EMPLOYMENT TRIBUNALS

Between

Claimant: **Miss R Donaldson**

Respondent: **Mothercare UK Limited**

Heard at London South Employment Tribunal on 17 September 2018 before Employment Judge Baron

Representation:

Claimant: **The Claimant was present in person with the assistance of Sarah Ayeni**

Respondent: **Victoria von Wachter - Counsel**

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

1 That the application by the Claimant to amend the claim fails;

2 That the claim is dismissed.

REASONS

1 The relevant history is as follows:

2006 approx	The Claimant commenced her employment with the Respondent.
31.03.14	The Claimant had a stroke and did not return to work thereafter.
06.01.16	The Claimant was dismissed.
16.02.17	ACAS Day A under the early conciliation procedure.
28.02.17	ACAS Day B and the early conciliation certificate issued.
28.02.17	First ET1 claim form presented.
30.03.17	Case closed for non-payment of issue fee.
26.07.17	Employment Tribunal fees declared unlawful.
29.01.18	The Claimant applies for reinstatement of the claim and second claim form ET1 provided to the Tribunal.
20.03.18	Claim papers served on the Respondent.

13.04.18	Response presented by the Respondent.
09.05.18	Preliminary hearing held by EJ Webster.
05.06.18	The Claimant applies for leave to amend the claim.
17.09.18	This preliminary hearing was held.

2 There was no copy of the first claim form ET1 available, but it was not suggested that it was any different from the second claim form. None of the 'standard' boxes in section 8.1 of the claim form were ticked. The Claimant ticked the box to indicate that she was making another type of claim, which she stated to be as follows:

> I am seeking a compensation claim because I had a stroke due to the stress of going to be dismissed from my employment.

3 In section 8.2 of the claim form the Claimant said that she was warned by a colleague on 30 March 2014 that she 'was due to be fired' and that she had her stroke the following day. The Claimant alleged that the negligence of the Respondent also brought on three more strokes. In section 9.2 of the claim form she said that she was seeking compensation in the sum of £1.5M. She referred to the cost of speech therapy, ongoing care, financial support for her son and living arrangements.

4 As recorded above that claim was administratively rejected when first presented because of the non-payment of the issue fee then chargeable, and the claim was reinstated in January 2018.

5 At the preliminary hearing on 9 May 2018 EJ Webster recorded that the Claimant had difficulty speaking and was partially paralysed. The Claimant uses a wheelchair, at least for part of the time. EJ Webster also recorded that she had advised the Claimant that the Tribunal did not have the jurisdiction to determine a claim for damages for personal injury caused by an employer, which is clearly what her claim was as originally framed. At this hearing I repeated the point on several occasions and I am satisfied that both the Claimant and Ms Ayeni understood the position.

6 The judge ordered that there be this preliminary hearing and that if the Claimant wished to amend her claim to include matters which were within the jurisdiction of the Tribunal then she must apply by 6 June 2018.

7 EJ Webster said the following:

> Whilst witness evidence is not always necessary at a preliminary hearing, given the Claimant's difficulties with speech I have strongly recommended that she tell her story about why she submitted her claim when she did by way of a witness statement.

8 The judge ordered that witness statements be exchanged by 10 September 2018. The Claimant provided a witness statement for this hearing which, I understand from Miss von Wachter, had not been provided to the Respondent previously. I am not taking any delay that there may have been in that respect into account. The statement contained some evidence as to what occurred in March 2014 and the Claimant's dismissal in January 2016. What it did not contain was any

evidence at all about the reasons for any delays in the presentation of the claim to the Tribunal.

9 The matters to be considered at this hearing were listed in the notes of the preliminary hearing of 9 May 2018 as follows:

9.1 If the Claimant makes an application to amend her claim is that application allowed?

9.2 Has the Claimant presented her original ET1 within the relevant limitation period?

9.3 If not, where the complaint was for discrimination, has it been presented within such other period as the Employment Tribunal considers just and equitable?

9.4 If a complaint for unfair dismissal is presented, was it reasonably practicable for the Claimant to submit the claim within the relevant limitation period?

9.5 If the Tribunal does not have the jurisdiction should the Tribunal strike the claim out under rule 37(1)(a) of the Employment Tribunal Regulations?

9.6 In any event, should the Tribunal strike out the claim under rule 37 on the basis that it has no reasonable prospect of success?

9.7 If not, should the Claimant pay a deposit under rule 39 of the Employment Tribunal Regulations because the claim has little reasonable prospect of success?

10 On 5 June 2018 the Claimant sent a letter to the Tribunal stating that she wished to proceed with her claim under the headings of disability discrimination, unfair dismissal and breach of the contract of employment.[1] The letter had been prepared with the assistance of Ms Ayeni. The letter did not contain any details of the factual allegations to be made under each of those heads of jurisdiction. I discussed the matter with the Claimant and Ms Ayeni and established broad details of the claims. We did not go into the niceties of the various statutory provisions as that was not necessary at this stage.

11 The claims for disability discrimination and unfair dismissal are based around the same point. That allegation is that the Respondent could, and should, have found some work which the Claimant was capable of doing. The claim for breach of contract was based on two propositions. The first was that the Claimant's contractual hours of work were 40 per week, and the Respondent had required her to work in excess of those hours. The second was that the Respondent was in breach of a term imposing a duty of care towards the Claimant on it.[2] That second element appears to me to be another way of expressing a claim in tort for personal injury.

12 The Claimant gave evidence, principally in answer to questions from me, but in answer to some questions in cross-examination also. The Claimant

---

[1] Miss von Wachter accepted that the Claimant was a disabled person at the material time because of the effects of her stroke.

