EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No. 4104145/2016

Held at Inverness on 11 January 2017

Employment Judge: Mr W A Meiklejohn

Ms Veronica Finlayson	**Claimant** **Represented by** **Mr M Smith, Solicitor**
Global Highland Limited	**First Respondent** **Represented by:** **Ms G Shaw, Solicitor**
Lifescan Scotland Limited	**Second Respondent** **Represented by:** **Mr K Tudhope, Solicitor**
Randstat Employment Bureau Limited	**Third Respondent** **No appearance or representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is

(1) the Claimant was, at the relevant time for the purposes of her claim, disabled within the meaning of section 6 of the Equality Act 2010 and

(2) her claim is not time-barred.

REASONS

1. This case came before me for a Preliminary Hearing on 11 January 2017. The Claimant was represented by Mr Smith. The First Respondent was

represented by Ms Shaw. The Second Respondent was represented by Mr Tudhope. The Third Respondent did not participate.

2. The issues to be decided at the Preliminary Hearing were (a) whether the Claimant was disabled within the meaning of section 6 of the Equality Act 2010 and (b) whether that part of the Claimant's disability discrimination claim which related to the alleged failure by the First Respondent and the Second Respondent to comply with their duty to make reasonable adjustments under section 20 of the Equality Act 2010 was time-barred.

3. For the purposes of the Preliminary Hearing, but not otherwise, it was accepted by Ms Shaw and Mr Tudhope respectively that (a) the First Respondent was an employment service-provider within the meaning of section 55 of the Equality Act 2010 and (b) the Second Respondent was a principal within the meaning of section 41 of the Equality Act 2010.

Evidence and Findings in Fact

4. I heard evidence from the Claimant. I had a joint bundle of documents to which I will refer by tab/item or page number as appropriate. I also had a Statement of Agreed Facts in terms of which the Claimant, the First Respondent and the Second Respondent agreed as follows –

    - That the Claimant entered into Terms of Engagement of Agency Personnel with the First Respondent in March 2012, and such contract was subsequently renewed on 22 March 2016. In terms of the Assignment Schedule issued by the First Respondent, the Claimant was latterly assigned to render services as a "Research Technician" to the Second Respondent within their Research and Development department. She commenced work with the Second Respondent in March 2012.
    - On 3 April 2012 and, separately, on 1 April 2015 the Claimant completed the First Respondent's Occupational Health

Questionnaires which are lodged as items 2 and 4 of the Joint List of Documents.

- In or about September 2014, the Claimant was diagnosed as suffering from tendonitis, and provided with a fit note. This fit note is lodged as item 3 of the Joint List of Documents.
- In or about September 2015, the First Respondent referred the Claimant to Dr Brian Fitzsimons of RS2, the First Respondent's Occupational Health advisors. The Claimant attended an appointment with Dr Fitzsimons on the 1st of September 2015, and Dr Fitzsimons provided the Claimant and the First Respondent with a report dated 2nd September 2015. This report is lodged as item 5 of the Joint List of Documents.
- The Claimant has consulted her GP Practice in relation to her tendonitis. Her GP, Dr Andrea Henderson, was asked to prepare a report in relation to her condition and these consultations. Dr Henderson duly provided a report in letter form, which is dated 18th November 2016. This report is lodged as item 13 of the Joint List of Documents.
- The Claimant was signed off from work on the 19th of February 2016, and did not return to work for the Respondents after that date.
- That the Productions listed as items 1 to 13 of the Joint List of Documents are true copies of the documents concerned.
- That the Claimant's ET1 was received by the Employment Tribunal on 29 July 2016.
- The date of receipt by ACAS of the early conciliation notification was 20 May 2016.
- The date of issue by ACAS of the Early Conciliation Certificate was 29 June 2016.
- The Claimant had three months to contact ACAS after the date discrimination is suggested to have occurred.
- Accordingly the 21 February 2016 (i.e. 3 months before 20 May 2016) is the start date of the three month period for the purposes of calculating whether the Claimant's claim of failure to make reasonable

adjustments (as set out in paragraphs 4 and 5 of the Claimant's statement of claim) is time barred.

5. Dr Henderson's letter of 18 November 2016 (pages 21-22) confirmed from a review of the Claimant's notes that she had attended at Inverness Medical Practice on 8 September, 24 October and 13 November 2014. She had pain in her right forearm and the diagnosis was tendonitis. She was advised regarding rest and gentle exercise and to use anti-inflammatory medication.

