided. The claimant added a report from Dr. William R. C. Weir, Consultant Physician dated 7th November 2020 along with background information about her conditions and an additional bundle of 18 pages. Mr. Wright for the first respondent helpfully emailed Miss. Smith the additional 18 page bundle.
4. Reasonable adjustments were made to the hearing to ensure that the claimant was provided with adequate breaks. The claimant gave oral evidence and was subject to detailed cross examination by Miss. Smith.

#### Background

5. The claimant was employed by the third respondent, an NHS Trust, as a pre-registration pharmacist, from 22 July 2019 until 20 January 2020. The first respondent is a non-departmental public body established under the Care Act 2014 and commissions training places from NHS Trusts for pre-registration trainee pharmacists. Individuals are recruited to these places via the National Recruitment Scheme (ORIEL). The second respondent is a statutory body which has responsibility for ensuring that candidates for entry into the profession of pharmacist and pharmacy technician are suitably qualified and trained. The third respondent is a NHS Trust and provided pre-registration pharmacy training to the claimant.
6. Early conciliation started on 24 May 2020 and ended on 23 June 2020. The claim form was presented on 24 June 2020.
7. It is agreed by the respondents that the claimant was at all material times a disabled person within the meaning of section 6 of the Equality Act 2010.
8. The claimant has several long-term disabling conditions including postural orthostatic tachycardia syndrome (POTS), post viral chronic fatigue, ehlers danlos syndrome (EDS), atlantoaxial instability (AAI), craniocervical instability (CCI), sub-axial instability, new daily persistent headache (NDPH).
9. The medical material from Dr. William R. C. Weir Consultant Physician dated 7 November 2020 added by the claimant to the agreed bundle describes the claimant's symptoms of a severe level of fatigue, unrelieved by sleep; post exertional malaise where attempts are made to exert herself beyond very narrow limits. She suffers from a persistent headache as well as painful joints and muscles. Cognitive difficulties manifest mainly as problems with short term memory and mental focus are a feature. The claimant satisfies the diagnostic criteria for ME/CFS. Dr. Weir's information about ME/CFS states that the defining features are an overwhelming sense of fatigue and chronic influenza-like malaise typically exacerbated after physical or mental exertion. The fatigue is accompanied by a profound lack of energy. Postural Orthostatic Tachycardia Syndrome (POTS) and Mast Cell Activation Syndrome (MCAS) are often associated with ME/CFS. POTS manifests with fast heart rate and faintness on changes in posture particularly on sitting or standing up from the horizontal.

#### Evidence

10. The claimant stated the extent of her symptoms prevented her from submitting a claim to the tribunal within the primary limitation period. The first month following resigning her position with the third respondent in January 2020, she was ill because she had been required to stand during her time with the trust. For months after this she spent periods of sleeping most of the day. She was awake for only 6 hours per day. She suffers from post viral chronic fatigue and she was exhausted by physical stress. She suffered post malaise exacerbation delayed onset. Pain was a lot more severe after this period and she found walking to the end of the street difficult.
11. From February 2020 the claimant described she would “crash” for days. She had no treatment. Her symptoms consisted of a profound level of weakness; she felt locked in her own body as if her whole body had gone to lead. She required her food to be cut up for her and water bottles to be opened for her. She had to crawl up the stairs and was unable to write with a pen. Movements were physically painful. From January 2020 to May 2020 her head and neck pain increased which was not improved by rest.
12. From January 2014 the claimant said she has suffered from permanent headaches. In 2019 she suffered structural abnormalities EDS hyper mobility and defective collagen instability in her neck and head pain and muscular pain. She suffered shaking hands because of a tremor. She also suffered nausea and muscular pains like flu symptoms. She was affected by noise and spent time lying down in a dark room.
13. Following leaving the Trust she also suffered from brain fog which meant she was unable to formulate a case. She had difficulty in processing her thoughts and concentrating on anything. She had trouble finding her words all the time and slurred her words.
14. At the time of resigning, she felt really demoralised because people were meant to help her at work and did not. She felt she had exhausted all her options; felt a loss of self and did not know what to do. Her G.P. does not provide treatment for her conditions; she is under the care of Dr. Weir. She sought an appointment to see him on 15 February 2020 which was booked for the summer but was cancelled due to the pandemic. She repeated she did not have mental capacity to formulate a case. Following receipt of a response to her enquiries from her M.P. on 20 May 2020, she contacted a lawyer on 22 May 2020.
15. Under cross examination, the claimant was taken to her letter dated 17 June 2020 (page 224) written to Sarah Davies of the third respondent. In the letter at page 226 the claimant mentioned she was not provided with a suitable chair and accepted that she had stated in her claim form she did not have a suitable chair in the first three months with the third respondent (July to September 2019). She accepted she was generally aware of the concept of disability discrimination but it was not at the forefront of her mind at the time and she did not look into disability discrimination and was unaware of applicable time limits in the employment tribunal. She had good internet access whilst at the third

