EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms N Oke	**v**	Department for Work and Pensions

PRELIMINARY HEARING

Heard at: Reading **On:** 18 May 2017

Before: Employment Judge George

Appearances
For the Claimant: Ms S Berry (Counsel)
For the Respondent: Mr S Purnell (Counsel)

RESERVED JUDGMENT

1. The employment tribunal has no jurisdiction to hear the claim of unfair dismissal because it was not presented within three months of the effective date of termination and it was reasonably practicable to do so.

2. The claim of unfair dismissal is dismissed.

3. The claimant's application to amend the claim to include a claim of breach of the duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 is refused.

4. Case management orders are made which follow the reasons for this judgment.

REASONS

1. The claimant was employed, most recently as a work coach on an executive officer grade, by the respondent between 6 May 1986 and 24 March 2016 when she was dismissed, ostensibly for the reason of capability.

2. The claimant had the misfortune to suffer a serious road traffic accident on 1 October 2015 following which she was absent on sick leave from which she had not returned at the date of her dismissal. She brought claims of unfair dismissal and disability discrimination on 19 August 2016 by a reasonably

concise ET1 that had been presented with the assistance of her union representative, Brian Edmunds. Early conciliation had been attempted between the parties. According to the EC Certificate, Day A was 19 July 2016 and Day B was 22 July 2016.

3. The respondent entered an ET3 on 21 September 2016 and defended the claims. Among the grounds for the defence was the assertion that the employment tribunal lacked jurisdiction (see page 33 of the joint bundle of document for the preliminary hearing, paragraphs 4 to 8). The reason why it is said that the employment tribunal lacked jurisdiction is that the claim was not brought within the time limits specified in section 111 Employment Rights Act 1996 (hereafter the ERA) and section 123 Equality Act 2010 (hereafter the EqA).

4. The case came before Employment Judge Vowles at a case management hearing conducted on 30 November 2016 where it was ordered that there be a preliminary issue to determine the following issues.

    4.1. Whether the tribunal has jurisdiction to consider the claims in view of the three month time limit.

    4.2. Whether any of the claims have no reasonable prospect of success and should be struck out.

    4.3. Whether any of the claims have little reasonable prospect of success and should be made the subject of a deposit order.

    4.4. Whether any case management orders are necessary in respect of the full merits hearing listed below.

5. At that preliminary hearing, Employment Judge Vowles also gave directions for the claimant to give further and better particulars of her claim. This led to the pleading at page 14 of the bundle. The particularisation of the claim on behalf the claimant made it clear that among the claims that she relies on is that the dismissal of her appeal was disability discrimination contrary to section 15 EqA (see paragraph 30 at page 19 of the bundle).

6. He also directed that there be an impact statement setting out the effects on the claimant of the disability on which she relies and disclosure relevant to the issue of disability. Following compliance with those orders, the respondent conceded that the claimant was at the material time of the events giving rise to this claim disabled within the meaning of section 6 of the Equality Act by reason of a combination of severe knee pain/bilateral patella-femoral osteoarthritis, whiplash, severe back and neck pain.

7. The claimant argues that each act undertaken under the attendance management process up to and including the dismissal of the appeal was an act of section 15 discrimination and an application of a discriminatory policy such that cumulatively they amount to a continuing act.

8. It is accepted by the respondent (see paragraphs 52 and 53 on page 45 of the bundle) that the decision to refer the claimant to a decision maker, that person's decision to dismiss her and the appeal manager's decision to uphold the appeal constituted unfavourable treatment. It is also accepted by the respondent that those decisions were each taken for a reason arising in consequence of the claimant's disability, namely her sickness absence following the road traffic accident.

9. The respondent's representative, Mr Parnell, accepted that at a preliminary hearing, the question for me in the EqA claim is whether the claimant has raised a strong prima facie case that the separate incidents ending in the appeal on 22 April 2016 are linked such as to amount to a continuing act. He realistically accepted that that question was likely to be answered in the affirmative based on the claimant's case as it is understood following the particularisation of her pleadings. Therefore no preliminary point is now taken by the respondent that the employment tribunal lacks jurisdiction to hear the EqA claim because they were not presented within the primary limitation period. That may be an issue for the employment tribunal deciding the claim at the full merits hearing, subject to an application by the claimant to extend time on the basis that it is just & equitable to do so.

