



# EMPLOYMENT TRIBUNALS

**Claimant**

Miss H Cormick

v

**Respondent**

WM Morrison Supermarkets Plc

**Heard at:** Norwich (in private)

**On:** 10 October 2019

**Before:** Employment Judge Postle

**Appearances**

**For the Claimant:** Miss Southwell, Sister

**For the Respondent:** Mr Liberadzki, Counsel

## JUDGMENT

1. The Claimant's application to amend to include a further disability of an ankle injury is refused.
2. The Claimant's claims under the Equality Act 2010 for the protected characteristic of disability are dismissed as having no reasonable prospect of success.
3. In any event, nearly all the claims are out of time and it would not be just and equitable to extend time.
4. The Claimant's representative confirmed that the claim under the Employment Rights Act 1996 for whistleblowing was withdrawn and is therefore dismissed.

## REASONS

1. This is a preliminary hearing to determine a number of points which were set out at the case management hearing by Employment Judge Postle on 11 July 2019, particularly:
  - 1.1. Whether the Claimant has a disability within the meaning of s.6 of the Equality Act 2010.
  - 1.2. Secondly, whether the Claimant's claims under the Equality Act 2010 and a claim under the Employment Rights Act 1996 (whistle blowing)

should be struck out as having no reasonable prospect of success or a deposit order be made on the grounds that the claims have little reasonable prospect of success.

- 1.3. Thirdly, whether all or some of the claims are out of time and whether they are single or continuing acts, and depending on the answer to that whether the tribunal should extend time on a just and equitable principle.
2. The Tribunal have had skeleton arguments on behalf of both the Claimant and Respondent, and helpfully matters have moved on since the last hearing in that the Respondent has conceded that postherpetic neuralgia described as complications from shingles and a left sided limp related to a stroke which the claimant suffered when she was 19 are disabilities within the meaning of Section 6 of the Equality Act 2010, but the Respondent do not concede actual or constructive knowledge of those disabilities.

### **Application to amend**

3. The Claimant has at this morning's hearing made an application to include a further disability, namely ruptured ligaments following an ankle injury that the Claimant sustained during the course of her work on 14 June 2018.
4. That application is made notwithstanding the fact that the disability of an ankle injury was not pleaded and not raised before me at the case management hearing in July 2019 despite myself going to some lengths to clarify with the Claimant's representative, whom I fully understand is not legally qualified, what the Claimant's disabilities were, and my notes of that hearing record the Claimant's disability relied upon, following a stroke, was constant nerve pain of her left shoulder and left arm and complications from shingles and left sided limp following the stroke (gait abnormality). If the Claimant's representative was in any doubt she could at that stage have simply said "*Ah but you have missed one out, an ankle injury*", she did not at that stage. The Claimant advances an argument that that was her error and the application is now made some months out of time, the events relied upon from that alleged disability follow June 2018 and the claim was issued in February 2019.
5. The starting point for any application to amend is the well-known case of Selkent Bus Company Limited v Moore and that reminds us also that there are a number of broad categories of amendments:
  - 5.1. The first category is amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of claim.
  - 5.2. The second category is amendments which add or substitute a new cause of action but one which is linked to or arises out of the same facts as the original claim.

- 5.3. The third category is amendments which add a wholly new claim or cause of action which is not connected to the original claim.
6. Now, clearly this is a new fact, a new issue and a new claim relied upon. The added complication here is it is not clear why in the further particulars that the Claimant / her sister provided to the Tribunal shortly after the claim was issued, making it clear what the disability was at paragraphs 2 and 3 where it said:

“The claimant is registered disabled and disabled for the purposes of the Equality Act following a stroke when the claimant was aged 19. The claimant was left with a permanent weakness to her left side arm and leg, and a limp caused by her left foot turning inwards.”

There is no doubt then what the Claimant believed her disability was.

7. The Respondent repeats, they accept the Claimant's disability due to her postherpetic neuralgia complicated by shingles and left sided limp. That is what the Claimant believed was her disability at that time and that was what was clearly pleaded and advanced at the previous Case Management hearing.
8. I am therefore not persuaded that it is fair or in the interests of justice, balancing all factors including any hardship to the Claimant, where a party now seeks to add an entirely new claim and fact in these circumstances and therefore the application to amend is refused.

