



EMPLOYMENT TRIBUNALS

Claimant: Ms C Williams

Respondent: Home-Start Liverpool

Heard at: Liverpool **On:** 6 June 2017

Before: Employment Judge Wardle

Representation

Claimant: In person

Respondent: Mr Flood - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's complaints of a failure to comply with the duty to make reasonable adjustments and of harassment on the grounds of disability, confined to the first, fourth and fifth elements of this were presented in time giving it jurisdiction to hear them but that her complaints of unauthorised deductions from wages and of unfair dismissal were presented outside the relevant statutory time limit in circumstances where it was reasonably practicable for them to have been presented in time leaving it without jurisdiction to hear them.

REASONS

1. This matter was listed for a preliminary hearing following an earlier preliminary hearing on 21 April 2017 when the respondent made it known that it would be applying for a substantive preliminary hearing in order to determine whether the claimant's complaints in respect of (i) an alleged failure to comply with the duty to make reasonable adjustments (ii) disability related harassment and (iii) unauthorised deductions from wages were presented in time.
2. The respondent's case with regard to time as advanced at the initial preliminary hearing is that any incidents upon which the claimant relies which pre-date November 2016 were presented to the Tribunal out of time in circumstances where, depending on the applicable test, it would have

been either reasonably practicable to have done so or not just and equitable to extend time.

3. In regard to the reasonable adjustments complaint it was clarified with the claimant at the initial preliminary hearing that she relies on three practices, criteria or provisions ("PCPs") namely (1) the expectation that she would work up to 8 hours per day to prepare for and attend at management committee meetings once every 6 weeks (2) the expectation that she would work for up to 8 hours per day on open days and special occasions as and when they occurred and (3) the requirement for her to attend work on dates that she had medical appointments.
4. The substantial disadvantage that she alleges in respect of the first and second PCPs is that she can only sit for one hour at a time and that the prolonged working day exacerbated her pain ever since her surgery on her right leg and hip on 17 June 2015. In regard to the third PCP she says that this caused her the substantial disadvantage of increased anxiety and stress prior to her medical appointments. In this regard further she says that she was required to attend work on the day of her pre-operative appointment on 8 June 2015 and that on the date of her first three-monthly post-operative check on Friday 11 September 2015, which was a day that she did not normally work she was told that she would have to come in.
5. In regard to the harassment complaint the claimant stated in her particulars of claim that these comprised (a) the ignoring of her requests for reasonable adjustments (b) visiting her home unannounced whilst she was ill in bed (c) being verbally attacked in a very aggressive manner in a medical review meeting on 9 August 2016 (d) being repeatedly threatened with dismissal on grounds of capability as a direct result of her condition and (e) the respondent's refusal to acknowledge her request for reasonable adjustments in order to enable her to come back to work and its insistence instead that she was unable to work due to sickness. By the Case Management Order made on 21 April 2017 the claimant was directed to provide the respondent with further particulars of her harassment complaint by 5 May 2017, which she attempted to address by the document at pages 44-58k of the hearing bundle.
6. In regard to the unauthorised deductions from wages complaint this was initially claimed to relate to 3.5 hours' unpaid overtime worked in the week of 8-12 June 2015, which was added to by the abovementioned further particulars document by reference to a sum of £119.83 in wages being withheld in September 2015.
7. In addition to these three complaints, which are argued to have been submitted out of time the claimant by her claim form has made complaints of direct disability discrimination contending that her dismissal was an act of less favourable treatment that would not have been suffered by a non-disabled hypothetical senior administrator in materially similar circumstances, of wrongful dismissal and of holiday pay. Subsequently on 2 May 2017 the claimant requested that the complaint of unfair dismissal be added to her claim. By her letter of application she stated that when she was completing her claim she lost/was timed out a couple of times with the form maintaining that she had ticked the box for 'unfair dismissal'

but was rushing to send her claim in on time. She also referred to her father being diagnosed with terminal lung cancer on 23 October 2016 and of his passing away on 18 December 2016, which had shocked her and her family and of her having to sort out his funeral and financial affairs owing to her mother's incapacity, which she had found emotionally difficult and had resulted in her suffering from depression, stress and anxiety adding that during early conciliation she had explained to the conciliator that she believed that her employment had been unfairly terminated by the respondent.

