EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106913/2019

Preliminary Hearing Held at Dundee on 3 October 2019

Employment Judge I McFatridge

Mrs J Kerr	**Claimant** **In person**
Fife Council	**Respondent** **Represented by** **Ms Caldwell** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Tribunal has no jurisdiction to hear the claim of disability discrimination as it was submitted out of time. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed she had been unlawfully discriminated against on grounds of disability by the respondent. They submitted a response in which they denied the claim. They also made the preliminary point that the Tribunal had no jurisdiction to hear the claim on the basis that the claim was time barred. They pointed out that the early conciliation certificate in this case had been issued on 26 October 2018 and that ACAS had been notified in terms of the early conciliation regulations on 26 September 2018. The claim form had not been lodged with the Tribunal until 14 May 2019.

2. The claim was subject to a degree of case management and the claimant submitted a timeline together with a chronology of events setting out the various claims she was making. The claimant narrated a history of having become aware of mobility issues in her role as a teacher from 2013 onwards. Latterly this was recognised as the first signs of the onset of Parkinson's Disease. The claimant's position is that from 2016 onwards she was allowed to work a particular work pattern. She considered this assisted her to deal with the symptoms of her Parkinson's disease. It was her position that the respondent unilaterally changed the working programme from June 2017 onwards. The claimant then indicated that she suffered a breakdown in health in September 2017. She was critical of the way this was dealt with by the respondent. She had returned to work for a time but had then gone off again. As at the date of the Tribunal she had been absent from work since August 2018. The last matter she referred to as a reasonable adjustment was that her union asked for her absence and pay to be reclassified in November 2018. In her timeline there was a box which covers the period July 2018 to March 2019. Against this she stated

> "Failure to provide a duty of care for me, throughout the last three years. No consideration of the impact of the long delays in making referrals, the uncertainty and the delays in the process, on me, who has a disability and is off with stress. And, the impact of the many things promised but never followed through.

Counselling was verbally offered at this meeting, and that information would be sent out, but it never was.

I paid for private counselling, costing £300.

Counselling has to be endorsed by my line manager. One of my colleagues had previously been offered counselling.

No investigation into my stress has taken place."

3. An Employment Judge decided it would be appropriate to hold a preliminary hearing to deal with the issue of time bar. At the hearing the claimant gave evidence on her own behalf. Productions were lodged by both the claimant and the respondent. I shall refer to the claimant's productions beginning with the word C and the respondent's beginning with the word R. On the basis of the claimant's evidence and the productions I found the following factual matters relevant to the matter to be decided by me to be proved or agreed.

Findings in fact

4. The claimant considered that the issues in this case began to arise in January 2017. From that date she found that her stress levels began to increase. The claimant was diagnosed with Parkinson's disease in 2016. She continues to receive treatment for this. Her present situation is that she has been absent from work for over a year and is now investigating taking early retirement on the grounds of ill health.

5. The claimant's view is that by June/July 2018 her health had deteriorated to the point it was almost irreparable. The claimant had previously involved her union in her discussions with the respondent.

6. The claimant had been planning to return to work after the school holidays in August 2018 but she began to suffer panic attacks. She had not previously experienced panic attacks. These panic attacks were extremely incapacitating. The claimant would lay her head on the pillow and have pains in her chest. She would be crying inconsolably. She found herself unable to breathe. The first occasion she had one she thought that she was suffering a heart attack.

She continued to have panic attacks for a period of around eight to nine weeks thereafter. This caused her to be unable to return to work.

7. One of the panic attacks lasted around four hours.

8. At the same time the claimant was appalled to discover one day at the hairdresser's that she was suffering from alopecia. She attributed this to her mental stress. The claimant also developed lockjaw and mouth ulcers. She was crying every day. She felt that matters were totally insoluble.

9. The claimant consulted her GP. She was prescribed anti-depressants. She did not find that they assisted her and she discontinued their use after a short time.

10. The claimant's medical records were lodged. These show her attending her GP on 13 August 2018. The note states

> "Letter at start of the summer stating working pattern which allows her to continue to work will only be extended until October. Weepy all summer. Panic attack last week and this morning. Feels struggling ++ and no energy left to fight her corner again. Feels robbed of confidence and feels her Parkinsons (which she is coping with just at the moment, having recently required increased dose of meds) is not being taken into account. Going for counselling. Trial fluoxetine and rv 1/12."

