EMPLOYMENT TRIBUNALS

Claimant: Mrs A Berry

Respondent: The Commissioners for HM Revenue & Customs

HELD AT: Manchester **ON:** 28 March 2017
5 May 2017
(in Chambers)

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr M Brown, Union Representative
Respondent: Mr Lewis, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant is a disabled person within the meaning of the Equality Act 2010.

2. The claimant's claims are in time except for her complaint regarding the failure to obtain an Occupational Health report and the Performance Improvement Plan.

3. The respondent's application for a striking out of the claimant's indirect claim or a deposit order fails and is dismissed.

REASONS

The Issues

1. This preliminary hearing was listed for today, 28 March 2017, to determine the following questions:

(1) Was the claimant disabled at the material time?

(2) Should the claim be struck out (in its entirety or in part) on the basis that the Tribunal does not have jurisdiction to hear it as it was presented outside the statutory time limit?

(3) Should the indirect discrimination claim be struck out or make subject to a deposit order on the basis that it has no reasonable prospect of success?

Respondent's Submissions

2. The respondent submitted that:

(1) The evidence was insufficient to establish that the claimant's sporadic migraines constituted a sufficiently substantial adverse impact to constitute the disability, bearing in mind the burden of proof was on the claimant;

(2) The claim was out of time, there was no continuous conduct and it would not be just and equitable to extend time; and

(3) The indirect discrimination claim was so weak it should be struck out or at least a deposit ordered.

Claimant's Submissions

3. The claimant submitted that:

(1) The claimant states that she has had the condition of migraines since she was 19 years old. She is now aged 38 years. Whilst the migraines are sporadic and vary in intensity it is clearly a recurring condition which, which she has a migraine, has a substantial adverse effect on her day-to-day activities.

(2) She relies on continuous conduct ending on 18 May when she was moved jobs and received an "achieved" marking. On this basis the claims are in time. If not she asks the Tribunal to exercise its just and equitable discretion.

(3) The claimant argues that the indirect discrimination claim is viable.

Findings of Fact

4. The claimant has worked for the respondent since 1999 as an Administration Officer, and for the past few years has worked two days a week.

5. There was considerable difficulty in obtaining cogent further particulars to the claimant's claim. These were originally ordered by Employment Judge Sherratt on 16 November 2016. The specific events the claimant relies on are:

(1) October 2014 – Discussion with Nikesh Vaja where it was agreed she would be referred to the Occupational Health as she had been absent due to migraine. However, that never occurred resulting in a failure to make reasonable adjustments.

(2) October 2014 to December 2014 – Nikesh Vaja gave the claimant an indicative "must improve" marking and she was placed on a performance improvement plan without any Occupational Health advice as to whether her condition might have affected her performance. This PIP ended in March 2015.

(3) May 2015 – The claimant received a "must improve" marking under the performance management review process by Catherine Nicholson. Again no Occupational Health advice was obtained, and again there was a failure to make reasonable adjustments and also a section 15 and indirect discrimination claim arises from this event.

(4) August 2015 – The claimant finally obtained an Occupational Health referral. The recommendations from the Occupational Health report including a transfer to more stable work tasks and area as her work environment was exacerbating her condition. The claimant also submitted an internal grievance regarding a PMR marking and the failure to make reasonable adjustments at this point in time.

(5) April 2016 – The grievance process was concluded and her appeal was not upheld although the respondent said there were management failings. The claimant's adjustments started to be implemented as she was transferred to a different work area as had been recommended.

(6) 18 May 2016 – The claimant was informed she had received an "achieved" marking under the PMR system. This rescinded the "must improve" marking and was the final marking. The claimant avers that until the final marking was not in place she was still suffering discrimination on the basis that she could have received a "failure to improve" mark due to the failure of the respondent to alleviate her stressful working conditions in the relevant year.

6. The respondent asserted that the claimant transferred roles on 13 April and was told her marking on 27 April. However I accept the claimant's evidence she did not transfer roles until 18 April and that she was not officially advised of her marking until 18 May.

