



EMPLOYMENT TRIBUNALS

Claimant: Mr J Tomlin

Respondent: Bexhill Electrical (Southern) Limited

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: by CVP **On:** 24 November 2020

Before: Employment Judge Truscott QC (sitting alone)

Appearances

For the claimant: Mr P Tomlin (son)

For the respondent: Mr A Ohringer of Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable to do so.

JUDGMENT on PRELIMINARY HEARING

It is the judgment of the Tribunal that:

1. The claimant was not disabled within the meaning of the Equality Act 2010 at the material time of September 2017.
2. The claimant's claim of disability discrimination was not presented within the time limit imposed by section 123 of the Equality Act 2010 and it is not just and equitable to extend the time for the presentation of the claim.
3. Accordingly, the claim of disability discrimination is dismissed.
4. The claim is continued for further procedure in relation to the claim for unfair dismissal.

REASONS

Preliminary

1. The respondent informed the Tribunal that disability remained in dispute [85] and the Tribunal directed that an Open Preliminary Hearing consider the issue [92-94]. The respondent also requested that the question of time limits also be considered at this

hearing [87]. The claimant was in agreement.

2. The claimant was represented by his son. The respondent was represented by Mr A Ohringer barrister. The claimant has provided a witness statement for the purpose of this hearing [251-2]. It mentions undiagnosed depression and his heart condition. The claimant also spoke to his written statements [83 and 86]. There was a bundle of documents to which reference will be made where necessary.

Findings

3. The claimant presented two nearly identical claims on 29 December 2018 and 14 February 2019 which have been consolidated complaining of:

- a. Unfair dismissal
- b. Disability discrimination
- c. Wrongful dismissal in respect of which notice pay has now been paid by the respondent.

4. A preliminary hearing for case management was held before EJ Davies on 7 November 2019 [69-73]. In relation to the claim of disability discrimination, directions were made for the claimant to provide a disability impact statement and for the parties to disclose documents relevant to the issue of whether the claimant was disabled. The claimant was also required to particularise his claim of disability discrimination.

5. The claimant particularised his claims of disability discrimination [86]. He complains that the requirement to drive early in the morning to a work site in September 2017 was indirect disability discrimination and the failure to provide alternative transport was a failure to make reasonable adjustments.

6. In the claimant's disability impact statement [83] he states that he has suffered from angina 'for a number of years' which was diagnosed in August 2012. He describes fatigue (when not taking medication) which means he cannot work more than 10 hours per day.

7. The claimant's has disclosed his medical records for 2012/3 [178-185]. The documents show the following of relevance:

- a. Suspicion of angina on 30 May 2012 [178]
- b. Working diagnosis of angina on 12 September 2012 [179]
- c. Coronary angiogram undertaken on 11 October 2012 [180]
- d. Angioplasty procedure undertaken on 14 December 2012 [181]
- e. His discharge letter shows his discharge medication which includes escitalopram [182]
- f. At a follow up appointment on 9 April 2013, it was recorded that the claimant had 'made a good recovery with no chest pain...' and lists his medication which includes citalopram [185]

8. The claimant has provided a photograph of a medical prescription dated 16 August 2019 showing a list of his current medication [186]. This includes citalopram which is understood to be prescribed for depression.

a. There is no evidence of what the claimant's medical condition was at the material

time (September 2017). However, in a health questionnaire which the claimant completed on 15 February 2018 he denied suffering from any disability [203-7]. On 5 November 2018, the claimant submitted an application to the Education and Skills Funding Agency where he declared that he did not have a disability or long-term health problem [212]. The claimant said that this was a mistake.

Submissions

9. The Tribunal received written submissions from counsel for the respondent and heard oral submissions from both parties.

THE LAW

10. A person has a disability for the purposes of the Equality Act 2010 (“EqA”) if he or she has a physical or mental impairment, which has a substantial and long- term adverse effect on his or her ability to carry out normal day-to-day activities (s.6 EqA).

11. The burden of proving disability is on the claimant. (**McNicol v. Balfour Beatty Rail Maintenance Ltd** [2002] ICR 1498)

12. Section 6(1) of the Equality Act 2010 (“the EqA”) states:

A person (P) has a disability if—

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

13. Under paragraph 2 of Schedule 1 to the EqA, long term effects is defined as the effect of an impairment which has or is likely to last at least 12 months. The effect of an impairment is deemed to be continuing if it is likely to recur.

