EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105215/2023

Preliminary Hearing held in Glasgow remotely by Cloud Video Platform on 5 December 2023

Employment Judge A Kemp

Ms E Black	**Claimant** **In person**
Takepayments Ltd	**Respondent** **Represented by:** **Mr S Brochwicz-Lewinski - Counsel** **[Instructed by:** **Mr W Clayton - Solicitor]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal does not have jurisdiction to consider the claimant's claims, under section 123 of the Equality Act 2010, and they are dismissed.

REASONS

Introduction

1. This is a claim for what are alleged to be breaches of the Equality Act 2010 ("the Act") under sections 13, 15, 19, 20, 21, 26 and 27 on the protected characteristic of disability. The claims are disputed, and disability status is not conceded.

2. There was a Preliminary Hearing on 27 October 2023 after which various Orders were made set out in a Note, and the present hearing was fixed. The orders included –

    1. That the claimant procure her GP copies of her medical records pertaining to her mental health for the period 1 June 2021 to

date and provide copies to the respondent within 1 week of receipt (i.e. by 3 November 2023)….

2. At least 2 weeks before the Preliminary Hearing (i.e. by 21 November 2023) the parties must send to each other the documents on which they intend to rely at that hearing.

3. Within 2 weeks (i.e. by 10 November 2023) the claimant must provide to the respondent and the tribunal the tables populated with the relevant information (which tables will also be emailed to her as a word document)…"

3. The Note recorded in paragraph 32 that the claimant accepted that her Claim Form lacked specification. The Note had detailed comments on what was required to provide the necessary specification, and tables within it setting out what was sought, at paragraphs 33 – 44. At paragraph 18 the Judge had recorded a discussion held with the claimant and that the claimant had confirmed that she did not seek to rely on the appeal process.

4. The Notice of Preliminary Hearing which was sent to parties on 2 November 2023 followed the terms of that Note and fixed the present hearing solely to determine the issue of a just and equitable extension under section 123.

5. The claimant provided a medical report from her GP, but not the records. The claimant has not supplied the relevant information.

6. The claimant did seek to raise an argument that the acts of discrimination included the appeal hearing, and decision, both in an email to the Tribunal and respondent sent shortly before this hearing and orally at the commencement of it. The respondent opposed this. After discussion it was agreed that the matter be addressed by an application to amend the Claim Form, that being an alleged period of conduct extending to 23 August 2023 which was the date of the appeal outcome letter, and that whether or not to allow such an amendment would be reserved to submissions and heard after the evidence. The claimant had attempted to formulate an amendment but had difficulty doing so, she being a party litigant. The precise wording was therefore also left for determination after the

evidence and submissions. This was far from ideal, but I considered it within the overriding objective to manage matters in such a manner. Helpfully Mr Brochwicz-Lewinski did not oppose that.

Evidence

7. A single Bundle of documents was before me. The claimant gave evidence, and did not lead any other witness. Most of the documents, but not, all in that Bundle were spoken to. The respondent did not call any witness.

Facts

8. I found the following facts, material to the issues before me, to have been established:

9. The claimant is Ms Elizabeth Black.

10. The claimant suffers from fibromyalgia, osteoarthritis and chronic asthma. She was admitted to University Hospital, Wishaw in the period 9 – 22 March 2023 as a result of concern over her physical and mental health. She has suffered stress from being the victim of domestic violence. She has received counselling and support for such violence. She was referred to Lanarkshire Rape Crisis Centre in April 2023. The Domestic Abuse Investigation Unit of Police Scotland are investigating the complaint the claimant made to them by the claimant. The claimant received assistance from the Community Psychiatric Nurse of her General Practitioner during 2023 as a result of an acute stress reaction. In July 2023 she was discharged from Community Psychiatric Nurse care, to use mechanisms and strategies that she had been taught previously. The claimant has consulted a solicitor to commence an action of divorce.

11. She was employed by the respondent until 29 March 2023 when she was summarily dismissed at a disciplinary hearing. That same day the claimant emailed the respondent to refer to her dismissal saying "…..I will appeal, and I will take it to a tribunal…."

12. The claimant had earlier taken a previous employer to an employment tribunal for a claim of unfair dismissal, which she had succeeded with.

13. The claimant appealed the dismissal (the document doing so was not before the Tribunal).

14. On 3 April 2023 the claimant contacted ACAS with regard to the dismissal. They advised her that it would be "better waiting" for the appeal to be determined before commencing early conciliation. The claimant was informed that she did not have the service to claim unfair dismissal, but that a claim of discrimination could be pursued.

