



## EMPLOYMENT TRIBUNALS

Between

Miss S C Fisher

Claimant

and

Brighton & Hove City Council

Respondent

Heard at London South Employment Tribunal on 9 March 2017

Before Employment Judge Baron

Representation:

Claimant: Stuart Markless - Caseworker

Respondent: Carol Haynes - Solicitor

### JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the Tribunal has the jurisdiction to consider the claims made by the Claimant.

### REASONS

- 1 I first of all sincerely apologise for the substantial delay in issuing the judgment and reasons. This is solely due to pressure of other judicial business.
- 2 The Claimant presented a claim to the Tribunal on 21 December 2016 making various claims under the Equality Act 2010 based upon the protected characteristic of disability. The Respondent accepts that the Claimant has certain disabilities. The details are not relevant for present purposes.
- 3 This was a preliminary hearing to consider whether the Tribunal has the jurisdiction to consider the claims being made, taking into account the statutory time limit in section 123 of the 2010 Act, as extended by reason of the ACAS early conciliation procedure. Day A for the purposes of that procedure was 12 October 2016, and Day B was 26 November 2016. Therefore any act or omission which occurred on or before 12 July 2016 is *prima facie* out of time.

- 4 The parties had agreed a list of issues which the Tribunal would have to determine if the matter proceeded to a hearing, and Ms Haynes had helpfully created a table with the factual allegations set out in chronological order as far as possible. The list of issues is set out below, and I will refer to the paragraph numbers in it as appropriate.

Discrimination arising from disability S15 EqA

1. With reference to the matters for which the Claimant was criticised on 15 April 2016 as described in paragraph 11 of the Grounds of Complaint (GoC)-
  - a. Did the criticisms relate to something arising from disability (carpal tunnel syndrome/anxiety & depression)?
  - b. If so were the criticisms unfavourable treatment
    - i. in themselves and/or
    - ii. the manner they were delivered?
  - c. If so was the treatment a proportional means of achieving a legitimate aim?
2. Was the requirement for the Claimant to undergo additional observations (paras 12,13 GoC) made because of something arising from disability (carpal tunnel syndrome/anxiety & depression)?

If so was it unfavourable treatment?

If so was the treatment a proportional means of achieving a legitimate aim?
3. With reference to the matters for which the Claimant was criticised following the observation on 24 June as described in paragraph 16 of the Grounds of Complaint (GoC)-
  - a. Did the criticisms relate to something arising from disability (carpal tunnel syndrome/anxiety & depression)?
  - b. If so were the criticisms unfavourable treatment?
  - c. If so was the treatment a proportional means of achieving a legitimate aim?

Direct Discrimination s13 EqA

4. With reference to the observation on 15 April 2016 was, because of disability, the Claimant treated less favourably than Briony Nash by
  - a. Receiving the criticisms as described in para 11 GoC and/or
  - b. Being subjected to additional observations, when Briony Nash was not?

Failure to make reasonable adjustments ss20 & 21 EqA.

5. On 19 January 2016 did the Claimant agree to stop formal support meetings?

Did the Respondent apply (as a PCP) an expectation that staff be resilient to change?

If so did this substantially disadvantage the Claimant compared with non disabled staff?

If so would it have been a reasonable adjustment to continue support meetings?

6. Was the Claimant expected to take lead responsibility in the job share arrangement (para 6 GoC)?

If so was it a PCP made because she was full time?

If so did this substantially disadvantage the Claimant compared with non disabled staff?

If so would it have been a reasonable adjustment not to have imposed the expectation?

7. Was the requirement for the Claimant to take school wide responsibility for clubs because she was recruited as a UPS2 teacher (para 8 Grounds of Resistance) a PCP?

If so did this substantially disadvantage the Claimant compared with other UPS2 non disabled staff?

If so would it have been a reasonable adjustment not to have imposed the requirement?

8. Was fixing an observation to take place on 15 April 2016 a PCP (para 10 GoC)?

If so did this substantially disadvantage the Claimant compared with non disabled staff?

If so would it have been a reasonable adjustment to have arranged the observation for a later date?

9. Were criticisms made by Ms Collis to the Claimant on 15 April 2016 excessively hostile?

If so was this a PCP applied to reinforce the importance of her words that substantially disadvantaged the Claimant compared with other non disabled staff?

If so would it have been a reasonable adjustment for Ms Collis to have been

- a. More sympathetic and supportive and/or
- b. Allowed the Claimant to have someone with her for support?

- 5 I find the following facts as material to this preliminary hearing.
- 6 The Claimant has been employed by Brighton & Hove City Council as a Teacher responsible for the Reception class at West Blatchington Primary School in Hove since 1998. The Claimant became unfit for work in October 2014, and returned on a phased basis in October 2015 and full time in January 2016.
- 7 The Claimant had been the subject of the Respondent's capability procedure and on 23 April 2015 had raised a formal grievance alleging failures of the Respondent to comply with the procedure. It appears that in connection with the return to work the Respondent ceased to pursue the capability procedure, and the Claimant ceased to pursue a grievance appeal.
- 8 The Claimant was advised by her GP on 27 June 2016 that she was unfit for work. The form Med3 described the conditions as being 'Exacerbation of depression; Severe stress'. The Claimant has remained away from work since then. She says that her GP advised her not to

engage with school matters at all to 22 July 2016 and to have a complete break from work to 31 August 2016.