6. The outcome of her visit to her GP on 13 November 2014 was that the Claimant was issued with a Statement of Fitness to Work (page 6) which advised "amended duties". The doctor's comments were as follows –

> "pain in the right forearm due to tendonitis
> certain movements are difficult for her to
> perform so amended duties are recommended: she
> has self referred to physiotherapy and I will
> write to expedite her appointment"

The Statement also advised that amended duties should apply for 12 weeks.

7. According to Dr Henderson's letter (at page 21) the Claimant "had a further fit note issued with amended duties" on 29 January 2015. This was not produced and the Claimant in evidence thought it was in the same terms as the previous one, which Dr Henderson's letter confirmed.

8. The Claimant's work with the Second Respondent involved the use of a pipette. She found this and other aspects of her work painful after the onset of her tendonitis. Following the fit note advising amended duties the part of her work involving the use of a pipette was in the main removed by the Second Respondent.

9. The Claimant described in evidence the effect on her of her tendonitis between September 2014 and September 2015. She said that at its worst she could not open doors in her home or turn a key in a lock. She could not chop vegetables,

carry a kettle, lift a cup of tea, undertake cleaning or washing, wring a cloth or open a jar. She could not write or drive her car normally because she could not turn the steering wheel with her right hand. She could not hold a phone to her ear. She could not use her tablet as she could not operate the touch pad with her right hand. She had stopped using her bicycle. She could not press on her face with her right hand to apply make up. She wore a bandage on her right arm.

10. By the time the Claimant attended her appointment with Dr Fitzsimons on 1 September 2015 her condition had improved, but she found pain was still triggered by certain actions such as shaking a duvet when making a bed. Dr Fitzsimons' report (at page 9) states that the Claimant "describes herself as three quarters of the way towards completely recovered". The Claimant's evidence was that her condition had "improved dramatically" but she realised that she had been "optimistic" (to describe herself as recorded by Dr Fitzsimons).

11. Dr Fitzsimons' report (at page 9) describes the effects of the Claimant's tendonitis in the following terms –

> "Initially, she was experiencing pain, paraesthesia and swelling of her forearm. This was significantly affecting her activities of daily living, namely opening jars and bottles, lifting even light things, cycling and swimming. She still struggles if lids are too tight, or if the weight of a load is too heavy. However, the aforementioned input from the physiotherapist, and her self-imposed and company supported adaptations and amendments, have all helped to bring about improvement."

12. The physiotherapist's input continued until June 2015 and involved (according to Dr Henderson's letter, at page 21) isometric strengthening exercises. Dr Henderson records that the Claimant was happy to self-manage her symptoms upon discharge from physiotherapy. The Claimant's self-imposed

adaptations involved (as recorded in Dr Fitzsimons' report, at page 9) swapping hands and using alternate fingers when possible.

13. The Claimant described her condition as at September 2015 as having the same problems but to a lesser extent. She could hold the steering wheel of her car with her right hand but could not pull the wheel with that hand. She could not use her tablet. She could pick up a cup of tea. When shopping she could lift only a few pounds, and chose to use her left hand rather than lift with her right. She could chop soft vegetables but not hard ones. She could apply some pressure with her right hand but could still not open a jar if it was stiff. She could wash dishes but could not clean her whole flat, for example she could not clean her kitchen and floorboards in one sitting. She was still not using her bicycle. She was able to wring with her right hand. She was still protecting her right arm to avoid pain. She continued to wear a bandage on her right arm.

14. The Claimant was not absent from work on account of her tendonitis between September 2014 and September 2015. However, following contact with her GP in January/February 2016 about a separate matter, she was seen by Dr Henderson on 24 February 2016 because her left arm had been causing problems. According to Dr Henderson's letter (at page 22) –

> "She struggled to open jars and doing washing up. She described a pressure feeling from her wrist to her elbow. She described pins and needles in the hand. She was struggling carrying shopping and she told me she had similar symptoms in her right arm."

