Case number: 2600274/2017

EMPLOYMENT TRIBUNALS

BETWEEN:

and

Mrs R Callow	Aurum Academy Trust Limited
Claimant	**Respondent**

At a Hearing

Held at: Lincoln On: 3-5 November 2014

Chairman: Employment Judge R Clark

REPRESENTATION
For the claimant: In Person
For the respondent: Mr Magee of Counsel.

JUDGMENT

having been sent to the parties on 19th August 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. INTRODUCTION

1.1. This is a preliminary hearing listed to determine the issue identified at the Telephone Preliminary Hearing held on 23 March 2017, namely:- a whether the claimant was a disabled person at the relevant time.

b whether it can be determined that the claim(s) are out of time

c To determine the respondent's contention that the claims have little or no reasonable prospect of success such that they should be subject to a deposit order or struck out

2. Background to this hearing

2.1. This case concerns claims of discrimination relating to the alleged protected characteristic of disability. The detail of the claims was explored at that earlier preliminary hearing before EJ Hutchinson and the direct discrimination claims have been particularised further and recorded in the note of that hearing and subsequent correspondence. In summary form, they are:-

a In or around June or July 2016 – the "micromanagement" allegation. b In Sept 2016 – being excluded from a staff meeting.

c On 15 Sept 2016 – being called into a meeting and subjected to demeaning language.

d On 16 September 2016, the failure to hold a whole school assembly to recognise the catering department's gold award.

e The Respondent's response to the claimant's resignation on 28/9/2017 – in that she was put on garden leave and excluded from contact with colleagues.

2.2. And amended in subsequent correspondence:- a On 21 September 2016, the respondent sending an email to the claimant requesting her to attend an absence review meeting (said to amount to putting pressure on her).

b On 26 September 2016 sending an email to the claimant requesting that she attend a further absence review meeting at rearranged date (also amounting to putting pressure on her).

2.3. The reasonable adjustment claim is not clearly particularised. The PCP relied on appears to be the requirement to attend work. The disadvantage is the employment consequences of not doing so which a disabled employee may face greater exposure to. The adjustment relates to provision of counselling support following an offer made by the respondent to explore it on 6 July 2016. For today's purposes, I have determined that the date on which the respondent is to be treated as failing to make the reasonable adjustment 21 July 2016.

3. EVIDENCE

3.1. I have heard from Mrs Callow who was questioned on her evidence. I did not hear any witnesses for the respondent.

3.2. I received a bundle of documents running to 123 pages.

3.3. I received oral closing submissions from both parties.

4. ISSUE 1 - Disability Status

4.1. A person is disabled for the purpose of the Equality Act 2010 ("the Act") if their circumstances satisfy the conditions set out in section 6 and Schedule 1 of the Act. In short form, I must be satisfied that there is a physical or mental impairment which creates a long term substantial adverse effect on the claimant's ability to carry out normal day to day activities. Schedule 1 further defines that test. In considering that test I have had regard to the 2011 guidance on the definition of disability. Of the many and varied situations in which disability can manifest itself which are covered

by the guidance and the Act, I have particular regard to the need to consider the effect of the impairment as it would be without treatment or medication (which may include the manner in which the disabled person copes or masks their impairment); that substantial means simply more than minor or trivial; that "likely" simply means it could well happen. The guidance provides illustrative examples at C3-6 and A5 in respect of depression as an impairment; B5, C6 and C2 in respect of cumulative effects, recurring conditions and long term; B14 in respect of treatment. I am reminded of the need to consider each element. (Goodwin v Patent office [1999] ICR 302)

4.2. Turning to the facts, there were elements of the claimant's evidence which was confused between how the condition has been in the past, how it was at the relevant time to these claims and how it is now. I accept Mr Magee's caution about being influenced by the evidence as it is now rather than at the relevant
time. However, on the evidence before me I am able to make following findings limited, at this stage, to the question of disability at the relevant time.

4.3. The claimant was diagnosed with depression in 2008. She continues to receive medical care under that diagnosis and has done at all material times in between. She has been prescribed Citlaprom for the last 9 years. That dose has varied from time to time. The illness has been relatively well managed during 2015 and the early part of 2016 during which her medication was 10µg daily but increased to 20µg. I find the claimant is ashamed of the diagnosis and seeks to mask it. The effects of the impairment come in waves and/or fluctuate over time. There can sometimes be episodes of rapid cycling of a few days bad followed by few days good.

4.4. Without the treatment she receives, I find the claimant would suffer bouts where she was unable to get out of bed for days at a time, would fail to take care of her personal hygiene, would leave the care of her children to her husband, would not plan

food for the children or the family, mainly as she would be unable to go out to go shopping. In those times she eats poorly and unhealthily. The medication helps her to minimise the severity of those effects.