7. In respect of the disability issue the Occupational Health report in August 2015 said that the claimant's short-term sickness absence had increased; that she stated she was suffering from work related stress; she worked 16 hours and there were frequent changes in her job role; she was also a union representative. She felt that the stress exacerbated her migraines and that she had been diagnosed with migraines since her teenage years. It was stated she was fit for her job role with advice as below. Under "Outlook" it stated:

> "Ms Berry has migraines which are stable at present but she remains vulnerable to further episodes. I am unable to advise when or for how long any future episodes would last. I would advise further discussion with management about Ms Berry having only regular tasks to prevent changing duties which causes stress and exacerbates migraines (if meets business needs). My interpretation of the relevant UK legislation is that in relation to the migraine Ms Berry has an impairment which is likely to be considered a disability because it has lasted

longer than 12 months, is likely to re-occur and would have a significant on normal day-to-day activities without the benefit of treatment."

8. In the claimant's impact statement she stated she had suffered with migraines for many years; the earliest she could remember was in 1999 and the symptoms could last from between five hours and three days. The symptoms were similar but the severity could vary. Her symptoms were visual aura, numbness in the tongue, struggling with speech, sensitivity to light, nausea, severe head pain in the right-hand side of the head. She stated:

"…After the head pain the head feeling as though I am in a fog. It's even sometimes sore to touch. Although the pain has receded the days after leave me a little absent-minded. At times I can get one migraine then another the day after the last one has ended. When the migraine attack is in full swing I cannot function. I find a darkened room and lie down in the dark for hours.

I have been prescribed migralieve, cocodamol, sumatriptan and paramax. Sumatriptan is a drug that works by taking as soon as I feel signs of a migraine attack. This frequently works for me. The only problem is it stops the migraine from worsening but the side effects of its own cause me to feel stomach ache, drowsy and absentminded.

If it doesn't work I take paramax or cocodamol which also have the side effects of making me feel drowsy. The side effects can cause me to act more slowly than normal and find it hard to understand new information and procedures. It can cause me to take more comfort breaks at work to try and keep myself from feeling so drowsy.

I also take care to keep hydrated and make sure I get the sleep I need. Stress also triggers it.

The symptoms above affect my ability to carry out my day-to-day activities if not properly controlled. The side effects of the prescribed medication can also have an adverse effect on my ability to carry out day-to-day activities also."

9. The respondent produced evidence of the claimant's absences from October 2012 and up to 22 April 2015, of which 16 days were referred to as "not noted" or "nervous system". The claimant, who I found to be a candid witness, stated that the "not noted" absence from 15-29 February 2012 was an operation and was unrelated to her migraine.

10. The claimant's evidence was that she only worked two days a week, and this was partly because of the difficulties she had because of her migraine, but the fact that she only worked two days a week enabled her to hide her migraines from her employer and avoid being off work sick as much as possible.

11. There was secondary evidence from her grievance that showed that of a total of 14 absences from 8 October 2012 only two absences related to migraine: 6-8 January 2014 and one day on 20 May. However, there was no explanation from where this information was obtained.

12. The medication evidence also showed that the claimant had visited the doctor on five occasions over a six year period between June 2010 and September 2016, and a note from 23 April 2015 suggested that the normal frequency for the claimant's migraines was one every two months. The claimant agreed this was generally the case and in cross examination confirmed it would not be many months between migraines but it would be around two months. The medical notes state as follows:

> "On 7 June the claimant, who was then pregnant, visited regarding migraines and stated she used to get migraines but had not had any for a long time:
>
> 8 January 2014: indicating she had had a cluster of migraines in the month before the visit and was seeking further medication.
>
> 18 June 2014: the claimant was requesting sumatriptan but stated she only used it occasionally.
>
> 23 April 2015: again a cluster of recent migraines was reported and said she ran out of sumatriptan months ago.
>
> 12 September 2015: a further visit regarding migraines.

13. In respect of the just and equitable issue the claimant said that she was unaware of the time limits and thought her claim would be considered continuous conduct. She was also trying hard to resolve the complaint internally – she sumitted a grievance in August 2015. The respondent pointed out the claimant was a trade union representative and so therefore either should have been aware or knew easily where to get advice. It was not reasonable that she was unaware or failed to make enquiries.

Law on Disability

14. The Equality Act 2010 defines a disabled person as a person who has a disability, and they have a disability, according to section 6(1) if he or she "has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities". Other relevant law is contained in the Government's guidance on matters to be taken into account in determining questions relating to the definition of disability, and the Equality and Human Rights Commission's Code of Practice on Employment provides further guidance. The material time disability has to be assessed is at the time of the discrimination complained of.