15. On 4 April 2023 the respondent wrote to the claimant to propose an appeal hearing on 6 April 2023 by Teams.

16. On or before 5 April 2023 the claimant consulted her union. They suggested that she seek legal advice from a solicitor. She did so but did not receive formal advice from the solicitor as the cost of that was beyond the claimant's means. After the dismissal she was in receipt of benefits of about £600 per month.

17. On 5 April 2023 the claimant wrote to the respondent by email to refer to her circumstances and the advice she had received that the appeal should not proceed on 6 April 2023. The respondent agreed to postpone it.

18. In April 2023 the claimant was referred by Lanarkshire Rape Crisis Centre to Citizens Advice, who gave her advice to the effect that until the appeal was dealt with they could not advise her in detail as it may be that the appeal would result in her getting her job back. The claimant spoke to an adviser at Citizens Advice who said something to the effect that it would be better to wait for the appeal outcome before commencing a claim.

19. The claimant carried out some online research into a claim of disability discrimination (on a date not given in evidence).

20. On 26 July 2023 the claimant contacted ACAS and commenced early conciliation.

21. A Certificate as to Early Conciliation was issued on 31 July 2023.

22. On 11 August 2023 an appeal hearing was held with the claimant. The person doing so was more junior to the dismissing officer (no note or other record of that hearing was before the Tribunal).

23. On 23 August 2023 the respondent wrote to the claimant rejecting her appeal (the letter doing so was not before the Tribunal). The claimant received that letter on 25 August 2023.

24. The claimant commenced the present claim on 28 August 2023. In her Claim Form she did not refer in the section with grounds of the claim to the appeal process, but stated that the date of dismissal was 25 August 2023.

25. The claimant was admitted to University Hospital Wishaw on 2 November 2023 and was discharged from it on 13 November 2023.

26. On 11 November 2023 the claimant sent an email to the respondent's solicitor referring to a number of WhatsApp messages she had received. The claimant uses her mobile telephone to send and receive electronic messages, and to search the internet. She used her mobile telephone to send the email on 11 November 2023. She does not have a personal computer, laptop, tablet or similar device, and does not have a printer. During the time of her being in hospital her credit card was improperly used to incur debt, and sums were improperly removed from her bank account, which added to the stresses she was under.

Claimant's submission

27. In an understandably brief submission the claimant argued that it was just and equitable to allow her claim to proceed. She sought "leeway" if her claim was late. She had a great deal of stress in her life during the material period. If she had known of the time limits she would have presented the claim well in time.

Respondent's submission

28. Mr Brochwicz-Lewinski had prepared a skeleton argument intimated in advance, which he expanded orally, and addressed the issue of amendment (of which he had not had prior notice). In brief summary he argued that the amendment should be refused. There was no basis to the argument of any discriminatory act in the appeal hearing or decision. He did not understand what the amendment was. It was substantially out of time. The reason it had been made was that it was apparent that the claim

was out of time. The claimant had access to advice from various sources. None of the stressors prevented her from claiming timeously. There was no evidence of any material impact from them in any event. There was no good explanation for the delay. The claimant had sent detailed emails in April 2023. It was still entirely unclear what the claim was for, as the claimant had not provided the further particulars ordered. It was accepted that there was no specific forensic prejudice beyond that from the passage of time dimming memories. The burden had been on the claimant and had not been discharged. Time ought not to be extended.

The law

(i) Amendment

29. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34. Whether or not particulars amount to allow an amendment falls within the Tribunal's general power to make case management orders set out in Rule 29, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), which commences as follows:

> "**29 Case management orders**
>
> The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order…."

30. Earlier iterations of the Tribunal Rules of Procedure contained a specific rule on amendment, and the changes brought into effect by the current Rules require to be borne in mind when addressing earlier case law.

31. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rule 2 as follows:

> "**2 Overriding objective**

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

32. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. In the former case the application to amend involved adding a new cause of action not pled in the original claim form. The claim originally was for unfair dismissal, that sought to be added by amendment was for trade union activities. The Tribunal granted the application but it was refused on appeal to the EAT. The EAT stated the following:

> "Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
>
> What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant;

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

33. In order to determine whether or not the amendment amounts to a wholly new claim it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the

claimant made no reference in her original claim to alleged victimisation, albeit she did refer to sex discrimination, and the victimisation claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the application to do so on the basis that the case as pleaded originally revealed no grounds for a claim of victimisation, and it was not just and equitable to extend the time limit. It said that the proposed amendment:

"was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time".

