EMPLOYMENT TRIBUNALS

Claimant: Mr Josh Collins

Respondent: Jenny Formby (sued as a representative of all members of The Labour Party except the claimant)

Heard at: Liverpool **On:** 25 February 2020

Before: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr Michell of Counsel

JUDGMENT

The judgment of the Tribunal is that all the claimant's claims for direct discrimination contrary to Section 13 of the Equality Act 2010 and his claims that he suffered a detriment for making a protected disclosure contrary to Section 47B of the Employment Rights Act 1996 are struck out for the reasons set out below. The claim for unfair dismissal is dismissed on withdrawal. All matters having been finalised there will be no requirement for a further preliminary or final hearing.

REASONS

1. At a closed preliminary hearing on 29 October 2019 before me I prepared the Case Management Orders which set out in writing the reasons for this open preliminary hearing. It was to decide:

(1) Whether the claimant be allowed to amend his ET1;

(2) Whether the claimant was ever employed by the Labour Party or was a worker with protections with regard to qualifying disclosures. Whether he could bring his claim under the Equality Act 2010 for discrimination relating to a perception that he had mental health issues.;

(3) Whether his claims had been made out of time, and with regard to the Employment Rights Act claims whether it was reasonably practicable for him to have made claims in time, and/or if the claims were out of time under the Equality Act 2010 whether it was just and equitable to extend time, and if the claims had been brought out of time whether they had been brought within such further period as I consider reasonable; and

(4) Whether the claimant's claims have any reasonable prospect of success or alternatively whether a deposit should be paid by the claimant on the basis that the claims had little reasonable prospect of success: and

(5) Although this was not an issue dealt with at the hearing in October it has come to my notice that the claimant wishes to make an application to strike out the respondent's ET3. As I have struck out all the claimant's claims that does not fall to be decided, though I ought to place on record that I have not heard from either party on that issue.

The Facts

2. The claimant did not issue proceedings until 2 July 2019 and his early conciliation certificate is dated 8 May 2019 and was issued on 7 June 2019.

3. The claimant suggested that he only found out about the mental health issues, about which he is concerned in response to his subject access request (SAR), on 12 February 2019.

4. I have seen and read statements from Mr Simms, who is a solicitor for the respondent, attached to which were other statements that Mr Simms had taken from Andrew Smith and from Anna Hutchinson both of whom belong to the Labour Party and interviewed Mr Collins in the summer of 2018. They decided that they would not appoint him in the post for which the claimant had applied. In doing so they had no knowledge of the protected disclosures of which Mr Collins now complains, nor of any mental health issues that have been referred to. Nor did they perceive that the claimant had any mental health problems when they interviewed him. Mr Collins himself accepts that he does not suffer from a mental health condition. Although I did not hear from these three witnesses, I heard no cogent evidence from the claimant to suggest that they were not telling the truth in those statements.

5. I also read the 300 paragraph statement from the claimant and statements from his witnesses, namely Sophie Heselwood, Jeanette Lord and David Lawrie. Again, I accepted the evidence presented to me by those three witnesses but what they told me was almost wholly irrelevant to these proceedings. I have set out below the facts that I found relevant to these proceedings and the issues before me.

6. I shall deal with the facts appertaining to the above subparagraphs 1(2), 1(3) and 1(4) first and then come to subparagraph 1(1).

7. The claimant initially suggested that he was an employee of the Labour Party. He has confirmed at paragraph 158 of his statement that he has never contended that he was. He suggests he was a 'worker' both for the purposes of his whistleblowing claim and his claim relating to disability discrimination under the provisions of the

Equality Act 2010 as defined, in the later Act, in relation to the wider definition of 'employee'. He was not an employee or worker; he was merely a Campaign Forum Delegate for the local Rosendale and Darwen labour party between September 2017 and 21 September 2018. He received no pay, there was no contract and no mutuality of obligation. Indeed, the claimant's own evidence suggest that his employment from February 2018 was with an organisation called 'Opportunity Makers' and he makes no mention of his 'job' with Rossendale in his application for the post with the Labour Party which he made in June 2018. He was interviewed for that post but was not successful. The reason he was unsuccessful was because he had less campaigning experience than other candidates and he was refused the post on merit. Other candidates were better. Neither of the two witnesses for the respondent who interviewed him had any knowledge of a perceived mental disability nor were they aware that, during 2018, the claimant had made protected disclosures about various issues. The claimant knew he had been unsuccessful on 13 September 2018. It follows that the claimant was not refused the post for any reason related to his perceived disability or whistleblowing.

