EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Hoque	v	**HM Revenue and Customs**

PRELIMINARY HEARING

Heard at: London Central **On: 24 May 2019**

Before: Employment Judge Elliott

Appearances:

For the Claimant: **Mr S Rahman, counsel**

For the Respondent: **Ms L Robinson, counsel**

JUDGMENT ON PRELIMINARY HEARING

1. The claim for discrimination arising from disability is dismissed upon withdrawal.
2. The reasonable adjustments claim is out of time and the tribunal has no jurisdiction to hear it.

REASONS

1. This decision was given orally on 24 May 2017. The respondent requested written reasons.

2. By a claim form presented on 2 May 2017, the claimant Mr Bokhtiar Hoque brought claims of unfair dismissal and disability discrimination. The claimant worked as an Intelligence Officer for the respondent HMRC.

3. A preliminary hearing took place on 5 July 2017. The claimant was ordered to provide his medical records to the respondent on the disability issue and to provide some further particulars of his claim. The order for production of medical records was subsequently stayed.

4. The claim was stayed from July 2017 to February 2019 due to the need to wait for criminal proceedings to conclude. The stay was lifted by Regional Judge Potter on 5 February 2019.

5. The unfair dismissal claim was dismissed on withdrawal on 6 February 2019.

6. A second preliminary hearing took place on 14 March 2019 before Employment Judge Glennie. The claimant was ordered to provide further and better particulars. He provided a Scott Schedule setting out his reasonable adjustments claim but had not clarified how he put his claim under section 15 Equality Act. Counsel for the claimant was asked to clarify this and to take instructions during a break.

7. Judge Glennie ordered that the legal and factual bases of the claim be set out. Mr Rahman for the claimant represented the claimant at that hearing. The respondent agreed when we looked in to it, that it had not been particularised. It had been overlooked. After the break of 45 minutes counsel for the respondent was still not able to explain the section 15 claim and a further break was taken of 15 minutes for further instructions to be taken.

8. After that break the claimant said that the section 15 claim was withdrawn and I confirmed it would be dismissed on withdrawal. The primary claim was said to be one for reasonable adjustments.

9. Counsel for the respondent said at the outset of this hearing that disability was not admitted. This hearing was approached on the basis that the claimant would meet the test for disability but it is not conceded by the respondent.

The issues for this preliminary hearing

10. The issues for this preliminary hearing were identified at the preliminary hearing before Employment Judge Glennie on 14 March 2019 as follows:

    a. Whether to strike out the claim on grounds that the claims have no reasonable prospect of success or alternatively for a deposit order on grounds that it has little reasonable prospect of success.

    b. Whether the complaints or any of them were presented out of time.

    c. If the complaints or any of them are out of time whether it would be just and equitable to extend time.

Witnesses and documents

11. The tribunal heard from the claimant.

12. There were skeleton arguments from both parties to which they spoke. All submission including oral submissions were fully considered including the authorities even if not referred to expressly below.

13. There was a bundle of documents of about 150 pages produced by the respondent.

The reasonable adjustments claim

14. There were three parts to the reasonable adjustments claim shown in the Scott Schedule at page 63 of the bundle. In short form (this not being a substitute for the way they are set out in the Schedule) they were: (i) the claimant being responsible for Fiscal Crime Liaison Officers (FCLOs) in terms of providing them with administrative support and dealing with correspondence, the disadvantage being that this was highly demanding and busy and the lack of additional work aids made this very difficult for the claimant; (ii) the need to maintain a knowledge of FCLO capabilities in post and undertake a significant amount of data processing and other tasks, which caused mental and physical strain to the claimant and (iii) asking him to be a deputy key holder for Brent keys, when he says his condition affects his memory and decision making. The adjustments he sought were set out in his schedule. All the adjustments related to the way in which he performed the duties of his job role.

Findings on the preliminary issues

15. The claim form was presented on 2 May 2017. The effective date of termination was 20 January 2017. The dates of Early Conciliation were from 17 March 2017 to 3 April 2017.

16. The respondent accepted that so far as the claim relates to dismissal it is within time. It was also agreed that the suspension date was 24 November 2015. The claimant did not go back to work after he was suspended and he was dismissed on 20 January 2017.

17. HMRC is responsible for the collection of taxes and the prosecution of offences including tax evasion. On 17 November 2015 the claimant was arrested in relation to money laundering, tax credit fraud, income tax evasion and mortgage fraud. As a result of this he was suspended on 24 November 2015.