10. The issues for me to decide today therefore are, firstly, whether the employment tribunal has jurisdiction to hear the unfair dismissal claim. Apart from alleged lack of jurisdiction under section 111 of the ERA no other arguments are relied upon by the respondent to support the allegation that the claim has little or no reasonable prospects of success.

11. However, the respondent also argues that on a fair reading of the document as a whole, the ET1 (page 8) does not include a claim for breach of duty to make reasonable adjustments contrary to section 20 and 21 of the EqA. It is argued that the claimant has sought to introduce one by way of a purported particularisation (see page 24).

12. The issues for me are therefore,

    12.1. Was the claim presented within three months of the effective date of termination taking into account the effects of the early conciliation rules?

    12.2. If not, then was it reasonably practicable for the claim to be presented in that time?

    12.3. If not, then was it presented within a reasonable further period?

    12.4. Does the ET1, on a fair reading of the document as a whole, make a claim for breach of a duty to make reasonable adjustments?

    12.5. If not, then should leave be given to amend the claim to include one?

    12.6. What issues would be raised by such a claim. Mr Parnell argues that page 24, paragraphs 55 to 59, do not disclose a claim of a breach of a duty to make reasonable adjustments with any reasonable prospects of

success and that it is not pleaded in a way that can properly be responded to.

13. I heard evidence given by the claimant with reference to a witness statement that had been prepared on her behalf and also from Mr Edmunds who was also cross-examined with reference to a witness statement prepared for him.

14. The respondent also called two witnesses: Mrs Mandy Clements, the District Operations Manager, who dismissed the claimant's appeal against dismissal; and Mrs Gavinder Saimbhi, Senior Change Lead, who was a note-taker at the appeal hearing. They were cross examined on behalf of the claimant on their witness statements.

15. By reason of section 111 of the ERA, any claim for unfair dismissal based on an effective date of termination of 24 March 2016 should have been made by 23 June 2016, subject to the effects of early conciliation (hereafter EC) within the Early Conciliation Rules of Procedure and section 207B of the ERA. The effect of section 207B of the ERA is that when working out the time by which a claim may be presented no account should be taken of the period starting with the day on which ACAS is contacted (Day A) and ending on the day on which the EC Certificate is issued (Day B). There is a different consequence of EC where the time limit expires between Day A and the date one month after Day B. That does not apply in this case.

16. In the present case, according to the early conciliation certificate, Day A is 19 July 2016 and that itself is more than three months after the effective date of termination. The early conciliation attempts are therefore ineffective to extend time under section 207B, ss 3 or ss 4 because time had expired before the early conciliation had been attempted. It is clear that the unfair dismissal claim was not made in time.

17. To understand the claimant's explanation for why she did not present the claim in time it is necessary to explore her appeal against dismissal, the appeal hearing and the subsequent couple of months in more detail.

18. The decision of Mandy Hurst to dismiss the claimant was taken in her absence, the claimant having informed her line manager, Mr Holland, that she was not well enough to attend the hearing (see page 186). She appealed against that decision to dismiss on 1 April 2016 (see page 195). The appeal was heard by Ms Clements on 22 April 2016.

19. The respondent has a policy called the Third Party Claim Process which can apply when a claim is made by an injured employee who is absent from work against a third party whom they regard as at fault for the injuries leading to that absence. By this, the respondent has reimbursed through the claim the sick pay that they have paid to that employee and the absence due to the injuries may be disregarded in the managing absence process. There is a dispute about the advice given by Shared Services to the claimant about the effect of a claim by her in relation to the October 2015 road traffic accident which I do not need to resolve. However, it is relevant to the issues today that on appeal, the claimant argued that Mandy Hurst took her decision in

ignorance of the fact that an application had been made before dismissal by the claimant.

20. It is clear from page 182 that the claimant notified Shared Services of her intention to make a third party claim prior to dismissal. I do not need to decide whether she had made an effective application at the time of dismissal or judge the impact of that on the issues in the substantive case. The relevance is that it appears that Ms Clements, when hearing what the claimant had to say, thought there was something that needed further investigation and therefore was unable to make a decision on the appeal at the hearing itself. She also knew that the claimant was shortly due to have an MRI scan and wanted to have the results of the scan before making her decision. The claimant said at the appeal hearing that she was ready to return to work or would be soon.

21. At the appeal hearing on 22 April 2016, Gavinder Saimbhi was a note-taker. The notes at page 222 are not agreed by the claimant. They were prepared by Ms Saimbhi from her own manuscript notes sometime after the hearing.