15. The Claimant was issued with Statements of Fitness for Work on 19 February 2016 (page 17), 4 March 2016 (page 18) and 16 March 2016 (page 19) stating in each case that she was not fit for work because of "Tendonitis NOS". She remained absent from work from 19 February 2016 until her employment ended on 5 April 2016.
16. Dr Fitzsimons' report (at page 10) advised as follows –

> "Ms Finlayson is determined to remain at work, and to return to full duties and as soon as possible. I think that simple adaptations could be put in place to help both encourage improvement and avoid recurrence of her tenosynovitis. Accordingly, I would recommend an ergonomic assessment of her tasks by a trained assessor, and any resulting advised changes made to assist her. Adaptations that could be considered might include simple measures like breaking up of long periods involving repetitive tasks, regular rotation of duties, ergonomic changes to her data input station (e.g. trackerball rather than mouse, wrist rests, adapted chair), and the mechanisation of high risk tasks (e.g. could a digital pipette rather than a manual one be used?). These would be relatively inexpensive and simple to institute."

I understood that " tenosynovitis" was another term for tendonitis.

17. Dr Fitzsimons' report was instructed by and addressed to the First Respondent. The Claimant was provided with a copy at the same time as the report was sent to the First Respondent. The Claimant understood that the Second Respondent also received a copy. June Crombie of the First Respondent emailed the Claimant on 26 October 2015 (page 11) to "check how things were going and if things were improving" after the occupational health referral and also referring to Dr Fitzsimons' suggestion that it would be prudent to review the Claimant in eight weeks to see how she was progressing.

18. The Claimant telephoned Ms Crombie in response to her email and told her that she was happy to go back to occupational health but as nothing had changed she did not see the point. Ms Crombie wrote to the Claimant on 22 March 2016 (page 20) about making a further occupational health appointment. When the Claimant telephoned in response to this letter she was told that this was no longer necessary.

19. When the Claimant completed the First Respondent's occupational health questionnaire on 1 April 2015 (page 7) she answered "yes" to the question "Are

you feeling well today?". She answered "no" to all of the "have you ever suffered from" questions including "any other medical condition/illness that may affect your performance at work". The Claimant's explanation was that the First Respondent was aware of her condition and she had read the question as meaning other than her tendonitis. She said that she was not being deceptive but acknowledged that this might have been an error on her part.

20. Some six to eight weeks after Dr Fitzsimons issued his report the Claimant was approached by Ms Dawn Stoddart who managed the laboratory where the Claimant worked for the Second Respondent. Ms Stoddart told her that Mr Peter Wilson was going to carry out an ergonomic assessment. No such assessment had been carried out by the time the Claimant's employment terminated on 5 April 2016.

21. The Claimant gave evidence about having difficulty using the safety glasses, which the Second Respondent provided and required her to wear, over her own glasses. She received a formal warning from Mr Wilson on 24 November 2015 (page 16) about not wearing her safety glasses. She wanted either the First Respondent or the Second Respondent to provide her with varifocal glasses which, according to her email to Mr Wilson on 24 November 2015 (page 15), they were unwilling to do.

22. The claimant made it clear that she was not contending that the failure to provide her with varifocal glasses was a failure to make a reasonable adjustment. She said that she understood one of the options (in the context of her seeking to be provided with varifocal glasses) was to leave her employment, which she did not want to do, and accordingly this was background information to explain why she had not pressed for the ergonomic assessment to be carried out.

23. The Claimant believed that the Second Respondent, despite having considerable resources as part of a large organisation, acted slowly when dealing with matters. To quote from her evidence in chief (as the Respondents

have done in their joint submissions) when asked "If something needed to be done, would you expect it to be done quickly?" the Claimant answered –

> "No. Important things could take a long time. I had to validate a fridge. It sounds menial. It needed to have verification. I did the job within a couple of months but it took a couple of years to get verified. It was important. It was storing product that was being released to the public. It took a couple of years. It was not done quickly."

The Claimant said that she had not expected to receive the ergonomic assessment for some six to twelve months after the Occupational Health report.

Submissions

24. There was insufficient time after the Claimant's evidence on 11 January 2017 for oral submissions and accordingly I directed that written submissions should be exchanged by 31 January 2017 and lodged by 7 February 2017. These written submissions were duly lodged (the First Respondent and the Second Respondent submitting jointly) and I am grateful to the parties' representatives for the evident care they have taken in the preparation of these. I consider that it would not do justice to these submissions were I to attempt to paraphrase them and so I will not do so. They will however be available within the case file should future reference to them require to be made.

