EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: B

HELD AT: Manchester **ON:** 4 July 2017

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimant: In person
Respondent: Mr W Dobson of Counsel

JUDGMENT AT OPEN PRELIMINARY HEARING

The judgment of the Employment Tribunal is that:

1. The claimant's complaints brought under the Equality Act 2010 of discrimination upon the grounds of the protected characteristics of race, religion or belief and disability were presented to the Tribunal outside the time limits provided for by section 123 of the 2010 Act. It is not just and equitable to extend time to enable the Tribunal to consider those claims and accordingly the Tribunal has no jurisdiction to entertain them.

2. The claimant's complaint of constructive unfair dismissal has no reasonable prospect of success. Pursuant to rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 that claim is struck out.

3. By reason of the Tribunal's judgment in paragraphs 1 and 2, there is no extant claim and accordingly the claimant's application to the Tribunal for permission to amend his complaints to include ones under the Employment Rights Act 1996 of detriment and dismissal for having made a protected disclosure and under the 2010 Act for discrimination by reason of the protected characteristic of sex are otiose. In the alternative, those applications are in any event refused.

REASONS

1. In this case, an open preliminary hearing was listed for 10 March 2017 to decide the issues identified by Regional Employment Judge Robertson on 8 February 2017. By reason of the issues to which I refer at paragraphs 5-7 of the Case Management Order prepared that day (and sent to the parties on 27 March 2017) the open preliminary hearing was adjourned. It was reconvened and came before me today.

2. I heard evidenced from the claimant. On behalf of the respondent, I heard evidence from Leanne Davidson who is employed as a HR Employee Relations Adviser. I then received helpful submissions from Mr Dobson on behalf of the respondent and from the claimant. The issues to which this matter gives rise are complex and in the circumstances I ruled that judgment would be reserved. I now set out my reasons for the judgment that I reached.

3. I shall firstly set out the history of the proceedings and the findings of fact that I have made that are necessary to enable me to reach my conclusions. I shall then set out the relevant law and then go on to give my conclusions.

4. Before doing so it may be worth reminding ourselves of the purposes of today's preliminary hearing. The issues for determination are:-

(1) Whether the claimant has presented his complaints alleging unlawful discrimination on the grounds of race, disability and religion or belief outside the time limit provided by section 123 of the Equality Act 2010 and if so, whether it is just and equitable to extend time to enable the Tribunal to have jurisdiction to consider those complaints.

(2) Whether some or all of the claimant's complaints should be struck out under rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 upon the basis that they have no reasonable prospect of success.

(3) In the alternative whether, as a condition of continuing with some or all of his complaints, the claimant should be ordered to pay a deposit upon the basis that those complaints have little reasonable prospect of success.

(4) Whether the claimant should be permitted to amend his claim to include a complaint of detriment and dismissal for having made a public interest disclosure (that being a complaint brought under the Employment Rights Act 1996) and/or a complaint of discrimination upon the grounds of sex (that being a complaint brought under the Equality Act 2010).

History

5. On 1 June 2016 the claimant made contact with ACAS. This was in order to initiate the mandatory early conciliation ('EC') process. Before a claim may be brought before the Employment Tribunal the claimant must invoke the EC process

by contacting ACAS. On 3 June 2016 ACAS issued a certificate certifying that the claimant had complied with the requirements of section 18A of the Employment Tribunals Act 1996.

6. The claimant presented his claim to the Employment Tribunal on 10 June 2016. The respondent presented its response form to the Employment Tribunal on 29 July 2016. The ACAS EC certificate, claim form and response form are at pages 1-27 of the Tribunal's bundle of documents.

7. In his claim form, the claimant said that he was represented by Howells Solicitors. Howells was placed on the record as acting as the claimant's representative. However, on 1 September 2016 Howells wrote requesting to be removed from the record as the claimant's representative. It appears from an earlier email of 17 August 2016 that Howells were acting pursuant to a scheme funded by the Legal Aid Authority restricted in scope to simply advising the claimant and not representing him before the Tribunal. The claimant's evidence (which I accept) is that he made contact with Howells for legal advice on 31 May 2016 (the day before he commenced the EC procedure).

8. The matter came before Employment Judge Franey on 18 August 2016. The claimant sent a letter to the Tribunal on 17 August 2016 (which was forwarded by Howells) to the effect that he was too ill to attend. Due to the funding restrictions under which Howells was operating, they too did not attend. A solicitor acting for the respondent was present at the hearing. Employment Judge Franey ruled that there should be a postponement of the preliminary hearing to 21 September 2016. He identified that the claimant was bringing the following complaints:

(1) Constructive unfair dismissal.

(2) Race discrimination.

(3) Disability discrimination.

(4) Discrimination because of religion or belief.

9. It is perhaps convenient to mention at this stage that the claimant, on page 6 of his claim form ET1, ticked the box to indicate that he was pursuing a claim for 'other payments'. It was subsequently clarified that by this the claimant was not indicating the wish to pursue a claim under any other jurisdiction. He intended this to be a reference to the compensation that he was seeking in the event of the successful pursuit of the other extant claims.