18. The outcome of a criminal investigation was provided to the claimant's line management for consideration of disciplinary charges. An investigation report dated 30 November 2016 recommended a disciplinary hearing.

19. The disciplinary hearing took place on 21 December 2016. The disciplinary officer found the disciplinary charges proven and the claimant was dismissed for gross misconduct. The claimant was given a right of appeal. His appeal was heard on 1 March 2017. The decision to dismiss was upheld.

20. The claimant said at this tribunal hearing that he pleaded guilty to the criminal offences. The unfair dismissal claim was withdrawn.

21. During his suspension the claimant raised a grievance on 5 July 2016 about his performance review. The review was completed while he was on suspension. The claimant's case was that if he had been given reasonable adjustments he would not have been in the "*must improve*" category. The grievance outcome was given on 27 January 2017 (page 127). The grievance was upheld and a number of recommendations were made including changing the claimant's end of year marking, a new display screen assessment and monthly two-way

performance discussions. The grievance outcome was therefore that some adjustments were necessary.

22. The claimant's evidence was that whilst he was on suspension he was still employed by the respondent and felt that he could only make a claim once he left his employment. He said that after his employment he "*initiated enquiries to bring a claim and did everything without delay*". In evidence he said that those enquiries were via ACAS after he received his dismissal letter. He also took advice through a legal service provided for employees of HMRC. He could not remember the name of this service.

23. It is also not in dispute that the claimant had an OH assessment and a display screen assessment on 30 October 2014 as a result of which adjustments were recommended. The claimant's case is that they were not made. The respondent does not concede this, but for the purposes of this hearing, made submissions on the basis that they were not made (without conceding the point).

24. During his suspension for a period of 15 months, the claimant dealt with criminal proceedings, disciplinary proceedings and grievance proceedings. He had a solicitor at least at some point during the criminal investigation. Although disability is not admitted by the respondent, the claimant's medical condition did not preclude him from conducting and taking part in those respective proceedings during his suspension.

The relevant law

25. The relevant law on strike out and deposit orders is found in Rules 37 and 39 of the Employment Tribunal Rules of Procedures 2013.

Rule 37
(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a) that it is scandalous or vexatious or has no reasonable prospect of success;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

Rule 39
(1) Where at a preliminary hearing ….the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

26. In ***Anyanwu v South Bank Students' Union 2001 ICR 391*** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full

examination to make a proper determination. It may be necessary to determine whether discrimination is to be inferred.

27. In ***Balls v Downham Market High School and College 2011 IRLR 217*** the EAT said that the test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test. If can be unfair to strike out if there are crucial facts in dispute and there has been no opportunity to test the evidence. Strike out is a draconian power.

28. In ***Ezsais v North Glamorgan NHS Trust 2007 IRLR 603*** the Court of Appeal said that it would only be in exceptional cases where it would be appropriate to strike out a claim when material facts are in dispute.

29. Section 123 of the Equality Act 2010 provides that:

> *(1) Subject to section 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

30. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

31. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96***. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a

policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

32. In ***Aziz v FDA 2010 EWCA Civ 304*** the Court of Appeal affirmed the principle that in considering whether separate incidents formed part of an act extending over a period, a relevant but not conclusive factor was whether the same individuals or different individuals were involved in those incidents.

33. In ***JobCentre Plus v Jamil EAT/0097/13*** the claimant sought a reasonable adjustment of working from a job centre nearer to her home; there had not been a refusal of a transfer in the three months prior to presenting her ET1, but the EAT upheld the finding of the ET that the duty to make a reasonable adjustment continued and it was the respondent's obligation to consider throughout the remaining period how it should be discharged. The EAT (Langstaff P) said in relation to ***Hendricks*** and the time limit, that where there is a duty which is a continuing duty it requires to be fulfilled on each day that it remains a duty (judgment paragraph 25). The claimant accepts that ***Jamil*** is not a suspension case.

34. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

35. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050*** the Court of Appeal said in relation to the time limit in section 123 EqA as follows:

> *Section 123(3) and (4) determine when time begins to run in relation to acts or omissions which extend over a period. In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to s 20(3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit would already have expired.*

36. In ***British Coal Corporation v Keeble 1997 IRLR 336*** the EAT said that in considering the discretion to extend time:

> *It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –*
>
> *(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 plaintiff acted once he or she knew of the facts giving rise to the cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

37. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather that the rule - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

38. The decision of the Court of Appeal in ***Apleogun-Gabriels v London Borough of Lambeth 2001 IRLR 116*** makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal process.