respondent. She did investigate disability in the workplace when she was seeking to obtain a suitable chair from Access to Work in July 2019 and she was hopeful the third respondent would provide her with a suitable chair in the next rotation. Thereafter, the claimant did not research this issue. The claimant stated that she sought free legal advice when she felt well enough in May 2020. She contacted her M.P. on 20 March 2020 and redrafted a letter previously sent to the second respondent. The claimant stated that she did not have any sick leave until 3 January 2020 and she was last physically in the hospital on 20 January 2020. In her letter to Sarah Webster on 5 January 2020 she informed her that she needed to leave and did thank her for getting a chair but she stated she was not going to be rude but there was no suitable chair provided. On 15 January 2020 the claimant corresponded with the second respondent in respect of seeking a bespoke training arrangement. The claimant had also corresponded with the second respondent on 19 May 2020.

### Submissions

16. Miss. Smith on behalf of the Third Respondent submitted that the relevant key dates were the date of the termination of employment on 20 January 2020; the primary limitation period on 19 April 2020; the ACAS certificate 24 May 2020 (Day A) and 24 June 2020 the date of the issue of the claim form. Miss. Smith submitted that the claim was 67 days out of time, namely 10 weeks late. Miss. Smith submitted that pursuant to section 123 of the Equality Act 2010 which provides a limitation period of 3 months (ignoring the ACAS certificate) the claimant contacted ACAS after the expiry of the time limit. In the circumstances the relevant question for the Tribunal was whether it was just and equitable to extend time. The burden rests upon the claimant to establish that and it is a general and wide discretion. Miss. Smith directed the Tribunal to the factors set out in the case of **Keeble** namely length of and reasons for delay; the extent of the effect on the cogency of evidence; whether the respondent has co-operated with a request for information; the promptness in which the claimant acted upon becoming aware of a cause of action and the steps taken to seek professional advice once she was aware of a cause of action.
17. First, she submitted ignorance of time limits needed to be distinguished from lack of knowledge. Denning in the case of **Walls Meat** stated that a key aspect of ignorance is that it needed to be both genuine and reasonable. What was the claimant reasonably aware of and not what she was just aware of. The case law also indicates that knowledge of the right of claim and time limits are separate matters.
18. When the claimant became aware of bringing a claim. The date used in her submissions was the effective date of termination on 20 January 2020 which she submitted was a generous date when a reasonable adjustment had not been made. The claimant was not provided with a chair from her ET1 in the first three months. She expressly submitted that she did not ask the tribunal to find when the omission crystallised which required a more detailed factual assessment on the hearing of the evidence. However, she submitted that the alleged failure to provide the claimant with a chair was on going from July 2019.

This impacts on the knowledge and reasonableness and ignorance of time limits.

19. In addressing the factors in **Keeble**, Miss. Smith submitted that the length of delay was some 10 weeks from the expiry of the limitation period which was a long period of time; three month primary limitation had expired so that there is considerable delay; it effectively amounted to a doubling of the initial limitation period. In respect of the reasons for the delay, Miss. Smith submitted the claimant relied upon (a) ill health and (b) knowledge of time limits. In regard to the claimant's ill health, there were three periods of time to consider. First the period of employment from 22 July 2019 to 20 January 2020; secondly 21 January 2020 to early May 2020 by early May 2020 the claimant's health had improved so that she felt able to pursue legal action and May 2020 to 24 June 2020 when the claimant issued her claim. In respect of the three periods there were different impediments at each stage. Miss. Smith invited the tribunal to note that the claimant had no sick leave from work until 3 January 2020. The claimant did have knowledge of disability. During the second period the claimant was clearly unwell; she was sleeping save for 6 hours per day. She suffered brain fog and an inability to open a water bottle. She did not say she could not make a claim then. During that period she was able to write correspondence namely emails in January, March and May 2020. In early May 2020 her health had improved to the extent to bring legal proceedings so her ill health does not apply for the whole period of delay. In respect of lack of knowledge of time limits the claimant is an intelligent educated and capable woman. She was aware of the general concept of disability discrimination. Time limits are there to ensure claims are brought promptly. The claimant's evidence was that she was not aware of specific time limits until a later day when she sought legal advice; it was submitted the claimant's ignorance was not reasonable. She was aware for a considerable amount of time at the trust about disability discrimination. It was submitted it was incumbent upon the claimant to look into that information and obtain advice. She possesses advance research skills but she elected not to use these. In the circumstances ignorance of time limits is not reasonable in this case.
20. In respect of the effect on the cogency of evidence, there was a lot of verbal communications with supervisors and what was said. This involves whether there was access to a chair on days in particular environments. The trust have to look back on what happened on a particular date or time. The expiry of the time limit and delay of two months has impacted on the reliability of that evidence and it was submitted that the trust is prejudiced.
21. The claimant did not take any point on lack of co-operation by the third respondent and on this basis, Miss. Smith had no observations. In respect of the claimant's promptness, she submitted the claimant was not prompt. The claimant talks about not having a chair for three months following her commencement at work; in September 2019 Access to Work were involved in discussions; an email was sent by the claimant to the trust on 5 January 2020 (page 213). She had a supervision on 10 January 2020. On 15 January 2020 the claimant emailed the GPC. This document reflects the narrative in her ET1 at page 216. However, the claimant did not present her ET1 until 24 June 2020.