4.5. During the recruitment process for her post with the respondent, the claimant declared that she was not disabled. She underwent a post offer medical questionnaire in which she declared a similar position. There is a pattern of hiding her diagnosis. I find the claimant believed she was under no obligation to make a full disclosure at this stage. Whether or not she is correct in that, one obvious consequence of keeping things secret is that it limits the prospects of establishing any claim before the employer gained knowledge of any disability albeit that does not affect the determination of whether she was or was not disabled.

4.6. During her employment, the claimant continued under the care of her doctor for her depression. The claimant's medical records are before me. Page 70 onwards covers the relevant period. From that I find the claimant continued with her prescription for citalopram. In August 2015 there is reference to depressive disorder, the claimant feeling really low, having lost interest and not being bothered about anything. She was recorded as not being able to enthuse about the new job. Her medication was increased. There were repeat prescriptions throughout the period of employment. On 7 April 2016 [74] there is a record of her suffering with a long history of depression, being unable to motivate herself regarding diet/weight loss. On 4 July 16 [75] there is a reference to low moods, to being all the time in a depressed mood. The gradual increase in the prescription can be charted from the 10µg at the start of her employment to 40µg by September 2016. I find there was a deterioration in the claimant's condition over this period.

4.7. There is a significant event on 6/7/2016 where the claimant did disclose to her employer how she had suffered with depression on and off for a number of years. The respondent undertook to investigate counselling support. There is a dispute of fact on the outcome of this, the respondent saying it was not available whereas the claimant says she received no feedback either way. I return to this point later.

4.8. Between 16 September and 3 October 2016 the claimant was signed off work as unfit for work with depression. She received emails from work requiring her to attend an informal meeting in the workplace which adopted the position that she was not too unwell to come into work for such a meeting.

4.9. Returning to the medical records after this date, on 16 September 2016, the GP records the claimant as being “in trouble” at school in respect of the 15 September meeting. On 20 September it records her having resigned as she felt the school did not understand her situation. She was not sleeping.

4.10. I then turn to whether those facts and circumstances establish the test of disability. There is no dispute that the claimant has been diagnosed with a mental impairment from 2008 nor that she has been treated with varying levels of medication throughout the relevant period. The focus of the issue before me is whether the effects of that impairment on normal day to day activities create a substantial long term adverse effect. In my judgment they do.

4.11. Firstly, the threshold is relatively low. Substantial means more than merely minor or trivial. Secondly, the effects have lasted for longer than 12 months and, even when viewing their fluctuating nature, the history shows at the material time the serious episodes were likely to recur over a period longer than 12 months. Whilst the evidence shows the effect is continuing, I am satisfied that at the material time,

particularly during 2016 the temporal requirement was made out. I am satisfied that getting up, getting dressed, personal hygiene, getting motivated to perform ordinary tasks, planning shopping, preparing meals are all normal day to day activities and that with or without her medication, but substantially more so without the benefit of medication, the claimant's impairment creates an adverse effect on her ability to carry out those activities which is substantial in nature. I have considered whether any or all of those matters could simply be a question of ability, but dismiss that. I am satisfied the degree to which the impairment affects her is to a degree which falls outside general range of abilities to perform those activities found in the general population at large.

5. The Basic Chronology

5.1. The issue of time limits requires me to make further findings of fact. The issue of the merits of the claim require me to understand the parties respective cases, without determining matters in dispute. In that respect, I now turn to consider the basic chronology.

5.2. The claimant was employed between 1 September 2015 and 28 October 2016. As I have already stated, she did not disclose the diagnosis of depression in the application or post appointment health screening. The claimant suffered a downturn in her mental health in July 2016. She was off sick for 3 days between 4 and 6 July. She attended her workplace on 6 July whilst still off work and met Ms Chatterton. During that meeting she disclosed her long term depression. The immediate response was positive, Ms Chatterton reassuring the claimant and stated that she was proud of her for being able to disclose it. Ms Chatterton offered to look into support that might be available. That offer of support became something an odd state of affairs in this case.

The respondent says it went back to the claimant the following day to say that, in fact, support was not available. It is

odd because within two months of this, the respondent would later offer this support. It is also odd as the claimant's case is that she received no feedback about counselling. I accepted that the time within such counselling could have reasonably been made available was within around 2 weeks and therefore determined the time at which the claim of a failure to make the adjustment is to be assessed is from 21 July 2016.

