EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Miss M Iqbal	**AND**	General Dental Council

Heard at: London Central - **On**: 2-3 November 2020

Before: Employment Judge Pearl

Representation
For the Claimant: Mr D Deejur, of Counsel
For the Respondents: Mr A Sugarman, of Counsel

JUDGMENT
of the Tribunal on preliminary issues

The Judgment of the Tribunal is that:

1. There is no jurisdiction to entertain the claims out of time
2. The Claimant was not at relevant times disabled for the purposes of the Equality Act 2010

REASONS

1. This preliminary hearing, held by CVP video link, had to deal with various preliminary points. First, it being agreed that the Claimant's ET1 was presented out of time, is time to be extended on a just and equitable basis so as to validate the claim? Second, was the Claimant at any material time disabled? The third issue would arise if there were jurisdiction to entertain the claim and that is, is her application to amend the claim to be allowed?

2. I received evidence from the Claimant as well as very full submissions from both Counsel and I have had regard to a bundle of 399 pages. In the afternoon of the second day I was able to tell the parties that I had come to a decision on the first of the two preliminary issues, as set out in the Judgment above. I reserved all my reasons. They agreed that it would be pointless to go on to continue the question of amendment, therefore that preliminary issue has not been adjudicated.

Jurisdiction

3. The claim is for age, sex, race and disability discrimination. The principal alleged discriminatory act is the Claimant's dismissal from her position of Paralegal Manager on 4 April 2019. The ET1 was presented in the proper way, via the online portal, on 11 November 2019. This was four days short of being three months out of time. The Claimant dealt with the drafting and the sending of the ET1 claim herself. She was fully informed about time limits. She is also an experienced paralegal who has a law degree.

4. She was cross examined with care by Mr Sugarman and the chronology was covered in detail. She accepts that she was informed about time limits and that she realised that she had to present her claim to the Tribunal within the period that ended on 15 August 2019. She used the ET1 form that she found on the internet. At some point she downloaded this as a PDF and I am unable to say when this was; or whether it was downloaded before or after she had completed it; or whether she used it as a working document saving it afresh. These considerations have not been raised by the parties. What, however, is very clear is that, for reasons that have been impossible to ascertain, the Claimant did not wish to submit the form in the way that the online guidance directs Claimants to do. This is by using the online portal, as it has been described. There is detailed guidance, and I will come to this shortly, but the Claimant was not prepared to submit the form in that way. Her witness statement says nothing at all about this and starts the chronology with her telephone call of 4 August 2019.

5. In evidence, the Claimant was more forthcoming. She said that before that date she had made six telephone calls or thereabouts to the Tribunal. She said she was sceptical that she was being given the right information. She also told me that in her paralegal work she had been misinformed by Courts before, so this time, in her own case, she wished to be 100% sure of the correct procedure. This is slightly curious evidence because: (a) If she had been misinformed before, one might wonder what guarantee there was that she would not be misinformed again; (b) In any event, the online guidance is perfectly clear as to how to make a claim and by using the link provided, one might think that any Claimant would necessarily be adopting the correct procedure

6. In any event this was the Claimant's state of mind and eventually, on 4 August 2019, she spoke to an employee at the Tribunal and she believes this may have been the sixth person. I am unsure why she still maintains in evidence that she found the online guidance confusing, but the key question that arises at

this stage in the chronology, as both Counsel recognise, is whether or not the phone call to the employee took place.

7. The Claimant's case is that the call was answered by "Debbie" who she is certain is a middle-aged woman of Caribbean ethnicity. For the reasons she set out in evidence, I consider that she is well able to recognise such an accent and that her evidence in this regard is accurate. As I told the parties at the outset of the hearing, there is such an employee in the Central London Office and she is named Debbie. It is feasible that at busy times calls from outside might go through to her, but I also shared with the parties that Debbie has never been a case worker. She is the sole PA employed in this Tribunal office.

8. The principal reason that I accept the Claimant's evidence that she spoke to Debbie is that I consider that it would be nigh-on-impossible for the Claimant to have invented such a tale. Where I am less confident is in accepting the Claimant's account of the terms of the conversation. I am wary about the possibility that some element of hindsight has crept into her evidence. In her witness statement the Claimant states that she was told that the only way that she could make a claim is via email to the Tribunal attaching the PDF claim form. I am hesitant about accepting that she was told this was the "only way" to claim. It seems to defy commonsense that the Claimant had not seen the guidance online that directs Claimants either to use the online portal or to send the ET1 by post to the address in Leicester. There was inconsistency in the Claimant's evidence, because she maintained that the guidance that she had read was confusing, but also said at other points that she had not seen the guidance that was shown to her.