15. Section 212(1) of the Equality Act 2010 defines "substantial" as meaning "more than minor or trivial".

16. Appendix 1 to the Employment Code provides guidance on the meaning of "substantial". It states:

> "The requirement that an effect must be substantial reflects the general understanding of a disability as a limitation going beyond the normal differences

> in ability which might exist amongst people. Account should also be taken of where a person avoids doing things which for example cause pain, fatigue or substantial social embarrassment because of a loss of energy or motivation."

17. In **Goodwin v The Patent Office [1999]** the EAT commented:

> "What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired."

18. They went on to say somebody might be able to do something "but with the greatest of difficulties" or "with an amount of concentration far greater than would be normal".

19. The cumulative effects of an impairment should also be considered, and of course the effects of treatment should be disregarded when assessing the substantial adverse effect.

20. Prior to the Equality Act 2010 there was a list of normal day-to-day activities for the Tribunal to consider. That no longer exists and the matter is at large. Appendix 1 to the Employment Code states that:

> "Normal day-to-day activities are activities that are carried out by most men or women on a fairly regular and frequent basis: walking, driving, typing, forming social relationships."

21. Indirect effect should also be taken into consideration i.e. as also canvassed above, that:

> "A person might be able to do something but the impairment causes them to suffer pain and fatigue when doing it and would not be able to repeat the task over a sustained period of time but might be able to do it on a few occasions."

22. In respect of "long-term effect", paragraph 2(1) of Schedule 1 to the Equality Act 2010 states that:

> "An impairment is long-term if it has lasted for at least 12 months, is likely to last for 12 months or is likely to last for the rest of the life of the person affected."

23. Fluctuating effects are catered for, as the guidance points out at paragraph C7:

> "The effect of an impairment does not have to remain the same during a 12 month period."

24. Of more relevance to this case is the situation regarding recurring conditions. Paragraph 2(2) of Schedule 1 to the 2010 Act provides that:

> "If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities it is treated as continuing to have that effect if the effect is likely to reoccur."

25. "Likely to reoccur" means it could well happen – paragraph C3 of the Guidance.

26. Paragraph C6 states that:

> "The effects are to be treated long-term if they are likely to recur beyond 12 months after the first occurrence."

27. In respect of more general guidance the EAT in **Goodwin v The Patent Office [1999]** stated that the Tribunal's approach should maintain a focus on the whole picture and they said:

> "Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that this aggregation should not take one's eye off the whole picture."

28. Paragraph C7 states:

"It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the long-term element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same during the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily."

Respondent's Submissions

29. The respondent accepted that the claimant suffered from migraines and that it was an impairment, but did not accept that it had a substantial adverse effect on day-to-day activities long-term. They submitted that the evidence showed that the claimant experienced irregular clusters of migraines, some of which were milder than others; that they were clearly not severe of frequent enough to require regular visits to her GP as she only attended on five occasions over a six year period with significant gaps between those periods. In addition the claimant had only taken four days off over a four year period (January 2012 to January 2016), and that was further evidence that there was no substantial adverse effect; and that the claimant had for a long time argued that her adverse performance assessments were due to the impact of her role as a trade union officer or as a part-time employee. They submitted that the pattern of the claimant's migraines was too sporadic and insufficiently chronic in nature to cross the threshold.

Claimant's Submissions

30. The claimant submitted the lack of visits to the GP relating to migraines was not evidence that the migraines were not severe or frequent. She did not visit the GP every time she had a migraine and she used pain relief medication she could obtain over the counter when she needed it. In June 2010 she admitted she had not had a migraine for a long time before that date but gave evidence that pregnancy had been a trigger factor causing her migraine condition to become more frequent. The medical notes showed migraine attacks had been one every two months. The medical records from 18 June were significant as the claimant was requesting sumatriptan and she had given evidence she rarely used it because it is only

effective as a preventative if the migraine has not started. If she was using it, it suggests that her migraines were severe and frequent. The further visits to the GP showed that her condition was becoming more severe.