5.3. After the disclosure was made to Ms Chatterton, the claimant alleges she was subject to various detriments. The first is that she began to be micromanaged. Her ET1 says June but she expressed this as a consequence and has clarified it to be from July 2016.

5.4. Other events are alleged to take place in the workplace during the start of the 2016/17 academic year. She says in September she was excluded from staff meetings, spoken to in demeaning terms and, after the catering department won a gold award, that she was snubbed in the way the school did not follow its usual recognition ceremony at a whole school assembly. The school says catering staff were not required to attend the staff meeting and that there was appropriate recognition of the award.

5.5. An event which is likely to be significant in the final analysis of these claims arises in respect of the school's response to apparent mistakes in kitchen ordering. On one occasion this resulted in a large number of children going without food. The respondent stepped in and arranged the meeting that happened on 15 September 16 [48]. That is accepted as being a fair record of the main points raised during the meeting. It does not conclude with any sanctions or disciplinary response. It

recognised issues with the Claimant's well-being and ill health and set out an agreed plan for avoiding a repeat which was directed at both the claimant in the kitchen and also administration.

5.6. Findings of fact will be necessary to determine what was occurring about that time which caused the claimant to suffer a deterioration in her health with the result that she went off work sick. It may or may not be that meeting or the background to it but from the following day, Friday 16 September, she was off work sick. She obtained and provided a fit note the same day which stated depression and signed her off for 2 working weeks, until 4 October 2016.

5.7. Notwithstanding the fit note and its terms, three working days later the respondent sent a letter to the claimant inviting her to an informal absence review meeting to take place during the currency of the fit note. There is a dispute of fact as to whether the terms of that letter are capable of amounting to a detriment, the respondent's position is that it is wholly supportive to engage in a welfare meeting with someone who is off sick. The contents may or may not be read like that in due course but it does include an explicit reference to "your current diagnosis". Without making any wider findings, I am satisfied for today's purpose that a letter like this and its terms being written after 4 days of absence into what was then a relatively short and finite period of absence has the potential to be a detriment.

5.8. The claimant replied by email on Monday 26 September in relaxed terms stating simply that she was unable to attend. That triggered a second letter from the school. Again I am asked to conclude there can be no detriment and it is true that it is supportive in part and now offers a change of venue so that it takes place off site. Again, however, for today's purposes I don't accept that there can be no possible detriment arising from the fact of the letter, its timing, its terms, the insistence of the meeting at that

early stage and particularly the presumption that her illness did not make her unfit to attend such a meeting. From the claimant's perspective, she was signed off sick with depression and it may be found to be reasonable for her to hold the belief that this was oppressive. She will say that led to the resignation the following day [58].

5.9. The school responded on 28 September accepting the claimant's resignation [59]. I am again invited to say there cannot be a detriment arising from the mere acceptance of a resignation. To that limited extent I would agree but this letter goes further than merely accepting the resignation. Firstly, the employer does not require her to attend work and instead invites her to concentrate on her health by imposing garden leave on the notice period. That too, could be found to be a supportive measure and an act which simply releases from her obligations. But within that, the claimant is now also subject to a prohibition from making contact
with anyone at the school. The need or reason for that is not clear and I am satisfied that there is a triable issue on whether imposing that restriction amounts to a detriment and, if it does, was done because of her disability.

5.10. That garden leave and the restrictions it imposed continued until the claimant's employment terminated on 28 October 2016.

5.11. After her resignation, I find the Claimant was advised by her GP to seek advice about her situation from the C.A.B. She attended one of their offices on 3 October 2016. She followed this up with further advice from a solicitor on 7 October but I find she was unable to continue with that professional support due to her financial situation. She was, however, given sufficient advice to know that she needed to embark on Early Conciliation ("EC") with ACAS as a pre-condition of lodging a claim with the ET.

6. ISSUE 2 - Time Limits

6.1. The limitation date for any claims arising on termination of employment would expire on 27 January 2017 before any adjustment is made for the purpose of complying with EC. EC is of course mandatory for the claims being brought by the claimant. She has contacted ACAS and engaged in EC and, to that extent, satisfied the bar on presenting claims to the ET set out in section 18A of the Employment Tribunal's Act 1996.

6.2. She did in fact commenced EC on 27 January 2017, the last day for presenting a claim to the ET based on her last day of employment. It therefore meant the provisions of section 140B of the 2010 Act applied to extend time. EC concluded on 27 February 2017 and it is common ground that period means that the time limit for the presentation of claims based on the EDT expired on 27 March 2017. The claim was in fact presented on 23 March and is in time so far as any claim based on the last day of employment is concerned.