8. The respondent by a letter dated 8 May 2017 objected to the claimant's application to add a claim of unfair dismissal. In its letter it pointed out that the claimant's suggestion that she was rushing to complete her ET1 claim form did not accord with her substantive pleadings, which were clear, detailed and specific in setting out the claims being pursued. In addition it referred to the fact that allowing for the impact of early conciliation at the point in time at which the claimant presented her claim form on 11 February 2017 she still had 9 days to 20 February 2017 to reflect upon the claim form and to present an additional claim in time. It further contended that it could not be claimed that it was not reasonably practicable to have presented the claim sooner having regard to the facts that the claimant would have received the ET3 response to her claim, which clearly identified the complaints being pursued, on or around 24 March 2017; that in the preparations for the preliminary hearing to consider case management her agenda made no mention of a claim for unfair dismissal and that she made no application to add to her claim nor made any suggestion that she was claiming unfair dismissal at the preliminary hearing even though there was discussion about and clarification of all the complaints being pursued.
9. In addressing these time issues the Tribunal heard evidence from the claimant, which was given by a written statement and supplemented by oral responses to questions posed. It had also before it a bundle of documents.
10. Having reserved judgment in circumstances where it would not have been possible in the time remaining on the day of hearing to complete its consideration of the issues requiring determination the Tribunal has since undertaken this task having regard to the evidence, the submissions and the applicable law in order to reach conclusions on the material issues.
11. In so doing it found the material facts to be as follows. The claimant's ET1 form presented on 11 February 2017 saw her indicating the type of claim that she was making by ticking the boxes for discrimination on the grounds of disability and that she was owed notice pay, holiday pay, arrears of pay and other payments. More particularly at section 15 of the form she provided additional information to the effect that she believed that the respondent's conduct in dismissing her was a direct result of her disability, having been diagnosed with malignant melanoma on 15 May 2015 and that the respondent had failed in its duty to make reasonable adjustments to accommodate her disability and that it had harassed her by engaging in unwanted conduct relating to her disability, which had the purpose or effect of violating her dignity and creating an intimidating, hostile,

degrading, humiliating and offensive environment for her as particularised in paragraph 5 above.

12. In terms of these disability related complaints there was no dispute that the complaint of direct discrimination in respect of her dismissal was presented in time in circumstances where her dismissal was effected on 16 September 2016; she had commenced early conciliation on 6 December 2016 and the certificate confirming that she had complied with the requirement to contact ACAS before instituting proceedings was issued by email on 20 January 2017, which gave her to 20 February 2017 to present her claim.
13. Turning to her other two disability related complaints and dealing first of all with her reasonable adjustments complaint the claimant acknowledged that the final act upon which she placed reliance concerned the meeting that the respondent convened with her on 9 August 2016 to discuss the report, which had been received from her GP regarding her current absence, which dated back to on or about 8 September 2015. On her evidence, which it should be said was refuted by the respondent, she asked at this meeting for adjustments in the form of her being allowed to attend medical and follow up appointments as and when necessary and in addition being permitted to shorten her working day if she was experiencing pain and could not sit for long periods of time. Following this meeting the respondent wrote to her on 1 September 2016 inviting her to a capability hearing on 8 September 2016, in which letter it referred to her acceptance that she would have difficulties in undertaking her role as Senior Financial Administrator and that there were no/further adjustments that could be made to assist her return to work. In response the claimant by an email dated 4 September 2016 to Jennie Bates, Senior Organiser, took issue with these statements maintaining that she did not state that she had difficulties undertaking her role, albeit that she did state that she was not 100% and still very unwell at present and that the reasonable adjustments that she had requested were those referred to above, to which Ms Bates replied by email on 5 September 2016 stating that any concerns she had could be discussed at the meeting on 8 September 2016.
14. However this meeting did not take place as scheduled as the claimant was taken into hospital with chest pains that morning. The respondent subsequently wrote out to her on 12 September and 13 September 2016. In the first of these letters she was advised that her capability hearing had been re-scheduled to 27 September 2016 and in the second she was told that the hearing would be at 2.00 p.m. on 16 September 2016, whilst adding that if the time was unacceptable having been informed by her that she had a hospital appointment that day the hearing could be rescheduled to 21 or 22 September 2016. Notwithstanding the claimant's difficulty in attending on 16 September 2016, of which the respondent was aware the hearing was conducted in her absence and resulted in her dismissal, which decision was communicated to her in a letter bearing that day's date, in which it was stated that as she had failed to attend the hearing and did not notify that she would not be attending it had been decided that her absence from work on sickness grounds remained below the required standard and was not capable of sustained improvement. By this decision