9. Page 364 which is the gov.uk page about making a claim to the Tribunal states with clarity that the claim could be made online or by post. It also directs people to read the guidance. At page 381 is the HM Courts and Tribunals Service "Making a Claim to an Employment Tribunal" document. That page re-states the information about the two ways of submitting the claim, i.e. online or by post to Leicester. It also says that the form can be taken to one of the Tribunal offices, such as London Central. The address is given. Page 384 states that a successful online submission will generate a receipt notification. The Claimant should contact the Employment Tribunal immediately if none is received. In addition, I note that the form itself (page 399) specifies that that when submitted in the correct way the office dealing with the claim should send confirmation of receipt within five working days and "if you have not heard from them within five days, please contract that office directly".

10. The Claimant's evidence was unclear, and to some extent contradictory, as to how much of the guidance she had seen. She maintained at one point that she had not seen some of the guidance that was shown to her, but she also maintained that she had seen lots of documents and that she was unable to absorb the contents. In any event, I am unable to find with any degree of certainty what she was told by "Debbie" over the telephone. I have come to the conclusion that much would have depended on precisely what it was the Claimant was asking. For example, there is a considerable difference between asking: (a) How to present a claim; or (b) Whether sending in the PDF by email

was the only way of presenting a claim; or (c) Whether it was a permissible way of sending in the claim. In my judgment, the precise response that the Claimant received would depend upon the terms of the enquiry and I am in no position to reconstruct that conversation, even though I am content to find that a conversation about the matter took place

11. I also accept that, on the balance of probabilities, the Claimant attempted to send the email that is in the bundle together with the attachment to the Tribunal that day. She exhibits a screen shot showing an item purportedly sent. It transpires that the Tribunal has been unable to find such an email or attachment, but that is not necessarily a point against the Claimant and I think it probable that she did send it in, in the way that she has maintained. Again, the possibility that this never happened and that she has constructed an elaborate ruse at a later date seemed to me improbable.

12. The Claimant accepts that she received no receipt acknowledgement at all. She also accepts that she waited at least six weeks before contacting the Tribunal to enquire about the progress of her claim. Plainly, she was worried that she had heard nothing and she also well appreciated that by this point she was out of time.

13. In was in the week of 16 September that she spoke to a member of staff by telephone. She sets out in her witness statement that she was told over the telephone that the way she had submitted the claim to the Tribunal was by using an older procedure that had recently changed. This is a curious piece of evidence because the online submission of claims procedure has been in place for a number of years and it had not recently changed. In any event, she was told that she had submitted the claim in the wrong manner.

14. A significant inconsistency in her oral evidence was whether she was or was not told the correct way to submit a claim when she spoke over the telephone in the week of 16 September. Initially she maintained that she had not given the person at the other end of the line a chance to tell her how to do it properly; and that the Claimant had "had enough by then". Further, she did not look online. A little further on she accepted that she was told that she could submit the claim via the portal. My note of evidence reads:

> "Claims now made via portal – accept was told this".

15. The Claimant did not attempt to submit a claim at that point. Having regard to her evidence overall, I am satisfied that the reason for this was that she thought that she could not put in a claim, as she told me. She had had enough, to use another phrase that she used in evidence. I infer from all of this that the most likely reason she had had enough was that she realised she was out of time for presenting a claim and thought that she had 'missed the boat'.

16. In the next week she wrote the email of complaint to Mr Westley dated 23 September 2019 at page 19. She obviously had enquired who to write to because he would be the correct person. She said she wished to lodge a serious complaint and recited that advice had been given by the employee she had

originally spoken to, to submit the application within an email. She was told this was the only way of lodging the application and stated that she was not informed of any other ways to submit her application. She went on to say that she was requesting clarification from Mr Westley's colleague in the conversation of 4 August. (I note the possible inference that could be drawn from this, that she did know there were other ways of submitting the ET1 at the time).