31. The claimant did not accept that her limited absence from work was evidence of a less severe condition. The claimant's work patterns were in part organised to enable her to manage her disability. If there were migraine attacks in work there were also attacks on days when she was not working at the weekend. She worked non consecutive days so that if she does have a migraine she has an opportunity to recuperate from any episodes. The respondent's own Occupational Health provider's opinion on 17 August was that the claimant suffered from a disability because it had lasted longer than 12 months, was likely to reoccur and would have a significant impact on normal day-to-day activities without the benefit of treatment. Occupational Health had full access to the claimant's medical records when drawing up their report. They pointed out the claimant's evidence was that some migraines can last for up to three days when the claimant's only option is to recuperate in darkness lying down.

Conclusions on Disability

32. I find that the claimant is disabled for the purposes of the Equality Act 2010. The claimant clearly has an impairment which, when it is operative, has a substantial adverse effect on her day-to-day activities. It is has a fluctuating effect. On some occasions the effect is alarming and distressful, and on other occasions it is less so, but on most occasions requires her to lie down in a darkened room until the attack passes. Clearly she is not able to engage in normal day-to-day activities for the duration of an attack. The claimant has had migraines since 1999 although before she had children she seems to have had long periods without suffering from one. However, since 2010 the frequency appears to have increased and I reject the respondent's contention that the fact the claimant did not attend her GP illustrates that the migraines were not severe. The claimant had medication and used it and went back for further medication, which shows that she was using that medication as far as she could. This is evidence of further attacks taking place more than were evidenced by attendance at the doctor's or attendance at work. I accept the claimant's evidence that she made every effort to attend work and in fact has been sent home on one occasion. I accept her evidence that part of her reason for choosing to work two days was in order to manage her condition better and give regular attendance in order not to lose her job.

33. Accordingly the claimant has an impairment which has a substantial adverse effect on day-to-day activities. It is a fluctuating and recurring condition which has that effect when it occurs, and in between attacks once the claimant has recovered she is symptom free. That comes firmly within the definition of a recurring condition and therefore I am satisfied that the claimant's migraines bring her within the definition of disability for the purposes of the 2010 Act.

Law on Time Limits

34. Section 123 of the Equality Act 2010 requires a complaint of discrimination to be brought within three months of the date of when the act complained of was done:

"(1) Subject to sections 140A and 140B:

Proceedings on the complaint within section 120 may not be brought after the end of –

(a) The period of three 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.

(2) …

(3) For the purpose of this section –

(a) Conduct extending over a period is to be treated as done at the end of the period; and

(b) The 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 the failure to do something –

(a) When P does an act inconsistent with doing it; or

(b) P does not inconsistent act on the expiry of the period in which P might reasonably have been expected to do it."

35. The leading case is **Hendricks v Commissioner of Police for the Metropolis [2002]** Court of Appeal –

"(1) The burden falls on claimants and the correct test is whether the acts complained of are 'linked to one another' and that they are evidence of a continuing discriminative state of affairs covered by the concept of an act extending over a period."

36. A relevant factor in deciding whether it is an act over a period is whether the same person or persons are responsible for each of the acts **Aziz v The FDA [2010]** Court of Appeal, and whether there is a break in time continuity between the different acts. Further one has to distinguish between an act which has continuing consequences and one which forms continuing conduct as established in **Sougrin v Haringey Health Authority [1992]** Court of Appeal, where a re-grading was a one-off act with continuing consequences, as would be the appointment to a job post.

37. The Court of Appeal in **Aziz** also approved the approach in **Lyfar v Brighton & Sussex University Hospital Trust [2006]** Court of Appeal, that the test to be applied when determining the question was whether the claimant had established a prima facie case or to put it another way:

"The claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs."

38. Specific considerations arise in respect of the failure to make reasonable adjustments. Is a failure to make a reasonable adjustment a continuing act or is it an omission?

39. **Matuszowicz v Kingston-upon-Hull City Council [2009]** Court of Appeal was a case where a teacher at a prison had his arm amputated below the elbow and he had problems negotiating heavy prison doors. His claim was that by August 2005 it would become clear that he could not work in the prison environment and the respondent failed to address that problem. Counsel argued that the claim was out of time since the duty to make reasonable adjustments had arisen as long ago as August 2005. The Tribunal found the breach was continuous, beginning in August 2005 and ending with the transfer of the claimant to Manchester City College in August 2006. On this basis this claim was in time. The EAT allowed the Council's appeal saying there was a one-off act of discrimination in August 2005. The Court of Appeal noted that:

> "For purposes of claims where the employer was not deliberately failing to comply with the duty the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date."