[2] That will presumably be an implied term.

had great difficulty expressing herself. I note that in a medical report of 15 June 2018 it was noted that the Claimant 'knows what she wants to say but cannot find the words to say it.' I make findings of fact as to what occurred taking those difficulties into account, but it was simply not possible to obtain further details.

13 The Claimant said that from at least after her dismissal on 6 January 2016 and possibly before, she wished to make a claim against the Respondent but was deterred from doing so by her husband / partner. That relationship has now broken up. What is certain is that in February 2017 the Claimant took legal advice because she had with her a letter from a firm of solicitors dated 13 February 2017. I did not of course enquire what advice was given to her, but the taking of advice coincides with the commencement of the early conciliation procedure and then the presentation of the first claim form ET1. I was not able to ascertain whether it was the Claimant who had made contact with ACAS or the solicitors then representing her, but the Claimant confirmed that she had herself completed in manuscript the claim form ET1 with the help of a carer. The Claimant said that she also completed the second claim form ET1.

14 My analysis of the position is as follows. Each of the claim forms contained a claim over which the Tribunal the Tribunal does not have any jurisdiction. The proper forum for such a claim is clearly the county court. The heads of claim listed in the letter of 5 June 2018 are matters over which the Tribunal does have jurisdiction. The letter was in effect an application to amend the claim.

15 The Tribunal has a general discretion whether or not to grant leave to amend. Miss von Wachter referred to the seminal decision of Mummery J (as he then was) in *Selkent Bus Co Ltd v. Moore* [1996] IRLR 661 EAT and cited part of the headnote:

> In deciding whether to exercise its discretion to grant leave for amendment of an originating application, a tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances include:
>
> > (a) The nature of the amendment, ie whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim.
> >
> > (b) The applicability of statutory time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.
> >
> > (c) The timing and manner of the application. Although the tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it, it is relevant to consider why the application was not made earlier. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly where the new facts alleged must have been within the knowledge of the applicant at the time the originating application was presented.

16 I add the following from the judgment itself:

> 20(4) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

17 The amendment being sought here clearly falls within the final category within paragraph (a) above. In those circumstances the application of the statutory time limits is important. The time limit in respect of any claim relating to the dismissal, whether it be of unfair dismissal or disability discrimination, must commence with the dismissal. That occurred on 6 January 2016. Under the current legislation the Claimant should then have contacted ACAS under the early conciliation procedure by 5 April 2016. She did not contact ACAS until 16 February 2017, over ten months out of time. However when the claim was presented it did not include the claims which the Claimant now wishes to bring.

18 Time started running in respect of any claim arising from earlier acts or omissions of the Respondent, such as a failure to make reasonable adjustments. For these purposes I am assuming in favour of the Claimant that any claims arose on her dismissal.

19 The claims the Claimant now seeks to bring were only proposed on 5 June 2018, two years and two months out of time. The Claimant cannot be blamed for any delay caused by the fees regime then in force. That period was from 30 March 2017 until the claim was reinstated on 29 January 2018, a period of ten months. Thus the net period by which the proposed amendment is out of time is sixteen months. That is still a very substantial period.

20 There is not a list of elements which the Tribunal must take into account when deciding whether or not to exercise its discretion to allow an amendment. In my view the principal factors in these circumstances are as follows. The first is the reason for the delay. Despite her serious speech difficulties, the Claimant made it clear to the Tribunal that she had wished to claim against the Respondent initially, but had been persuaded by her partner not to do so. The second factor is the fact that the Claimant did receive legal advice. I was not told what that advice was, but this is not a case where the Claimant was unable to ascertain what claims she may have.

21 It is well established that in respect of the claim of unfair dismissal any failure by professional advisers is not a material, factor in deciding whether or not it was reasonably practicable for the claim to have been presented in time. The position with discrimination claims is not so rigid as the test is whether it is just and equitable for time to be extended. That leads onto the next matter.

22 The third and most important factor is the prejudice to the parties. That breaks down into two points. I was informed by Miss von Wachter that her instructions were that those involved in the dismissal of the Claimant have long since left the Claimant's employment, and consequently would not be available to give evidence. That, she said, would cause considerable prejudice to the parties.

23 The other aspect of potential prejudice to each of the parties is the merits of the claims. There is obviously more prejudice to a claimant in not

allowing a strong claim to proceed than there is preventing a weak one from proceeding. Miss von Wachter submitted that the claims which the Claimant now wished to pursue were almost bound to fail.

24 I had some poor copies of medical reports in the bundle. Fortunately the most recent one dated 15 June 2018 was the most legible. It recorded that the Claimant was 'dependent on carers and family members for help and support for personal and domestic activities of daily living.' In the penultimate paragraph the following was stated:

> In summary, [the Claimant] has, despite her own best efforts, been left with residual physical, speech and possibly cognitive problems which have a significant impact on her ability to fulfil her personal, family, and social roles. She is no longer able to work, drive, or access many community settings.

25 There is no reason to conclude that as at the date of dismissal the prognosis was any more hopeful.

26 In those circumstances in my view that is no reasonable prospect of the Claimant succeeding in her claims of unfair dismissal, or under the Equality Act 2010. As Miss Wachter put it, 'the dismissal of an employee who will never return to work because of illness cannot be said to be unreasonable and so any disability discrimination or unfair dismissal claim would fail.' I agree.

27 I am not prepared to allow the requested amendment to add claims of breach of contract. Any evidence concerning the Claimant's working hours must by now be unavailable or stale. The general allegation about relating to a duty of care is so amorphous as not to be justiciable.

28 I therefore decline to allow the requested amendments.

29 I also strike out the claim as originally pleaded on the ground that it has no reasonable prospect of success. As already explained the Tribunal does not have the jurisdiction to consider a claim for personal injury, and that is clearly what the original claim was.

Employment Judge Baron

20 September 2018