22. I also had the benefit of a transcript done for the purposes of the preliminary hearing of those original manuscript notes. The manuscript notes are at page 203A and the transcript at page 203I.

23. The claimant and Mr Edmunds produced their own notes of the appeal hearing at page 225. I am satisfied that those are a combination of their several recollections written some time after receiving page 222. The email at page 221 suggest that the composite notes prepared by the claimant and Mr Edmunds were done on around 27 July 2016: therefore, three months after the meeting itself.

24. To the extent that I need to do so, I make the following observations about the claimant's evidence about what happened on 22 April.

25. Initially she said in oral evidence that Ms Clements did not say at the meeting that she, the claimant, was going to be reinstated but that MC had said in a later telephone call "you must have sensed that I was leaning towards reinstatement". She then corrected herself and said that it was at both the telephone call and the meeting.

26. This contrasts with what appears in the notes that she and Mr Edmunds have produced as being their composite recollection at page 227. I have concluded that, to some extent, the claimant's notes elide her recollection of what happened on 22 April and her impressions of what was said during the telephone call which happened on about 9 May.

27. However, it must be said that the typed notes at page 222 have a number of significant omissions when compared with the original manuscript notes of Ms Saimbhi. These include a striking phrase remembered by both the claimant and by Mr Edmunds: "New evidence but if comes as another dismissal – disappointed". It should be noted that Ms Clements' evidence about that

expression was that she had said that she did not want to get the claimant's hopes up because if it came out as dismissal, she (as in the claimant) would be disappointed rather than, as the claimant appeared to believe, that Ms Clements would be disappointment. I find that explanation by Ms Clements plausible and I accept it. Nonetheless, it is surprising that the notes prepared by Ms Saimbhi do not more accurately transcribe what she had recorded at the time as having been said at the hearing. I therefore think that the notes at page 222 do, as the claimant says, fail to record important things which were said by Ms Clements.

28. On the claimant's account, the 22 April meeting was a very positive one. She says (her paragraph 22) that Ms Clements was worried about "raising my expectations" but that the meeting was generally positive. The claimant regarded it as a clear implication that success on the appeal was a formality (see references to what she says was said at page 224). The impression that that meeting was likely to lead to a favourable outcome was also one received by Mr Edmunds (see his paragraph 14).

29. The claimant went on to testify that she had had a telephone conversation with Ms Clements on about 9 May 2016 (see her paragraph 25) in which the latter told the claimant positively that she was to be reinstated. Ms Clements did not recall the details of the telephone conversation but accepted that there had been one on 9 May 2016. I accept that whatever was said in the telephone call, it caused the claimant to think that she had been reinstated but it seems highly unlikely to me that Ms Clements would have made quite so positive and definite a statement. Ms Clements had (to judge by the manuscript notes) been careful to state that she did not want to get Mrs Oke's hopes up and if she was careful then it seems likely that she was similarly circumspect on the telephone. The reason I conclude that this was nonetheless the impression the claimant received is that it was clear that she told Mr Edmunds that she had been reinstated because he emailed Ms Clements on 9 May (see page 107).

30. Ms Clements replied (see page 208) the next day saying: "Brian, I have not given Nicky a decision yet, albeit I appreciate this is now due. I have not told her anything other than I spoke about at her appeal meeting. It was incorrect of Nicky to make her approach to Shared Services. I will communicate my decision to Nicky as soon as possible."

31. Mr Edmunds told the claimant about this email (see his paragraph 17) and the claimant confirmed that orally. Her words in evidence were: "He (BE) told me that she hadn't made her decision".

32. The claimant texted Ms Clements (see page 237) on 11 May apologising for telling Mr Edmunds about the reinstatement and having received no reply, sent a second text on 23 May. This is quite a long text but two points stand out. First, that she had been told some days before of a request by Ms Clements for documents (see page 241) and that suggests that she was aware or should have been aware that Ms Clements still needed further information in order to make a decision.

33. Secondly, there is the following statement: “If you have changed your mind” at page 248 she asks for clarification so that she can prepare for further help. Ms Clements said she did not recognise the text messages and did not respond to them. She said that it was possible that she had never seen them because she had changed her phone at about that time.

34. The claimant gave evidence that when Mr Edmunds told her that Ms Clements had not yet made a decision she still deep down believed that she had a job but in hindsight (which I took to mean at the time of writing the text of 23 May) not having received a reply to that of 11 May asking for an outcome letter she wrote so that she could decide whether or not present a claim to the employment tribunal. Mr Edmunds accepted that he knew that there was a time limit but not what it was. He was clearly in a position where not only could he advise the claimant about her options but he was able to access resources quickly which could tell him what the correct procedure was.