34. The Court of Appeal has commented that the extent of any new factual enquiry following an amendment application is one of the factors to take into account, in ***Evershed v New Star Asset Management Holdings Ltd [2010] EWCA Civ 870.*** If the new claim is sufficiently similar to that originally pled, that supports the granting of the amendment where the "thrust of the complaints in both is essentially the same".

35. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said that in relation to an amendment, which arguably raises a new cause of action, the Tribunal should:

" … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

36. Guidance on the issues of timing and manner of the application was given in ***Ladbrokes Racing Ltd v Traynor UKEATS/0067/06***. The matters to consider included why the application was made at that stage and why it had not been made earlier; the delay and additional costs that may be incurred should the application be granted; and any evidential prejudice caused to the other party by the loss or diminution in quality of cogent evidence.

37. The perceived merits of the claims sought to be added by amendment may also be a factor to consider in relation to the balance of hardship. It would be an issue if the application is to add what was described as an

"utterly hopeless" case: ***Woodhouse v Hampshire Hospitals NHS Trust UKEAT/0132/12*** . In that case however the EAT held that the tribunal had made an error of law in examining the strength of the evidence as to claims of disability on the documents provided, some of which included detail that had been present on the issue of disability, contrary to the Tribunal's findings.

38. In ***Kumari v Greater Manchester Mental Health Foundation Trust [2022] EAT 132*** the employment tribunal held that a factor against allowing amendment was its assessment of prospects of success (and also as to whether to grant a just and equitable extension). The EAT conducted a review of authority, and held that the Tribunal had been entitled to take account of its assessment of prospects, as it had considered the issue by reference to identifiable factors that were apparent at the preliminary hearing, taking proper account of them. It added, however, the following comments with regard to such an assessment:

"…the employment tribunal should proceed with care and caution and, if it is relying on its general view of the strength of a proposed complaint as a point against granting the amendment, then it must identify a reasoned basis for doing so on which it is properly entitled to rely, bearing in mind that it does not have before it the full evidence that the tribunal would have at a full hearing, and the need to avoid becoming drawn in to conducting a mini-trial."

39. In ***Vaughan v Modality Partnership [2021] IRLR 97*** the EAT summarised the authorities and concluded that there was a balance of justice and hardship to be struck between the parties. There was further commentary on the process to follow in ***Chaudhry v Cerberus Service Security and Monitoring Services Ltd [2022] EAT 172.***

40. In ***Zhang v Heliocor Ltd and another [2022] EAT 152*** it was held that if the new details were particulars of a claim already presented that did not require permission to amend, and whether or not that was the position was an issue that should be considered first, after which should be considered as a secondary issue if new claims were sought to be added whether to allow that as an amendment.

(ii) **Jurisdiction s. 123**

41. Section 123 of the Equality Act 2010 provides:

"**123 Time limits**

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(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."

42. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that

extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

43. Where discrimination arises out of a dismissal the date from which timebar commences is the date when, by reason of such notice, the employment was terminated (***Lupetti v Wrens Old House Ltd [1984] ICR 348.***)

44. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***). All of the circumstances may be considered, but three issues that may normally be relevant in this context are firstly the length of and reasons for the delay, secondly prejudice to either party (particularly whether a fair hearing of the case is possible) and thirdly the prospective merits of the claim.

45. There is a divergence of authority in relation to the first aspect. There is one line to the effect that even if the tribunal disbelieves the reason put forward by the claimant as to delay it should still go on to consider any other potentially relevant factors, which can include the prospective merits of the claim: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, following ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.***

46. A different division of the EAT decided in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that where there was no explanation for the delay tendered that was fatal to the application of the extension, which was followed. In ***Edomobi v La Retraite RC Girls School UKEAT/0180/16*** in which the EAT added that it did not:

*"*understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

47. In ***Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801*** the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason".

48. In ***Rathakrishnan*** there had been a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act 1980 provided that no significant factor is omitted. That is an English statute in the context of a personal injury claim, which does not apply in Scotland, and is not relevant to the present case as a result. There was also reference in ***Rathakrishnan*** to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim in England, where it was held to be appropriate to consider the plaintiff's prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded:

"What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** *involves a multi-factoral approach. No single factor is determinative."*

49. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held similarly:

"First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion."

50. That was followed in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*****,** which also discouraged use of what has become known as the ***Keeble*** factors, in relation to the Limitation Act 1980 referred to, as form of template for the exercise of discretion.