Applicable law

25. The statutory definition of disability is found in section 6(1) of the Equality Act 2010 –

> "A person (P) has a disability if –
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

26. This definition is supplemented by the provisions found in Part 1 of Schedule 1 to the Equality Act 2010 headed "Determination of Disability" including –

> "**2. Long-term effects**
>
> (1) The effect of an impairment is long-term if –
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) 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 to be treated as continuing to have that effect if that effect is likely to recur…."
>
> **5. Effect of medical treatment**
>
> (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."

27. Section 120 of the Equality Act 2010 confers jurisdiction on the Employment Tribunal to determine complaints of the type being pursued in this case, and section 123 deals with time limits –

> "(1) ….Proceedings on a complaint within section 120 may not be brought after the end of –
>
> (a) the period of 3 months starting with 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, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

Discussion and disposal

28. I will deal firstly with the question of whether the Claimant was disabled for the purposes of the Equality Act 2010. The relevant evidence comprised –

(a) Paragraphs 4 and 5 of the Statement of Agreed Facts.
(b) The Claimant's oral evidence.
(c) Document 2 (Occupational Health Questionnaire of 3 April 2012), Document 3 (Statement of Fitness for Work of 13 November 2014), Document 4 (Occupational Health Questionnaire of 1 April 2015), Document 5 (Occupational Health Report from Dr Fitzsimons of 2 September 2015), Document 9 (Statement of Fitness to Work of 19 February 2016), Document 10 (Statement of Fitness to Work of 4 March 2016), Document 11 (Statement of Fitness for Work of 16 March 2016), and Document 13 (Letter from Dr Henderson of 18 November 2016).

29. The Respondents reminded me in their written submissions that the relevant time for considering whether a person is disabled is the date of the alleged discrimination, referring to **McDougall –v– Richmond Adult Community College 2008 IRLR 227**. They also reminded me that whether a person is disabled has to be judged on the basis of evidence available at the time the discrimination is said to have taken place, not by reference to subsequent

events – **Mahon –v– Accuread Ltd UKEAT/0081/08** – and should not judged with the benefit of hindsight. The onus was on the Claimant to establish that she was disabled at the relevant time.

30. The Respondents directed me to the Statutory Guidance on matters to be taken into account in determining questions relating to the definition of disability. The term "mental or physical impairment" should be given its ordinary meaning. A "substantial" effect is one which is more than "minor" or "trivial". The meaning of "long-term" is found in Part 1 of Schedule 1 to the Equality Act 2010. Day-to-day activities are "things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities".

31. The Claimant was diagnosed with tendonitis in her right arm in November 2014. She had displayed the symptoms since September 2014. The second Respondent acted in accordance with the Claimant's Statement of Fitness for Work dated 13 November 2014 (page 6) by amending her duties, and in particular by removing in the main the requirement to use a pipette. The Claimant herself took steps to protect her right arm (see paragraph 12 above).

32. When the Claimant attended her appointment with Dr Fitzsimons on 1 September 2015 the tendonitis in her right arm had subsisted for approximately one year. Over that period her condition had improved, although I accepted the Claimant's evidence that she had been "optimistic" or "naive" to describe herself, as she did to Dr Fitzsimons, as "three quarters of the way towards completely recovered".

33. I found the Claimant to be a credible witness and I did not accept the Respondents' assertion that she had exaggerated her symptoms, nor their submission that her evidence regarding her symptoms and their impact on her daily life could not be relied on and should be discounted. Her description of her symptoms as at September 2015 (see paragraph 13 above) was credible

and confirmed that her condition was improving from the time when her symptoms were at their worst (see paragraph 9 above). I did not find it "inconceivable" as submitted by the Respondents that, if the Claimant had been suffering from the symptoms she now maintains she had up to September 2015, she would have neglected to describe these to the Occupational Health adviser. Dr Fitzsimons' report contained a summary rather than a comprehensive list of the Claimant's symptoms and as such it was not in conflict with the Claimant's oral evidence.

34. The relevant time for the purposes of my determining whether the Claimant was disabled (in respect of her claim that the Respondents had failed to make reasonable adjustments) began in September 2015 when the Respondents received Dr Fitzsimons' report and ended in April 2016 when her contract came to an end. I was satisfied that the Claimant was disabled within the definition in the Equality Act 2010 throughout that period.

35. The Respondents in their written submissions describe the history of the Claimant's consultations with her GP practice and highlight the absence of reference to detailed examination, the absence for much of the relevant period of prescription of medication and the fact that the Claimant did not consult her GP between January 2015 and January 2016 (and then in relation to another health issue rather than her tendonitis). This was factually correct but not necessarily contradictory of the Claimant's evidence about her condition. She was attending physiotherapy until June 2015 and at the point of discharge was to self-manage her symptoms, which indicates that her symptoms subsisted.