Conclusions

39. Both parties said in relation to the time point that they had not been able to find an authority on the effect of a suspension on a time limit issue such as this. It was accepted on behalf of the claimant that whilst ***Jamil*** referred to a continuing obligation throughout employment, this was not a suspension case. What the ET found in ***Jamil*** (ET decision set out in paragraph 5 of EAT's judgment) was that the employer had a policy of refusing to allow the claimant to transfer to work in Uxbridge.

40. The claimant's case is that the failure to make the reasonable adjustments, which involved adjusting the duties of his job so that he could perform better, was an ongoing and continuing act to the point of dismissal. The claimant's submission is that it was not until the respondent dismissed him, that he knew that they were not going to make the adjustments. If the claimant is right on that submission, he is within time and there is no need to consider whether it is just and equitable to extend time.

41. The respondent submitted on the ***Abertawe*** case (above), that it should have become clear to the claimant after a period of 6 months following his OH assessment and display screen assessment on 30 October 2014, that the respondent was not going to do it. I make it clear that the respondent does not accept that it did not do what was required, but made this submission for the purposes of the time point argument. The respondent said that the claimant should have known by 30 April 2015 that the adjustments he sought were not happening and time began to run from that date. Primary limitation on the respondent's case therefore expired on 29 July 2015 and the claim was not issued until 2 May 2017.

42. The respondent said that if they were wrong about this then time ran from the date of suspension on 24 November 2015, thus the primary time limit expired on 23 February 2016. The claim was therefore at best 15 months out of time.

43. The respondent also submits that during the lengthy period of suspension from 24 November 2015 until dismissal on 20 January 2017, the claimant experienced no substantial disadvantage as a result of the failure to make adjustments. The claimant's response to this was that he did not know until dismissal that the respondent was not going to make the adjustments.

44. Following ***Abertawe*** the date by which the employer might reasonably have been expected to comply with the duty should be determined in the light of the facts as they would reasonably have appeared to the claimant. The claimant at all times knew that the respondent had not made the adjustments that he sought. He knew the outcome of the OH and DSE assessments of 30 October 2014. There is a point at which it must become apparent to the claimant that his employer, to quote from ***Abertawe,*** was "*sitting on its hands*" and not doing what he required. I agree with the respondent that six months is certainly long enough for this and is in my view generous. I agree that time therefore ran from 30 April 2015 and expired on 29 July 2015.

45. If I am wrong about this, then by the date of his suspension he knew from his point of view that the respondent had not done what he wanted them to do. It was clearly not going to happen while he was suspended. He knew as of 24 November 2015 that any adjustments he contended were necessary and were recommended over 1 year previously, had not been made and were not going to be made while he remained suspended.1

46. I find that time ran from 30 April 2015 and if I am wrong about this, then at the very latest time ran from 24 November 2015. The claimant did not find out upon dismissal that his adjustments were not going to be made. He knew that they had not been made since recommended on 30 October 2014. There is a reasonable period when he can be taken as waiting to see if his employer is going to put it in to place, but as the Court of Appeal said in ***Abertawe***, there is a point at which it should become apparent that they were not taking steps to address the disadvantages he expressed. I find that he knew or ought reasonably to have known by the end of April 2015 and if I am wrong about that, then as at 24 November 2015, this ought reasonably to have been clear to him.

47. On my primary finding the claim is 22 months out of time and on my alternative finding it is 15 months out of time. I have considered whether it is just and equitable to extend time. I have taken account of the claimant's medical condition and the fact that notwithstanding that condition, he was fit enough to work from October 2014 until his suspension over a year later. I have also taken account of the fact that he was well enough to engage in disciplinary proceedings, criminal proceedings and grievance proceedings and that he had access to advice through a service provided in his workplace, as well as ACAS. He had a solicitor at least during part of the criminal proceedings, which although in a completely different field of law, could have pointed him towards advice for his employment issues.

48. The claimant submits that it is just and equitable to extend time because he was awaiting decisions from his employer on the disciplinary and grievance issues. I find against the claimant on this submission. I have found that it should have

become apparent to him by April 2015 that the respondent was not making the adjustments he contended for. In addition to this following ***Apleogun-Gabriels***, there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal process.

49. For the above reasons I find that this reasonable adjustments claim is 22 months out of time and it is not just and equitable to extend time.

50. As a result of this decision it has not been necessary for me to consider the application for strike out or a deposit order.

51. The claim is out of time and the tribunal has no jurisdiction to hear it.

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Employment Judge Elliott

24 May 2019

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Sent to the parties on:

19 June 2019

For the Tribunal:

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