10. The claimant's unfair dismissal claim is founded upon the basis of a constructive dismissal. The claimant resigned from his employment with the respondent by giving one month's notice in a letter dated 16 May 2016 (page 215). The notice was effective from 13 June 2016. It is accepted by the respondent that the unfair dismissal claim has been presented to the Tribunal within the time limit provided for in section 111 of the 1996 Act.

11. The claimant accepted that the several complaints of discrimination were presented to the Tribunal outside the time limit provided by section 123 of the 2010 Act. This is because the claimant was absent from work upon sick leave with effect from 20 May 2015 until the effective date of termination of his contract of

employment on 13 June 2016. The claimant accepted that all of the allegedly discriminatory acts and omissions which he says constitute the unlawful discriminatory conduct upon the part of the respondent occurred before 20 May 2015. It is no part of the claimant's case that there was any allegedly discriminatory conduct after that date during his period of sick leave.

12. By section 123(1) of the 2010 Act proceedings in the Employment Tribunal to determine a complaint of discriminatory conduct in the workplace may not be brought after the end of the period of three months starting from the date of the act to which the complaint relates (which, where conduct extends over a period, is to be treated as done at the end of that period). The height of the claimant's case, therefore, is that the discriminatory conduct extended over a period ending on 20 May 2015. He did not initiate the mandatory early conciliation procedure until 1 June 2016. The relevant limitation period expired on 19 August 2015. The claim was therefore presented over nine months following the expiry of the limitation period. The claimant accepts that the discrimination complaints may only be pursued if the Tribunal extends time upon the basis that it is just and equitable so to do in order to vest the Tribunal with jurisdiction to consider them.

13. At the preliminary hearing heard on 21 September 2016 the claimant presented to the Tribunal and to the respondent’s solicitors some further and better particulars of his claim. These are at pages 39-41. These were prepared by the claimant in reply to a request for further particulars of his claim from the respondent’s solicitors. In addition to giving further particulars of the extant claims the claimant included reference to less favourable treatment related to sex (at page 39) and of detriment and dismissal related to ‘whistle-blowing’. The claimant was therefore intimating a claim of detriment and/or dismissal related to having made a public interest disclosure. These are claims that may be made under Part IVA and section 103A of the 1996 Act. The public interest disclosure claim is set out at page 40.

14. Upon the same page, the claimant sought to explain why he had presented his discrimination claims out of time. In essence, he cited ill health and domestic family issues. I shall deal with both of these aspects later in these reasons.

15. At the preliminary hearing held on 21 September 2016 Employment Judge Holmes ordered the claimant to indicate whether he wished to apply to amend his claim to include complaints related to public interest disclosures. On 9 October 2016 the claimant confirmed that he wished so to do (page 44).

16. After the preliminary hearing of 21 September 2016 the respondent’s solicitors served upon the claimant a second request for further particulars (pages 42 and 43). These were eventually answered by the claimant on 21 February 2017 (pages 228-230). The claimant's claims set out in the second set of particulars were of constructive unfair dismissal and discrimination related to the following protected characteristics:

(1) Sex

(2) Race

(3) Religion or belief

(4) Disability

17. In addition, the claimant included particulars about his public interest disclosure claims. As he confirmed at the preliminary hearing that came before me on 10 March 2017, those encompassed both detriment in employment and constructive dismissal.

18. A further preliminary hearing was held on 8 February 2017 in order to consider the respondent's application for there to be an open preliminary hearing. The respondent wished for there to be such a hearing to decide whether: the discrimination claims had been brought out of time and if so whether time should be extended upon just and equitable grounds; whether any of the claimant's claims should be struck out as having no reasonable prospect of success; in the alternative whether the Tribunal should order a deposit to be paid by the claimant as a condition of him being allowed to continue with them upon the basis that the claims had little reasonable prospect of success; and the status of the claimant's applications to amend the claims to include those upon the grounds of public interest disclosure and sex discrimination. At that preliminary hearing held on 8 February 2017 Regional Employment Judge Robertson ordered there to be an open preliminary hearing to determine all of these issues.

19. It was against this background that the matter came before me on 10 March 2017. As I have already said, because of the issues raised by the claimant and to which I refer at paragraphs 5-7 of the minute of that preliminary hearing (at pages 54-56) the parties consented to an adjournment of the matter to a later date. I gave case management directions in order to ensure the effectiveness of the matter upon the next occasion.

20. The principal reason for the adjournment of the matter on 10 March 2017 was the presentation by the claimant of a report from Dr Moruf Adelekan, Consultant Psychiatrist, dated 23 February 2016. This was at pages 83-95 of the bundle that I had before me in March 2017 and at pages 268-280 of today's bundle. As I observed in paragraph 6 of my minute on the previous occasion, a number of the passages in that psychiatric report were redacted. When the claimant had the opportunity of addressing me upon this issue he referred to very serious family circumstances involving domestic abuse of both him and his infant daughter by his former spouse.

