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EMPLOYMENT TRIBUNALS

Claimant: **Miss F Khan**

Respondent: **HM Revenue and Customs**

Heard at: **East London Hearing Centre**

On: **19 July 2018**

Before: **Employment Judge Elgot (sitting alone)**

Representation

Claimant: In person

Respondent: Ms N Ling (Counsel)

JUDGMENT AT A PRELIMINARY HEARING

The Employment Judge having reserved her judgment now gives judgment as follows and written reasons are attached.

JUDGMENT

1 The claim of disability discrimination, as set out in the un-amended Claim lodged at the Employment Tribunal on 16 January 2018, is out of time and the Tribunal has no jurisdiction to hear it. I decline to exercise my discretion to extend time by reference to section 123(1) Equality Act 2010 on just and equitable grounds because no such grounds have been shown by the Claimant.

2 The Claimant's application to amend her claim in order to include the alleged discriminatory act of "making the decision of serving me with a written warning letter and putting me on a monitoring period for sickness absence" (that letter being dated 7 August 2017) is granted.

3 The amendment is however out of time. I consider it just and equitable to extend the time limit to 30 April 2018 which is when the application to amend was clearly made in writing.

4 However, by reference to Rule 39 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, I consider that this only remaining allegation, which is that the issue of a first written improvement warning under the Respondent's attendance management policy was an act of disability discrimination, is a claim which has little reasonable prospect of success.

5 The Claimant is therefore ordered to pay a deposit in the amount of £350 as a condition of continuing to advance that allegation. The amount of the deposit has been fixed following enquiries at the hearing into the Claimant's ability to pay. A deposit order is attached.

REASONS

1 The issues to be determined at this Preliminary Hearing are set out at paragraph 16 of a Preliminary Hearing Summary prepared by Employment Judge Jones following the first Preliminary Hearing in this case which took place on 16 April 2018. It is clear from the Minutes that EJ Jones conducted a comprehensive review of the Claimant's case and took pains to clarify and explain to her what steps she should take to apply to amend her Grounds of Complaint and make her case ready for a substantive hearing.

2 In particular Employment Judge Jones made relevant Orders numbered 1, 2 and 3.

3 The Respondent now concedes that the Claimant is and was a disabled person, at all times material to this case, for the purposes of the Equality Act 2010. She has mental health difficulties arising from depression and anxiety and a spinal disc problem. That concession as to disability was made on 2 July 2018.

4 At this hearing the Claimant was unrepresented. Her trade union representative attended for support but not to represent her. The Respondent was represented by Ms Naomi Ling of Counsel. I asked the Claimant a number of questions in order to obtain from her an outline of her submissions addressing the remaining issues. Thereafter the Claimant was placed on oath and Respondent's Counsel was given the opportunity to ask her questions about her case. I also had the benefit of oral submissions from Ms Ling.

5 There was a small bundle (the PH Bundle) of relevant documents prepared by the Respondent and sent to the Claimant in advance. I read only those documents in the bundle to which I was referred specifically by the parties and/or the representative.

6 The grounds of complaint attached to the Claim lodged by the Claimant on 16 January 2018 ("the original claim") refer in paragraphs 1-10 to a complaint of disability discrimination which the Claimant now identifies as being a complaint under

section 20 Equality Act 2010 (failure to comply with a duty to make reasonable adjustments for disabled persons). The identification of the complaint as a section 20 claim is contained in the Claimant's email to the Tribunal and the Respondent of 18 June 2018.

7 The original claim is a contention by the Claimant which is further particularised at pages 46-49 of the PH bundle in an email with attachments dated 30 April 2018. The Claimant says that in January 2016 she sought an extension of a pre-existing temporary arrangement for her to work part-time hours. She wanted that arrangement also to be potentially extendable into the future until such time as she felt able to resume her full-time contracted hours of 36 per week. She had worked reduced hours, 25 per week, since September 2013, such arrangement having been agreed to by the Respondent in accordance with its Alternative Working Pattern (AWP) policy. The Claimant's complaint is that after two years and three months (September 2013 - January 2016) of working an alternative pattern of hours the Respondent insisted that in future continued reduced hours must be the subject of a permanent change in her contract and could not continue as a temporary arrangement.

8 That refusal to extend the part-time temporary arrangement occurred, the Claimant says, in January 2016 and was, she contends, a breach of the Respondent's duty to make reasonable adjustments in respect of her as a disabled person. I did not hear witness evidence or I assume see all the relevant documents but I am satisfied that such a claim may not be entirely without merit. This is because any employer considering its section 20 duty must consider whether it is a reasonable adjustment to depart from a standard policy in order to remove any substantial disadvantage to which the standard policy, as an identifiable provision, criterion or practice (PCP), puts its disabled employees as compared to those who are not disabled.

9 Be that as it may, it is inescapably the fact that the Claimant's request for an extended and extendable arrangement outside the AWP policy was made in January 2016 and, upon refusal, she says the alleged act of disability discrimination occurred. Her Claim was made on 16 January 2018 and thus her complaint is significantly out of time.