17. What is significant from this email is that she went on to say that she now knew from the recent telephone conversation that her application had never been officially received; and she was blaming the misleading information for this state of affairs. The colleague "should never give out incorrect information to applicants … [she] should be retrained or attend a development course". What I derive from this email is that the Claimant believed that she had lost the opportunity to present a claim and that she was complaining about this. I find that she did not at that stage intend to re-apply. I do not consider it realistic or likely that this was because she did not know that she could raise a claim out of time. Given her experience as a paralegal and her accepted facility at engaging in legal research, it defies all probabilities that she either did not know or could not discover this by 23 September. It would have been the easiest matter to discover that claims are made out of time and, indeed, that time can be extended for discrimination claims on a just and equitable basis. But a much more likely explanation of the Claimant's conduct, and the terms of the email, is that she did not wish to pursue this course and was, instead, taking the legitimate course of making a complaint to the administration.

18. Mr Westley responded on 16 October 2019 and he apologised for "the information you claimed to have received" being incorrect. "In order to assist me further, can I ask if you took the name of the member of staff that gave you incorrect information during your telephone call …". He then stated: "Moving forward in relation to your claim, you will still need to make your claim in the required way and also provide your early conciliation certificate. You can make your claim directly online using the following link …".

19. There was focus in the evidence upon the gap in time between 23 September 2019 when the Claimant wrote to Mr Westley and 11 November 2019 when she made her claim in the proper form. At one point, she gave as a reason for not claiming earlier that she needed to know from someone senior in the Tribunal how to proceed. This strikes me as being very unlikely to be the real reason and is not a piece of evidence I accept. Having been so badly served by information allegedly given by a member of staff, it seems reckless to say that a manger to whom the Claimant had complained was somebody whose advice she awaited before bringing a claim. Knowing that she could simply use the online claim procedure and also knowing where to find it, I reject the notion that she was waiting for Mr Westley's response. What I find occurred here is that until she read that response she did not intend to re-present her claim. Once she received it she had a change of heart.

20. The final period of delay that requires an explanation is from 16 October 2019, when Mr Westley wrote to her, to 11 November, when the ET1 was submitted. This is two days short of four weeks and is explained away by the

Claimant as being due to: (a) his response going into her junk folder; and (b) various types of technical difficulty that she was experiencing with her phone and/or equipment. Anxiety, financial matters, other Court proceedings and looking for work are also given as reasons for the delay.

The evidence about this is generalised and, in my judgment, less than wholly convincing.

21. Both Counsel are in agreement as to the legal principles. There is no need here to set out the law in any extensive way. It is well known from the case of Robertson that there is no presumption that the discretion to extend time on a just and equitable basis should be exercised in favour of the Claimant. The Court of Appeal in that case emphasised that it is for Claimants to persuade Tribunals that it is just and equitable to extend time. This has been followed in subsequent case law. It is equally well known that the s.33 Limitation Act 1980 factors are relevant: British Coal v Keeble. Those factors have been summarised by Mr Sugarman in paragaraph 7 of his written submission and, without reciting them here, I confirm that I have looked at each one and taken them into account.

22. Of those factors, the extent to which the Claimant acted promptly and reasonably once she knew of relevant facts and, in particular, that she had the right to sue, is the most significant in this case. I am prepared to accept that, notwithstanding the rather unclear evidence that the Claimant gave in some respects, she can be excused for thinking that her initial submission of the ET1 was valid. She can certainly be criticised, having regard to her position as a knowledgeable paralegal who had good research skills. Nevertheless, having accepted that some sort of conversation took place on the telephone with "Debbie", I am prepared to accept that, whatever was precisely in her mind, the Claimant thought she was following advice and thought that she had submitted a claim properly.

23. What is, I conclude, fatal to her application to extend time is the course that events took thereafter. She delayed in following up, which was in direct contradiction of the guidance that I am satisfied she had read. That guidance, which appears in more than one document, is neither confusing nor technical. She had no acknowledgment of her email from the Tribunal and it was careless of her to leave matters and take them no further by way of an enquiry. This was particularly the case given that she knew about the importance of time limits.

