Case Number: 2300270/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS (sitting alone)**

BETWEEN:

Ms O Adekoya-Ajayi

Claimant

AND

St George's University Hospital NHS Foundation Trust

Respondent

ON: **17 January 2019**

Appearances:
For the Claimant: **Mr W Brown, Solicitor**
For the Respondent: **Ms T O'Halloran, Counsel**

REASONS FOR JUDGMENT DATED 17 JANUARY 2019 PROVIDED AT THE CLAIMANT'S REQUEST

1. On 20 January 2018 the claimant filed a claim of unfair dismissal with the Tribunal. This preliminary hearing was listed to consider the claimant's application (made on 14 June 2018) to amend her claim by adding section 15 and section 20 claims under the Equality Act 2010 ("the 2010 Act"). Mr Brown confirmed that the unfair disability claim was being withdrawn and accordingly a dismissal on withdrawal Judgment was given in that respect.

2. I heard evidence from the claimant on the issue of time limits, was referred to a bundle of documents and heard helpful submissions from both representatives.

Relevant law

3. The Tribunal has power to grant leave to amend a claim under its general case management power in rule 29 of the Employment Tribunal Rules of Procedure 2013. Guidelines for exercising that power are set out in the decision of the EAT in Selkent Bus Co Ltd v Moore ([1996] IRLR 661). The matters for consideration are:

a. the nature of the amendment, whether it is minor or substantial;
b. where the claimant proposes to include a new claim by way of amendment, the Tribunal must have regard to the relevant time limits and, if the claim is out of time, to consider whether the time should be extended under the appropriate statutory provision; and
c. the timing and manner of the application

4. It was emphasised in Selkent that

> "…the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment"

and that

> "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".

Accordingly, this is a balancing exercise and one to be done always in the context of the overriding objective.

5. As for the timing of the application, although delay in itself should not be the sole reason for refusing an application, the Tribunal should nevertheless consider why it was not made earlier and why it is now being made, for example, whether it was because of the discovery of new facts or new information appearing from documents disclosed on discovery. Further in Evershed v New Star Asset Management Holdings Ltd (UKEAT/0249/09/CEA) it was stated that

> "it is not the business of the tribunal to punish parties (or their advisers) for their errors. In very many, perhaps most, cases where permission is given to amend a pleading, the party in question could if he had been sufficiently careful have got it right first time round".

6. A distinction can be drawn between amendments which add or substitute a new claim arising out of the same facts as the original claim and those which add a new claim which is unconnected with the original claim and therefore would extend the issues and the evidence. In TGWU v Safeway (UKEAT/0092/07/LA) it was stated that

> "… amendments that involve mere re-labelling of the facts already pleaded will in most circumstances be very readily permitted".

7. The relevant time limits referred to above are that any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the 2010 Act).

8. The burden is on the claimant to convince the Tribunal that the discretion to extend should be exercised (Robertson v Bexley Community Centre [2003] IRLR 434). The Tribunal has a very wide discretion in determining whether to do so, it is entitled to consider anything that it considers relevant subject however to the principle that time limits are exercised strictly in employment 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.

9. The Court of Appeal in Chief Constable of Lincolnshire Police v Caston ([2010] IRLR 327) has confirmed that when considering this discretion, Tribunals should adopt as a checklist the factors mentioned at section 33 of the Limitation Act 1980. Namely the balance of prejudice together with all the circumstances of the case including:
    a. the length of and reasons for the delay;
    b. the extent to which the cogency of the evidence is likely to be affected by the delay;
    c. The extent to which the party sued had cooperated with any requests for information;
    d. The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and
    e. The steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action.

10. If a claimant argues that he was ignorant of his right to bring a complaint, the Tribunal has to consider whether it was reasonable for him to have been ignorant and to have remained so throughout the primary time limit (Perth and Kinross Council v Townsley EATS 0010/10).

Relevant Facts

11. Having assessed the submissions and all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.

12. The claimant was employed by the respondent in its medical HR team. She was dismissed with an effective date of termination of 31 August 2017 although her appeal against dismissal was not heard until 26 October 2017. She was still engaging in email correspondence with the respondent as late as 21 November 2017.