40. In the absence of evidence as to when the omission was decided upon the legislation provides two alternatives for defining the point. The first is when a person does an act inconsistent with doing the omitted act. The second requires an enquiry which is not straightforward. It presupposes the person in question has carried on for a time without doing anything inconsistent with doing the omitted act and it then requires consideration of the period within which he might reasonably have been expected to do the omitted act if it was to be done. This appears to require an enquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustment. Alternatively the Tribunal could use their discretion to extend time where it would be just and equitable to do so.

41. In respect of extending time limits section 123(1)(b) allows the Tribunal to extend time where they think it is just and equitable to do so. In **Robertson v Bexley Community Centre t/a Leisurelink [2003]** the Court of Appeal stated when Tribunals consider exercising the discretion:

> "There is no presumption that they should do so unless they can justify a failure to exercise the discretion, quite the reverse, as a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule."

42. The Tribunal is encouraged to take into account the checklist contained in section 33 of the Limitation Act 1980 and as discussed in **British Coal Corporation v Keeble [1997] EAT**. Such circumstances are the length of and the reasons for any delay; the extent to which the cogency of the evidence is likely to be affected by a delay; the extent to which the party sued has cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. The Tribunal should also consider the prejudice to each party.

43. In respect of ongoing internal procedures such as grievances, different approaches have been adopted. In **Aniagwu v London Borough of Hackney & another [1999]** the EAT stated it was sensible of the claimant to take the view that the best of course of action was to redress his grievance internally before embarking on legal proceedings and therefore concluded it was "just and equitable to allow A's claim to proceed".

44. In **Robertson v The Post Office [2000]** EAT the EAT said that the fact of an ongoing appeal or grievance was one factor to take into account.

Respondent's submissions on time limit point

45. The respondent submitted that the complaints were materially separate in several ways:

(1) The individual responsible for the decisions –

(a) Mr Vajal was the sole individual manager responsible for the Occupational Health complaint and the PIP complaint and made no other decisions in relation to the claimant's other complaints;

(b) Catherine Nicholson was the individual manager responsible for the "must improve" matter; and

(c) Catherine Nicholson was replaced by Samantha Alti and both Catherine Nicholson and Samantha Alti put arrangements in place to reduce the amount of tasks the claimant was required to perform before she was transferred to the static role on Richard Walker's team on 5 May.

(2) Time periods –

(a) One material timeframe ranges from October 2014 to April/May 2016; and

(b) There were periods of several months separating events.

(3) The nature of the decision of the omissions themselves –

(a) Whilst the decisions related to the claimant's performance or her role or her health, that was insufficient:-

(i) The OH complaint, an isolated administrative or individual managerial failing by NV specifically that related to potential health concerns. Such a failure could not constitute a failure to make a reasonable adjustment (**Tarbuck v Sainsbury's Supermarkets Limited [2006]**);

(ii) The PIP complaint relates to another markedly separate isolated performance management decision by NV about the claimant back in 2014. The focus of that decision was forward looking;

(iii) The "must improve" complaint relates to a decision taken by another manager altogether about the claimant's performance over the previous year. The decision was backward looking;

(iv) The role transfer complaint relates to an alleged failure by the respondent to make a decision to transfer the claimant within a reasonable timeframe rather than a deliberate decision not to.

(b) While some of the events may have had consequences if it was continued onwards following the individual event, this is also not sufficient with more for the claimant to succeed on this point."

46. The respondent then submits that if each of the complaints is considered as a separate act they were presented outside the statutory time limit:

(1) The Occupational Health complaint is out of time, the key dates being:

8 October 2014 – when NV said he would obtain Occupational Health advice;

8 November 2014 – the date when the respondent could have been reasonably expected to have sent that referral off. The claimant's name had not been put in within three months after that date or such period as extended by the new rules. The Occupational Health referral took place on 7 August 2015. The claimant contacted ACAS on 25 April 2016. The early conciliation certificate was issued on 8 June 2016 and time limit runs out on 8 July 2016, one month after day B. The claim was presented on 17 August 2016.

(2) The PIP complaint is out of time also. The PIP was introduced in December 2014 and ended in March 2015 at the latest. The time limit from the reference to ACAS early conciliation is 8 July 2016 but the claim was not presented until 17 August 2016.