She contacted ACAS on 24 May 2020. In the circumstances the claimant did not act promptly.

22. Miss. Smith submitted that the claimant was aware of organisations that provide legal advice. She had internet access where advice is available. The claimant first obtained advice on 22 May 2020 she could have taken reasonable steps to issue proceedings but it took her over one month to submit a claim. Her claim is out of time and the claimant cannot satisfy the tribunal it is just and equitable to extend time in this case. In respect of other respondents remaining in the case as parties if the Third Respondent is dismissed as a party, it was submitted that this would not prevent a fair trial going ahead in the circumstances.
23. On behalf of the First Respondent Mr. Wright submitted that no point was taken on the time point by his client. Similarly, the Second Respondent took a neutral position and made no submissions about time.
24. The claimant submitted that she would seek disclosure of work emails from Ms. Webster to demonstrate that the claimant had sought a chair and support at the Trust. She further submitted it was not the case that by May 2020 she suddenly became well. May 2020 is the point of time when she began to show an improvement in her health. She lives every day with her conditions. The claimant submitted that she was organised and did things when she was able to. In respect of the length of delay being considerable, the claimant submitted that 35 days out of time she contacted with ACAS; the Third Respondent did not engage in the conciliation process and an extra month was added onto this period. She had not acted unreasonably. She did not get a suitable chair. There is email evidence that a chair was ordered for the claimant but it was unsuitable. Whilst suffering from ill health, the claimant did not have capacity; she lacked energy and cognitive function but she did not have a choice at the time; she was simply too unwell to seek legal advice. The claimant submitted that she had heard that the Tribunal had time limits of months as opposed to years but she did not have the energy to look into this. Presenting a claim to the Tribunal was a struggle. There was a lack of co-operation by the Third respondent during the conciliation period. There is email evidence in existence of the claimant challenging the chair decision. The claimant submitted that she went to lengths to make it work and she spoke to chair suppliers to make it work. The claimant submitted that she took steps to take advice via civil legal aid. They can assist by advising about the preparation of documents. Further the claimant contacted a pro bono organisation for the preparation for today's hearing. During the period when the claimant was not well enough to start the conversation as she was completely debilitated as she did not have health at that time and she did not have an option. She sought the full correspondence prior to her registration where she stated she was assured she could work part time and have a chair.
25. Miss. Smith further submitted that the claimant had provided additional evidence in her oral submissions but she took no issue about that as the claimant was a litigant in person.