- 9 On 2 September 2016 the Claimant raised a further grievance. In that document she mentioned the support meetings referred to in paragraph 5 of the list of issues, the responsibility for clubs referred to in paragraph 7, and also issues relating to observations. Other matters were also raised. A letter was sent on 20 September 2016 in response to the grievance. I do not find either the grievance letter or the response to it particularly focussed, and it suffices to say that the Claimant was not satisfied. She appealed against the outcome on 11 October 2016.
- 10 The Claimant stated in her witness statement, and I accept, that during this period she was concentrating on seeking to resolve the continuing difficulties by the internal process, rather than seeking to claim to the Tribunal. That was on the basis that the grievance procedure in 2015 had been at least partly successful. Indeed, on the day of this hearing there was to be an appeal in the grievance process which the Claimant was not intending to attend.
- 11 The Claimant instructed her solicitors during the period from at least April until November 2015. During this period the Claimant was made fully aware of her rights under the Equality Act 2010. It is not necessary to record all the documents, but my attention was drawn particularly to the Claimant's grievance of 23 April 2015 prepared by her solicitors in which there are several references to disability discrimination.
- 12 Mr Markless submitted that the allegations in paragraphs 2, 4b, 5, 6 and 7 relate in each case to conduct extending over a period. In the alternative, time should be extended on the just and equitable basis. Further, he said that there were material disputes of fact which could only be resolved by the obtaining of evidence at a hearing.
- 13 Miss Haynes submitted that the complaints are of single acts, and that there had been significant delays by the Claimant in the presentation of the claim. She had had legal advice and was aware of the provisions of the 2010 Act. Her solicitors could have presented the claim in time.
- 14 I now consider the position. A distinction must of course be drawn between an act extending over a period, and a single act with continuing consequences. That may be straightforward in theory, but less so in practice. I consider each of the allegations in turn.
  - 14.1 Allegations 1 and 4a clearly relate to a single incident on 15 April 2016. Mr Markless did not seek to argue to the contrary.
  - 14.2 Allegations 2 and 4b are of additional observations being undertaken. As I understand it (without at present making a definitive finding) such additional observations are alleged to have been ongoing, with the last one being on 24 June 2017.
  - 14.3 Allegation 3 relates to a one-off incident following the observation on 24 June 2017. Again, it was not argued on the Claimant's behalf that the criticisms on that occasion constituted anything other than a single incident.

- 14.4 Allegation 5 appears to be a one-off decision with continuing consequences.
- 14.5 Allegation 6 is said to be a continuing requirement which had evolved over time rather than as a result of a specific decision.
- 14.6 Allegation 7 is said to be a provision, criterion or practice and accordingly questions arise as to whether an adjustment should have been made, and if so, by when.
- 14.7 Allegations 8 and 9 are clearly one-off acts.
- 15 I was referred to what I might describe as the usual authorities. They were *Bexley Community Centre v. Robertson*, *British Coal Corporation v. Keeble*, *Chohan v. Derby Law Centre*, *DPP v. Marshall* and *Kingston-upon-Hull City Council v. Matuszowicz*.
- 16 If an allegation is in time, then that is an end of the matter. If it is out of time, then it could be found to be part of an act extending over a period. Otherwise the Tribunal has the power to extend the time period. The Tribunal has a wide discretion to do that which it considers just and equitable in the circumstances. It is a matter of balancing the prejudice to each party. Reference is often made to what I might describe as the *Keeble* factors in these circumstances. They are not definitive and their relevance depends upon the particular circumstances. In this case I have noted in particular that the Claimant had been advised of the provisions of the 2010 Act in 2015.
- 17 I have concluded that the allegations should proceed to a hearing. I am with Mr Markless that there are material disputes of fact which can only be resolved by the hearing of evidence, but that of course applies in many claims. It is not determinative as to whether any discretion should be exercised in favour of the Claimant, but it does indicate the difficulty of coming to a conclusion of the issue of time limits at a preliminary hearing.
- 18 I see the factual allegations as being largely variations on a theme, or two themes, although for the purposes of clarification of the claims, and the making of decisions on them, they have had to be broken down. Several of the allegations relate to additional responsibilities being placed on the Claimant and/or not being removed. The other theme is the number of observations undergone by the Claimant, and the outcome of those observations. It may well be that on the hearing of the evidence the Tribunal will come to a conclusion that what occurred was, at least to some extent, an act extending over a period. I am not in a position to decide to the contrary on the information before me. That alone is sufficient in my judgment for me to allow the claim to proceed to a hearing, but that would only defer the issue as to jurisdiction.
- 19 I have therefore considered whether it would be just and equitable to extend time in respect of allegations that would otherwise be out of time. In my judgment it is appropriate for time to be extended where it is necessary to do so to give the Tribunal jurisdiction.

- 20 If there has been any fault on the part of the Claimant's solicitors (as to which I am not making any finding) then that should not necessarily be held against the Claimant where there is a discrimination claim. I have also taken into account the point made that the Claimant was seeking to resolve matters through the grievance process, which had achieved an apparently satisfactory result in 2015.
- 21 I take into account as an important factor that the Claimant remains employed by the Respondent, although on sick leave at present. I do not know the outcome of the grievance appeal, but I am assuming that the difficulties between the parties have not been resolved because otherwise the claim would no doubt have been withdrawn.
- 22 I have of course noted that the Respondent will have to defend claims which are outside of the statutory time limit, and that is a prejudice to it. However, to be balanced against that is the fact that there will be a definitive ruling from the Tribunal on the merits of the claims. It appears to me that having a definitive outcome will be of benefit to both parties so that they will know where they stand. That benefit in my judgment outweighs any prejudice to the Respondent.
- 23 The matter will therefore be listed for a hearing on the merits of the claims.

**Employment Judge Baron**

**24 May 2017**