24. She unreasonably delayed in contacting the Tribunal. Once she did so, and discounting some of her evidence about that telephone call, it is crystal clear that she knew that her claim had not been validly presented. She knew that she was now out of time. My findings are that she deliberately chose to make a complaint and decided at that point not to present a claim. Thereafter, she did not act with any degree of urgency or promptitude in following up her complaint. Once she finally read Mr Westley's email, she then had a change of mind and as I have found decided at that point that she would institute a claim. A number of weeks had passed between her speaking to the Tribunal and then deciding, belatedly, to issue a claim out of time. The explanation for the delay is notably weak and, as I have found, the more significant factor is likely to be a change of mind on her

part. In these circumstances, I consider that it is neither just nor equitable to extend time having regard to the way in which she dithered and delayed after she sent in the initial ET1 attached to an email, following the Debbie conversation. To extend time in these circumstances would be to grant an unreasonable indulgence to the Claimant and to excuse her own unreasonable conduct. It is, of course, a wide discretion that the Tribunal has as to whether or not time should be extended. However, in these particular circumstances, I conclude that it would be neither just nor equitable nor reasonable to extend time. I should add that I am grateful to both Counsel for their submissions on the question of jurisdiction. Mr Deejur stresses the first part of the Claimant's account, namely the telephone conversation with the Tribunal. He only touched on events thereafter. He says that a fair hearing could still go ahead if time were extended but that is not a decisive factor by any means. I have found Mr Sugarman's submissions in relation to the latter chronology and the delay that is disclosed therein to be considerably more persuasive. In any event, as I have recorded above I regard the proposed extension of time to be neither just nor equitable.

Disability

25. Whether or not the Claimant was at material times disabled is a preliminary issue to which I now turn. At the outset of employment, the Claimant answered a questionnaire saying that she had no disability. There was then no mention of stress until later in 2018. Performance issues were raised in mid-September. On 27 November there was a difficult encounter with the surgery over the telephone: page 357. She saw the doctor the next day. The notes record that the Claimant felt under a lot of stress at work and was being discriminated against and devalued. There are references to her state of anxiety. She was given a certificate of unfitness that was valid until 11 December and the diagnosis was stress. The Claimant tentatively suggested in evidence that she may have told the doctor that she was feeling suicidal but that it should not be recorded in the notes. I consider this unlikely.

26. After the certificate expired, the Claimant returned to work and I am satisfied that she made real efforts to carry on working. She agrees that she did not return to the GP and that she had no more time off. She agreed in cross examination that she had had eighteen days off because of the stress and anxiety and to that extent she corrected her witness statement. To take matters shortly, the Claimant maintains that at this point after returning to work she was suffering all sorts of symptoms including crying and other symptoms of stress, but that she did not want to tell anybody. Therefore, there is nothing in the work record and there is no follow up meeting with the GP. Nor, in the one GP entry that I have referred to, are matters such as loss of memory, crying or inability to get up referred to.

27. There is a note of the Claimant's appraisal. This records that she was unwell in the latter part of 2018. "She advised me that this was predominately due to personal events during the year and some stress at work. She made good use of the EAP and felt she had recovered on her return to work. Her personal issues had also been resolved". The Claimant, in essence, maintains that this was reticence on her part and was less than wholly accurate.

28. The Claimant's response to her assessment starts at page 250. There is no reference anywhere to health issues such as depression, anxiety, sleepiness or the like. She relies upon having spoken to HR about some of these matters as well as the EAP service. As to her managers, she did not think, she told me, that anyone would take what she said seriously. She gave further outline evidence about her relationship with HR and also EAP; and she confirmed that none of this was in her witness statement. The penultimate point on page 259 was also put to her and she agreed that she did not say anything about anxiety or depression or ongoing issues with mental health.

29. In January 2019 she had some days off work for unrelated matters. On her return on 14 February she had a meeting that was described as a sickness review and she said there "were no other issues". She said that no Occupational Health referral was necessary. The manager asked again (page 291) whether OH was necessary "in respect of her current stress levels" and the Claimant confirmed that this was not the case. She was "no longer dealing with personal issues that impact those proceedings and that the 'cloud has lifted'." The Claimant accepted that she said this. She also accepted that this pattern of response continued in later performance meetings and her case here is that she thought speaking accurately about her mental state would not help.

30. In March the Claimant had five days off with what was described in the return to work interview as work related stress. She was referred to OH. The manager, Mr Meadows, in doing so said that the stress and anxiety was "interlinked to her ongoing Performance Management". The Claimant said in evidence that she did not tell him of other symptoms that she now says she was suffering.