51. More recent cases have followed the ***Rathakrishna***n line, such as ***Owen v Network Rail Infrastructure Ltd [2023] EAT 106*** *and* ***Concentrix CVG Intelligent Contact Ltd v Obi [2023] IRLR 35***.

52. In my view there remains a divergence in authority between these two lines, which Court of Appeal decisions have not determined conclusively. I consider that the first line of authority set out in ***Rathakrishnan*** is that which accords with the statutory definition, and is if not determined by at least supported by the Court of Appeal authorities referred to in the two most recent paragraphs. The Court of Appeal in ***Morgan*** commented on the issue of prejudice and whether the delay prevented or inhibited the employer from investigating the claims while matters were still fresh. In ***Adedeji*** the court stated that there would be prejudice if the evidence was less cogent, but also had the effect of requiring investigation of matters that took place a long time previously. In each case it stated that those were factors to be taken into account, but did not suggest that they were determinative issues.

53. The Inner House of the Court of Session held in the case of ***Malcolm v Dundee City Council [2012] SLT 457*** that the issue of whether a fair trial was possible was "one of the most significant factors" in the exercise of this discretion, in its review of authority. It referred *inter alia* to the cases of ***Chief Constable of Lincolnshire v Caston [2010] IRLR 327*** and ***Afolabi v Southwark London Borough Council [2003] ICR 800.*** In ***Malcolm*** the delay had been of the order of a month, but it is notable that whether a fair trial was possible or not was not considered to be a determinative issue, which I consider also supports the conclusion I have reached.

54. There are other matters that can be relevant to the reason for the delay. ***Virdi v Comr of Police of the Metropolis [2007] IRLR 24*** held that if it is the claimant's solicitors who are at fault in presenting the claim, then such fault cannot be laid at the door of the claimant. That case was applied in ***Benjamin-Cole v Great Ormond Street Hospital for Sick Children NHS Trust UKEAT/0356/09*** where it was held that an employment judge, in refusing an extension of time, was wrong to have placed upon the

claimant responsibility for the faults of an experienced but unqualified legal adviser.

55. Delay caused by a claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings may justify the grant of an extension of time but it is merely one factor that must be weighed in the balance along with others that may be present: ***Robinson v Post Office [2000] IRLR 804*** approved by the Court of Appeal in ***Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116***. The EAT in ***Wells Cathedral School Ltd v Souter EA-2020-000801*** confirmed that ***Robinson*** (and by extension, ***Apelogun-Gabriels***) had not established any rule of law and that each case would turn on its facts regarding reliance on an internal process as the reason a claim was late.

56. Where there is said to be some ignorance of the relevant law (in this case as to the time limit) the reasonableness of that lack of knowledge is a factor to take into account - ***Bowden v Ministry of Justice UKEAT/0018/17, Averns v Stagecoach in Warwickshire UKEAT/0065/08*** and ***Adedeji*****.**

57. Issues of prejudice have been addressed above, particularly in ***Malcolm,*** and as to merits in ***Rathakrishnan*****.**

Discussion

(i) Amendment

58. It appeared to me helpful to start with the ***Selkent*** guidelines, as they have become known, which are (as the authority makes clear) not an exhaustive list of factors to take into account. I do so cognisant of the authority of ***Zhang*** which is to the effect that if all that is done is provide further particulars of an existing complaint amendment is not required. It appears to me that that authority is not consistent with the others to which I have referred. I consider that if new facts are sought to be added to an existing claim, as here, whether or not to allow them is a matter for the exercise of discretion under the overriding objective. They may more readily be allowed where there is no new claim, but there may be circumstances (for example if doing so is at a Final Hearing and if allowed would require the postponement of that hearing) where the application

should be refused. It is all a matter of the circumstances of the case, in my view.

59. I considered first of all the **nature** of the amendment. There was nothing in the narrative of the Claim Form referring to any aspect of the appeal process, although by the time of its presentation the letter itself had been received. It was only the date of receipt that could form a basis for an existing basis in the pleadings to refer to the amendment, but that was not apparent from the date without some explanation.

60. I considered that there was a very small causative link between what had been pled in the Claim Form, by the reference to the date of 25 August 2023, and the terms of the amendment sought. The claimant had not referred to the appeal process at all in the narrative. In reality materially different facts were sought to be relied upon to those that had been pled.

