# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Simeone

**Respondent:** First Great Western Railway

**Heard at:** London Central **On:** 12 October 2017

**Before:** Employment Judge H Grewal

**Representation**

Claimant: No appearance

Respondent: Mr N Roberts, Counsel

**JUDGMENT** having been sent to the parties on 12 October 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 The claim form, accompanied by a number of documents, was presented on 3 May 2017. Early Conciliation had commenced on 6 April 2017 and the certificate had been issued on 21 April 2017. It was impossible to ascertain from the claim form and the accompanying documents whether the Claimant was making any complaints which the Tribunal had jurisdiction to consider and, if so, what the complaints were.

2 After two preliminary hearings (on 5 July 2017 and 11 September 2017) it was clarified that the Claimant wished to make the following complaints:

(i) The Claimant was disabled by reason of back problems in 2015 (after sustaining an injury at work in February 2015) and the Respondent failed to make reasonable adjustments in respect of his attendance at an Occupational Health assessment in April 2015 and by requiring him to move large objects at Acton on 23 June 2015.

(ii) Between August and September 2015 the Respondent failed to make reasonable adjustments by providing him with lighter duties and support. In addition, there was a failure to make reasonable adjustments in respect of

the Claimant's disability as a result of suffering from Irritable Bowel Syndrome, in that, his access to toilet facilities was taken away.

(iii) When the Claimant returned to work in January 2017 at Paddington (having been absent sick since September 2015) the Respondent failed to make reasonable adjustments in relation to his disabilities of depression/anxiety and IBS by not giving him a phased return to work and by putting him on front line duties on the concourse without support. This was sorted out in March 2017.

3 The Respondent conceded that the Claimant was disabled by reason of depression/anxiety between January and March 2017 but disputed disability because of back pain and/or IBS. At the preliminary hearing on 11 September 2017 the Claimant accepted that the complaint at paragraph 2(iii) (above) did not appear in his claim form and the accompanying documents and he applied for leave to amend his claim to add that complaint.

4 The preliminary hearing today was listed to determine:

(a) The Claimant's application to amend to add the complaint at paragraph 2 (iii) (above);

(b) Whether it was just and equitable to consider the complaint at paragraph 2 (i) and (ii) (above); and

(c) If necessary, whether the Claimant was disabled by reason of his back problems or IBS at the relevant time in 2015.

5 The Claimant did not attend the preliminary hearing today. The clerk telephoned him to seek an explanation for his non-attendance. He said that he did not know that there was a preliminary hearing listed for today. I did not accept that application. The Claimant had been present at the hearing on 11 September 2017 when this preliminary hearing had been fixed and the note of that hearing, which had been sent to both parties, had stated in the first paragraph that the preliminary hearing would take place on 12 October 2017. In compliance with the orders made at that hearing, the Claimant had submitted his skeleton argument for today's hearing on 5 October 2017. In those circumstances, I considered that it was appropriate to proceed with the matter in the Claimant's absence. I took into account the skeleton argument that he had submitted. Having considered that, the Respondent's submissions and all the documents I reached the following conclusions.

## Application to amend

6 I considered firstly the nature of the amendment. The Claimant is not seeking to clarify his existing claim or to attach a different label to facts already pleaded. He is seeking to introduce a new cause of action which is unrelated to the existing claims and will require the pleading of additional facts to support it. It relates to a different disability from that which is relied upon in respect of his existing claims.

7 I then considered whether the claim was in time when the application to amend was made. That involved determining when the application to amend was made when the act of discrimination occurred. Although the Claimant referred to this in the first preliminary hearing on 5 July 2017, the application to amend was not made until the preliminary hearing on 11 September 2017 when the Claimant accepted that he

had not complained of this in the original claim form and accompanying documentation and needed leave to amend to include it.

8 Section 123(1) of the Equality Act 2010 provides that a complaint of disability discrimination may not be brought after the end of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal considers just and equitable. Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)) and failure to do something is to be treated as occurring when the person in question decided on it (section 123(3)(b)). In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something when P does an act inconsistent with it or, if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

9 The relevant provision in the Disability Discrimination Act 1995 referred to "an act extending over a period" and to "a deliberate omission" to do something. It contained a provision identical to section 123(4) of the Equality Act 2010 as to when a person was deemed to have decided upon an omission. In **Kingston upon Hill City Council v Mastuszowicz [2009] ICR 1170** the Court of Appeal held that a failure to make reasonable adjustment was an omission and not an act. Therefore, the time for presenting the complaint ran from when the person decided upon the omission. There is no concept of a continuing omission.