to proceed with the hearing in the claimant's absence she was effectively denied the opportunity to have discussed the matters which she had raised in her email dated 4 September 2016 concerning her ability to undertake her role and her request for reasonable adjustments. On this basis it appeared to the Tribunal that for the purposes of her reasonable adjustments complaint that the final act was therefore this denial of opportunity by the respondent's decision to hold the hearing in the claimant's absence on 16 September 2016 in less than clear circumstances, which having regard to her commencement of early conciliation on 6 December 2016 and the issue of the certificate of compliance on 20 January 2017 meant that its presentation on 11 February 2017 was not out of time as contended for by the respondent.

15. Turning next to her harassment complaint as stated above in paragraph 5 this comprised five elements. The first of these was the alleged ignoring of her requests for reasonable adjustments. In cross-examination the claimant confirmed that these requests centred around the meeting on 9 August 2016 convened to discuss the report dated 25 July 2016 received from her GP and accepted that the last time she raised it as an issue was by her email dated 4 September 2016 to Ms Bates. Without more this would have meant that the early conciliation request was made three days too late on 6 December 2016 to allow for an extension of time under the early conciliation rules but having regard to the manner in which this request was dealt with by the respondent as detailed in the paragraph above and the Tribunal's finding that the final act in respect of this request was the denial of opportunity to have it discussed at the capability meeting on 16 September 2016 it follows that this element of the complaint as an alleged act of harassment is also found to have been presented in time.
16. The second element of her complaint related to alleged unannounced visits to her home whilst she was ill in bed. Again in cross-examination she confirmed that the first two of these occurred in the post-operative period on 26 June and 30 July 2015 and the third on 28 September 2015.
17. The third element as confirmed by her was an alleged verbal attack on her by Ms Bates at the meeting on 9 August 2016 to review her GP's report.
18. The fourth element related to her allegedly being repeatedly threatened with dismissal on the grounds of capability, which according to her further and better particulars of claim began at a back to work interview with Ms Bates on 7 September 2015 when she says that she was given notice of a disciplinary hearing to be held on 11 September 2015 but was told that there was a way round it by choosing to accept voluntary redundancy, which matter was pursued with her the following day despite her originally being given until 10 September 2015 to decide whether she wished to take up the option when she was told by Ms Bates that if she were to take voluntary redundancy she could sort it out with the board that night, which subsequently saw her being informed by HMRC on 27 October 2015 that her employment with the respondent had terminated on 11 September 2015 resulting in her owing monies to them. On her evidence this treatment continued at the review meeting on 9 August 2016 and in the follow up letter that she received from Ms Bates dated 2 September 2016

requesting her attendance at a capability meeting on 8 September 2016, in which according to the claimant she wrongly attributed statements to her to the effect that she had accepted that she would have difficulties in undertaking her role and that there were no/further adjustments that could be made to assist her return to work, which she challenged in an email dated 4 September 2016. It continued further in the form of repeated calls after she was forced to miss the meeting on 8 September 2016 because of her being taken to hospital with chest pains and letters requiring her attendance at meetings variously on 14 September 2016 for disciplinary purposes to address the non-provision by her of a sick note, which she had intended to take to the missed capability meeting and on 27 September and 16 September 2016 for capability purposes culminating in her dismissal in her absence on the second but earlier in time of these dates.