21. The report of 23 February 2016 was presented to the Tribunal in exactly the same form upon this occasion as it had been upon the last occasion. The claimant chose not to present the Tribunal with an unredacted version of the report. Therefore, matters in relation to that report have been taken no further forward. This is unfortunate particularly given that the Tribunal provided protection for the privacy of the claimant and his infant daughter by reason of the Case Management Orders set out at paragraph 8 (at pages 55 and 56 of today's bundle).

22. The only new medical evidence before the Tribunal is that at page 212. This is a letter from the claimant's GP dated 28 July 2015. It was prepared, presumably at the behest of the claimant's solicitors, to assist him with an application for legal aid for a family dispute and was in support of his contention that he had been the victim of domestic violence.

23. The claimant's factual evidence was that he suffered serious mental health issues because of very difficult personal circumstances involving alleged abuse of him and his infant daughter by his former partner, and which arose from a very

difficult relationship with her. His evidence, therefore, was that his mental health issues and difficult domestic circumstances (being the reasons advanced by him for late presentation of his claim) were very much intertwined.

24. The claimant has made an allegation that his former partner gave false testimony to the police on 14 June 2015. This testimony resulted in him being arrested on 25 June 2015 and appearing in court on 26 June 2015. This led to him facing a trial on 14 August 2015 at which he was acquitted. It is not clear with what criminal offences the claimant was charged. At all events, as I say, he was acquitted. Following that acquittal he has sought to persuade the police and the Crown Prosecution Service to prefer charges against his former partner. In the light of their refusal he has sought to institute a private prosecution against her and is currently pursuing a judicial review application arising out of these matters. The claimant has a hearing before the Administrative Court on 13 July 2017. The allegations which he wishes to bring against his former partner are at pages 225-227 supplemented at pages 220-224. Further, the claimant is engaged in proceedings before the Family Court.

25. The Tribunal has little difficulty in finding as a fact that the claimant has had and continued to have very difficult domestic circumstances concerning serious allegations and counter allegations between him and his former partner, and at the centre of which is the child of that relationship.

26. During his time employed by the respondent the claimant raised four grievances. The claimant in fact referred to there being five grievances in total when giving evidence before the Tribunal today.

27. At all events, four of those five grievances are in the bundle. The first grievance is dated 26 June 2014 at pages 87 and 877. The second grievance is dated 13 January 2015 at pages 104 and 105. The third grievance is dated 6 April 2015 and is at page 198. The fourth grievance is dated 23 April 2015 and is at pages 204 and 205.

28. The second grievance at pages 104 and 105 concerned alleged bullying, victimisation and discrimination upon the grounds of disability, sex and race. That grievance was not upheld and on 2 March 2014 the claimant presented his appeal. The appeal is at pages 123-175. At pages 130-133 (being part of the appeal) we see the claimant setting out the respondent's definitions of harassment and bullying, "dictionary definitions" and "ACAS definitions". In the latter, the claimant sets out in some detail his understanding of direct and indirect discrimination, discrimination by association and discrimination by perception. In addition, he describes accurately concepts of harassment, victimisation and the definition of disability within the 2010 Act. It was suggested to the claimant by Mr Dobson that this demonstrated good research skills. The claimant sought to downplay this, saying that he simply cut and pasted from the respondent's and ACAS' websites.

29. I now turn to consideration of the medical evidence. In chronological order the medical evidence before the Tribunal is as follows:

(1) The GP letter of 21 July 2015 at page 212 to which I have already referred. As I have said, this records that the claimant presented at the

surgery on 21 July 2015 with a condition which could be a result of domestic violence.

(2) The report from an Occupational Health adviser of 22 September 2015 at pages 260-263. This says that the claimant is not currently fit to attend work, and although “social issues” are mentioned (at page 261) the Occupational Health adviser does not expand upon these to suggest any impact of them upon the claimant's health.

(3) The report of 23 February 2016 at pages 268-280 to which I have already referred. The diagnosis of Dr Adelekan is that the claimant suffered with an episode of recurrent depressive disorder (being a condition recognised by the World Health Organisation in the 10th edition of its International Classification of Diseases.) The claimant was in contact with Mental Health Services between 19 May 2015 and 29 May 2015. He had told the assessing practitioners that he had suffered with long-term mood issues and was on antidepressant medication for almost five years. He identified work related pressures as the main precipitating factor for this episode. The report says that, “he also admitted that the work related problems had rubbed negatively on his personal life including his relationship with his wife”. Dr Adelekan gave a guarded prognosis. He said, “He suffers with recurrent depressive episodes and would need to be adherent to medications and other prescribed treatments in order to remain well and prevent relapses. However, he did not appear inclined to continue engaging with Mental Health Services as at the time of his discharge in May 2015. If his mental health symptoms are not properly controlled, these could continue to affect his emotional, career and family life”.