She is then noted as having gone back to her GP on 10 September. This time the note states

> "Anxiety with depression
> recently having anxiety and panic attacks along with low mood, problems at work. Recently seen DR SKL with this. Came for another sick line, not started fluoxetine and not keen. Trying to cope without them. Attending private counsellor and doing yoga and meditation. Works as primary school teacher. Known Parkinsons and problems at work due to shift/work pattern changes. Discussed advice, med3 issued."

11. She is then noted as attending her GP on 2 October. The note in relation to this states

> "Depressed mood
> Parkinsons worse – stiffer and tremor notably worse currently. Physical sx have worsened with mood. Mood worsened following last appt but beginning to improve now, but physical not changing yet. Going down legal route against work due to disability discrimination. Will need lawyer's letter at some point. rv as needed."

12. As noted in her GP notes the claimant at this time contacted a counsellor and attended six sessions with the counsellor. She discontinued this as she was unable to afford any more sessions. Her counsellor provided a letter dated 6 June 2019 (C32) which confirmed that the claimant was in a sense of despair and desperation due to how she was feeling regarding her treatment at work. The counsellor indicates that the claimant came for life coaching in August 2018 and participated in a six week intensive one to one programme. She confirms the various symptoms the claimant suffered from.

13. The claimant's union had previously been involved in her case in trying to arrange a solution with the respondent. The claimant contacted them. Her union representative came to visit the claimant at her home. Whilst there the claimant completed an online application to ACAS under the early conciliation regulations. This was completed on the claimant's ipad. The claimant found it difficult to type at the time and her union official did most of the typing. The early conciliation application was dated 26 September 2019. At that stage the claimant was extremely anxious and tearful and continuing to suffer panic attacks.

14. Thereafter, the claimant's union instructed solicitors, Messrs Dentons who engaged with the respondent under the ACAS early conciliation. They made a proposal to the respondent on behalf of the claimant. The respondent accepted this proposal. It is understood that the proposal related to the steps which would be taken to facilitate the claimant's return to work once she felt well enough to do this.

15. On Wednesday 21 November 2018 the claimant's union e-mailed her. The claimant did not actually see the e-mail until 22 November. The union passed on information from Messrs Dentons to the effects that as the respondent had agreed to the proposals made on behalf of the claimant the solicitors would not be going any further with the submission of matters to an Employment Tribunal. The claimant was advised that the deadline for submitting a claim was Friday 23 November.

16. At the time the claimant was still suffering from severe anxiety and depression. In November/December 2018 she was feeling suicidal at times. She felt that the union and the solicitors instructed by them (Dentons) had exceeded their authority. She had not seen the letter sent to the respondent outlining the union's solicitors proposals for resolving matter until some time after it was sent. Her position at the Tribunal hearing was that she did not approve of this. She did not take any steps at the time to contact the union or Messrs Dentons to complain nor did she take any steps to raise Tribunal proceedings.

17. As noted above the claimant had found that anti-depressants did not help her. She was no longer able to afford counselling. She formed the view that the only way she could get herself out of the mental health difficulties which were afflicting her were to use the techniques she had been taught at the CBT sessions which she had attended with her counsellor and also yoga and meditation. She believed that she had to effectively pull herself up by her own bootstrings.

18. As part of this process the claimant decided in January 2019 that she required some sort of challenge. She decided that she would set herself a challenge of cycling 50 miles per week every week for the coming year. Her husband set up a Just Giving page for her on her instructions. Since the beginning of the year the claimant has maintained her challenge and has regularly posted on her page confirming that she has been able to keep up with the target of cycling 50 miles per week.

19. The page raises money for a Parkinson's charity. The claimant chose cycling since she is unable to do impact sports and she has serious mobility issues with walking or running.

20. The claimant felt that her mental situation began to improve after the New Year although she still felt extremely fragile and had difficulty attending meetings. In February 2019 she went on to nil pay. As a result of this she required to claim benefits. An appointment was arranged for the claimant to attend the DWP for interview. The claimant suffered a panic attack and was unable to attend this interview which was due to take place some time in March 2019.

21. In May 2019 the claimant turned 50. She felt that this was some kind of turning point and that she required to take steps to take control of her situation. As a result of this she lodged her claim with the Tribunal. The claim form was completed primarily by the claimant's husband and was submitted to the Tribunal on 16 May.