19. The fifth element relating to the respondent's alleged refusal to acknowledge her request for reasonable adjustments in order to come back to work and its insistence instead that she was unable to work due to sickness was confirmed by her to relate to what was discussed at the review meeting on 9 August 2016 and the respondent's take on this as communicated to her by Ms Bates' letter of 2 September 2016.
20. Complaints of unlawful discrimination must be presented to an employment tribunal before the end of the period of three months beginning with the date of the act complained of pursuant to section 123(1)(a) Equality Act 2010. Where the complaint relates to a continuing act of discrimination such as harassment section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of that period.
21. As indicated above the Tribunal is of the view that the first element of the claimant's harassment complaint relating to the ignoring of her requests for reasonable adjustments was presented within the statutory time limit. Having regard to the similarity of the fifth element relating as it does to her reasonable adjustments request and the respondent's response to this as concluded by the holding of the capability meeting in her absence on 16 September 2016 it also finds this to have been presented in time.
22. Turning to the second, third and fourth elements the last act in respect of the unannounced home visits was on 28 September 2015; the verbally aggressive attack by Ms Bates took place on 9 August 2016 and the final communication in respect of the repeated threats of dismissal was the letter dated 13 September 2016 requiring her attendance at the capability hearing on 16 September 2016, which the claimant had previously been told had the potential for her dismissal. Having regard to the date of this communication the Tribunal also finds this fourth element to have been presented in time.
23. On the face of things, however, the second and third elements of the harassment complaint have been presented outside the requisite three month limitation period unless it were to be found that they were part of a continuing act of discrimination.

24. The leading authority to consider in determining whether a particular situation gives rise to an act extending over a period is the decision of the Court of Appeal in *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530, which makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.
25. Having considered the substance of these elements of the claimant's harassment complaint the Tribunal, whilst noting that Ms Bates was involved in both, found the visits and the manner in which the review meeting was conducted to have been a couple of isolated specific acts and hence not part of a continuing act. It did so because home visits to an employee on long-term sick leave are recognisably carried out to ascertain their welfare and the first two of these were carried out soon after the claimant's operation and the third after she had submitted a fit note signing her off for a period of three months when there was an issue surrounding a possible negotiated termination to be resolved and because the exchange which was at the heart of the alleged verbal attack concerned an incident that had occurred with the claimant's son on 28 September 2015, in respect of which Ms Bates believed that the claimant had lied to the police to protect him following her reporting of it. As such the Tribunal finds these two elements as having been presented out of time.
26. That having been said there is an escape clause which allows a tribunal to consider any such complaint which is out of time provided that it is presented within 'such other period as (it) thinks just and equitable' pursuant to section 123(1)(b) Equality Act 2010. However there is no presumption that a tribunal should exercise its discretion to extend time and the burden is on a claimant to persuade the tribunal to exercise its discretion in their favour. In the instant case the claimant advanced no evidence to explain why these two elements of her harassment complaint were not presented within the statutory time limit or to support an extension of time and having regard to the fact that she had consulted solicitors as early as September 2015 regarding her employment with the respondent and could reasonably have been expected to have been advised as to her ability to bring claims if she believed that she was being discriminated against and/or harassed on the grounds of her disability the Tribunal concluded that it would not be just and equitable to extend time in respect of these two elements.
27. In terms of her unauthorised deductions complaint this related to 3.5 hours' unpaid overtime in the sum of £46.08 allegedly worked in the week commencing 8 June 2015 and wages in the sum of £119.83 withheld for the period 8 to 15 September 2015, which was treated by the respondent as a period of unauthorised absence in circumstances where she claims that it was suggested to her by Ms Bates that she could leave at 12.30 p.m. on 8 September 2015 and that she would not need a sick note pending consideration by the board of an offer of voluntary redundancy.
28. The time limit for presenting a complaint of unauthorised deductions from wages is provided for in section 23(2)(a) of the Employment Rights Act

1996, which states that a complaint must be presented before the end of the three-month period beginning with the date of the payment of wages from which the payment was deducted. Thus in the case of these deductions as a monthly paid employee which the Tribunal saw as two separate deductions as opposed to a series of deductions the relevant dates for payment would have been 30 June and 30 September 2015 and the last dates for presentation would have been 29 September and 29 December 2015. Having not been presented until 11 February 2017 following the issue of an early conciliation certificate on 20 January 2017 this complaint is plainly out of time. A tribunal may though if it is satisfied that it was not reasonably practicable to present a complaint within three months, permit it to be presented within such further time as it considers reasonable, which is provided for by section 23(4) of the Employment Rights Act 1996.