35. I therefore conclude that when the claimant wrote the text on 23 May she was asking for clarification of the position in part so that she should know whether to bring an employment tribunal claim or not. This is inconsistent with her having a firm and fixed view that she had been reinstated and that an employment tribunal claim was unnecessary. She received no response to the text of 23 May 2016.

36. There was considerable delay before the outcome of the appeal was communicated to the claimant. Several reasons contributed to that. Ms Clements was seeking advice and information relevant to her decision. Her responsibilities as primary carer for her mother at a time when the latter underwent a traumatic surgical procedure meant that she had a period of leave. She also discovered problems with her own health.

37. At this stage in the proceedings it is only necessary to record that there was delay. The outcome of the appeal was in fact notified to the claimant on 30 June 2016 although she herself did not receive the letter until a few days later. Mr Edmunds and the claimant therefore only found out of the outcome of the appeal after expiry of the time limit for bringing employment tribunal claims based upon the dismissal.

38. Mr Edmunds gave evidence about the reasons why there was delay on the part of the claimant from that point until the presentation of the claim on 19 August 2016. I accept that he has given an accurate account of what happened. However, the details on the claim form at page 8 are very similar to those on pages 249B and C. This is a request dated 28 July 2016 to the union to support the claim even though the face of it it is out of time.

39. The delay in presenting the claim once the appeal outcome was known was caused in part by the need on the part of the claimant for assistance due to her ill health and, in part, the difficulty in Mr Edmunds getting permission to be released to visit her to take instructions. He did that on 8 July 2016 at which the respondent’s version of the minutes of 22 April 2016 were discussed. Mr

Edmunds described problems with the claimant's union's subscription, following the termination of her employment, and explained that that also needed to be sorted out before the union could consider her application for assistance. In the end, Mr Edmunds assisted the claimant to put in the claim even though he was not doing so in an official capacity as a union representative. She also received some assistance from her daughter.

40. When considering this issue, I start with section 111(2) of the ERA

> "(2) [Subject to the {early conciliation provisions}], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—
> (a) before the end of the period of three months beginning with the effective date of termination, or
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

41. The question of why the claimant failed to present the claim in time is one of fact. Having found the facts, the question posed by section 111 is whether the existence of that reason means that it was not reasonably practicable for the claimant to present the claim in time. The claimant relies upon her stated belief that the claim was unnecessary because she had been reinstated.

42. Mr Parnell relies upon the case of London Underground Ltd v Noel [2000] ICR 109 Court of Appeal. Reading from the head note at 110A to B:

> "Where an employee had all the necessary facts to found a complaint within the three month period prescribed by section 111(2)(A) of the Employment Rights Act 1996 it was "reasonably practicable" to present the complaint in time within the meaning of section 11 (2)(B): that an offer of re-employment made to an employee during the statutory period did not make it reasonably impracticable for her to present a complaint for reinstatement and the existence of the offer of a new job did not fundamentally affect her right to present a complaint."

43. The facts of Noel were more stark than those in the present case. An offer of re-employment had been made to the claimant after a successful appeal. The Court of Appeal held that this did not fundamentally affect her right to present a complaint. The offer of re-engagement was withdrawn after the expiry of the time limit for presentation of an employment tribunal claim when Ms Noel failed a drugs test.

44. In the present case, did the claimant know every fact that she needed to know in order to present a claim before expiry of the time limit? The answer in this case is clearly yes. She had been dismissed; all of the facts and matters that she now relies on were known to her; she believed for a time that she was to be reinstated but that was clarified by Mr Edmunds after the exchange of emails on 9 May; and the text of 23 May shows that as at that date the claimant was seeking confirmation of the outcome prior to deciding whether or not to bring a claim. I have concluded, therefore, that although she did think on 9 May that she was to be reinstated, she did not continue fully to believe

that for long. Even if she did continue to believe that she would be reinstated, in order for a mistaken belief to mean that it was not reasonably practicable for a claimant to bring a claim that belief has to be reasonable. In the present case I find that it was not reasonable for the claimant to continue to believe that she was to be reinstated beyond 23 May, well within time for her to present the claim. Mr Edmunds told her that no decision had been made and there was no response to her text of 23 May. Finally, on the strength of Noel, the existence of an offer of reinstatement would not fundamentally affect the claimant's right to present a complaint.