Matters arising from the evidence

22. I had absolutely no doubt that the claimant was a truthful witness and that she was relating matters as she saw them. I have restricted my findings of fact to those matters which in my view are relevant to the issue of time bar which I required to determine. The claimant also gave some evidence in relation to her primary claim. It was clear to me that the claimant feels passionately that she has been badly treated by the respondent and in particular by the Head Teacher of her school in relation to the change to her working pattern. It is clear that the claimant has had to cope with an extremely debilitating progressive illness as well as the symptoms of stress and anxiety which she relates to her work situation. It is to her credit that she has taken steps to address her symptoms using the various tools which she has had to seek out for herself. One cannot but feel a degree of admiration as well as considerable sympathy for her. It was clear to me that there were some factual disputes between the claimant and the respondent in relation in particular to the steps which have been taken by the respondent since August 2018 in order to resolve matters. It is not for me to make any findings of facts in relation to

those disputes. What was undisputed however was that the claimant had instructed solicitors through her union to, as she put it, "go down the legal route" in the autumn of 2018 and that to this end the claimant had submitted an online application for early conciliation with the assistance of her union representative on 26 September. It was also common ground that the union's solicitors had sent a letter to the respondent setting out what bore to be the claimant's proposals as to the way forward and that the respondent had accepted these. The claimant also accepted that her union had sent her an email on 21 November indicating that the deadline for raising Tribunal proceedings was in two days' time and saying that in view of the progress being made they would not be raising proceedings. I accepted the claimant's evidence that she was not in a good place mentally at the time and that she did not challenge this either with her union or with Dentons, the solicitors.

23. The respondent was initially critical of the claimant's decision to subject herself to the challenge of cycling 50 miles per week during the whole of 2019 which she agreed voluntarily to do in 2019. Having heard the claimant's explanation for this I am in absolutely no doubt that such criticism is unjustified. Indeed my understanding was that, having heard the claimant's explanation, the respondent's solicitor was no longer insisting on this point albeit the respondent's position was that the claimant had been able to set up a Just Giving page online in January 2019 and could therefore have been expected to have been able to submit an online ET1 at that time as well had she wished to. They also referred to the fact that the claimant had herself lodged a lengthy and complex grievance letter in February 2018. I accepted the claimant's evidence that her husband had actually completed most of the Just Giving page and most of the ET1 which was eventually submitted in May 2019.

Issue

24. The sole issue which I was required to determine was whether or not the ET1 had been submitted timeously. I required to decide this on the basis that the claim is as set out in the claimant's pleadings. It would be possible for me to make a decision that certain aspects of the claim were time barred and other aspects were not. It would also be open to me to decide that all parts of the

claim were part of a continuing act and should be dealt with on that basis or alternatively that there were individual separable claims. Both parties made full submissions. The claimant lodged a written case law summary. I was referred by both parties to a number of legal authorities. Rather than set these out at length it is appropriate to mention these where appropriate in the discussion below.

25. The Tribunal's jurisdiction to deal with claims of discrimination under the Equality Act is conferred by chapter 3 of that Act and in particular section 120. Section 123 of the Act goes on to deal with time limits. It states

> "Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of –
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> (a) The period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) Such other period as the employment tribunal thinks just and equitable.
>
> ….
>
> (3) For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
>
> (a) when P does an act inconsistent with doing it, 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."

26. In this case the claimant provided a Scott Schedule which set out a timetable of events. It refers to a number of issues extending over the period from 2015 onwards. I have set out above those allegations most recent in time. In her evidence however it was clear that her principal concern was over the fact that whilst the respondent had agreed to an amended working pattern in or about June 2016, in January 2017 the Head Teacher indicated that she was

proposing to change the agreed work pattern and this change came into effect in June 2017. Her position is that three weeks after beginning working the new pattern she had a breakdown at work. She was then absent for a time. She narrates various matters where she considers the respondent ought to have dealt with matters differently. She returned to work in February 2018 and worked until June 2018. She made various points regarding the way she was treated by the Head Teacher for the period between then and May 2018. She indicated that she took out a grievance in February 2018. She also sought to move schools. She noted that in June 2018 the Head Teacher handed her a letter indicating that the claimant would be permitted to work the patterns she wished but could not do so with her former work partner but would job share with a full time teacher. The claimant was concerned about the terms of this letter which she considered to be discriminatory. She did not return to work after August 2018. In November 2018 she asked for her absence to be reclassified (through her union) but this was refused. There was then a section which covers the period July 18 to March 2019 which is quoted above. The claimant states that the PCP which placed her at a disadvantage over this period was

> "Failure to provide a duty of care for me, throughout the last three years. No consideration of the impact of the long delays in making referrals, the uncertainty and the delays in the process, on me, who has a disability and is off with stress. And, the impact of the many things promised but never followed through.
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> Counselling was verbally offered at this meeting, and that information would be sent out, but it never was.
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> I paid for private counselling, costing £300.
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> Counselling has to be endorsed by my line manager. One of my colleagues had previously been offered counselling.
>
> No investigation into my stress has taken place."