(4) A further Occupational Health adviser’s report of 25 May 2016 (pages 218 and 219). The Occupational Health adviser found there to be a substantial mental impairment. In her opinion, the claimant was currently unfit for work and was not expected to be fit for work in the next six months. She noted a history of depression spanning approximately five years. The claimant reported significant long-term personal issues which are unlikely to be resolved in the short-term. She reported that the claimant's mood was “very low last year resulting in him taking excess medication which was then treated in hospital”. He expressed no suicidal ideation but was considered to be preoccupied in trying to make changes to improve his personal circumstances. She noted that the claimant “does a lot of writing about his circumstances and he finds this beneficial”.

(5) The final piece of medical evidence is at page 264. It is a report from a Consultant Neurologist dated 24 November 2016. He refers to a history of depression and anxiety which was formally diagnosed in 2010 and that the claimant attempted suicide in 2015. The clinical diagnosis was of non epileptic attacks and stress related symptoms. There had been no episodes of unresponsiveness since June 2015.

30. In addition to this medical evidence, the claimant said that he was in touch with Mind and other domestic violence organisations. I accept this to be the case. The claimant's account is corroborated by:

(1) A letter from Behind Closed Doors (Prevention and Recovery Service) of 21 August 2015 confirming that the claimant was referred to them and is currently receiving telephone support.

(2) Email exchanges between the claimant and Leeds Mind at pages 241-245.

(3) Email exchanges between the claimant and Relationship Matters at pages 244 and 245.

31. None of the medical evidence presented by the claimant shows that he was incapacitated or sufficiently impaired such that he could not have brought a complaint of discrimination sooner than he did. I do accept that there were times when in reality the claimant was so incapacitated that it would not have been practicable for him so to do. The period shortly before the diagnosis of depressive disorder referred to in Dr Adelekan's report (which period of depressive disorder coincided with the attempted overdose of 18 May 2015 and a period of unresponsiveness) and the period several months after that must have been very difficult for the claimant. That said, there were no episodes of unresponsiveness according to the neurologist's report at pages 264 and 265 after June 2015. The claimant did not engage with Mental Health Services after his discharge following the recurrent depressive disorder in May 2015. Upon the basis of this medical evidence I cannot be satisfied that the claimant was suffering from such a serious mental impairment that he was unable to present a complaint to the Employment Tribunal about a course of discriminatory conduct ending on 20 May 2015 by no later than 19 August 2015.

32. The claimant is plainly an individual with good research skills. Not only were there the employment law references to which I have already referred. The list of allegations which the claimant wishes the authorities to prefer against his former partner again demonstrates impressive research skills (in relation to the criminal law). As we have seen from the chronology (as evidenced by his grievances) the claimant's discrimination complaints extended over a period as shown from the fact of the discrimination complaints raised in the grievance of 13 January 2015. Again, there was no medical evidence to show that the claimant could not have presented his discrimination complaint prior to a period within three months of 20 May 2015 when the course of conduct ended. Viewing matters, therefore, both before and after the conclusion of that course of conduct there is simply insufficient medical evidence to satisfy me that the claimant was incapable by reason of mental impairment of proceeding with his claim in a timely fashion. That said, I must look at the issue in the round and focus not just on the medical evidence but other issues in play at the relevant time.

33. Leanne Davidson's evidence was that key individuals whom the respondent would have wished to call in order to meet the claimant's claims are unavailable or may not cooperate. In particular:

(1) The respondent has had no contact with Emma Wilson since she resigned her position on 7 August 2014. The respondent does have her home address but is unable to guarantee her reply or cooperation in the proceedings.

(2) The respondent does not have information available to be able to indentify Emma Wilson's line manager. That information appears to have been lost following a system upgrade carried out in 2014.

(3) Emma Bilton resigned her position in October 2016. Again, the respondent has a home address but is unable to guarantee her reply or cooperation in the proceedings.

(4) Chris Gregory was dismissed in March 2016 by reason of gross misconduct. The respondent therefore does not consider it feasible to call him as a witness.

(5) Zara Richards left the respondent's employment on 30 September 2016. Again, the respondent has a home address but considers it unable to guarantee her reply or cooperation in proceedings.

(6) Sheila Munroe was assigned to the respondent from the United States and has returned there. She is no longer employed by the respondent and the respondent considers it not to be feasible to call her as a witness.

(7) The respondent accepts that the five individuals referred to in paragraph 19 of Ms Davidson's witness statement are compellable as witnesses as they are current employees of the respondent.

(8) The exception to this is Naomi Brewerton who has been absent from work due to non-work related stress since 15 February 2017. The respondent does not have an indication of the likely return to work date and therefore does not consider it feasible to call her as a witness in these proceedings.

(9) Joey Crone's employment ended on 20 November 2015. The respondent has managed to contact him through social media but cannot guarantee his reply or cooperation in proceedings.

(10) Jodie O'Leary remains an employee of the respondent and will be able to be called as a witness. The respondent is in the same position for Alistair Seyers and Nick Ellyard.