45. Furthermore, if I am wrong about that, then it is clear that the claim could have been made by 28 July 2016 at the very latest because the details put forward to the union in the request for assistance are so very similar to those in the ET 1. By presenting on 19 August 2016 I have concluded that the claim was not presented within a reasonable further period. The employment tribunal has no jurisdiction to hear the complaint of unfair dismissal and it is dismissed.

46. I agree with the respondent's representative that on a fair reading of the ET1 as a whole, it makes claims of unfair dismissal and disability discrimination in connection with the capability dismissal. There is no claim on the ET1 as presently constituted of a failure to make reasonable adjustments during employment. It is not clear from paragraphs 55 to 59 of the amended particulars of claim (page 24) how the claimant seeks to argue a breach of duty to make reasonable adjustments. In those paragraphs she criticises the respondent for offering adjustments to the her role which were allegedly unreasonable. She also argues that medical assessments themselves form part of the duty to make reasonable adjustments and this is a fundamentally flawed argument as it relies on an old authority which has been overruled. The argument is no longer pursued by Ms Berry.

47. As argued by Ms Berry in her closing submissions and in the draft list of issues, the proposed breach of a duty to make reasonable adjustments claim is rather different. Reliance is placed on the managing absence policy as being a PCP and it is alleged that the claimant suffered substantial disadvantage because, as a disabled person, she could not comply with the policy and that led to her dismissal. The adjustments that are contended were needed in order to get her back to work were, firstly, more time before starting or concluding the formal process, and, secondly, allowing the claimant to work reduced hours or from Uxbridge when she was fit to return to work. As articulated, that is completely different to paragraphs 55 to 59.

48. No application in writing to amend the claim has been made. This case has already been through one preliminary hearing which attempted to clarify the case. The claimant has been advised by professional legal representatives and there is no explanation as to why the claim put before me now was not on the amended particulars of claim.

49. It is true that the nature of the amendment is to add a new legal head of claim but not to argue different facts. However, there is no prejudice to the claimant in refusing this application to amend since the availability of a claim under

sections 20/21 EqA is a different way of arguing that the dismissal is discriminatory to that already pleaded and that dismissal caused a single amount of indivisible loss. However the claim adds to the complexity of the decision making process for the employment tribunal. The balance of convenience is against allowing the amendment and it is refused.

50. There was a joint application by the parties for there to be a split trial of liability and remedy to which I acceded. If the claimant is successful there may need to be medical evidence directed to issues of causation of financial loss and it is better that the parties are not put to that expense at this stage.

51. Therefore the issues to be determined at the final hearing on 1, 2, 3 and 4 August 2017 are broadly those set out in issues 4 to 6 on the draft list of issues.

52. The respondent is to particularise the legitimate aim and matters of proportionality upon which they rely within 14 days of the date on which this order is sent to the parties and to prepare a draft list of issues setting out the claimant's claim and their defence as now presently understood. The claimant is to respond to that within seven days of it being sent to her.

CASE MANAGEMENT ORDERS

Made pursuant to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

1. The respondent is to particularise the legitimate aim relied on as a defence to the claim of unfavourable treatment for a reason arising in consequence of disability and the matters relied on as showing that the claimant's dismissal was a proportionate means of achieving that legitimate aim **within 14 days of the date on which this document is sent to the parties**.

2. The respondent is to send to the claimant a draft list of issues within **14 days of the date on which this order is sent to the parties**.

3. The claimant is to state **within seven days of the date on which the list of issues is sent to her** whether she agrees or disagrees with that list.

4. The hearing of this matter presently listed for 1, 2, 3 and 4 August 2017 shall be a hearing of the issue of liability only.

5. The bundle of documents need only contain documents relevant to issues of liability.

6. The claimant is to serve on the respondent a schedule of loss by **15 June 2017**.

7. **Witness statements**

7.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses. The witness statements need only address issues of liability.

7.2 The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.

7.3 The facts must be set out in numbered paragraphs on numbered pages in chronological order.

7.4 If a witness intends to refer to a document, the page number in the bundle must be set out in the reference.

7.5 It is ordered that witness statements are exchanged so as to arrive on or before **11 July 2017**.

7.6 Each party must bring to the tribunal **at least five additional copies** of the statements which it has served. The parties are reminded of rule 44, which requires a copy of each statement to be provided to the public.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

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Employment Judge George

Date: 10 June 2017…….

Sent to the parties on: .....