### The Law

26. Section 123 of the Equality Act 2010 specifies time limits for bringing discrimination claims and provides
- “(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.*
- (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;*
  - (b) if P does no inconsistent act on the expiry of the period in which P might reasonably have been expected to do it.”*
27. The Court of Appeal in the case of **Matuszowicz v Kingston upon Hull City (2009) EWCA Civ 22** held a person will be taken to have omitted to do something when he does an act inconsistent with it or on the expiry of the period in which he might have been reasonably expected to do the act. Lord Justice Sedley when considering the time provisions in paragraph 3 of Schedule 3 of the Disability Discrimination Act 1995 stated *“For obvious reasons this can create very real difficulties for claimants and their advisers. But there are at least two ways in which the problem may be eased. One is that claimant and their advisers need to be prepared once a potentially discriminatory omission has been brought to the employer’s attention to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission. The other is that when deciding whether to enlarge time ...tribunals can be expected to have sympathetic regard to the difficulty..”*
28. In the case of **British Coal Corporation v Keeble (1997) IRLR 336** it was held that the Tribunal’s discretion to extend time under the just and equitable test is wide and comparable to that under section 33 of the Limitation Act 1980 and the court can consider prejudice to the parties, the length of any delay and the excuse advanced for it. The Court of Appeal in **Robertson v Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434** made clear there is no presumption that time will be extended.
29. In **Chohan v Derby Law Centre (2004) IRLR 685** HHJ McMullen QC summarized the relevant principles from the authorities as follows :-
- (a) A tribunal demonstrably taking the wrong approach or not taking account of a fact which it should have done errs in law;
  - (b) The availability of legal advice is a relevant question;
  - (c) The use of the checklist under the Limitation Act 1980 is often useful;
  - (d) It is not a requirement to go through the checklist but failure to consider a significant factor will amount to an error of law;

(e) The failure by a legal adviser to enter proceedings in time should not be visited upon the claimant for otherwise the defendant would be in receipt of a windfall.

30. The Limitation Act 1980 checklist requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to :-
- (a) the length of and reasons for the delay;
  - (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
  - (c) the extent to which the party sued had cooperated with any requests for information;
  - (d) the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action and
  - (e) the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.
31. A factor to be weighed in the balance along with others is a claimant's delay by reason of invoking an internal process (**Robinson v Post Office IRLR 804** and **Apelogun-Gabriels v London Borough of Lambeth (2001) EWCA Civ 1853**). In the case of **Abertawe Bro Morgannwg Univeristy v Morgan (2018) EWCA Civ 640** the Court of Appeal stated the duty to make reasonable adjustments begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the disadvantage. If time began to run on that date a claimant may be unfairly prejudiced. In particular the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired. Further, the case established that there was no requirement that it had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour.
32. Ignorance of rights is a relevant factor but the claimant's ignorance needs to be reasonable. **Wall's Meat Co Limited v Khan (1978) IRLR 499** referred to by the third respondent concerned an extension of time under the reasonably practicable discretion which is a stricter test than the just and equitable discretion; the case held ignorance of essential matters can be regarded as grounds for an employment tribunal to hold that a claim in time was not reasonably practicable if it can be shown that the ignorance or mistaken belief was itself reasonable; ignorance will not be if it arises from the fault of the complainant in not making inquiries reasonably that should have been made. Ignorance of a time limit may be a factor to consider but a claimant who is aware of her rights will generally be taken to have been put on enquiry as to the time limit. A debilitating illness may prevent a claimant from submitting a claim in time but it should be supported by medical evidence.

#### Conclusions

33. The starting point is that where a claim is brought outside of the primary limitation period the burden rests upon the claimant to persuade the Tribunal



that it is just and equitable to extend time. There is no presumption that an extension of time will be granted.

34. In summary, the claimant's complaint is that the pre-registration training required her to be mobile and to stand for prolonged periods and there was a failure to adjust the nature of the training or provide her with a suitable chair so to access the training. On her case this continues to be the case in terms of the first respondent's commissioning of the training course and the approval of the course by the second respondent. Throughout her time with the third respondent she says she was not provided with a suitable chair.
  
35. At the commencement of her training at the third respondent she was aware the chair provided was unsuitable but she sought to remedy this via assistance from Access to Work and her unchallenged evidence is that she liaised with the chair suppliers herself and hoped a suitable chair would be provided. Unfortunately, the suitability of the chair was not resolved. Her case is that her health conditions were exacerbated and her general health deteriorated. She went off sick on 3 January 2010 and resigned on 20 January 2020. Although the third respondent did not wish a finding at a preliminary hearing as to when the discriminatory act crystallised in the absence of a more detailed forensic analysis of the evidence, potentially it is arguable that the discriminatory act of a failure to make a reasonable adjustment crystallised on the date of her sickness or on the date of her resignation when she says she had to leave the third respondent's employment or even sooner.
  
36. The claimant has brought her claim outside the primary limitation period provided for in section 123 of the Equality Act 2010 and there had been a significant delay.
  
