EMPLOYMENT TRIBUNALS

Claimant: Miss C Schmidt

Respondent: Hoghton Leisure Limited

Heard at: Manchester **On:** 6 April 2018

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr J Bromige, Counsel

JUDGMENT

1. The complaint of unfair dismissal is struck out because the claimant had not been employed for two years by the respondent prior to the effect date of termination.

2. The complaints in respect of failure to pay holiday pay and sick pay are struck out because they were not presented within the applicable time limit even though it was reasonably practicable for that to have been done.

3. The application for permission to amend the claim form to introduce a complaint of direct discrimination because of gender reassignment is refused.

REASONS

Introduction

1. This was a preliminary hearing in which the claimant represented herself, via the services of an interpreter in Hungarian, Miss Csabai, and in which the respondent was represented by counsel. It concerned two matters: firstly whether the existing claims should be struck out, and secondly whether permission to amend should be granted.

Background

2. Following early conciliation through ACAS between 19 December 2017 and 8 January 2018, the claimant presented her claim form on 9 January 2018. It was rejected by the Tribunal because the name of the respondent on the claim form did not match that on the early conciliation certificate. The claimant corrected the defect by email of 21 January 2018 in which she explained that the ACAS certificate was in the proper corporate title of the respondent; the respondent identified on the claim form was simply the hotel at which she had been employed as a night porter/housekeeper. The defect having been rectified, the claim was accepted on 21 January 2018 and served on the respondent.

3. On 26 January 2018 the Tribunal wrote to the claimant warning that consideration was being given to striking out her unfair dismissal complaint because according to the claim form she had been employed for less than the two years required by section 108 Employment Rights Act 1996 ("the 1996 Act"). The claim form also contained complaints in respect of holiday pay and sick pay which were not affected by that consideration.

4. The claimant responded to that warning by email of 31 January 2018. The email raised for the first time a complaint that the dismissal was direct discrimination because the claimant was a transgender person (transitioning from male to female). The email asserted that the real reason for the termination of her employment at the end of February 2017 was that she was transgender. That was treated as an application to amend and Employment Judge Horne listed the case for a preliminary hearing.

5. The response form was presented on 21 February 2018. It resisted the complaints on their merits. It said that the reason for dismissal in February 2017 was that the claimant had not submitted any fit notes since October 2016 despite being on sick leave throughout that period.

6. At the hearing I heard oral evidence on oath from the claimant. I also had the benefit of some documents which had been sent in by the claimant attached to her application to amend of 31 January 2018. I heard submissions from both parties before making a decision.

Relevant Legal Principles

7. The relevant legal principles can be summarised as follows.

Unfair Dismissal – Two Years

8. Section 108 of the 1996 Act requires an employee to have been continuously employed for not less than two years in order to have the right to bring an unfair dismissal complaint. That requirement is waived in certain classes of case where the reason for dismissal is one of a number of prescribed reasons, none of which applied in this case.

Time Limits – Holiday Pay and Sick Pay

9. Complaints in relation to holiday pay and sick pay can be brought as unlawful deductions complaints under Part II of the 1996 Act. Section 23(2) provides that the time limit is three months from the date of the alleged underpayment. A reference to ACAS for early conciliation "stops the clock", and if ACAS are contacted within that three month period the claimant will have at least a month from the date on which the ACAS certificate is issued in which to present the claim within time.

10. Where a claim is presented out of time the Tribunal can hear it only if the claimant establishes that it was not reasonably practicable for it to have been presented within the time limit, and that it was presented within such further period as the Tribunal considers reasonable. The case law on this demonstrates that something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal). Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal ("EAT").

11. The holiday pay claim could in the alternative be brought under the Working Time Regulations 1998, but the time limit set out in regulation 30(2) is in identical terms.

Amendments

12. It is inherent within the general case management power in rule 29 of the Employment Tribunal Rules of Procedure 2013 that the Tribunal has power to grant or refuse permission to amend. In common with all such powers under the rules, the Tribunal must have in mind the overriding objective in rule 2, which is to deal with the case fairly and justly. That includes, so far as practicable, ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and important of the issues, avoiding delays, so far as compatible with proper consideration of the issues, and saving expense.