8. With regard to time limits, the claimant is an intelligent man with an exceptional ability to express himself. He has been able, during the course of this litigation, to manage and arrange an enormous amount of information and to present that information to this Tribunal. He made it clear to me that, as he had no mental health issues, he had no mental incapacity during the period September 2018 to July 2019. He accepted that he was able to contact solicitors to obtain advise. He is able to use IT, to research legal issues and, indeed, ultimately, he was able to produce his own ET1 for the Tribunal. The claimant suggested that he could not seek advice from the CAB because of Stephen Hughes' involvement with one CAB office. Mr Hughes was a labour councillor and the claimant and Mr Hughes were in dispute over some issues. The claimant did not accept, when cross examined that he could have sort advice from other CAB offices. I found that the claimant could have done or, alternatively, could have sort advice from other employment experts. The claimant gave no reasonable explanation as to why he did not seek such advice. At one point he seemed to suggest that he needed to wait for a response to his SAR application. The claimant also suggested that it was only when he received that SAR response in February 2019 that he was then aware of the possibility of a claim relating to disability. That does not explain why he did not issue proceedings in time with regard to his protected disclosure claim. The claimant was of the view that he was a whistle-blower during 2018. If he connected the fact that he did not get the job in September 2018 because of the whistleblowing, he would have connected those two issues at that time (i.e. September 2018). Furthermore, if the information he received in February 2019 about an alleged referral to the mental health team fuelled his suspicions about the treatment he was receiving from the respondent's officers, he still waited until July 2019 to issue these proceedings - a period of five months. He had no explanation for that delay other than to suggest he was still researching matters. Initially the claimant did not believe he had not got the job because of his protected disclosure or because of perceived disability. He thought it was because of, in his words, "corruption in the party".

9. The policy of the respondent is that, after a certain period, documents relating to interviews and job applications are destroyed. That has happened in this case and consequently if this matter proceeded to a final hearing the respondent witnesses

would have to rely wholly on their recollection, which by the time the trial takes place, could be some two to two and a half years after the events in question.

10. With regard to prospects of success, listening to the evidence of the claimant at this hearing, it is inconceivable that a Tribunal would find that he was either an employee or a worker. He was clearly a volunteer and has no protections either under the Employment Rights Act or Equality Act, with one exception. I accept that Section 39 of the Equality Act opens the door to the claimant to be able to plead that he did not get the job in September 2018 because he was deemed to be disabled. But the claimant has no evidence at all that that was the reason for his lack of success. Cogent evidence will be given by the respondent witnesses who will say they had no idea that the claimant may be disabled, nor did they assume that was the case. The Tribunal will be faced with that evidence and with the claimant's own evidence that he is not disabled and never has been. The claimant would have to show that, despite him not being disabled for some, yet, unexplained reason, the interviewers felt he was disabled. There is no evidence that I have seen that the interviewers found the claimant's behaviour, for example, bizarre or out of the ordinary at interview, nor does the claimant suggest that he was acting, for example, irrationally or out of character at the interview. There is also no evidence to suggest that some third party had told the interviewers that the claimant was disabled.

11. Finally, with regard to the issue of amendment, the claimant set out his claim clearly in his first ET1 in July 2019. On 23 October he set out in more detail what his claims were. At the time of the hearing in October the respondent's legal team had not had chance to consider the new material from the claimant. Since that October hearing the pleadings have been completed by the claimant setting out further and better particulars as ordered and the respondent has lodged its final ET3. The claimant has now withdrawn his unfair dismissal claim, which he initially made and has set out exactly when his protected disclosures were made although the lawyers for the respondent continue to suggest that the claimant has failed to clarify, with the necessary precision, his claims.

The Law and Decision

12. The principles I have applied to come to my judgment are set out below and I then applied those principles to the above facts. For ease of presentation I have set out other findings of fact below.

