Case No: 2601506/17

EMPLOYMENT TRIBUNALS

Between:

Ms M Russell **Claimant**	**and**	Done Brothers (Cash Betting) Ltd t/a Betfred Ltd

At a Attended Preliminary Hearing

Heard at: Nottingham **On:** Monday 19 March 2018

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: In person
For the Respondent: Mr R Anderson, Consultant, Peninsula

JUDGMENT

1. The claim of unfair dismissal is dismissed for want of jurisdiction, namely lack of qualifying service.

2. The application to amend the claim to bring one of disability discrimination pursuant to the provisions of the Equality Act 2010 is dismissed.

REASONS

Introduction

1. The claim (ET1) was presented to the tribunal by the Claimant on 30 September 2017. In it she set out how she had been employed in one of the Respondent's betting shops from 6 March 2017 to 21 July 2017. She ticked the box for unfair dismissal. She fully particularised the claim, which essentially related to how during the employment she received insufficient training and was then told that she had to undertake a test of proficiency; that the test was conducted in a poor fashion so that she did not have the proper ability to concentrate on it, the test taking place on 18 July; then how on 21 July she was visited by an area manager, Mr Parker, at around 7 pm and informed that she was being dismissed there and then for having failed the test and she was paid one week's wages in lieu of notice.

2. She pleaded how she appealed that decision and had an appeal hearing but that the decision to dismiss her was upheld. In that respect, I have looked at her appeal letter dated 26 July 2017, the appeal hearing on 26 August 2017 and the outcome letter which is dated 14 September 2017.

3. She then went through the ACAS early conciliation procedure between 24 and 25 September and then she brought her claim to tribunal on the 30th.

4. If I stop there, the particulars to which I have referred wholly concentrate on the unfairness of the dismissal. Inter alia, she refers to that she had had one or two absences but that the employer had made clear, in what I gather would be a management for attendance outcome letter, that there was no action being taken against her. She did not therefore refer to anything unfavourable having occurred to her in relation to any such absence. Finally she did not describe what the nature of the absence was.

5. Following the presentation of the claim it was put before a Judge and because on the face of it there was no jurisdiction to entertain this claim of unfair dismissal as the Claimant lacked the necessarily 2 years' qualifying service.

6. She was informed to that effect by letter from the tribunal on 16 October and told to show cause in writing why her claim should not be dismissed by 30 October. She duly replied upon that date setting out reasons why she thought her claim should be allowed to proceed, thinking as is clear from her letter that the 2 year rule did not apply to her. But she did not engage any of the exceptions to the two year rule to be found in the Employment Rights Act 1996[1].

7. What she did say at her paragraph number 7 was as follows:

> "*During the course of my employment I had made the company aware I was scheduled to have a hip replacement. This would inevitably involve taking time off work, I don't know the length of time that would be involved but I believe the employer has used the test as a means to get rid of me because they did not want the staffing problem that my sickness absence would create. A hip replacement is a serious operation and I believe the recovery period can last some weeks.*"

8. The tribunal having received that letter, it was again put before a Judge, this time that being Employment Judge Ahmed. He directed a letter be sent to the Claimant informing her that the tribunal was thus still without jurisdiction. The letter went out on 19 December. The Claimant replied on 8 January 2018. What she now said was as follows, having first apologised for any confusion her previous letter might have raised:

> "*… but on re-reading my application it has occurred to me that my claim should in fact have been filed as a case of Discrimination and not Unfair Dismissal. I would therefore seek the Tribunals leave to enable me to amend my claim to that of Discrimination I have set out briefly below a summary of the reasons I believe this should be allowed but will obviously to into further detail should the Tribunal grant such leave.*

[1] An example is whistle blowing. As is clear from the factual scenario as set out in the ET1, this is not engaged.

Under the Equality Act 2010 I believe I have been discriminated against in respect of my disability which is a protected characteristic covered under Chapter 15, Part 2, Chapter 1. I believe such discrimination does not require 2 years of employment to enable my claim to proceed.

Under Chapter 2(13)(1) I believe the Respondent directly discriminated against me because they have treated me less favourably then they have treated other employees and I firmly believe this was due to the fact that they were made aware of my disability and forthcoming treatment for the same.