61. I then considered the terms of the amendment, and found great difficulty in knowing what they were or might be. The claimant did not elaborate them initially before her evidence, and did not do so in her evidence itself, or in her submission. I asked her during her evidence on what basis she argued that the appeal hearing or decision were discriminatory, and she could only say, in brief summary, that there had been no basis for the original allegations against her, and that the refusal of her appeal had been wrong. Taking matters at their highest it appeared to be an argument that because there was no evidence against her, the decision to refuse her appeal must have been discriminatory. That is however not a sufficient argument as to any discrimination, in my view. There requires to be something more than the fact of a protected characteristic and the fact (if it be so) of unreasonable behaviour. The claimant did not explain what her position was in this respect, and I was left unaware of what the amendment she wished to make was. I considered that I could not enter the arena, as it is generally known, and make an argument that she herself did not do as if acting in the capacity of her representative.

62. There is also the issue of conduct under the terms of section 123, as if the appeal was part of conduct for these purposes her Claim would be in time. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory

regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387*.** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner*, *[2003] IRLR 96***) What the claimant has not done however is to set out any real argument for conduct extending over a period to be found beyond the fact that she did appeal, and that appeal was refused.

63. There was nothing put before me which would amount I consider to a basis for a finding of conduct extending over a period for these purposes. I did not consider that the fact that the appeal had been heard and refused amounted to conduct for these purposes.

64. The respondent raised the issue of **time-bar** in relation to the amendment. That is also not without complexity, and is addressed further below. In general however it appeared to me that amendment was required to plead new facts relied on for the claim. Doing so was well outwith the primary time-limit to do so, and if to be allowed would require a just and equitable extension if not covered by conduct extending over a period. It appeared to me not just and equitable to allow an amendment which was firstly as vague as that referred to above, indeed I could not ascertain what exactly the proposed amendment was, and secondly which I consider had no realistic prospect of success on the basis on which it had been made. As commented on below the argument made by the claimant was essentially one of the unfairness of the dismissal, and the later appeal decision, and that is not a matter that is before me. I concluded that this aspect did not favour granting the application to amend.

65. The **timing and manner** of the provision of the proposed amendment was firstly that it was made shortly before the present hearing, and secondly was not made clearly and effectively in the circumstances explained above. It had also been made after the earlier Preliminary Hearing at which the claimant had been noted to have excluded an argument that the

appeal was discriminatory. I considered that this aspect was also not in favour of granting the application to amend.

66. I considered then the issue of the balance of **prejudice**. It appeared to me that as there was no proper basis pled for the amendment, it would not cause the claimant material prejudice to refuse it. On the other hand if allowed, and if matters otherwise proceeded to a Final Hearing, it would cause extra expense in having the facts (whatever relevant facts there were in relation to the appeal) determined in evidence.

67. I considered whether there would be **hardship** to the claimant, and for the same reasons concluded that there would not be. These two factors both in my view were not in favour of granting the amendment application.

Conclusion on amendment

68. Having regard to all the circumstances that I have set out above I considered that the balance of prejudice and hardship favoured refusing of the application to receive the amendment, and that it was in accordance with the overriding objective to do so.

Issue to be decided re jurisdiction

69. In light of that decision, the sole issue for determination was whether or not it was just and equitable to allow the Claim to proceed, under section 123 of the 2010 Act.

Discussion

70. The date of dismissal was 29 March 2023. Early Conciliation ought to have been commenced on or before 28 June 2023. It was not. It was commenced on 26 July 2023. The claim form was presented on 28 August 2023. As early conciliation was not timeous, the period of early conciliation did not apply for these purposes, such that the commencement of the Claim was exactly two months late, although the intimation of early conciliation to the respondent was made slightly less than one month late.

71. The first matter to assess is the credibility and reliability of the claimant. I had concerns in a number of respects as to the reliability of her evidence,

and in one particular respect a matter that also went to its credibility. I shall address reliability first of all.

72. Firstly she said that she had been told by Citizens Advice and ACAS that because the appeal had been made against the dismissal it was not "pertinent" to raise the Tribunal Claim until the outcome of the appeal was known. Her evidence initially was that she had been told that she could not pursue a claim until the appeal decision had been given. I asked her when she first received advice, and she said July (2023). In cross examination however she was taken to an email she had written on 5 April 2023 which referred to having had advice from her union and ACAS. When later questioned about what each adviser had said, the evidence changed. She said that it was Citizens Advice who had said to her that she should not go to the Tribunal until the appeal had been decided, that ACAS had not said that, and later that the comment from Citizens Advice was to the effect that it would be better to wait, rather than that she must wait, or words to that effect. That was a material level of inconsistency in my opinion.