6.3. There is no claim arising from the EDT per se, at least as a dismissal, but the final act of discrimination in the garden leave restrictions continues over a period until that date and is therefore in time. However, the effect of the period of EC is such that anything alleged to have occurred before 28 October 2016 is prima facie out of time as having occurred more than 3 months before EC was entered into. If they are to proceed, they require an extension of time.

6.4. The jurisdiction question for me today is only about whether it is just and equitable to extend time. I do not trespass on the issue of whether any one discrete act is linked to any other discrete act so as to form part of a continuing act. That requires a full determination of all the facts and, although I note the same individuals appear to have

been involved throughout, such matters are better left for a full ET after on hearing all the evidence, if necessary.

6.5. By section 123 of the 2010 Act, Employment Tribunals have jurisdiction to consider a claim for discrimination only where it is brought within 3 months of the date of the act to which the complaint relates or such other period as is just an equitable. It is for the claimant to show it is just and equitable and there is no presumption in favour of an extension. (Robertson v Bexley community centre 2003 IRLR 434). It has been held that the factors set out in section 33 of the Limitation Act 1980 may be informative in weighing the relative prejudice to the respondent of allowing an out of time claim against the prejudice to the claimant of refusing it (British Coal Corporation v Keeble [1997] IRLR 336). Those factors import considerations of the prejudice to both parties, the length of the delay, the reason for the delay, the effect on the cogency of evidence, whether the respondent had cooperated with requests for information, and the promptness of the claimant's actions when she knew of her right to bring a claim. Additionally, other factors that might be relevant include whether the claimant was given incorrect advice, any ignorance of rights, and whether the disability or ill health has any bearing on the time limit.

6.6. I start with prejudice. Other than losing the windfall of a "limitation" type defence, there is no prejudice to the respondent in terms of the availability of witnesses or the cogency of evidence. Indeed, as there is a claim in time, in order for the Tribunal to understand the background to that claim the same evidential ground is likely to be covered in any event.

6.7. The length of the claimant's delay is not extensive, at most it is 3 months and in many cases about one month. The reason for the delay follows what, in my judgment, is common in discrimination cases where the last event is in time but earlier matters,

which may not in themselves have motivated the claimant to litigate, nonetheless are then relied on as part of the picture. That is typical because it reflects the common experience of the vast majority of employees not to bring claims at the first possible matter, whether they know the detail of the litigation procedure or not. They hope things will change, that they are wrong or that it was a one off. That is what I find occurred here.

6.8. There is nothing arising in the consideration of whether the respondent cooperated with requests for info. I do not regard a minimal response to EC, if that is in fact what happened, as engaging this factor. Each party may engage in EC only to the bare minimum if they chose. This is not a case of later discovered facts and I am not assisted by this factor in this case.

6.9. I am satisfied that the claimant has acted promptly once she knew of her rights and although she commenced EC at the last day, she has nonetheless acted in time as far as the last matter is concerned.

6.10. Whether ill health or disability has any bearing on time limits presents a mixed picture. There is evidence of consultations with CAB and a solicitor as early as October 2016 which tends to suggest the claimant was able to take steps to progress the claim at that time. Having said that, I am also satisfied that there had been a deterioration in her health at the relevant time and the nature of how it manifested affected her motivation to do normal day to day activities, not to mention litigating. The claimant was in a more acute phase of her depressive cycle having been off sick since 16 September 2016. This is likely to have had an effect on her ability to bring the claims in time, particularly as the result of her consultation with the solicitor appears to have left her with a financial obstacle to professional assistance leaving her to bring any

claim unassisted as a litigant in person. This is a case where I view the ill health as a relevant factor, particularly
as an ability to motivate herself to action is part of the condition, but I take the view is a long way from a determinative factor that it might be in other cases.

6.11. The final relevant factor is the merits of the claims themselves. It is never likely to be just and equitable to allow a party to bring a hopeless claim. The question may be whether a poor claim is so poor as to tip the balance against a just and equitable extension. But for the reasons I deal with below, this is not a claim that faces strike out or a deposit and there is nothing in the merits of the claims which would cause me to step back from reaching a just and equitable conclusion in favour of extending time.

6.12. My conclusions on the time limit extension is that the claimant has established that is just and equitable to allow the claims to proceed. I have weighed all the factors but the two I find of greatest significance are that there is a claim in time so far as garden leave is concerned and the respondent has to engage with the background to that in any event. Secondly, there is no evidential prejudice to the respondent in defending the case on its merits arising from the relatively short delay in bringing proceedings.