For the purpose of clarification I would advise that the disability which I claim is that of arthritis in my hip, such claim falling within Schedule 1, Part 1 s1(a) … has last for 12 months and (b) is likely to last for 12 months.

The Respondents were aware of my problem and were also aware that I was on a waiting list in respect of hip replacement surgery which would undoubtedly have meant time off work.

For these reasons I would again beg the Tribunals leave to enable me to amend my claim to that of Discrimination and proceed with my case on that basis.

…"

9. Another Judge, this time Employment Judge Macmillan, seems to have granted the application to amend but of course this he could not do in terms of the Tribunal's 2013 Rules of Procedure because the Respondent would be entitled to be heard on the issue of whether any such application should be permitted. This was in due course spotted by my colleague Regional Employment Judge Swann. By that time, there had been a Response (ET3) submitted by the Respondent. Apart from pleading to the actual factual issues, it was made plain that it opposed the application to amend, both in terms of it being out of time and as to the merits of the same; and as a fallback thereto, also pleading that if in fact the amendment was allowed then the tribunal should consider dismissing the claim as having no reasonable prospect of success or otherwise being vexatious. Secondly if the tribunal did not strike it out, then the tribunal should order a deposit, the claim only having little reasonable prospect of success.

10. It follows that is why I am sitting today to adjudicate upon these issues.

11. I have heard from the Claimant under oath. As is now obvious, I have not only the original claim but the further submissions made by the Claimant to the tribunal on 30 October and 8 January. I have then also considered the Response. Finally, I have been taken to the Claimant's detailed letter of appeal of 26 July; the minutes which she signed as being accurate of the appeal hearing on 26 August; and the outcome in terms of that appeal whereby it was dismissed written by Adrian Edgington, an Area Manager of the Respondent and which is dated 14 September 2017.

First consideration: the application to amend

12. I am well aware of the approach I should take to applications to amend and as per the guidance of first Mr Justice Mummery in ***Selkent Bus Company Ltd -v- Moore [1996] ICR 836 EAT*** and as particularly clarified by Mr Justice Underhill in ***Transport and General Workers' Union -v- Safeway Stores Ltd [EAT/0092/07]*** and which approach was endorsed in ***Arley -v- Office of National Statistics [2005] IRLR 201 CA***. The crucial issue is to look at all the circumstances in relation to the application to amend and including whether it technically out of time, although that may not necessarily be fatal.

13. Having carefully considered this matter, I come to the following conclusions.

14. When the claim was presented to the tribunal, it was most fully pleaded. There was nothing in it at all relating to any link between the Claimant's health, and in that respect any form of disability, and the circumstances of the dismissal. On an aside, I would observe that if the Claimant had the necessary 2 years' qualifying service, then prima facie the way in which the test was conducted in relation to her would have made this dismissal on the face it, and no more than that, unfair. But fairness or otherwise is irrelevant unless the Claimant has got the necessary 2 years' qualifying service.

15. When the Claimant first made the submissions to the tribunal which I have now recited fully on 30 October, she made it plain that she had prior to her dismissal made the Company aware that she was scheduled to have hip replacement and for reasons that I have cited thus linked that to why she was dismissed. She further clarified this on 8 January:

> "*The Respondents were aware of my problem and were also aware that I was on a waiting list in respect of hip replacement …*"

16. Finally, the Claimant made further submissions to the tribunal once she was on notice of today's hearing and these were submitted by email on 11 March 2018. Inter alia, she raised:

> "*…*
>
> *When the Claimant originally filed her claim it was on the basis of Unfair Dismissal. At that time the Claimant was of the opinion that the test had been used as a means to dismiss the Claimant whilst not admitting the real reason behind the dismissal, the fact that the Claimant was on the waiting list for surgery on her hip.*
>
> *…*"

17. That factual analysis assertion, even on the Claimant's own evidence today, is plainly wrong. I will accept for the purposes of today, taking her case at its highest and in that context because the Respondent says it never knew of any hip problem, that the following is the factual scenario the Claimant is putting forward. That is to say when she started her employment she disclosed that she had a back problem. At that stage, the medical jury was out so to speak on what was causing the back problem. Subsequent

thereto, she had one or two appointments with the medics on the basis of trying to find out what was causing the back problem, but thereafter all that had happened before she was dismissed is that she had obtained an appointment with physiotherapy, which was going to be as I gather a further step to discuss what the e-ray results revealed and options, or possibly it may have been just to further explore whether the back problem could be eased. All that matters to me is that the Claimant, as is now clear from the evidence, had not at that stage seen the medics for the purposes of it being determined that she would need to have a hip replacement operation and thus she had not received any notification that she would be going on the waiting list. From what I can gather from the Claimant's evidence, it is only some weeks after she was dismissed that she was informed by the doctors that she needed her hip op; and then she was going to have it on 26 November but it had to be cancelled and it subsequently took place on 6 December.