36. Dr Henderson's letter of 18 November 2016 refers (at page 22) to the symptoms the Claimant was displaying in her left arm at the appointment on 24 February 2016 and records the Claimant as saying that her "right side was not completely better". The discharge letter Dr Henderson received following the Claimant's second spell of physiotherapy stated, according to Dr Henderson's letter, that "her right arm was gradually improving". Dr Henderson's letter also states that the Claimant told her on 17 November 2016 that "she continued to have ongoing pain in her right arm" and, in the

context of her symptoms causing her to waken from sleep, that "her right side has always been worse than the left".

37. I did not of course have the benefit of oral evidence from Dr Henderson and I would have been reluctant to treat her letter as conclusive of the Claimant's disability or otherwise. However it seemed to me that her letter was broadly supportive of the Claimant's own account of the effects of her tendonitis. This reinforced my view that the Claimant had not exaggerated her symptoms in her oral evidence.

38. The Respondents argued that the Claimant's explanation of her response in the Occupational Health Questionnaire of 3 April 2015 (see paragraph 19 above) was not credible. Mr Smith's answer to this was that it was difficult to see what the Claimant could possibly have had to gain by failing to complete the form correctly. The Respondents already knew about her condition. The Second Respondent had already modified her duties. No disciplinary consequences were visited upon the Claimant for completing the form incorrectly. The Claimant accepted in her evidence that she might have been in error, as clearly she was. However there was force in the points made by Mr Smith and I did not believe that the Claimant's error tainted the credibility of her evidence.

39. I was satisfied that the Claimant's tendonitis in her right arm did have a substantial adverse effect on her ability to carry out normal day-to-day activities. I accepted her evidence as recorded at paragraph 13 above. I also accepted her evidence about the problem which developed in her left arm as recorded at paragraph 14 above. The effects which the Claimant described including driving, using her tablet, lifting anything above light weights, chopping anything other than soft vegetables and cleaning her flat were substantial adverse effects on her ability to carry out normal day-to-day activities. These subsisted from September 2014 and continued as at April 2016 and were accordingly long-term for the purpose of the Equality Act 2010.

40. I turn now to the issue of time bar. In the Statement of Agreed Facts it was common ground that (a) the Claimant's ET1 was received by the Employment

Tribunal on 29 July 2016, (b) the date of receipt by ACAS of the early conciliation notification was 20 May 2016, (c) the date of issue by ACAS of the early conciliation certificate was 29 June 2016, (d) the Claimant had three months to contact ACAS after the date discrimination was suggested to have occurred and (e) 21 February 2016 (ie three months before 20 May 2016) was the start date of the three month period for the purposes of calculating whether the Claimant's claim of failure to make reasonable adjustments (as set out in paragraphs 4 and 5 of the Claimant's statement of claim) was time-barred.

41. The reasonable adjustments relied on by the Claimant were those detailed in Dr Fitzsimons' letter of 2 September 2015, all as narrated in paragraph 4 of the ET1 (page 1). Not surprisingly the evidence focussed on the Respondents' alleged failure to have an ergonomic assessment carried out. While Dr Fitzsimons had referred to other potential adjustments it was logical that the first step would be an ergonomic assessment.

42. Leaving to one side for the moment the Respondents' argument that a failure to instruct an ergonomic assessment could never amount to a failure to make a reasonable adjustment, the only evidence of any action by the Respondents towards carrying out an ergonomic assessment was the Claimant's reference to Ms Stoddart approaching her some six to eight weeks after the date of Dr Fitzsimons' report to say that Mr Wilson would be doing this (see paragraph 20 above). The Claimant did not expect things to move quickly.

43. In terms of section 123(3)(b) of the Equality Act 2010 failure to do something is to be treated as occurring when the person in question decided on it. In the present case the evidence, in terms of what Ms Stoddart said to the Claimant, indicated that the Second Respondent intended to carry out an ergonomic assessment rather than having decided not to do so.

44. In terms of section 123(4) of the Act, in the absence of evidence to the contrary, a person is taken to decide on failure to do something either (a) when they act inconsistently with doing it or (b) absent any inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it. Both

sides recognised the potential relevance of the Employment Appeal Tribunal's decision in **Cyprien -v- Bradford Grammar School UKEAT/0306/12/DM**. There was no inconsistent act by the Respondents apart of course from the Claimant ceasing to be employed, but if the obligation to make reasonable adjustments still subsisted at that point, no issue of time bar would arise.