10 I have considered whether she later repeated that request and received repeated refusals. The Claimant's submissions were difficult to clarify and the nature of her evidence in this respect was difficult to obtain even in response to specific questions from me and from Respondent's Counsel. If there were any such repeated requests and reiterated refusals no dates or any details can be specified by the Claimant and she has no supporting documents. Taken at its highest, therefore, it may be that the Claimant is saying that time to lodge her Claim started to run each time she asked again for this adjustment.

11 However, the latest of any such requests must have occurred in May/June 2017 because by July 2017 the Respondent had agreed, as recorded in its letter to the

Claimant dated 7 August 2017, that Ms Khan could again work temporarily reduced hours with no need for her to agree and sign a new permanent contract with amended terms and conditions. At that point, she told me, she was happy again with the arrangement just as she would have been if it had been agreed in January 2016.

12 The latest date on which the Respondent refused temporary reduced hours and allegedly failed to make the section 20 adjustment must therefore have been in May/June 2017 and any such complaint is out of time.

13 The early conciliation notification to ACAS is dated 17 November 2017.

14 Should time be extended? I considered whether to fix the time limit to be at the end of such other period as I think just and equitable (section 123(1) Equality Act 2010).

15 Despite the difficulties in discovering from the Claimant why she made no claim within the original time limits it was possible, by patient exploration of the Claimant's case, to discover her response. She said: "*I was all over the place*" and "*did not know the rules".* She was unwell and absent from work for some time from January 2016 until May/June 2017 but was not absent for all of that time and certainly returned briefly to work in March 2017. It is unclear whether she went back on a phased return to her full-time hours or on full-time hours without phasing. The Claimant says that she was "*looking into my rights*" and *"just checking everything*" with her trade union and what she called the "workplace legal team" which appears to be a helpline run internally by the Respondent as part of a workplace wellness initiative. Again, it was difficult to obtain from the Claimant any clear answer about who she spoke to in the relevant period or about what.

16 The Claimant also gave evidence that she did seriously consider making a request for a permanent reduction in hours and accepting new contractual terms but she eventually decided not to do so.

17 In all these circumstances I agree with the submission of Respondent's Counsel that it was not until the Claimant received the first written improvement warning in relation to absence on 7 August 2017 that any conscious intention to pursue these complaints to the Employment Tribunal crystallised in her mind. Before then, to use her words, *"I did not know where I was going with it*" and she had not successfully discovered, despite the various enquiries she described, her entitlements under the 2010 Act. She has access to her brother's laptop and the internet.

18 Upon receipt of the 7 August 2017 letter containing not only the warning but the Respondent's agreement to adjustments by way of "informal" and "temporary" change to contract hours the Claimant told me she thought:

> *"Why couldn't they give me this in 2015/16 when I asked but only in 2017 they also sent it to me with a warning letter. If I had had this in 2015 the warning would not have happened, it would not have come to a formal warning."*

19 The Claimant was asked whether the letter is what prompted her to sue in the Employment Tribunal and she answered, "*yes … if it had been given earlier it would not have come to a formal warning*". This analysis is supported by paragraph 1 of the Minutes of the Preliminary Hearing conducted by EJ Jones:

> *"The Claimant confirmed in the discussion today that her complaint to the Employment Tribunal is about the warning letter she received from the Respondent at the conclusion of the sickness absence process in August 2017."*

20 I find that the reason the Claimant made no earlier claim was not just that she was unable to obtain expert advice or received inaccurate or less than timely information or advice from her trade union or other sources but because she had no real plan to take tribunal proceedings until she received the 7 August warning issued simultaneously with a proposed new arrangement for the adjustments to her working hours which she had previously requested.

21 In those circumstances the Claimant has failed to show me why I should extend the time limit for the original complaint on any just and equitable basis when, I am satisfied, she knew she might have a disability discrimination claims, but did not pursue those claims until the catalyst of the warning letter occurred.

22 I have next considered whether the Claimant should be permitted to amend her original claim so as to ask a Tribunal to decide whether the warning letter is itself an act of discrimination. This would mean she would have one remaining extant ground of claim.

23 It is still unclear whether the Claimant makes the amended claim under section 20 or section 15 of the 2010 Act. Section 15 describes a type of discrimination against disabled persons where it is alleged that an employer treats the disabled person unfavourably because of something arising in consequence of her disability, for example, more frequent or extensive sickness absence, and the employer cannot show that the treatment of the disabled person is a proportionate means of achieving a legitimate aim.

24 The Claimant described, in a somewhat contradictory account, how she had sought either to attach and/or copy and paste the text at pages 46-49 beginning with the words 'Supporting Document' to her original claim. She failed to achieve that aim because of the limits in her knowledge of computers and information technology and said she was struggling with unfamiliar technology. She did manage to send to the

Tribunal the middle section of that text headed "A brief overview of the situation" with ten numbered paragraphs but not the text that now appears before or after that middle section. This is strange and the subsequent actions of the Claimant are similarly difficult to understand. She did not attempt to secure delivery of all the relevant pages and attachments by, for example, simultaneously sending them by post. She did not notice that her claim had been sent in an incomplete format until she arrived at the Preliminary Hearing on 16 April 2018 and she did not bring a full set of the printed pages with her to show EJ Jones or the Respondent. When ordered by EJ Jones to make an application in writing to amend her claim "to add a complaint about a letter she received from the Respondent in August 2017" and to do so "as soon as possible and by 30 April 2018" the Claimant left it until the deadline of 30 April 2018, to send the missing pages.