29. In terms of the reasonable practicability of the claimant having presented her complaint within the relevant three-month time period nothing was advanced by the claimant to cause the Tribunal to conclude that there were any impediments operating during it to have reasonably prevented, interfered with or inhibited her in presenting her claim in time. She had already sought advice as regards her employment before the time limit in respect of the first alleged deduction expired through the CAB and Merseyside Employment Law; she remained in contact with Merseyside Employment Law beyond September 2015 and accepted that she could ring at any time to speak to their solicitor; she had access to a computer and the internet and knew how to use this resource to research relevant websites for the purpose of bringing litigation and whilst she continued to be certified as unfit for work she did not suggest that the pain associated with the surgical procedure she had undergone or the medication that she was taking incapacitated her to such an extent that she was unable to have presented a claim. Accordingly in the Tribunal's judgment it was reasonably practicable for the claimant to have complied with the statutory time limit for this complaint's presentation and having found as such there was no basis on which to consider whether the primary time limit should be extended meaning that the Tribunal is without jurisdiction to entertain this complaint.
30. Turning finally to her unfair dismissal complaint having been dismissed on 16 September 2016 and having commenced early conciliation on 6 December 2016, which saw the early conciliation certificate being received by the claimant on 20 January 2017 she had until 20 February 2017 to present such complaint in order to comply with the statutory time limit. In the event whilst she presented a claim within this period on 11 February 2017 she did not indicate by ticking the relevant box that she was pursuing a complaint of unfair dismissal and neither did her particulars of claim plead as such.
31. Indeed it was not until 2 May 2017 by an email to the tribunal that the claimant requested that a complaint of unfair dismissal as a new cause of action be added to her ET1 claim. Her explanation for the lateness of its presentation was that she believed that she had ticked the relevant box but must have inadvertently un-ticked it whilst completing and submitting the form on-line during which process she lost and was timed out of the

form a couple of times and that she only became aware of the omission following the preliminary hearing on 21 April 2017 when in a legal consultation she was asked why she had not ticked the unfair dismissal box. Such explanation was found to be implausible by the Tribunal having regard to the following facts. First of all there was scant reference to unfair dismissal in her particulars of claim and little in the way of pleading as to the grounds why her dismissal was believed to be unfair in a document which ran to eleven pages. Secondly the grounds of resistance set out in the response to her claim received by her on or about 24 March 2017 listed at the outset the complaints that she had brought by her claim form, significantly absent from which was a complaint of unfair dismissal. Thirdly in the dealings between the parties in advance of the preliminary hearing for the purposes of completing the hearing's agenda no mention was made by the claimant of unfair dismissal being one of her causes of action. Fourthly the Case Management Order from the preliminary hearing makes it clear that some considerable time was spent during it agreeing a list of issues and clarifying the claimant's complaints significantly absent from which again was any reference to unfair dismissal being pursued as a cause of action. As such it seemed to the Tribunal that the claimant's attempt to add a complaint of unfair dismissal was very much an afterthought as a consequence of which it was sought to be presented some considerable time after the time limit for its presentation had expired.

32. For the reasons set above at paragraph 29 the Tribunal considered that it would have been reasonably practicable for the claimant to have presented a complaint of unfair dismissal within the relevant time-limit and again having found as such there is no basis on which to consider whether the primary time limit should be extended meaning that the tribunal is accordingly without jurisdiction to entertain this complaint.
33. In conclusion therefore the Tribunal finds that the claimant's complaints of a failure to comply with the duty of reasonable adjustments and of harassment on the grounds of disability, confined to the first, fourth and fifth elements of this have been presented in time giving it jurisdiction to hear them but that her complaints in respect of unauthorised deductions from wages and of unfair dismissal were presented outside the relevant statutory time limit in circumstances where it was reasonably practicable for her to have complied with it leaving it without jurisdiction to hear them.

Employment Judge Wardle

5th July 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

6th July 2017
FOR EMPLOYMENT TRIBUNALS