The proposed adjustments are

> "An employee should be given an early OH referral to identify support, within weeks, rather than months, or years as in my case.

> Managers must be advised, and guided, by HR, of their responsibilities under the equalities act, and HR should consider monitoring the managers actions throughout, when a person presents with a disability.
> Follow your own policies and support the person with the disability.
> Offer counselling, early on – these are life changing illnesses.
> Reimburse my counselling costs – I wouldn't have needed them if I was still on my initial work pattern.
> Consider an Equalities Officer, who manages and provides specialist advice to managers, and employees. Single point of contact."

The claimant has also completed a box entitled March to Current however no PCPs are identified over this period.

27. In order to come to a decision on time bar the first matter which I had to consider is the date of the act to which the complaint relates. It is clear that the focus of the claimant's claim is on the decisions of her Head Teacher in relation to her work pattern, the last of which occurred in 2018 and the reclassification of her pay which her union asked for in November 2018. I was unclear on the evidence whether this was refused in November 2018 but even if it was not it is clear that the respondent continued to pay the claimant on an unreclassified basis and given the terms of section 123(4) this act would be deemed to have happened in November/December of 2018 at the latest. It is also possible to ascertain from the Scott Schedule that the claimant appears to be making a claim that the respondent ought to have reimbursed her counselling fees however on the basis of the claimant's testimony she saw her private counsellor for a six week session in August/September 2018 and could not continue with any further appointments after this because she could not afford this. Once again therefore, even on the interpretation most generous to the claimant, it would appear clear that the start date in respect of this claim would be around October 2018 at the latest. The last point mentioned by the claimant is that no investigation into her stress has taken place, once again this is a failure to do so something which must be deemed to have occurred when the respondent is to be taken to have decided on this in terms of regulation 123(4). It therefore appears to me to be absolutely clear that all of

the matters referred to in the claimant's claim were fully complete by around November/December 2018. The claim form was not submitted until 14 May 2019 and was therefore submitted outwith the primary three month period. It should be noted that I considered but rejected the argument that the claimant is still subject to an ongoing continuous act. It is clear that what the claimant complains of are various decisions which were made in the past. Her current position is that she feels that it is now too late for anything to be done that would be able to get her back to work and she is exploring early retirement on the grounds of ill health.

28. Having established that the claim was not submitted within the primary limitation period of three months I required to consider whether it would be just and equitable to extend that time limit. I was correctly referred by the claimant to a number of cases including ***British Coal Corporation v Keeble and others [1997] IRLR 3366***. This case clearly sets out the approach which the Tribunal is required to take and refers Employment judges to the checklist of factors set out in s33 of the Limitation Act 1980. Although this is a piece of English legislation I consider that it is appropriate for me to apply it given the clear guidance in the ***Keeble*** case.

29. It is clearly relevant that the claimant had suffered from serious ill health in the period in question. I had considerable sympathy for her position and entirely accept that over at least part of this period her mental health was in her words not in a good place. I also note however her evidence that this improved from January 2019 onwards. I entirely accepted her evidence about the challenge and do not see this evidence as in any way reducing the impact of her ill health. I also however consider the fact that the claimant was represented by her union and indeed by specialist solicitors instructed by her union over this period to be highly relevant. Her union were aware of all of the claims which she wished to make. I do not have details of the proposals which were made by Messrs Dentons on her behalf but I accept the evidence that the respondent Council accepted their proposals. The fact of the matter is that these did not result in the claimant returning to work. The respondent referred me to the case of ***Steeds v Peverel Management Services Limited [2001] EWCA civ 419***.