25 Nonetheless I do on balance accept the Claimant's explanation and permit the amendment by reference to the principles and guidelines in Selkent Bus Co Ltd v Moore [1996] ICR 836 EAT because the issue of the warning letter is the core of the Claimant's disability discrimination complaint.

26 The prejudice to the Claimant in excluding her core complaint by a refusal to accept the amendment, which was not put forward as part of the original claim because of IT difficulties would be a denial of natural justice and be of greater prejudice to her than to the Respondent. The Respondent has always known that it was facing a disability discrimination complaint and has taken appropriate steps to prepare a response and defence. I agree that the Respondent now has further work to do to prepare for the substantive hearing but I am not persuaded that it will suffer serious further prejudice in dealing with the one remaining ground of complaint. I reiterate that all of the original claim has been dismissed for want of tribunal jurisdiction because out of time.

27 Pursuant to Rule 29 of the Tribunal Rules 2013 and having considered the principles in Selkent I consider this to be a necessary and appropriate amendment of substance which is the fulcrum of the Claimant's disability discrimination claim and I am satisfied as to the reason why this part of her complaint was not included in the original claim nor the original text attached to her Claim.

28 There are two other factors to consider. The amended claim is also out of time. The warning letter was sent on 7 August 2017. The Claimant did not notify ACAS for early conciliation until 17 November 2017. I am satisfied that the reason for this delay is that she failed to obtain or receive proper, reliable and accurate advice from anyone she consulted including her trade union. Again, it is odd that there was such a comprehensive failure of assistance but the Claimant said that she was told and she believed that she must pursue an internal appeal against the warning before she could make any tribunal claim. That appeal was unsuccessful and the outcome was notified to her on 20 October 2017. She still waited almost a month before referring the matter to ACAS. However she also told me that she understood from her advisers that it was necessary to make a separate 'grievance' in relation to her unsuccessful appeal against the issue of the absence improvement warning letter. I have not seen a copy

of any such written grievance. The Claimant told me that she lodged her grievance and notified for early conciliation on the same day.

29 In the circumstances I grant an extension of time for the amended claim because it is just and equitable to do so. The Claimant has mental health difficulties, she is clearly confused and has made a number of genuine mistakes. She has received incorrect advice apparently from a number of sources and has failed, despite being urged to obtain legal representation, to obtain or receive expert legal advice, all of which has led to delay. I also take into account, as one factor in my decision that the Claimant was waiting for completion of internal procedures which she mistakenly believed must be resolved before she could resort to a tribunal claim.

30 Deposit Order – The Claimant is left with one ground of complaint, either under section 15 or section 20 of the 2010 Act, which I provisionally assess it to be a claim of low value.

I am reminded by Ms Ling of the leading case of Griffiths v Secretary of State for Work & Pensions [2017] ICR 161, a copy of the Court of Appeal judgment having been handed to me and to the Claimant. The case is authority for the point that a disabled employee, particularly where her level of absence is vastly in excess of the triggers in the employer's absence management policy, cannot as a matter of entitlement claim that the employer must make particular adjustments such as discounting the level of 'disability-related' sickness absences or agreeing to other modifications of policy. Even where there is a provision, criterion or practice (PCP) consisting of triggers within a sickness absence policy which put a disabled employee at a substantial disadvantage it may not be reasonable to require an employer to discount those absences, permanently, adjust hours of work and/or delay or refrain from issuing warnings. Any proposed adjustment must be reasonable in any particular case. Ms Ling pertinently asks:

> *"How can the Claimant succeed when Ms Griffiths did not given the scale of her absence in the relevant period."*

31 Although the Griffiths decision does leave open to tribunals the possibility of finding that a dismissal for disability related absence may constitute discrimination contrary to section 15 of the 2010 Act I conclude that even the amended claim which I have allowed and in respect of which I have extended the time limit is a claim which has little reasonable prospect of success. I refer to Rule 39 of the Employment Tribunal Rules 2013 and make an order requiring the Claimant to pay a deposit of £350 as a condition of continuing to advance the allegation that the issue of the warning letter on 7 August 2017 was an act of disability discrimination.

32 The Claimant told me that from November 2017 she has only been in receipt of statutory sickness pay but will go back to work next week on part-time hours. Her full-time gross salary is approximately £24,500 per annum. She has substantial personal

debts but does own a house in Northumberland with equity of approximately £35,000. She receives no disability related benefits and has no financial dependents. I consider that I have made reasonable enquiries into her ability to pay the deposit and have decided that £350 is an appropriate figure. A deposit order is attached to this judgment which also incorporates a note advising of the potential consequences of the deposit order and the Claimant is advised to refer to that information carefully and, once again, she is urged to seek expert legal advice in respect of her remaining claim.

Employment Judge Elgot

15 August 2018