31. Her original ET1 had no disability claim at all. Her explanation of this is that she thought that disability referred to physical disability only. Not surprisingly, the Respondent submits that this is a disingenuous response, given the Claimant's legal background and paralegal experience. The claim form also stated that she was not disabled. The claim form at page 32 makes the same point.

32. The law is not in dispute. S.6(1) of the 2010 Act provides that a person has a disability if he or she "has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities". I need to have regard to any relevant paragraphs in the Statutory Guidance. It is agreed that I need to ask whether the Claimant had a mental impairment in this case? If so, did it affect her ability to carry out normal day to day activities? If so, were the adverse effects substantial; and were they long-term?

33. Long-term is defined in schedule 1 as follows:

> "The effect of an impairment is long-term if –
> (a) It has lasted for at least twelve months, or
> (b) It is likely to last for at least twelve months …"

It is common for medical evidence to be relied upon, but it is not absolutely essential.

34. There is a well known passage from J v DLA Piper UK [2010] ICR 1052 in which Underhill P discusses mental impairments. Having referred to symptoms of low mood and anxiety he continued in paragraph 42 as follows:

> "The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or … 'adverse life events'.

In my judgment, this is close to the case asserted by the Claimant on the facts of this case.

35. Underhill P continued in the same paragraph by noting that this reflected a distinction that had routinely been made by clinicians. Although it may be a difficult distinction to apply any difficulties would disappear where a Tribunals starts"… by considering the adverse effect issue and [where it] finds that the Claimant's ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a commonsense observation that such reactions are not normally long lived".

36. The Claimant's case on disability rests on a lengthy description of the symptoms that she was suffering at material times, namely the latter part of 2018 and 2019. I consider that in order to find that she was disabled in this case, I have to, first, be satisfied that she suffered these symptoms, or most of them. Second, I have to be satisfied that the symptoms constitute a mental impairment. I should say that, if so, it would not be difficult to conclude that the impairment affected her ability to carry out normal day to day activities. It would almost go without saying that they were substantial. However, the third matter I would need to be satisfied about is that the adverse effect was long-term. In answering all of these questions it would be in all cases necessary to scrutinise the medical evidence with care.

37. The Claimant's difficulty is that the medical evidence that I have summarised above and the further narrative evidence as to what happened thereafter, as well as what was recorded in interviews and documents, give no support to the Claimant's case, either on mental impairment or on the long-term question. The lack of any follow up with the doctor is not a criticisable matter but it is a very significant factor. In November 2018 the GP prescribed some antihistamines which were to be taken in order to help the Claimant sleep. She told me that after one month she never returned for any further medication. Since she never went to the doctor to complain of sleeplessness and the other evidence I have alluded to does not support such a claim, this aspect of her case is far from secure. The other relatively dramatic symptoms that she describes for

the relevant period are also confronted, in the evidence, by an absence of medical assistance or intervention, and absence of medication and an absence of time off work. Where complaints or at least descriptions of her mental state may have been expected to be given, they do not appear in the documents.

38. Accordingly, the Claimant's case is dependent on:

(a) Her evidence in the witness statement being accepted almost without qualification; and
(b) An inference being drawn from that evidence that she was suffering a mental impairment that was at the time likely to last for at least twelve months

39. My conclusion on this important issue is that the Claimant fails evidentially. It is not merely that there is an absence of medical evidence; it is that that absence and the other evidence I have referred to contradicts her claims both as to suffering from an impairment and also on the issue of it being long-term, as defined. The Claimant has the burden of establishing that she was disabled and in my view the factors weighing against her cannot be overcome. I am not satisfied that she was suffering from a mental impairment and on the separate issue of being long-term, I consider that the Claimant is on even weaker ground. Even if there were such an impairment, evidence that she was saying that she had recovered and that the various life events were no longer causing her anxiety and stress strongly tell against her. This is evidence I cannot disregard and I conclude that it fails by some margin to establish that any impairment was long term in the sense demanded by the statute.

40. For these reasons, I determine the disability issue against the Claimant.

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Employment Judge Pearl

Dated: 3 December 2020

Judgment and Reasons sent to the parties on:

03/12/2020.

For the Tribunal Office