45. The Respondents referred me to paragraph 23 of the EAT's decision in **Cyprien** - "A negligent omission is to be treated as a deliberate omission as of a given date; and that date is the date at which the employer, had he been acting reasonably, would have made the reasonable adjustments." They submitted that an ergonomic assessment could have been instructed and completed shortly after the Occupational Health report was issued and certainly within one month of 2 September 2015. There was nothing in the evidence to support the Claimant's argument that the duty to carry out the ergonomic assessment remained outstanding as at 21 February 2016 (so as not to be time barred).

46. The Claimant's position was that I should approach the matter from the standpoint of when it should have been apparent to the Claimant that action should have been taken. In paragraph 11 of their decision in **Cyprien** the Employment Appeal Tribunal had referred to the findings in fact of the Employment Tribunal in that case in these terms – "They concluded that they had to consider, "when the time period expired within which they [the Respondent] could reasonably have been expected to do the omitted act if it was to be done" and that that was a question of fact for the Tribunal. They concluded that, "at the most" i.e. on the most favourable basis to the Claimant, it must have been apparent that the action would reasonably have been taken no more than three months after 9 February, i.e. by May 2010. Thus the claim in respect of the first adjustment should have been made by August 2010 if it was to come within the primary time limit." The EAT made no adverse comment on this and Mr Smith argued that this in effect meant that there was a subjective element to the test.

47. I was not convinced that the test in section 123(4) was subjective, nor that this was what the Employment Appeal Tribunal intended. It seemed to me that an

employee's expectation of when his/her employer would carry out a reasonable adjustment was simply one of the factors in deciding objectively whether the period within which the employer might reasonably have been expected to do so had expired.

48. I was not satisfied that the test in section 123(4) was actually engaged in this case. Section 123(4) applies "in the absence of evidence to the contrary". In this case there was evidence to the contrary, ie contrary to the assertion that the employer should be taken to have decided not to make the adjustment. That evidence was the approach by Ms Stoddart to the Claimant some six to eight weeks after Dr Fitzsimons' report had been issued. That indicated that the Second Respondent did intend to carry out the ergonomic assessment. It would in my view be illogical to deem the Second Respondent to have decided not to do something which they had expressly indicated that they would do.

49. On the other hand, having regard to the passage in **Cyprien** to which the Respondents referred, had sufficient time passed without the ergonomic assessment being carried out for there to have been a negligent omission by the Respondents to make a reasonable adjustment and, if so, upon what date did that negligent omission occur? Put another way, did the failure actually to carry out the ergonomic assessment supersede the stated intention to do so?

50. I noted that a period of more than nine months had passed between the date upon which the Respondents became aware of the Claimant's tendonitis (from the terms of the Statement of Fitness for Work dated 13 November 2014) and the date of the Occupational Health report (2 September 2015). That, together with the Claimant's perception that the Second Respondent dealt with things slowly and her expectation that it would take six to twelve months for the assessment to be carried out, tended to suggest that it was always going to take quite some time for the assessment to be carried out.

51. I was not prepared to accept the Respondents' contention that a reasonable period to carry out the ergonomic assessment would have been no more than one month after 2 September 2015. Section 123(4) requires the focus to be on

the person subject to the duty to make the reasonable adjustment. It does not focus on when a reasonable employer would have made the adjustment. If I had found it necessary to decide the date upon which the Respondents should be held to have negligently omitted to carry out the ergonomic assessment, that date would be no less than six months from the date of the Occupational Health report, ie 2 March 2016. I say "no less than" because the Claimant was by that date medically certified as unfit for work and it might not have been possible for an assessment to be carried out in her absence. In any event, as that date was after 21 February 2016, the claim would not have been time barred.

52. I recognise that this is longer than the period of three months in **Cyprien** but I consider that period to have been determined on the basis of the facts of that case whereas I require to decide the point on the basis of the facts in the present case. Given that the Second Respondent had already implemented the amended duties recommended by the Claimant's GP and there was evidence that the Claimant's symptoms were improving, the ergonomic assessment could not be said to be urgent.