7. ISSUE 3 – Merits

7.1. I am asked to consider whether any of the claims fall into either test set out in rules 37(1)(a) or 39 of the 2013 rules. In short, whether the claims have *no* reasonable prospect of success, in which case I may order that part of the claim to be struck out, or *little* reasonable prospect of success in which case I may order the claimant to pay a deposit as a condition of allowing that claim to continue.

7.2. Against that statutory test, I remind myself that it is rare to strike out a discrimination claim on the merits as having no reasonable prospect of success. (Anyanwu v South Bank Student Union [2001] IRLR 305). Discrimination claims are fact sensitive and only in the clearest of cases will it be appropriate to strike out without hearing all the evidence. Likewise, in respect of deposit orders I remind myself that this is not a mechanism to achieve a strike out by the back door, but to discourage genuinely unmeritorious claims with the prospect of costs if
the claim fails for the same reasons. Any order requires an enquiry as to the claimant's means and the level of any deposit should be achievable. (Hemdam v Ishmail & Al-Megraby [2016] UKEAT/0021/16)

7.3. The two tests must of course be applied in the context of the liability test that will apply at the final hearing. In direct discrimination, that is whether the claimant was treated less favourably because of her disability of depression. In the reasonable adjustments claims, it is whether the respondent applied the PCP of a requirement to attend work regularly. If so, did this put the claimant at a substantial disadvantage compared to a non-disabled employee. Did the respondent know of her disability and the disadvantage the PCP put her to and, finally, did it fail to make the adjustment contended for (provision of Counselling and Support) and would that adjustment have been a reasonable one to have made.

7.4. In respect of the direct discrimination claims, it is common ground that the underlying events relied on by the claimant took place although there remains a dispute of fact as to whether the claimant was in fact excluded from meetings or simply not required to attend, spoken to in a demeaning manner or appropriately for the situation, denied the usual celebration assembly etc. If that dispute of fact was found in favour of the claimant, the acts or omissions would amount to detriments. As is often the case in direct discrimination claims, the central issue is the reason why those alleged

detriments happened. That is clearly a triable issue that may or may not be found to be because of her disability. Whether that is the reason or not is a matter for the trial but it does not fall into either category for deposit or strike out.

7.5. The respondent's essential argument in seeking strike out or deposit on the claims relating to the absence meetings and garden leave are that they are supportive or merely acknowledgments of a resignation and not capable of amounting to detriments. I have already set out why I disagree. In my judgment they are capable of amounting to detriments and it will be for the final hearing to determine whether they in fact do amount to detriments and the reason why they occurred. In particular, the exclusion from school during her notice period and the restrictions placed upon her potentially have a link to her absence for depression. Consequently, those matters will be determined at a final hearing.

7.6. Some aspects of the claim are clearly stronger than others. I am less convinced that the reason why the meeting about the shortfall in catering supplies was either held at all, or conducted in demeaning terms (if it was), was because of the claimant's disability. There are no direct comparators and it will be argued that it would have taken place as it did were a non-disabled employee responsible for catering. Likewise, I retain some reservations about the reasonable adjustment claim. It is arguable that there is a PCP to attend work to a reasonable level and that, on balance, I accept the likelihood of being off sick leads to a greater risk of some sanction. That risk is likely to be greater where a disabled employee's disability poses a greater susceptibility to time off work. There may be some evidential overlap between this claim and the letters sent in September seeking an early absence meeting. Whether counselling is a reasonable adjustment that would remove or substantially alleviate that disadvantage is not clear but I am satisfied that it is an arguable point.

7.7. The question remains whether any of those remaining matters warrant the imposition of a deposit order and whether their merits are such as to tip the balance in respect of the time limit points? After considering it in the round I have concluded to both is no. I am not satisfied the little reasonable prospects test is made out. They both require significant findings of fact to be set in the context of the surrounding events which is a matter for the final hearing. Though it is entirely possible those claims might fail, as indeed any of the others might, I am not satisfied that the essence of the claims as they appear before me today mean their merits are sufficiently poor to warrant the imposition of any deposit (or to weigh against an extension of time limits).

8. CONCLUSIONS

8.1. I am satisfied that the claimant was disabled within the meaning of the Equality Act 2010 at the material time by virtue of the diagnosis of depression.

8.2. I am satisfied that the claim relating to the garden leave restrictions is in time and that it is otherwise just and equitable to extend time to 27 January 2017 for the claimant to bring all her other claims.

8.3. For completeness, I make no orders under rules 37 or 39 in respect of the merits of the claims. The claimant should not treat that as a positive endorsement of the strength of her case, merely that I am not satisfied the test for making such orders has been met.

EMPLOYMENT JUDGE…CLARK

DATE…10 August 2017

SENT TO THE PARTIES ON
14 November 2017