(11) Jane Oldfield resigned on 1 April 2016. The respondent has been able to contact her through social mediation but again cannot guarantee her reply or cooperation in these proceedings.

(12) Finally, Andrea Wilkinson has resigned her position with the respondent but she has confirmed that she is willing to be a witness.

34. The following emerged form the cross examination of Leanne Davidson by the claimant:-

(1) The claimant said that he had been able to indentify Emma Wilson's line manager and offered a name to Leanne Davidson.

(2) The claimant said that he had managed to locate Emma Bilton through social media.

(3) It was suggested that because Zara Richards works for an organisation that provides services to the respondent she would be prepared to cooperate and attend as a witness.

(4) The claimant took issue with Ms Davidson's evidence that Jane Oldfield had resigned her position from the respondent based upon what she (Jane Oldfield) said on her LinkedIn profile. Ms Davidson said that she may not have updated that.

35. Leanne Davidson conducted her investigation into the circumstances of the individuals named between paragraphs 5 and 34 of her witness statement (summarised in paragraph 34) upon the basis of the claimant's second further particulars of claim at pages 228-230. While some of those named remained in the respondent's employment it is the case that some have left but would have been there to give evidence had the claimant brought his claim in good time. That said, Emma Wilson resigned on 7 August 2014 which is in my judgment much sooner that it was reasonable to anticipate the claimant presenting his claim. Indeed, for today's purposes, I take the claimant's case at its height and proceed upon the basis that the course of conduct of which he complains ended on 20 May 2015. The limitation period had thus not expired by the time of Emma Wilson's departure from the respondent. Had he presented the claim in time the respondent would therefore have been in the same position with reference to Emma Wilson and has not therefore shown any prejudice by reason of the late presentation of the claims arising from her non- availability.

36. The same cannot be said, however, for Emma Bilton, Chris Gregory, Zara Richards, Joey Crone and Jane Oldfield.

37. I hold that the prejudice to the respondent around an apparent inability to identify Emma Wilson's line manager is caused not by the delay in the claimant presenting his complaints but by reason of the performance system upgrade in 2014 before the period within which it was reasonable for the claimant to present his claim and before the limitation period had even expired.

38. In summary, therefore, I am satisfied that the delay in the presentation of the claim has prejudiced the respondent in that a number of individuals who would have been in their employment had the claim been presented in time have now left. With the exception of Sheila Munroe who is overseas it is certainly possible that the respondent may obtain the cooperation of those individuals. However, the late presentation of the claims has undoubtedly made the respondent's position more difficult than it otherwise would have been.

39. After he went on sickness absence leave on 20 May 2015 the claimant received sick pay from the respondent in accordance with the respondent's sickness policy. The claimant's sick pay entitlement was exhausted in January 2016.

40. Before the claimant took his final period of sick leave commencing on 20 May 2015 he was absent on sick leave between 28 August 2014 and 15 September 2014 and between February 2015 and 30 April 2015. He therefore returned to work for a very short time in early to mid-May 2015. In relation to these two earlier periods of sick leave, the claimant exhausted his contractual sick pay entitlement on 3 April 2015. However, the respondent exercised discretion to extend payment of sick pay until 30 April 2015. The claimant was notified of this by a letter from a member of the HR team dated 30 April 2015 (at pages 206 and 207).

41. We have already referred to the claimant's letter of resignation which is at page 215. The letter is addressed to Mr Ellyard. The claimant says:-

> *"This letter is my letter of resignation. I do not feel that I need to go into the specifics as you will be well aware of this started and finished. The sensible thing for me to do is resign as it relieves me of fewer things to worry about. I am giving you whatever notice period that I am required to give you. Please could you also arrange and sort out any holiday pay that I am owed since February 2015 till my last day of employment. I am aware that I am entitled to this because I have been unable to take these holidays due to sickness. Thank you for your support and approachability while I have been dealing with you."*

42. In the first set of further particulars the claimant says (at page 40):-

> *"I do not know why I resigned when I did. I believe it was the first time I actually looked at my situation regarding employment and realised I was not going back. The business could have sacked me but I never did anything wrong which could be considered misconduct let alone gross misconduct."*

The Law

43. I now to a consideration of the relevant law. I have already touched upon the statutory provision regarding time limits for the bringing of discrimination claims under the 2010 Act. The relevant provisions are at section 123. Time limits in Employment Tribunal claims are enforced strictly. The presumption is against extending time. The burden is upon the claimant to show exceptional reasons for extending time. The Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it thinks relevant. When considering whether to extend time on just and equitable grounds Tribunals may find it useful to refer to the factors set out in **British Coal Corporation v Keeble [1997] IRLR 336**. These include the length and reasons for delay, the extent to which cogency of evidence was likely to be affected by delay, the promptness with which the claimant acted once he knew of facts giving rise to the cause of action and steps taken by the claimant to obtain appropriate professional advice.