73. Secondly she was aware that she had been dismissed on 29 March 2023 as she had referred to that in an email that day. She had referred in that email to going to the tribunal, as well as appealing the decision. She was aware then of the right to pursue a claim, and that was in the context of her having made an earlier tribunal claim against a previous employer.

74. Thirdly, I was left unclear as to what the reason for not commencing her claim timeously was. There were a number of possibilities raised in the evidence. The first was to the effect that she had been told not to until after the appeal, but as referred to above there was inconsistent evidence on what exactly the advice had been. The second was to do with her medical condition. On that, she had been ordered to provide GP records. Her evidence was that she had not understood that, and thought that the GP letter was sufficient. It seems to me however that the Note of the Preliminary Hearing was entirely clear, and if that was not so later emails to her from the respondent's solicitor did make it clear.

75. There were various letters produced in support of the claimant's position, but they were very general indeed. The GP letter mentioned stress, but

the extent of it, the nature of it, whether or not there was a mental impairment, and how that impacted on decision-making was not referred to. In evidence it appeared to me that the claimant did not argue that she had been prevented from the degree of stress she was under from deciding what to do, or from progressing matters as she should.

76. The fourth was evidence from the claimant of her not knowing about time-limits. That however requires to be set in context. Firstly the claimant had access to advice from her union, ACAS and Citizens Advice. Secondly she did carry out some research online. Thirdly the test is not what someone actually did or did not know, but whether that is reasonable in the circumstances. Fourthly the claimant had experience of a tribunal claim earlier. Fifthly she wrote detailed emails to the respondent, which included referring to making a tribunal claim, in March and April 2023 as referred to above. Sixthly she accepted in cross examination that she had undertaken some online research, but the date of her doing so and its detail was not given in evidence.

77. The fifth is that although her evidence was that she had understood from what she had been told that she should wait for the appeal outcome before commencing a claim, she did not in fact do so, as she started early conciliation on 26 July 2023. I asked her what led to that, and her reply was concern over delay, and having something available to use as early conciliation if needed. I did not understand that answer. It was not I considered consistent with what she said the advice had been.

78. The sixth is that the claimant wrote to the Tribunal shortly before the hearing arguing that the respondent had deliberately delayed her appeal hearing to allow time to expire. In cross examination however it was pointed out to her that the first appeal hearing date had been for 6 April 2023 and that she herself had asked for that to be delayed. It appeared to me that there was no merit in the argument of deliberate delay by the respondent, and that the claimant's argument that there had been was at the best evidence of her being unreliable in her evidence.

79. The seventh is from what is recorded in the Note following the first Preliminary Hearing, at paragraph 21. The arguments recorded there for a just and equitable extension are:

(i) That the claimant was unfit by reason of hypomania, but there was no medical evidence to support that, nor was that part of the claimant's oral evidence. The GP report not only did not mention hypomania but also referred to an acute stress reaction, and that Community Psychiatric Nurse involvement was ended in July 2023. It appeared to me that the GP report was not consistent with what is recorded in the Note in this respect.

(ii) It was suggested that the GP had provided fit notes to confirm this diagnosis for the purpose of a PIP application, but those documents were not within the Bundle.

(iii) She had, it was recorded there, made limited contact with ACAS in early July, but in fact she had done so far earlier, in April 2023.

80. In short, none of the reasons given in that Note were borne out in the evidence. It is also apparent that the claimant had not set out during that hearing the advice she says Citizens Advice had given her, or that she had understood that she had to wait for the appeal decision before commencing a Tribunal claim.

81. Finally, this being a matter going both to reliability but also is the matter which may go to credibility to which I referred above, in her initial evidence the claimant had referred to a report from her consultant psychiatrist dated 23 November 2023 which certified that she had received in patient treatment from 2 – 13 November 2023. She stated that she had not had her mobile telephone with her during her stay in hospital. It was then pointed out to her in cross examination that she had emailed the respondent on 11 November 2023. That had been done from her mobile telephone. The claimant said in reply that she had been discharged from hospital on that date. I did not find that piece of evidence reliable, and I had considerable reservations as to its credibility. She had not made any comment about any inaccuracy of the dates given in that report when referring to it initially. It appeared to me most unlikely that the dates given in that certificate would not have been accurate, or that if they were the claimant would not have pointed that out in her evidence. That was so particularly given the short proximity in time between the events and this hearing. I concluded that the most likely explanation was that the claimant

did have her mobile telephone with her during her time in hospital, such that she was able to send a message from the hospital when receiving in patient treatment on 11 November 2023.