13. The claimant was represented by her union throughout the internal capability process. Although they declined to assist her with the Tribunal claim, the union did advise her that if she wanted to pursue a claim she had to first go to ACAS. The claimant's evidence was that she also thinks that they said something to her about time limits.

14. The claimant did get in touch with ACAS and the conciliation period commenced on 7 September 2017 and concluded on 21 October 2017. The claimant's evidence was that at some point the conciliator told her, and it seems likely that this would be at the end of the conciliation period, that if she was going to Tribunal she would have to get her form in as soon as possible.

15. The claimant had access to the internet at home and was capable of doing relevant research herself.

16. The claimant started a new temporary but full-time job some time in October 2017.

17. The primary limitation period expired on 30 November 2017. The extended limitation expired on 13 January 2018 and accordingly when the claim form was

filed on 20 January 2018 it was one week late. The claimant told me that she had been working on the claim form for some time doing a little bit at a time. She described her general mental state as poor both because of long-standing depression issues for which she said she was on medication (although there was no evidence before me of that and her GP's letter upon which she relied did not give any detail of the extent of her depression or its impact upon her) and also because, sadly, she suffered the bereavement of a parent in June 2017. It is also clear that the claimant suffered and had been suffering for some time some physical pain in her shoulder and/or arm.

Conclusion

18. By reference to the factors set out in Selkent, I am satisfied that - with the exception of time limits - they are either neutral or go in favour of the claimant and suggest allowing the amendment. I accept Mr Brown's submission that the very detailed account given in the claim form includes all of the underlying facts relevant to the proposed disability claims and that this application amounts to a relabelling exercise rather than bringing in new factual matters. I also agree with him that the balance of prejudice is such that the claimant is more prejudiced by being denied the opportunity to bring her claim than the respondent is by being forced to defend it. In saying that I do not for the moment to minimise the impact on the respondent, a publicly funded body, of having to defend claims of this nature but there are very good public policy reasons why discrimination claims are important and are to be dealt with accordingly.

19. As indicated, however, I do regard the time limit points as significant. I do not doubt that the claimant was suffering from some form of depression (whether in the clinical sense or not) in the relevant period although in the absence of medical evidence I cannot form a view on how medically significant it was. I also have no doubt that she was affected by her then recent bereavement. However, it is clear that she was capable of engaging in detail with the required processes both in terms of her internal employment issues and those that she needed to take in order to bring a claim i.e. engaging with ACAS and then obtaining, completing and submitting a claim form. Also, during the period in which the time limit was running she applied for, obtained and started full-time work.

20. These matters lead me to conclude that the impact of her undoubted difficulties on her state of mind was not such that she effectively could not take the steps that were required to protect her position. Critically she was aware that there were time limits running against her and had been expressly told by ACAS that she should submit the form as soon as possible. Indeed when answering Miss O'Halloran's questions, the claimant indicated that although in October 2017 she still felt unwell she was drafting and checking emails because she 'had no choice' and 'had to do it'. The same could be said in respect of complying with time limits.

21. Accordingly, even though the just and equitable discretion is a broad one, it is not without limits and I conclude that in all the circumstances it is not appropriate to exercise my discretion in favour of the claimant on that issue. Importantly, even if she had ticked the disability discrimination box when she completed the claim form when it was first submitted, she would at that point have already been out of time

and of course by the time this application to amend was made at least another six months had gone by (although it seems her lawyers acted promptly when they were instructed).

22. Therefore, even though the other Selkent factors go in the claimant's favour, I consider the time point to be so fundamental that I do not allow her application to amend to bring in the disability claims.

23. For the avoidance of doubt, in making this decision I have not formed or taken into account any view on the merits of the proposed disability discrimination claims as I have not heard evidence regarding them.

24. As the unfair dismissal claim has been withdrawn, this brings these proceedings to a close.

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Employment Judge K Andrews
Date: 12 March 2019