44. The Tribunal has power to strike out all or part of a claim or a response to a claim if it considers the claims have no reasonable prospect of success. This power is provided at rule 37(1)(a) of schedule 1 to the 2013 Rules. When considering whether or not to strike a matter out as having no reasonable prospect of success the proper question is not whether the claim (or defence as the case may be) is likely to fail or whether it is possible that it will fail; nor is it a question of considering

whether or not the other party is likely to be able to establish as facts those matters set out in their pleaded case. The Tribunal must consider upon the basis of the material before it whether there are no reasonable prospects of the claim or defence succeeding. This will normally involve looking at the contentions of a party responding to such an application and taking them at their height.

45. Upon a complaint of constructive dismissal the claimant must show that the respondent was in repudiatory breach of the contract. An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract,. Conduct is repudiatory if viewed objectively it shows an intention no longer to be bound by the contract.

46. There must be acceptance of the repudiation of the contract in order for it to be terminated. Unilateral repudiation of the contract by the employer does not terminate the contract of employment until accepted by the employee. The employee must resign in response at least in part to fundamental breaches by the employer. The employee must make up his mind to leave soon after the conduct of which he complains. If he continues for any length of time without leaving he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged. Therefore, where one party commits a repudiatory breach of contract the other can choose either to affirm the contract and insist on its further performance or can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses and once he affirms the contract his right to accept the repudiation is at an end.

47. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract but if prolonged it may be evidence of affirmation. Affirmation can be implied if the employee calls on the employer for further performance of the contract, since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the employee himself does acts which are only consistent with the continued existence of the contract such acts will normally show affirmation of the contract.

48. Provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time. An employee does not affirm the contract by delaying a few weeks before acting upon the breach in order to find alternative employment.

49. The act of continuing to receive sick pay is consistent with affirmation. Mr Dobson drew my attention to **Fereday v South Staffordshire NHS Primary Care Trust (EAT/0513/10)**. In that case, the claimant was absent through ill health. Following repudiatory beaches of contract upon the part of her employer she called upon that employer to continue to perform their contractual obligations by paying her sick pay.

50. The respondent seeks, as an alternative to a strike out of the constructive unfair dismissal complaint, an order from the Tribunal that the claimant be ordered to pay a deposit as a condition of continuing with that claim. When considering whether to make a deposit order the Tribunal is entitled to have regard to the likelihood of the claimant being able to establish the facts essential to his case and

reach a provisional view as to the credibility of the assertions being advanced. There is greater leeway upon considerations that pertain to a deposit order than there are for the more draconian sanction of strike out.

Claimant's amendment applications

51. I now turn to consider the relevant principles pertaining to the claimant's amendment applications. It will be recalled that the claimant has applied to amend his complaint to pursue sex discrimination and public interest disclosure claims. Mr Dobson said in paragraph 4 of his written submissions that if the Tribunal is with the respondent (and consequently time is not extended to consider the discrimination claims and the constructive unfair dismissal claim is struck out) then it is axiomatic that the amendment applications will fall away as there can be no amendment of an existing claim for which there is no jurisdiction.

52. The principles relevant to whether an amendment should be allowed or not are set out in **Selkent Bus Co v Moore [1996] ICR 836**. The Tribunal should take into account all of the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Amendment applications can vary from simply the correction of clerical and typing errors on the one hand to the making of entirely new factual allegations changing the basis of existing claims on the other. If a new complaint or cause of action is proposed to be added by way of amendment the Tribunal must consider whether the complaint is out of time. However, that is not determinative. What must be considered is the timing and manner of the application. Delay in making the application is one of the factors to be taken into account. The paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.

53. An application to amend must identify the facts being relied upon and the cause of action sought to be added. An unclear application to amend is doomed to fail.

54. Upon the protected disclosure claim (were it to be allowed to proceed) it is for the claimant to satisfy the Tribunal that there has been disclosure of information which is a qualifying disclosure. It must therefore be a disclosure of information that in the reasonable belief of the employee making the disclosure is made in the public interest and tends to show one or more of the six matters (or 'relevant failures' as they are sometimes known as) referred to in section 43B(1) of the 1996 Act. A distinction is to be drawn between information on the one hand and an allegation on the other. The provision of information is the conveying of facts as opposed to an allegation (whether based upon those facts or not).

Conclusions

55. I now turn to my conclusions. I shall start with the limitation issue as it relates to the extant discrimination complaints (in other words, those other than the complaint of sex discrimination sought to be added by way of amendment). By way of reminder, the continuing course of conduct said to constitute unlawful discrimination ended when the claimant went on sickness absence from 20 May 2015. The time limit therefore expired on 19 August 2015. The claimant did not

initiate the early conciliation process or submit his claim to the Tribunal until early June 2016 which is in excess of nine months out of time.