82. Whilst this was outwith the period for the purposes of timebar it is I consider relevant firstly as it affects the assessment of the credibility and reliability of the evidence, and secondly as one issue is the lack of specification required of the claims made, as addressed below.

83. I do accept that there were substantial stresses in the claimant's life. She was seeking advice from charities advising victims of domestic abuse. She spoke to investigations by the police, consulting a solicitor to commence divorce proceedings, and other matters. What there was not however was evidence that these stresses were so great that she had been unable to present a timeous claim. There was no detailed medical evidence on this, no medical records, and the claimant herself gave limited evidence.

84. From the evidence I heard, it appeared to me that the reason for the delay was that the claimant had understood that it would be better to wait for the appeal outcome, that she had hoped for success with it, that she had not carried out her own research into time-limits for making a claim, and that when the issue had been raised (she said in evidence it was at the Preliminary Hearing but in fact it was when she received the Response Form which raised the point) it was a surprise to her.

85. It does not appear to me that the claimant received what may be described as "bad" or negligent advice from Citizens Advice. I have concerns over the reliability of the evidence by the claimant given as to what exactly the advice was. It is possible that advice did not address time-limits, either when the claimant was speaking with Citizens Advice or having earlier discussed matters with ACAS on 3 April 2023, although that would be a surprise as time-limits are so well-known as an issue, and would be what either an ACAS or Citizens Advice adviser would be expected to comment on. But there was not, I consider, any evidence that there had been positive advice given to the claimant to the effect that the claimant could not commence early conciliation until the appeal decision had been taken, which was what she was initially seeking to argue, it appeared to me. The advice was, at best for the claimant, something to the effect that it may be

better to wait. At its highest for the claimant what was said was incomplete, but she was not actively misled by negligent advice in my opinion from the evidence before me.

86. I take into account that the claimant had appealed, that the appeal hearing had been postponed at her request, and that it was not actually heard until 11 August 2023 with a decision on 23 August 2023. No notes of the appeal hearing were before me, nor was the appeal letter within the Bundle. That the claimant had appealed, had believed that waiting for the outcome was the appropriate step, was a factor to consider. I also took into account that her Claim Form had given the date of receipt of the appeal letter as the date of dismissal, reflecting what she said had been her understanding at the time.

87. But her argument that she required to wait until the appeal decision is, I consider, materially if not fatally undermined by her commencing early conciliation before the appeal hearing itself took place. That is not consistent with what she said the advice had been. If it had been as she claimed it was, the early conciliation notification would have been on or after 25 August 2023. This inconsistency in her evidence was a matter that she did not explain.

88. What the claimant did not do was to make her own enquiries about that. That was so even although she had prior experience of an Employment Tribunal, was competent to do so at the time and not unfit as had been claimed, and is clearly an intelligent woman capable of writing detailed emails, as she did in April 2023. She had even emailed the respondent on the day of her dismissal to refer to making a Tribunal Claim, as well as an appeal. She accepted in cross examination that she had undertaken online researches, but was somewhat coy about what those were. I did not consider that there was an adequate explanation for any failure to make enquiries about time-bar.

89. It appears to me from all the evidence before me that the claimant has not proved a good reason for the delay. There was a reason, which was that she had not ascertained the time-limits that apply to such claims and had been advised, or thought, something to the effect that it would be better to await the appeal outcome, albeit that in fact she did not do that. The

reason in evidence from the claimant was not a reason that I consider in all the circumstances of this case to be a sufficient one.

90. But having not a sufficient reason is not I consider determinative. The test is a multi-factorial one in my view. All factors require to be weighed in the balance. I then considered the issue of prejudice. The respondent did not argue for a particular forensic prejudice. The delay in commencing early conciliation was of the order of a month or so, and overall was exactly two months. That delay is limited in its effect on the cogency of the evidence. A fair hearing of the issues would be possible in my view.

91. The third aspect I considered was the prospective merits of the claim. If the claim would appear to have reasonable prospects, that is a factor that may suggest that the discretion should be exercised in favour of the claimant. The difficulty here is that it is not clear what the claim is for and why. There is a rough outline of a claim, on a number of grounds under the 2010 Act. But the claimant has not complied with the orders from the last Preliminary Hearing for specification of the claims made. She accepted at the first Preliminary Hearing that that was required, as is readily apparent from the Claim Form itself. To give one rather obvious example, although there is a claim under section 27 of the Act there is nothing that suggests that there had been a protected act.