13. With regard to amendment, I noted the principles set out in the **Selkent v Moore** case. All circumstances must be considered. I have to balance the hardship and injustice that potentially may be meted out to both sides or to one rather than the other. I have to ask myself whether the amendment is a relabelling, a more detailed setting out of the facts or completely new claims. I have to consider time limits and consider how long it has taken the party requesting the amendment to make the application and I have to consider the way in which the application has been made.

14. Subject to the above I have a wide discretion and in all the circumstances of this case I will allow the claimant's amendments on the basis that, in terms of the amendment and only the amendments the respondent's and its lawyers have not been prejudiced. They know the essence of the claimant's claims and have been able to set

out their defence to the claims. Furthermore, the amendments are akin to relabelling and the giving of of detail rather than being new claims.

15. With regard to the claimant's existing claim that he is a 'worker', I applied these principles. It is for the claimant to show that he is a worker or an employee as set out in the wider definition in the Equality Act. Section 47B Employment Rights Act affords protection from detriment for workers as defined in section 230(3) of the Act. With regard to discrimination, the wider definition in section 83 Equality Act protects all employees, agency workers, applicants for a job and workers under a contract personally to do work. The facts show that the claimant was never an employee nor did he work for the respondent under a contract personally to do work. There was in fact no contract between the claimant and the respondent. He volunteered and the Supreme Court's decision in **X v Mid-Sussex CAB** is clear. A volunteer is not protected by the Equality Act. The claimant therefore has no standing to pursue his whistleblowing claim nor any general discrimination claim. He could however pursue his claim for discrimination by perception under the provisions of Section 39(1) of the Equality Act on the basis that he was an applicant for a job and he contends he was refused the role because the respondent perceived him as disabled. I deal with that discrete issue under the heading of 'time' and 'no reasonable prospect'. However, his whistleblowing claim is struck out as the claimant was not a worker.

16. With regard to the out of time issues I considered the following principles. Both heads of claim require proceedings to be issued within three months of the event which raises the claim. I accept that where an act continues over a period of time, time starts running from the end of that period. Time can be extended for the Equality Act claim if it is just and equitable to do so. Time can be extended in the Whistleblowing claim if it was not reasonably practicable to have issued proceedings in time. However, there is no presumption that time should be extended. Both claims have been made out of time. Time limits are there for a purpose and I have to consider whether the delay in issuing has prejudiced, in this case, the respondent. The length and reason for the delay and whether any proper reason has been proffered for the delay. Applying those principles, all the claims must be struck out. These claims crystallised as claims in September 2018 and it was not until July 2019 that the claimant issued proceedings. That is a delay which cannot be tolerated and the claimant gave no good reason for the delay. He was not incapacitated, he is intelligent, he knew there were time limits, he knew he had to go through a conciliation process. Even if I felt that new information was received by the claimant in February 2019 regarding some suggestion that the respondent's officers had been told he had mental health issues, those people involved in 2018 had no inkling of that issue and did not decide to reject him as an employee for that reason. Even if I am wrong with regard to that last issue, the claimant delayed too long after 12 February 2019 to issue proceedings. Another five-month delay. That has prejudiced the respondent. Documents have been destroyed and respondent witnesses are already finding it hard to remember the details of things that occurred in September 2018. That is fatal to the claimant's case and therefore his claims are struck out for want of jurisdiction.

17. With regard to there being no reasonable prospect of success for these claims I applied the following principles. In discrimination cases the higher courts have made it very clear to Tribunals that such claims should not be struck out or dismissed unless there is a very good reason so to do and the case is extremely weak. I equate

whistleblowing cases with discrimination cases in that regard. I would not strike out the Equality Act claim because it would be better for a full tribunal to hear all the facts. However, the whistleblowing claim is so hopeless that, despite the higher courts' warnings, it has to be struck out as having no reasonable prospect of success. The claimant was not a worker, it is obvious that he was not, I believe that he understands that himself. Consequently, I strike that claim out for that reason. If it was not otiose, I would have made a deposit order in relation to the Equality Act claim for having little reasonable prospect of success. However, as I have already decided that that claim was made out of time, and the delay was unconscionable, the Tribunal has no jurisdiction to hear that claim.

18. For all the above reasons these claims will end here and all claims are struck out.

Employment Judge Robinson

Date: 17 April 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 April 2020

FOR THE TRIBUNAL OFFICE