10 Section 140B of the Equality Act 2010 provides for extension of time limits to facilitate early conciliation. In that section "Day A" is the date on which Early Conciliation notification is given and "Day B" is the date on which the Early Conciliation certificate is issued. The section provides,

> "*(3) In working out when the time limit set by section 123(1)(a) … expires the period beginning with the day after Day A and ending with Day B is not to be counted.*
>
> *(4) If the time limit set by section 123(1)(a) … would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period."*

11 At both the preliminary hearings and in the agenda submitted for the second one the Claimant claimed that he returned to work in January 2017. In his skeleton argument he said that he returned to work on 7 February 2017. In either case he claimed that there was an Occupational Health report from August 2016 which had advised that he should have a phased return to work and that he should not work alone. His complaints of failure to make reasonable adjustments are about the Respondent's failure to have a phased return to work for him and the fat that he was required to work alone on numerous occasions. In his agenda he said that that had continued until late March/early April 2017, at the preliminary hearing he said that it had been sorted out in March 2017, in his skeleton argument he said that it had continued until 7 April 2017.

12 Applying the law the failure to make reasonable adjustments occurred when the Respondent required the Claimant to return to work without putting in place a phased return to work and when it required him to work alone. The former occurred when he returned to work which, at the latest, was on 7 February 2017. The latter occurred on a number of occasions from 7 February onwards. By the end of February, at the latest, it was clear to the Claimant that the Respondent was failing to make those

adjustments. I, therefore, concluded that the acts of discrimination occurred at the end of February 2017.

13 Taking into account the extension of time limits, the time limit for that claim would have expired at the latest by 15 June 2017. The application to amend was not made until 11 September 2017. The Claimant was seeking to add a claim that was out of time.

14 There was no explanation of why this matter had not featured in the original claim. All the facts giving rise to it were within the knowledge of the Claimant. I took into account that the Claimant was off sick at the time but that had not prevented him from putting in claims about other matters. At a stage 3 grievance hearing on 3 April 2017 the Claimant said that he had felt much better since being at Paddington, he had felt more welcome there and everyone had been very supportive. His union representative had said that the role was working well but there were currently no vacancies there. All the evidence indicated that the Claimant had not made any complaints about failures to make reasonable adjustments about his time in Paddington between January and April 2017 because he had not had any concerns about it. There was no satisfactory explanation why that claim had not been made in time and no grounds for concluding that it would be just and equitable to allow it to proceed.

15 Having considered all the above matters I concluded that greater hardship would be caused to the Respondent if I gave the Claimant leave to amend his claim than to the Claimant if I refused his application.

Whether it would be just and equitable to consider the complaints of failures to make reasonable adjustments in 2015

16 These complaints were presented over two years after the time limit for presenting them expired. The delay is considerable. There has been no explanation as to why they were not presented earlier. The Claimant was represented by his trade union in the internal grievances and, therefore, had access to advice from his trade union. He also had a reputable solicitors' firm, Thompsons, acting for him in his personal injury claims against the Respondent. It is inevitable that the cogency of evidence will be affected by the delay – memories fade with the passage of time and it is more difficult to retrieve the relevant documentary evidence. Having taken into account all the above factors, I concluded that it would not be just and equitable to consider those complaints.

Application for costs

17 The Respondent applied for its costs of £10,286 on the grounds that the claim had had no reasonable prospect of success and that the Claimant had acted unreasonably in bringing it and in the way that he had conducted proceedings.

18 I accepted that the Claimant had acted unreasonably in bringing his claim and in the way in which he had conducted it. His complaints in respect of matters in 2015 were considerably out of time and he did not put forward any basis on which it would be just and equitable to consider them notwithstanding that. There was also no reasonable prospect of his establishing that he was disabled as a result of his back condition. The preliminary hearing listed for 11 September was converted from a half hour telephone hearing to a hearing in person for two hours because the Claimant did not comply with the Tribunal's orders of 5 July and failed to provide medical

evidence that he had been unable to do so for health reasons. The Claimant did not attend the hearing today and provided no satisfactory explanation for his failure to do so.

19 I still had a discretion as to whether to order costs or not. The Respondent has incurred considerable costs in defending this claim. I had very limited evidence of the Claimant's means but that was attributable to the Claimant's non-attendance today. The Claimant earned £1,733 per month while he was working. I understood that he had recently been dismissed. He also had periods of sickness absence which might have had an impact on his pay. I accepted that it was likely that he had limited means. Having taken into account all the above matters, I decided that an order for the Claimant to pay £2,500 of the Respondent's costs would be appropriate.

Employment Judge Grewal 1 December 2017