13. The leading case on how this discretion should be exercised remains **Selkent Bus Co Limited v Moore [1996] ICR 836**, in which the then President of the Employment Appeal Tribunal, Mr Justice Mummery, gave guidance on how

Tribunals should approach applications for permission to amend. At page 843 at F, the EAT said:

> **"Whenever the discretion to grant an amendment is invoked, the Tribunal should take account of all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."**

14. The EAT went on to identify some circumstances which would certainly be relevant, although such a list could not be exhaustive. It will be important to identify the nature of the amendment, distinguishing between minor amendments such as the addition of factual details to existing allegations, or major amendments such as the making of entirely new factual allegations which change the basis of the existing claim. A substantial alteration which pleads a new cause of action may have to be treated differently from a minor amendment.

15. It is also essential for the Tribunal to consider whether a new complaint would be out of time as at the date of the application to amend. The fact that an application would be out of time if lodged as a fresh claim is not an absolute bar to permission to amend being granted, but depending on the circumstances it can be an important consideration. In **Abercrombie and others v AGA Rangemaster Ltd [2014] ICR 209** the Court of Appeal said in paragraph 50 that

> **"Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way or amendment. But where it is closely connected with the claim already pleaded – and a fortiori in a re-labelling case – justice does not require the same approach."**

16. The timing and manner of the application is also relevant. An application should not be refused solely because there has been a delay in making it, but delay is relevant to the exercise of discretion. It is relevant to consider why the application was not made any earlier.

17. The EAT in **Selkent** concluded that passage with the following:

> **"Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."**

Equality Act Time Limits

18. This application sought to make a complaint under the Equality Act 2010. Section 123 provides that a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. The Tribunal can extend time if it is just and equitable to do so.

19. The case law on the "just and equitable" extension includes **British Coal Corporation –v- Keeble [1997] IRLR 336**, in which the Employment Appeal Tribunal (Smith LJ presiding) confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980.

20. In **Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434** the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis under the discrimination legislation. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

> **"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."**

21. Subsequently in **Chief Constable of Lincolnshire –v- Caston [2010] IRLR 327** the Court of Appeal in confirming the Robertson approach made clear that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

Findings of Fact

22. Having heard evidence from the claimant and considering the documents on the Tribunal file I made the following findings of fact.

23. The claimant was first employed by the respondent on 1 January 2016 but had a break in employment in March 2016. She was employed again with effect from 19 May 2016 as a kitchen porter/housekeeper. In September 2016 she informed her employer that she was undergoing gender reassignment.

24. The claimant had three weeks of sick leave in August 2016 and then was off work from September 2016 with a back injury sustained in a road traffic accident. She ceased providing fit notes during that period because she believed her partner (who was also employed by the respondent) was told they were no longer required.

25. In March 2017 the claimant went to return to work. She was told in late March that her employment had terminated with effect from 28 February 2017 and that a P45 had been issued (which she had not received).

26. The manager said to the claimant that she should speak to ACAS about this. He did not explain what he meant by ACAS and the claimant did not understand it. She did not carry out any internet research about ACAS.

27. However, on 10 April 2017 she saw the Citizens Advice Bureau ("CAB") in Preston. She did not ask them what ACAS was and they did not explain it. The CAB said they would write a letter for her to her employer about her sick pay and holiday pay, but she does not know if any letter was sent. She did not receive payment.

28. The claimant left the matter there. She did not pursue it any further.

29. From late 2016 onwards the claimant had a solicitor acting for her in a claim for compensation for the personal injury sustained in the road traffic accident. In late 2017 the solicitor was obtaining details of her remuneration in her two jobs that she was working at the time of the accident. One of those jobs was her job with the

respondent, and some details were provided by email of 6 November 2017. That email gave a brief account of the circumstances leading up to the termination of her employment which she did not regard as accurate, and that caused her to ask her personal injury solicitor about whether there was anything she could do. He explained that she had to go to ACAS and how to do that. It took a little time because of the need to get someone to interpret for her, but she spoke to ACAS just under a month later on 19 December 2017 to initiate early conciliation.