56. In these circumstances, therefore, it is for the claimant to show exceptional reasons to persuade the Tribunal to depart from the strict enforcement of the time limit in section 123 of the 2010 Act. The claimant gives as the reason for the delay the interlinked issues of his mental health and his difficult domestic circumstances. I have already determined that the medical evidence is of little help to the claimant in persuading me that he could not have presented his complaint to the Employment Tribunal must sooner than he did. Quite simply, there is no medical evidence that he was suffering from a mental impairment such as to have prevented him from presenting his claim within the primary three month limitation period which started to run on 20 May 2015. There is nothing which explains away from a medical perspective a delay of in excess of nine months.

57. I accept that the claimant has been involved in difficult criminal and family litigation. The claimant told the Tribunal that family law proceedings began around May 2015. Shortly after that, the claimant found himself arrested and then facing a criminal trial which took place on 14 August 2015. Since then the claimant has, as I have said, sought to bring or influence the bringing of criminal proceedings against his former partner.

58. The claimant was in contact with Mental Health Services between 19 and 29 May 2015 and experienced sporadic episodes of unresponsiveness around June 2015.

59. I have already said that the medical evidence is insufficient to warrant a finding that for medical reasons alone the claimant was incapable of filing proceedings before 19 August 2015. However, when I take into account the other factors (being the family and criminal litigation which were at their most intense between May and August 2015) I find myself persuaded that the claimant has shown good reason for not presenting the complaint before 19 August 2015. On any view, the claimant was going through an extremely stressful time over this period. The difficulty for the claimant, however, is that he then waited over nine months from the date of expiry of the limitation period before presenting his claim. There is simply no good medical explanation for a delay of this magnitude. There is also no good explanation arising from the non-medical issues and factors advanced by the claimant. Following the acquittal in the criminal proceedings, the claimant has been set upon instituting criminal litigation against his former partner. He has also continued to engage in the family law proceedings. There is no good reason in my judgment why the claimant could also not have attended to Employment Tribunal litigation within a reasonable time following the acquittal. I have already passed comment upon his research skills in connection with his grievances. In conclusion, therefore, I find the claimant not to have shown good reason for the delay.

60. It is difficult not to have sympathy for the claimant and the concerns that he had not only for himself but also for his child. However, Parliament has legislated short limitation periods for employment matters. Those time limits are strict and can only be displaced if the employee seeking an extension of time shows a good reason so to do.

61. I am also satisfied, upon the evidence, that the cogency of the evidence that would be advanced before the Employment Tribunal at a subsequent hearing has been adversely affected to the prejudice of the respondent. It is the case that not all of the relevant evidence has been adversely affected. Some evidence from witnesses is still available to the respondent but some of those identified by the claimant as discriminators are no longer in the respondent’s employment. This is to the prejudice of the respondent as a timeous claim would have enabled those witnesses to be advanced by the respondent in defence of the claimant's actions. The position now is not so certain.

62. The claimant's evidence is that he was unrepresented in the family law proceedings that commenced in May 2015. It was suggested that he could have sought legal advice about the employment claim much sooner than he did. The claimant said that it was a matter of “capability and mental ability as to what you are capable of dealing with”. In reality, this aspect of the matter follows the findings that I have made about the length and reasons for delay. I accept that it would have been difficult for the claimant to have contemplated going to see a solicitor about his employment issues between May and August 2015. However, once the criminal litigation was behind him in my judgment he could have much sooner sought legal advice and certainly prior to 31 May 2016. There was no suggestion that he was unaware of the facts giving rise to his claim. In fact, on the contrary, he had known of them from May 2015.

63. In conclusion, therefore, I hold that there is no good reason to extend time. The extant discrimination claims were presented out of time and accordingly the Tribunal has no jurisdiction to consider them. They stand dismissed accordingly.

64. I now turn to the constructive unfair dismissal complaint. At its height, the claimant's case upon this is that he does not know why he resigned. I refer again to the relevant passage on page 40. This is a most unpromising beginning for a constructive unfair dismissal complaint in circumstances where it is for the claimant to show that the respondent was in repudiatory breach of contract and that he elected to accept the repudiatory breach and treat himself as discharged. It is difficult to see how a constructive dismissal complaint can have any reasonable prospect of succeeding in circumstances where the claimant does not know the basis upon which he decided to resign.

65. An even greater difficulty for the claimant is the issue of affirmation. The alleged breaches ceased on 20 May 2015 when the claimant went on long-term sick leave. There is no evidence that the claimant was so unwell that he was unable to or lacked capacity to decide whether or not to resign.

66. Proceeding upon the basis that the alleged discriminatory acts constitute the fundamental breaches, then it is plain on any view that the claimant called upon the respondent to continue to perform the contract. He did this by virtue of the respondent paying sick pay and the claimant accepting that pay. There were two periods of sick pay. The acceptance by the claimant of sick pay for the period between February 2015 and 30 April 2015 constitutes affirmation of the contract by the claimant and the waiver of any fundamental breaches as he may be able to establish that occurred prior to February 2015. The same principles apply in relation to the second period from the claimant accepted sick pay from the respondent. He did so up to January 2016. It is my judgment that these are acts inconsistent with the

acceptance by the claimant of a repudiatory breach upon the part of the respondent. On the contrary, they evidence affirmation. The claimant has therefore waived his right to claim that he was constructively dismissed.