(3) The "must improve" complaint – the relevant report recording the rating was 27 April 2015. The ordinary time limit would have been 26 July 2015. The time limit that ran out on the ACAS conciliation was 8 July 2016. The claim was not presented until 17 August 2016. The claimant argues it was not communicated to her until 18 May 2016 that she was no longer in the "must improve" category and therefore she says this is continuous. The respondent does not accept this and says time runs from 27th April.

(4) The role transfer complaint – the respondent says that the Occupational Health report was received on 17 August 2015 containing the recommendation that the claimant be moved. The claimant's last day in her old role was 4 April 2016. She says she began in her new role on 18 April. The respondent says it was 13 April.

(5) The claimant went to ACAS on 25 April and her certificate was discharged on 8 June. The claim was presented on 17 August 2016.

Claimant's submissions on time limits

47. The claimant says that the failure to obtain this Occupational Health report was a continuing factor in her being awarded a "must improve" marking and placed on a performance improvement plan between October and December 2014, and that getting a final "must improve" marking in May 2015 was also contingent on the fact that no Occupational Health report had been obtained, as had it been obtained reasonable adjustments would have been introduced. She therefore says that these two events of the indicative "must improve" and the PIP followed by the "must improve" were all linked to the failure to obtain an Occupational Health report. When the report was finally received, recommendations were made that she should be transferred to a more stable work area. However, the claimant was not moved until April 2016 and was not awarded an "achieved" marking under the PMR system until 18 May 2016. These last two events are in time.

48. Paragraph 13 above is also relevant

Conclusions on Time Limits

49. It is clear that the respondent was aware that there may be an issue surrounding the claimant's performance when her manager, Nikesh Vaja, agreed to make an Occupational Health referral in October 2014. Regrettably he failed to do so. The respondent says that was a one off "omission" with continuing consequences as in **Sougrin**. Likewise the PIP the claimant was placed which did not seem to have been followed up at all after it had been set up in December 2014 and was definitely abandoned by March 2015.

50. It seems to me that the occupational health referral has the potential to be either a one off act or a continuing omission. I prefer the later description and would find that this omission ended on 17 August 2015, so that for this issue time begins to run. I have considered whether to exercise my just and equitable discretion to allow this claim to proceed. Whilst I appreciate that the claimant could not be sure she would be transferred on the back of the report or her markings adjusted this is a factual connection not an ongoing state of affairs which is potentially discriminatory. I support her view that it was better to get the matter resolved internally rather than issue proceedings at the drop of a hat but the matter of the OH referral was resolved and she still brought proceedings so it was not the case that the internal resolution would prevent legal action. On that basis I am not convinced that the accessing of internal procedure was a cogent reason for delaying a claim .Accordingly I do not exercise my discretion to allow that claim out of time. In addition I accept the points the respondent makes about the claimant's status as a trade union representative. I do not believe she could do her job properly without some knowledge of time limits or at least an awareness of the need to check. Therefore any ignorance is not reasonable. It was also a considerable time later that the claimant went to ACAS.

51. I make the same finding in respect of the PIP which ended in March 2015.,it was an one off act ending at that date so time runs from then.It is out of time and for the same reasons as above I do not extend time..

52. These two matters are ofcourse still factually relevant.

53. I accept that a state of affairs in respect of her job transfer and her performance marking existed from October 2014 until the claimant was moved in April 2016, and at that point the state of affairs came to an end as the claimant obtained a more congenial post which did not exacerbate her migraines. For the claimant to be in time the two matters have to be linked together as she relies on the last act being her achieved marking which she says she did not know about until 18 May. However, I accept the claimant's proposition that the series of events placed her performance under a cloud and made her more vulnerable to disciplinary action, and even though her job had moved in April 2016 the fact that she had got a "must improve" in May 2015 and the possibility of getting another one in May 2016 meant that this cloud was still hanging over her until 18 May.

54. Accordingly I find that the matters are interlinked and should not be viewed as stand alone separate acts. There is, therefore, continuing discrimination up to 18 May in respect of these two matters and therefore these claims are in time.

55. As a result of taking this view I have not found it necessary to grapple with the conceptual difficulties around ascertaining when a failure to make a reasonable adjustment bites, as it has not proved necessary.

Indirect discrimination claim – striking out application

56. The third matter which I had to make a decision on was whether the claimant's indirect discrimination claim should be struck out as having no reasonable prospects of success or a deposit ordered on the basis that it had little reasonable prospect of success.