37. In considering the concept of just and equitable extension along with the Keeble guidance, the factual context of the claimant's ill health requires consideration in particular regard to the length of and reasons for the delay. The claimant suffers a debilitating life-long health condition. It causes the claimant physical and mental limitations. The unchallenged evidence of Dr. Weir is that symptoms include a severe level of fatigue, unrelieved by sleep; and post exertional malaise where attempts are made to exert herself beyond very narrow limits. I accept the claimant's evidence that by early January 2020 she became so unwell she required time off sick and that she reached the conclusion she could not continue to work at the third respondent's trust in those working conditions and resigned on 20 January 2020. The symptoms she described she was suffering at this time and thereafter to May 2020 when she noted some recovery are consistent with the medical material from Dr. Weir. Further from May 2020 onwards to date of issue although the state of her health had reached a point where she could investigate and consider legal action, she was by no means fully recovered and she continued to suffer symptoms impacting on her physical and mental health which impeded her efforts to seek a legal resolution for her issues. I accept the claimant's evidence that she was too unwell to issue her claim at an earlier date following her resignation and in fact she issued her claim at the first opportunity her health facilitated this.

38. In reaching these conclusions I take into account the correspondence the claimant entered into prior to the date of issue of proceedings. The claimant had written to the second respondent on 15 January 2020 (page 216) complaining that she was struggling to complete the training with her health conditions. She had also liaised with her M.P. Nigel Adams in March 2020 about her employment with the third respondent but writing to the second respondent and liaising with a M.P. is not necessarily indicative that an individual is sufficiently well enough to issue proceedings. By May 2020 the claimant's health started to improve so that she was able to contact a lawyer. Infact, the improvement in the claimant's health is indicated by the articulate and detailed letter written to Ms. Davies on 17 June 2020 (a week before the issue of proceedings). I am persuaded that by June 2020 the claimant was sufficiently well enough to issue proceedings.
39. In respect of the cogency of evidence being affected by delay, there is no suggestion by the third respondent that relevant witnesses are no longer available. It is suggested that by reason of delay memories fade because to defend the claim the third respondent's witness would have to recall oral conversations and each occasion a chair was not available for the claimant. I am not persuaded by this argument in the circumstances that the respondent witness appears to be available to give evidence; the witness would have had to recall conversations with the claimant even if the claim was made within the primary limitation period and the claimant's case is that the regime of training prevented her training access due to her disabilities throughout the period and the chair provided was simply not suitable. In any event the claimant's case is that she had entered into email correspondence with the third respondent complaining about the chair and with Access to Work and there is an evidential trail. In the circumstances I reject the suggestion that the third respondent is prejudiced evidentially by the delay.
40. Although the claimant complained there had been a lack of engagement by the third respondent during the ACAS conciliation period, in my Judgment this is not a relevant matter to be considered as to whether there was a lack of co-operation with any requests. In the circumstances, it is relevant that the claimant had complained about the training regime and lack of a chair and the third respondent was aware of it whilst the claimant was employed by them.
41. I accept the third respondent's point that the claimant was an intelligent competent individual with good research skills who had general knowledge of the concept of disability discrimination in particular by her contact with Access to Work. During the course of her employment with the third respondent the claimant did seek to sought out the issues by raising them with the third respondent; contacting Access to Work and chair suppliers. I accept the claimant's evidence that she tried to make it work. In these circumstances the claimant did not further investigate her rights to litigate or tribunal time limits and in my Judgment this was reasonable. Further, the claimant's poor health in January 2020 must be taken into account when considering the reasonableness of her actions when investigating her rights to litigate and investigation of employment tribunal time limits following her resignation. In my judgment the claimant simply was not well enough to undertake these inquiries. By May 2020 her health started to improve and on receipt of her M.P.'s response she

contacted a lawyer. However, her health condition was not fully resolved sufficiently for her to take the steps to litigate this case until June 2020.

42. By 17 June 2020 the claimant's health had improved to the extent that she was able to draft an articulate and detailed letter to the third respondent. This was one week prior to the issue of her claim. In these circumstances she did act promptly and issued her claim one week later.
43. If the time extension is not granted to the claimant, the third respondent will be removed from this litigation. I am not persuaded that it is important for the third respondent to remain a party in the case so that the first and second respondent can defend the claims. Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 avail a party with the rights to seek disclosure from a third party and/or the attendance of a witness if it would be in accordance with the overriding objective.
44. In all the circumstances it is just and equitable to extend time so that the claimant can pursue the third respondent.
45. The first and second respondents maintain a neutral position as regards time and made no submissions to strike out the case on a time point. I am persuaded, taking all the circumstances of the case into account set out above and including the claimant's case that the bar to her accessing training designed and approved by the first and second respondents continues to today, it would be just and equitable to extend time so that the claimant can also pursue the first and second respondents.

**Employment Judge Wedderspoon**

Dated: 11 December 2020

**Sent to the parties on:**

Dated: 8 February 2021

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