67. In these circumstances, it is my judgment that the claimant's complaint that he was constructively dismissed by the respondent has no reasonable prospect of succeeding. It is the case that a strike out is a draconian sanction as it effectively drives the party on the wrong end of a strike out order from the judgment seat. However, the Tribunal is empowered to strike out those cases which have no reasonable prospect of succeeding. Upon the basis of the claimant's pleaded case at page 40 and upon the basis of the unarguable factual basis concerning the claimant's acceptance of sick pay over two periods the constructive dismissal claim does stand no reasonable prospect of succeeding. It is therefore dismissed.

68. This renders the amendment application academic and otiose. Mr Dobson is correct to say there can be no amendment of an existing claim for which there is no jurisdiction.

69. However, I shall deal with the amendment issues for the sake of completion. Upon the public interest disclosure claim, no explanation has been advanced by the claimant as to why this was not included with the ET1 presented on 10 June 2016. Insofar as the claimant alleges that he suffered a detriment for having raised a qualifying disclosure, undoubtedly those complaints are out of time for the same reason as were the discrimination complaints.

70. The public interest disclosure matters referred to on page 40 appears to relate to three issues. These were described by the claimant as follows:-

- *"From day one I had spoken up and reported minor issues which relate to the day-to-day running of the office which affected others. I would wait to see if it was a one off issue; if it was not then I would report it as the behaviour of some of those individuals affects the lives of others.*

- *I was pre-warned by other employees when I started of the conduct of managers and there is no point in speaking up because non-one listens.*

- *Just before I went off sick I raised major issues regarding the conduct of numerous managers and how they were abusing their power or doing things which were illegal or not doing their jobs. This was raised all the way to the top of the business (Shelia Munroe based in the US) but this did not resolve anything it actually got worse for me."*

71. The first two of these issues do not appear to relate to the relaying by the claimant of information tending to show one or more of the six relevant failures. The claimant refers to reporting only "minor issues". He appears therefore to face an insurmountable hurdle in seeking to show any public interest element in such matters, they being minor in nature. The second bullet point above refers to individuals providing information to the claimant rather than him providing information to others. The third issue refers to the claimant raising "major issues" just before he went off sick. It is not clear which period of sick leave the claimant is referring to, but assuming it to be the latter then, again, the complaint has been presented to the

Tribunal outside the relevant time limit. Although not determinative upon an amendment application it is a matter that I must take into account.

72. It is, frankly, difficult to understand to what issues the claimant is referring in the passage that I have just quoted. The passage is unclear. It is also unclear whether the claimant simply wishes to claim detriment for having made a public interest disclosure or whether he is somehow seeking to link those matters to his subsequent decision to resign. If he does seek to make that link then again he faces the formidable issue around affirmation to which I have just referred.

73. In the second further and better particulars the claimant expands upon the public interest disclosure issues at page 229. He names individuals involved in the issues. Some of those no longer work for the respondent and therefore upon that aspect of the matter the balance of prejudice when considering the amendment application favours the respondent.

74. The claimant refers to having made a disclosure about illegal activity upon the part of the respondent in seeking to collect statue barred debts. Although seeking so to do is not unlawful (it being for the defendant to such a claim to raise a limitation point upon a claim of breach of contract to which the Limitation Act 1980 applies), I can accept that in the reasonable belief of the claimant that may have constituted illegal activity. The claimant is not a lawyer.

75. However, when considering an amendment application the Tribunal is able to look at the merits of the claim sought to be added. Again, one comes back to the issue that the claimant faces formidable difficulties as any detriment said to arise from the alleged disclosure of illegal activity ceased in May 2015 and is thus well out of time, and insofar as that detrimental treatment was said to be a repudiatory breach the claimant has affirmed the contract of employment in any event and therefore waived the right to complain of constructive dismissal.

76. I now turn to the sex discrimination claim. Again, no explanation is advanced by the claimant as to why such a complaint was not included when the ET1 was presented. The complaint is in any event significantly out of time as were the other complaints of discrimination. The same prejudice arises as far as the respondent is concerned. Further, the allegation appears to be no more than a bare assertion that female employees were treated more favourably than male employees. The sex discrimination complaint is so vague as to be a matter to which it is impossible for the respondent to give a meaningful response.

77. In conclusion, therefore:-

(1) The discrimination complaints included in the ET1 when it was presented to the Tribunal are out of time and it is not just and equitable to extend time to vest the Tribunal with jurisdiction to entertain them.

(2) The complaint of constructive unfair dismissal has no reasonable prospects of success and is dismissed.

(3) Although otiose, the Tribunal would have dismissed the applications to amend in any event.

(4) The alternative application by the respondent for an order that the claimant pay a deposit as a condition of continuing with the claims need not be considered.

Employment Judge Brain

Date 22 August 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

24 August 2017

FOR THE TRIBUNAL OFFICE