57. Section 37(1)(a) of the 2013 Regulations set out that a Tribunal has the power to strike out a claim on the basis that it has no reasonable prospect of success. If it does not meet that test but it has little reasonable prospect of success under rule 39(1) a party may be ordered to pay a deposit of up to £1,000 as a condition of continuing with that element of the proceedings. The Tribunal in deciding both matters should have regard to the overriding objective and should make reasonable enquiries into the ability of the paying party's ability to pay a deposit and any other relevant information.

58. The claimant's claim of indirect discrimination is that the performance management reporting system has a substantial adverse effect on the claimant because of her disability of migraine and cannot be justified. The claimant argues that because of her migraine she and others in similar situations are more likely to receive a negative performance marking. The claimant provided no evidence of this.

59. The claimant also says that it negatively affects disabled members of staff, especially when reasonable adjustments have not been implemented. However, the respondent says this is conflating the indirect claim with a reasonable adjustments claim and extends the reference group to all disabled people.

60. The respondent also relied on the claimant contending in the past that her performance failings had resulted from her trade union work and being part-time rather than directly from her disability. The respondent also contends that it is almost

inevitable that an Employment Tribunal would accept that the respondent had a genuine and legitimate aim i.e. in seeking to assess a worker's performance, and that it was reasonably necessary to have the PCP in place to pursue that aim in order to satisfactorily deliver organisational performance, discharging its statutory obligations, providing a vital public service effectively and efficiently and delivering value to the tax paying public.

61. In the claimant's submissions she stated that in effect it was self evident that employees with migraine disabilities were more likely to be subject to a negative performance marking than employees without it, as the key performances of productivity, accuracy, perceived attitude towards work and behaviours may all be affected by migraine disabilities. She also objected to a report from Keele University being excluded from the bundle which concluded that, "disabled HMRC employees were more likely to receive poor performance marking and the system was discriminatory in both its constitution and application". She acknowledged the respondent has a proportionate and legitimate aim to monitor staff but the application of the policy to disabled employees without amendment was a disproportionate response considering the size and resources available to the respondent.

62. The claimant also referred to the case of **Essop v The Home Office** recently decided by the Supreme Court which stated that there was no necessity for claimants in an indirect discrimination claim to explain why the PCP puts or would put the affected group at a disadvantage. She mentioned this presumably because the respondent's submissions had referred to this; however it is likely that that was before the decision of the Supreme Court in **Essop**.

Conclusions

Indirect discrimination claim

63. In respect of striking out the indirect discrimination claim, bearing in mind the overriding objective, I refuse the respondent's application. I refuse it at this juncture because there is simply not enough evidence to suggest the claim is sufficiently without merit as to meet the test of no reasonable prospect of success. Some of the evidence referred to, which was not before me at the hearing , indicates that the matter is a matter requiring evidence to be submitted and assessed. In addition whilst the respondent states it is inevitable a Tribunal would find that the respondent's policy was justified, again that is a matter which a Tribunal can only decide after hearing evidence. Accordingly the matter is not struck out.

64. It is not right to say that a tribunal will inevitably find that the respondents performance management policy is objectively justified . It would certainly assist the respondent to show how the respondent dealt with disabilities within this system, and in particular in the claimant's case. It may well be that these matters are all properly considered and it may well be that a point is reached where disability related underperformance cannot be tolerated for all the reasons given but it requires consideration in a tribunal.

65. In respect of issuing a deposit, I refuse to do this for the same reasons as above. The matter requires further evidence and case Management Orders need to be made in order that that evidence is set out in an orderly fashion.

66. I note generally that in the claimant's complaint of 19 August 2015 i.e. her formal grievance, she stated she believed that she had been marked down as “must improve” because of her being a part-time worker and undertaking trade union duties,she does not say because of her disability. This may mitigate against her in relation to her disability claims. However, she also mentioned that she had been referred to Occupational Health regarding the stress she was suffering at work “relating to the discrimination and the detrimental effect it has had on my underlying disability of migraines. The department has known about my underlying medical condition for a number of years but have never investigated any reasonable adjustments and the support that I may have needed”.

Employment Judge Feeney

Date 17th May 2017

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

18 May 2017

FOR THE TRIBUNAL OFFICE