This is a claim which dealt with the discretion afforded to courts under section 33 of the Limitation Act 1980. As noted above, the ***Keeble*** case makes specific reference to section 33 as providing an appropriate checklist for Employment Tribunals to use in similar circumstances. In that case it states in section 27:

> "Thus as the authorities stand, so far as fault on the part of the claimant is a relevant factor in exercising the court's discretion under section 33, his solicitor's faults are not to be attributed to him personally. However this is not to say that the existence of a claim by the claimant against his solicitors is an irrelevant factor. On the contrary, as Lord Diplock pointed out in Thomson's case [1981] 1WLR at page 752C-D.
>
> 'When weighing what degree of prejudice the plaintive has suffered the fact that if no direction is made under section 2D he will have a claim over against his solicitor for the full damages that he could have recovered against the defendant if the action had proceeded must be a highly relevant consideration'."

30. I therefore consider that this factor feeds in to the balance of prejudice which I will consider below. There is also another matter which feeds in to the balance of prejudice arising from this situation when I consider it from the point of view of the respondent. The respondent in September 2018 are faced with a claim by an employee who is alleging disability discrimination over a lengthy period of time. Solicitors acting for that employee invoke the early conciliation process and during that process make various proposals in order to settle the matter and the employer accepts these. As a result of this, their understanding is that the matters have been resolved. They are maintained in this view when the period within which these solicitors could raise proceedings based on this conciliation certificate expire without any proceedings being raised. I obviously do not know what was involved in the discussions in this period but it is clear that even if the claimant had a claim in respect of an act of discrimination which had occurred on the same day as she applied for ACAS conciliation 26 September 2018 any right to raise proceedings within the primary limitation period would expire on 25 January 2019 at the very latest. Given that it is clear that much of the claimant's claims if not all of them related to a period well

before 26 September the respondent had every reason to believe that the matters raised by the claimant had been satisfactorily dealt with. This remained the case for a further four months until the claimant lodged her ET3 in May 2019.

31. Going through the list contained in the 1980 Act it appears to me the length of the delay in this case is at least four months. So far as the reasons for the delay is concerned I accept that the claimant's ill health was a factor. Another factor appears to be that in the claimant's eyes at least the solicitor who was instructed by her union exceeded their brief when they reached an agreement with the respondent and when they advised her on 21 November that they would not be proceeding to raise a Tribunal claim. I accept that the claimant's ill health was a factor in the reason why the claimant did not immediately challenge this.

32. The respondent's representative did not dwell greatly on the effect of the delay on cogency of the evidence. Certainly if the sole delay was one of four months that would not have a great effect on cogency. I do however have a concern that in this case much of the "meat" of the claimant's case relates to the way she was treated by her Head Teacher at her place of employment. The claimant makes a number of very specific points regarding incidents which took place in 2017 and again during the early part of 2018. I do have some concerns that the cogency of the evidence in relation to these matters might be effected by the delay although I have to say that if this was the sole ground for my decision it could be dealt with by only allowing part of the claim to proceed.

33. With regard to section 33(3) (e) it does not appear to me that the claimant acted with a great deal of promptness either in involving her union in the first place or in seeking to resurrect matters after the union's solicitors had confirmed they would not be raising proceedings themselves and after they clearly advised her that they considered the time limit to expire around the end of November 2018. The claimant's evidence was that her mental health was improving from January onwards. She also advised that at the end of the day it was her husband who drafted the ET1 claim form. She did not give any evidence as to why she could not have asked him to draft it before this.

34. I am finally left with the balance of prejudice. If an extension of time is granted then the respondent faces having to deal with a claim which they thought they had settled at the end of last year by agreement with the claimant's solicitors who were acting for her at the time. I consider this is a prejudice to them. As against that if an extension is not granted the claimant loses the opportunity to have a claim adjudicated upon which is clearly of some importance to her.

35. Although the just and equitable jurisdiction to extend time limits is a wide one I am conscious that the upper courts have reminded Tribunals on numerous occasions that it is not an unlimited one. The well known case of ***Robertson v Bexley Community Centre t/a Leisure Links [2003] IRLR 434*** states that there is no presumption that Tribunals should exercise their discretion unless they can justify failure to exercise the discretion quite the reverse. The exercise of discretion is the exception rather than the rule.

36. I consider that in this case the balance is a fine one however at the end of the day that the fact that the claimant was clearly advised by her solicitors in November 2018 that they were not proceeding with a Tribunal claim and the fact that the respondent would have been entitled to believe that the issues raised at that time had been resolved by them agreeing to the suggestions of the claimant's solicitor all bring the balance down in favour of not extending time. The claim of disability discrimination is therefore time barred and is dismissed.

Employment Judge: **Ian McFatridge**
Date of Judgment: **17 October 2019**
Date sent to parties: **17 October 2019**