53. Returning to the Respondents' argument that a failure to carry out an ergonomic assessment could never amount to a failure to make a reasonable adjustment, this was based on paragraphs 391 and 392 in Division L, Section B of Harvey on Industrial Relations and the cases there referred to, in particular **Tarbuck –v– Sainsbury Supermarkets Ltd 2006 IRLR 664**. The cases cited in the relevant section of Harvey are examples of the employer failing either to consult with the disabled employee or failing to conduct an assessment. The position after **Tarbuck i**s clear – there is no free standing obligation to consult the employee or to consider what adjustments should be made; the only question is whether the employer has complied with his obligations or not.

54. Section 20(3) of the Equality Act 2010 sets out the requirement, where a provision, criterion or practice of the employer puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison with those who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

55. In the context of taking steps to avoid a disabled employee being placed at a substantial disadvantage I think it is difficult to say that complying with a recommendation of an Occupational Health report to have the employee's tasks ergonomically assessed by a trained adviser is not capable of being a reasonable step for the employer to take. Whether it was a reasonable step in this case is not for me to decide. However, if it was, it was a step which, on the basis of the evidence before me, the Respondents did not take following receipt of the Occupational Health report and which had not been taken prior to the Claimant's employment ending.

56. There is in my view a significant difference between (a) failing to conduct an assessment which, following **Tarbuck**, would not constitute a failure by the employer to make a reasonable adjustment and (b) failing to follow an express recommendation to conduct an ergonomic assessment in an Occupational Health report commissioned by and addressed to the employer. That report listed a number of adaptations that might be considered, with the ergonomic assessment being the first step towards these. It was arguably a step which it was reasonable for the Respondents to take to avoid disadvantage to the Claimant.

57. If I am wrong in finding that this case can be distinguished from **Tarbuck**, I still do not believe that the claim has no reasonable prospect of success as contended by the Respondents and I am not persuaded that it should be struck out. The adaptations referred to in the Occupational Health report were potentially reasonable adjustments which the Respondents arguably should have made.

58. In my view this is a case where section 123(3)(a) of the Equality Act 2010 applies. The Respondents' "conduct" was their alleged failure to carry out an ergonomic assessment and/or any of the other adaptations referred to in Dr Fitzsimons' report over the period of time which commenced with their receipt of that report and ended with the termination of the Claimant's engagement. That alleged failure continued after 21 February 2016 and

accordingly the Claimant's claim in respect of failure to make reasonable adjustments was not time barred.

59. If I had found that the alleged failure to make reasonable adjustments had occurred before 21 February 2016 I would have required to consider in terms of section 123(1)(b) of the Equality Act 2010 whether it was just and equitable to extend the time within which the claim might be presented.

60. Mr Smith argued that I should have regard to (a) the assurance given to the Claimant that an ergonomic assessment was going to be carried out, so that she believed that something was happening behind the scenes and her failure to act was excusable, (b) the Claimant's experience of the time it took the Second Respondent to do things and (c) the Claimant's reluctance to press the issue of the ergonomic assessment in light of the response to her request for varifocal glasses. He referred to **Chief Constable of Lincolnshire Police –v– Natasha Casten 2009 EWCA CIV 1298** and reminded me that I had a wide discretion to extend the time limit. He cautioned against the Respondents getting the benefit of their own failure to act.

61. The Respondents reminded me by reference to **Robertson –v– Bexley Community Centre 2003 IRLR 434** that the exercise of discretion was the exception rather than the rule. The burden of proof was on the Claimant. They also reminded me of the factors to be taken into account under reference to **British Coal Corporation –v– Keeble 1997 IRLR 336**. There had been significant delay by the Claimant despite her acknowledgment in evidence that she was "aware of her rights". She had decided to pursue her claim only when she lost her position. The delay impacted on the cogency of the evidence. There was prejudice to the Respondents.

62. If it had been necessary for me to determine if it was just and equitable to extend the time limit in this case I would have decided the point in favour of the Claimant, on the basis of the arguments advanced by Mr Smith. In my view the Claimant had been entitled to believe that there was going to be an ergonomic assessment, and adaptations made, to assist her. It may not have been in her

mind at the time that there was an ongoing failure to make the alleged reasonable adjustments and she may have been spurred into action only when she lost her position, but it would not be just and equitable for the Respondents to benefit from their own alleged failure to act.

Employment Judge: Mr WA Meiklejohn
Date of Judgment: 21/02/2017
Entered in register: 21/02/2017
and copied to parties