30. The claim form contained no reference to dismissal being because the claimant was transgender. That was not mentioned until her email of 31 January 2018 to the Tribunal. The claimant explained that she had not thought at the time that her dismissal was anything to do with being transgender and nor had she held that view at the time she completed her claim form in early January 2018. She said it was following receipt of the Tribunal letter of 19 January 2018 rejecting her claim that she thought about matters further, and realised that the real reason must have been that she was transgender. That explained why her application to amend was only made at the end of January 2018.

Submissions

31. Mr Bromige submitted that the unfair dismissal claim should be struck out, and that the sick pay and holiday pay claims were brought out of time when it was reasonably practicable for them to have been presented within time. The claimant had been made aware of the existence of ACAS and had the opportunity to get advice from the CAB well within the primary limitation period. As to the amendment, he submitted that it was possibly misconceived as a matter of law if the claimant had not proposed to undergo the gender reassignment process until early May 2017, since she would not attract the protection of section 7 of the Equality Act 2010 until then, but in any event that it should be refused under the **Selkent** principles. It was well out of time and there was no good reason why it had not been brought any earlier. It appeared to be a case where the claimant had retrospectively applied a label to her dismissal which had not been in her mind at the time.

32. Miss Schmidt submitted that she had acted reasonably throughout and that she had been unaware of her rights until her solicitor explained ACAS properly to her in late 2017. She was convinced that the real reason for terminating her employment was the transgender issue even though that had not occurred to her at the relevant time. It was the fault of the CAB for not advising her properly about her rights when she went to see them in April 2017.

Decision

Unfair Dismissal

33. Even on the claimant's case the unfair dismissal complaint could not be considered because she had not been employed for two years at the date of termination. That complaint was dismissed.

Sick Pay and Holiday Pay

34. I was satisfied that it was reasonably practicable for the claimant to have brought her complaints about sick pay and holiday pay within the primary time limit. She was alerted to the possibility of taking some action by her own manager when she was informed in late March that her employment had terminated. She could have researched ACAS on the internet at that stage, or if not then she could have asked the CAB what was meant by ACAS. She made no enquiry of the CAB about that matter when she could easily have done so. It was also open to her to ask her personal injury solicitor about such matters. That is not to criticise the claimant for having failed to take these steps, but simply to recognise that she could reasonably have found out about her legal rights and have brought this complaint within time. Accordingly those complaints were dismissed.

Application to Amend

35. That left the application to amend. I took into account the nature of the amendment. It was a substantial amendment introducing a wholly new cause of action under the Equality Act 2010. A complaint of transgender discrimination was very different from the claims on the claim form, particularly given that the claimant did not have the right to complain of unfair dismissal in any event. That meant that the applicability of time limits was a very weighty consideration, even though the amendment application was made at a very early stage in the proceedings and in a way which clearly set out the claimant's case on transgender discrimination.

36. As to time limits, I was satisfied that it would not be just and equitable to extend time. The claimant had access to specialist advice from the CAB in early April. She also had access to a solicitor. Had she thought there was any element of transgender discrimination in her dismissal she could have sought that advice and brought the claim within time. The fact that this possibility had not even occurred to her until late January 2018 did not assist her: that was not a good reason for not having brought the claim any earlier. Further, the fact that this application was triggered by the rejection of the claim form because of a discrepancy between the early conciliation certificate and the claim form did not provide a good explanation for why it was only raised now. I considered that Mr Bromige was right to say that this was an example of the claimant retrospectively re-labelling events which had not appeared in that light to her at the time or throughout the remainder of 2017.

37. Employment time limits are short. The application to amend was made eight months out of time. Although it seemed unlikely that the passage of time would have any real impact on the cogency of the evidence, the respondent would still be prejudiced in defending a claim brought almost eleven months after the relevant events instead of one brought within three months. Even if that claim were successfully defended, the respondent was likely to be put to cost which would not be recoverable from the claimant as a general rule.

38. In contrast the claimant was losing the opportunity to pursue a claim which had not even occurred to her as a possibility until 11 months after the termination of her employment. To grant permission to amend would effectively be to allow her to circumvent the statutory time limits in a way against which the Court of Appeal cautioned in **Abercrombie.**

39. In those circumstances I concluded that the balance of prejudice favoured refusing the amendment and permission to amend was refused.

40. It follows that these proceedings are at an end.

Employment Judge Franey

9 April 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 April 2018

FOR THE TRIBUNAL OFFICE