92. I do take account of the fact that for a period, from 2 – 13 November 2023, the claimant was in hospital under the care of a consultant psychiatrist. But she had sent an email on 11 November 2023, which was relatively lengthy. I consider that the claimant did have her mobile telephone with her, and was able to view material sent to her by that method. I accept that she does not have a laptop or similar device, or a printer, and that the Note of the Preliminary Hearing was itself relatively lengthy and detailed. Even if I proceed on the assumption that the claimant was not able to respond to the Note until after she had left hospital, which is being generous to the claimant, that has still given the claimant three weeks to be prepared for the present hearing.

93. I accept that the claimant having facilities limited to a mobile telephone makes completing the tables sent to her less easy. But it is not impossible or impractical to do so. It could simply have been done by hand, starting

with the headings in the tables and completing the detail. Nothing that was before me explained why the claimant has not done so, other than that there are many other stressors in her life. She was however aware of the terms of the Orders, that they required to be completed by 10 November 2023 and that she had not done so. She could have applied for a variation of the order, or postponement of this hearing, but did not. She could have provided a response to the Orders albeit late, and asked for them to be received late at this hearing. It ought to have been obvious, even to a party litigant, that the detail sought was necessary to further the claims she wished to make, as the Note itself makes that clear, and that that could be relevant to the issue of what was just and equitable.

94. What the effect of this is, in my view, is that the respondent (and Tribunal) is even at what is now quite a late stage not properly aware of the basic facts on which the claims are made. The necessary specification of them has not been given in the pleadings either originally or later. It is therefore not possible for me to assess the merits of the claims. The reason I am not able to do so is that the claimant has not set out the required detail herself. I consider that she could, and should, have done so by the date of the hearing before me.

95. Whilst that may be a factor against extending jurisdiction I considered that I should seek to do the best I could in examining the case that might be made for the claimant. It seems to me that the claimant is likely to establish that she was a disabled person at all material times from the three physical impairments referred to in evidence. The position with regard to any mental impairment is not so clear, as the GP report refers only to an acute stress reaction. It is not clear whether the respondent knew that and if so when, either actually or from what it ought reasonably to have known, but for these purposes I shall assume that the claimant can also establish that she does have some form of mental impairment as well as the physical impairments referred to.

96. What is however simply unclear to me is on what basis any of the proposed claims might succeed. Despite my attempt to derive some form of claim from them which is intelligible I have not been able to do so. From the information before me, the respondent believed that the claimant had

been guilty of dishonesty, and the claimant refutes that. She argues that there was no evidence of her being guilty of any dishonesty. But this is not an unfair dismissal claim, and nothing yet before the Tribunal sets out even the basics of a case that might be one of disability discrimination. The claimant's evidence before me was in reality about the unfairness of her dismissal, for example that the appeal officer was more junior to the dismissing officer, not that the dismissal was caused by, arose out of, or related in some way to her disability. There is no PCP I have been able to identify. I am unaware of the allegations of harassment, or of any protected act.

97. From what is before me, both in writing and from the evidence, it appears to me that the claim has no reasonable prospects of success because of the lack of any specification, or identification, of facts on which any of the pled claims of discrimination could be found, despite that having been ordered by the Tribunal, which referred the claimant to the necessary detail, and referred her also to the Equality and Human Rights Commission Code of Practice: Employment, and sources of assistance more generally.

98. I then considered all of the matters before me in the round. I took account of the fact that the claimant is a party litigant, that she has had significant stressors in her life, that they included a period in hospital in March 2023 prior to her dismissal, and again in early November 2023 together with other issues arising at that latter time (although it is the period until commencement of the claim that is material for the purposes of the Preliminary Hearing, the later period is relevant in light of the failure to comply with the terms of the Orders), that she does not have access to a laptop, printer or similar device, and that she has not been able to afford to instruct legal representation. I accept that she is likely to be a disabled person, although the evidence on that has been very limited to date. The stressors have included domestic abuse and the involvement of counsellors, as well as a police investigation.

99. It appeared to me however that the claimant had not discharged the burden on her of establishing that it is just and equitable to allow the claims to proceed. There was not, in my opinion, a sufficient reason for the delay,

the delay was not immaterial, the pleadings of the claim had not progressed to the point at which it was possible to know what facts the claims of disability discrimination were based upon, and her evidence did not explain that basis. In the absence of her discharging the burden as to a just and equitable extension the claim is outwith the jurisdiction of the Tribunal.

100. The Claim must be dismissed accordingly.

Employment Judge A Kemp

Employment Judge

20 December 2023

Date of judgment

Date sent to parties **21 December 2023**