#### **Strike out / Deposit order**

9. Dealing with whether the claims should be struck out on the grounds that they have no reasonable prospect of success. I remind myself of what Justice Langstaff said in the case of Chandhok v Tirkey UK EAT/0190/14/KN, in which he highlighted that there may be many occasions when discrimination claims can be properly struck out. One such category is in those cases where only an indication of a possibility of discrimination and without more evidence are insufficient for a tribunal to conclude that discrimination has taken place. I remind myself one should always be cautious of striking out a discrimination case, but there are clearly circumstances where it would be justified.

#### **Direct Discrimination claim**

10. Looking at the first claim direct discrimination, that is where one person is treated less favourably than another, is or has been, or would be treated in a comparable situation because of disability. To show direct discrimination it will generally be necessary for a claimant to persuade the Tribunal that a person not disabled was or would be differently treated in the same or not materially different circumstances and that is Section 123 of the Equality Act 2010.
11. It therefore follows that the key question in direct discrimination claims is one of causation. Was the disability effective even if not the sole cause of treatment judged objectively? It is well established that the simple fact that an employer has behaved badly or unreasonably will not in itself prove anything.

12. I am persuaded in this case there is simply no evidence supporting the claims that the reason for the treatment, the causative reason was the Claimant's disability or the motivation for the treatment was the claimant's disability. There is no actual or hypothetical comparator advanced suggesting that they would be treated more favourably.
13. In any event, paragraphs 13 to 16 of the notes of the Case Management Hearing also depend entirely on the Claimant persuading the tribunal she has an ankle injury which of course is not a disability relied upon at the relevant time in July and following that period. Therefore, I am persuaded that I should strike the claims out on the grounds that they have no reasonable prospect of success.

#### Reasonable adjustments claim

14. Turning to reasonable adjustments, the same applies for the reasonable adjustments, in my view they have no reasonable prospect of success simply because there is no material evidence supporting the fact that the failure to make any adjustment for the Claimant was because of her cited disabilities.

#### **Jurisdiction**

15. If I am wrong on the above conclusions, I now turn to the question of whether the claims are out of time and whether it would be just and equitable to extend time.
16. For the Tribunal to accept jurisdiction proceedings must be brought within 3 months of the date of the complaint in question (act), Section 123(1)(a) of the Equality Act 2010, subject to an overriding discretion to extend time on the just and equitable principle. Conduct extending over a period is to be treated as done at the end of that period and that is at Section 123(3)(a). These time limits are to be read of course subject to ACAS Conciliation Extensions where relevant and in deciding whether a particular situation gives rise to an act extending over time, it is appropriate to have regard to the nature and conduct of the discriminatory conduct of which the complaint is made.
17. The problem we have here is that looking at the various acts that are cited they are clearly not extending over or connected to the period of time and therefore the claims relating to the incidents prior to 23 October 2018 are isolated, unconnected and I repeat not connected or can be said to be extending over the period of time.
18. Therefore, the next question one has to look at is whether it would be just and equitable to extend time and the burden of proof is on the Claimant to show the reason why a claim was not issued within time and unfortunately the claimant is not here and the tribunal are clearly in some difficulties. It is said the Claimant is not well enough to attend, had that been the case it would have been open to the Claimant / her representative to make an application to postpone together with supporting medical evidence. No such application was made.

19. It is a high hurdle to overcome to persuade a Tribunal to exercise its discretion to extend time, it is the exception rather than the rule and there is no presumption that a Tribunal should exercise its discretion, it is simply not sufficient to say, *"No I did not know that I could bring a claim"* or that *"I was not well at the time"*. It is clear that the Claimant certainly was in a position to make a detailed grievance in January 2018 and there is a wealth of information these days on the internet and organisations giving free legal advice, whether it be Citizen's Advice Bureau or some firms of solicitors who will give limited free advice about Employment Tribunal claims. So, ignorance of the law is no defence, the Claimant / her representative has advanced no valid reason why the claim could not be presented in time. I am not persuaded that the hurdle has been breached which would allow me to exercise my discretion to extend time to allow the claims in. So, for that reason also the claims do not proceed.

**Employment Rights Act 1996 claim (whistleblowing)**

20. To deal with all matters finally, Miss Southwell has sensibly confirmed to the tribunal this morning that the claim under the Employment Rights Act 1996 is withdrawn and I now formally dismiss that as well.

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Employment Judge Postle

Date: ...14 November 2019.....

Sent to the parties on: 14 November 2019

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For the Tribunal Office