18. Why does that matter? It is because when I look at not only the particulars of her original claim but I go back to her appeal and indeed the appeal hearing, there is no mention whatsoever of the hip issue. Furthermore, in her appeal hearing she was given every opportunity to canvass whether there could have been any other reason for what had happened other than her alleged allegation, which was partly upheld, that the conditions for taking the test were poor, and she said no. Indeed, I quote:

> "*Q: Can you think of any other reason why Peter* (Mr Parker) *came to the decision to dismiss, timekeeping.*
> *A: No, there was one day I was early and 2 days I was late as got shifts wrong.*
> *Q: Absences?*
> *A: No*"

And so on and so forth.

19. The Claimant tells me that it only dawned upon her that there was an inference to be drawn in terms of the hip operation notification and indeed her hip itself when she talked to a friend around about the time when she got the notification of the first operation, which had to be cancelled, ie 26 November. But that just cannot fit with what she says in her submissions to the tribunal, to which I have referred, on 11 March because therein she says, in terms of presenting her claim:

> "*At that time the Claimant was of the opinion that the test had been used as a means to dismiss the Claimant whilst not admitting the real reason behind the dismissal the fact that the Claimant was on the waiting list for surgery on her hip*"

20. In other words, I do not put this down to simply, as suggested by the Claimant, misuse of the English language. The Claimant is English born and bred and highly articulate as is clear from all the submissions that I have referred to. I am with Mr Russell that there is a major conflict here on the Claimant's evidence. She may not be a legal scholar in terms of matters of employment but she was able to discuss her case very early on with the CAB (and it is clear to me she did not raise the hip issue); and albeit she may not have had long with ACAS on the telephone over early conciliation, it is clear

she did not raise it then either. She was able to further explore matters on the internet and inter alia by reference to the employment tribunal website.

21. Therefore, I am driven to the conclusion that what has happened here is the Claimant has tried to rescue a case that could not get off the ground because of the 2 year qualifying service rule by latterly trying to evoke the Equality Act. What I would then add, in terms of all the circumstances, is that on the face of it, the amended claim is one which in terms of my considering all the circumstances is not one where I consider the interests of justice would therefore deserve that it be allowed to proceed. After all, the Respondent would be put to the expense of a 3 day hearing. I say that because on the face of the pleadings of the Claimant there is no doubt whatsoever that she is relying upon the employer having knowledge that she was going to have to have the hip operation as being the reason why she says that they dismissed her. But on her own evidence, they did not know about the intended hip operation at the time of the dismissal. All they knew is that she was going to attend a physiotherapy appointment. That is a wholly different thing from saying 'Oh they are about dismissing me because now they know I am going to have a hip operation and that is going to mean I am going to have time off work and therefore they have gone ahead and dismissed me'.

Conclusion

22. It therefore follows that I have concluded, and applying the test to which I have referred and having regard to all the circumstances, that I am not prepared to permit the claim to be amended. What it therefore means is that as the original claim was one which cannot but be dismissed for lack of qualifying service (ie the unfair dismissal claim) that therefore the claim in its entirety becomes one which is dismissed. There is one caveat to that. The Claimant did not actually plead as an amendment that she received a shortfall in her wages when she was dismissed on 21 September. Clearly, she was entitled to a balance of wages of 3½ hours at £7.50 per hour, which is £26.25. I would have permitted an amendment in that respect because that would be in the interests of justice but I do not need to do so because the Respondent has conceded the position and has undertaken to pay the Claimant within 14 days the sum of £26.25.

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Employment Judge P Britton

Date: 24 April 2018

JUDGMENT SENT TO THE PARTIES ON

01 May 2018

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