14. In **SCA Packaging Ltd v. Boyle** [2009] ICR 1056 it was stated that a condition is likely to continue or recur if ‘it could well happen’, The likelihood is to be determined based on the facts known at the date of the alleged discriminatory act (**McDougall v. Richmond College** [2008] IRLR 227). There is also Guidance on the Definition of Disability, section C.

15. Paragraph 5 of Schedule 1 states in so far as is material:

- (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if-
 - (a) Measures are taken to treat or correct it, and
 - (b) But for that, it would likely have that effect.

16. Para. B1 of the Guidance on the definition of disability (2011) (“the Guidance”) states:

The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.

17. The Appendix to the Guidance provides a useful list of effects which would and which would not normally be considered to be substantial.

18. Whether a condition is likely to continue or recur is a question which will often require medical evidence. (**Royal Bank of Scotland plc v. Morris** (UKEAT/0436/10))

19. In order to rely on deduced effects under para. 5 of Schedule 1 EqA, it is normally necessary to present clear medical evidence. (**Woodrup v. LB Southwark** [2003] IRLR 111, para 13)

Just and equitable extension

20. Section 123(1)(b) permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

21. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Viridi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

22. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment ... cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

23. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;

the extent to which the party sued had co-operated with any requests for information;
the promptness with which the claimant acted once she knew of the possibility of taking action; and
the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

24. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

25. Further guidance cited to the Tribunal was that the Tribunal must not make assumptions in the claimant's favour on any contentious factual matters that are relevant to the exercise of the discretion: **British Transport Police v Norman** UKEAT/0348/14 at para 39. The lack of specific prejudice to the respondent does not mean that an extension should be granted: **Miller v Ministry of Justice** UKEAT/0003/15 at para 13. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

26. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as “the just and equitable power” has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

27. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the “just and equitable” discretion should be exercised in the particular case. That obligation is not just a matter of the burden of proof. It also raises the question of what is the standard of proof to be established in order to persuade the Tribunal that a period other than the normal three months should be applicable. It is therefore a matter which requires evidence – which may be oral and subjected to cross examination or documentary.

DISCUSSION and DECISION

28. To satisfy the definition of disability, a claimant must show that at the material time:

- a. He had a physical or mental impairment;
- b. The impairment had a substantial adverse effect on his ability to carry out normal day to day activities; and,
- c. The substantial impairment was long-term in that it had or is likely to last for at least 12 months or it was likely to recur.

29. The claimant did suffer from an impairment which had significant adverse effects, but the evidence shows that he recovered from that after the angioplasty procedure on 14 December 2012. The claimant does not himself suggest that in 2017 he suffered substantial adverse effects, he says that he would suffer such effects if he were not taking his medication. However, there is no evidence of what the medication he was taking in 2017 was for and what if any effect this had. Neither is there any evidence that the adverse effects were likely to recur. At least one of the medications could be identified as being prescribed for depression.

30. Whilst the Tribunal did not place great weight on the Health Questionnaire and the Funding application, there was a lack of evidence in support of disability including an absence of medical records or a medical print out from the GP in 2017. The evidence does not support the argument that the claimant was disabled in September 2017 which is the time of the alleged discrimination.

31. As the claimant is complaining about discrimination in September 2017, his claim for disability discrimination was made approximately one year out of time. No explanation has been given for the delay. The claimant says that there is no issue of time bar because following the incident of 2017, there were continuing consequences but this is to mix an act with continuing consequences where the time bar runs from the incident and a continuing act which would not be time barred. The Tribunal is satisfied that this was not a continuing act of discrimination.

32. The Tribunal considered the prejudice to each party. The respondent would have to address an as yet not well particularised claim where, because there are no documents, there would be reliance on a verbal discussion in 2017. The claimant can continue with his unfair dismissal claim which should be the main focus of his attention rather than a weak disability claim. The balance was against the claimant.

33. On the guidance set out earlier and weighing all the relevant factors, the Tribunal considers that it is not just and equitable to extend the time for lodging the claim.

Employment Judge Truscott QC

25 November 2020