Case Number: 3328504/2017 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Prince	**v**	Audit Bureau of Circulations Limited

Heard at: Bury St Edmunds **On:** 30 June 2020

Before: Employment Judge M Warren

Appearances
For the Claimant: Mr T Kirk, Counsel.
For the Respondent: Mr T Perry, Counsel.

JUDGMENT

1. The claimant's application to amend his claim to include unfair dismissal is refused.

2. The claimant's application to amend his claim to include a claim that the act of dismissal amounted to disability discrimination is granted.

3. The claimant's application for costs is refused.

REASONS

General

1. This hearing was conducted via the Ministry of Justice's Cloud Video Platform. This was necessary because of the prevailing circumstances of the Coronavirus crisis. No objection was raised to the hearing being conducted in this format. The hearing proceeded without significant difficulty; initially at the outset we were unable to hear Mr Prince, but he overcame that technical difficulty after a few minutes. There were a couple of occasions during the respondent's submissions when the transmission from Mr Perry froze, but he was able to overcome that difficulty and I was able to take him back to the point in his submissions where we lost him.

2. There were some difficulties in my gathering to hand the papers to which the parties wished to refer. We were able to overcome this by my entering into direct email correspondence with counsel for each side before the hearing commenced. I am grateful to both barristers for helping me overcome that obstacle. I am also grateful to them for contacting me to let me know that they were in the CVP waiting room when the tribunal staff hold told me that the hearing was to be by telephone.

3. Documents I had before me were:

   3.1 A bundle contained within a pdf file running to page 313 provided by the respondent's solicitors.

   3.2 Skeleton argument on behalf of the claimant.

   3.3 Written submissions on behalf of the respondent.

   3.4 Witness statement of Mr Prince.

   3.5 Authority in the case of Geys v Société Générale.

   3.6 Copy contract of employment.

   3.7 Breakdown of costs from Mr Kirk.

   3.8 Further and better particulars of the proposed amended claim.

   3.9 Letter from respondent to claimant dated 20 March 2019.

   3.10 Letter from respondent to claimant dated 21 May 2019.

   3.11 Letter to claimant from Aviva dated 5 November 2019.

4. I conducted this hearing from my home and I did not have the tribunal file before me.

5. I heard evidence from Mr Prince.

History of the case

6. Mr Prince had been employed as an Auditor by the respondent since November 2008. At the time when he issued these proceedings by a claim form dated 21 October 2017, he remained in the respondent's employment. His complaints were of disability discrimination.

7. The matter first came before Employment Judge Lewis at a closed preliminary hearing on 22 June 2018. He listed the matter for an open preliminary hearing to determine whether or not Mr Prince met the definition of a disabled person within the Equality Act 2010 at the material time.

8. The open preliminary hearing took place before Employment Judge Laidler on 15 October 2018. She found that Mr Prince was a disabled person as defined in respect of back pain, sleep apnoea, type 2 diabetes and depression. Significantly, she found that he was disabled from June 2016; many of the allegations pre-dated June 2016.

9. Employment Judge Lewis had approved a list of issues prepared by those advising Mr Prince. Employment Judge Laidler directed the parties to liaise and agree on how that list of issues should be amended, in light of her findings. There ensued a dispute between the parties as to how the list of issues should be amended.

10. On 14 March 2019, the respondent's solicitors wrote to the Employment Tribunal to say that they did not agree with the claimant's proposed amendments to the draft list of issues and wished to make an application for an unless order that the claimant be required to complete a Scott Schedule within 7 days.

11. On 1 April 2019, the respondent's solicitors wrote a further letter to the Employment Tribunal, applying for an order requiring the claimant to produce a completed Scott Schedule and that he pay a deposit.

12. On 4 April 2019, a letter was written to the parties on the instructions of Employment Judge Laidler which read as follows:

> "The respondent's application is completely inappropriate and is refused. [She was referring to the application dated 14 March 2019] The Tribunal will not be assisted by a Scott Schedule and has never ordered one. Employment Judge Lewis commended Mr Kirk's list of issues produced for the preliminary hearing on 22 June 2018. All the claimant's representative has attempted to do is to update that list following Employment Judge Laidler's decision on disability. Rather than making this application (which was never going to be granted) the respondent's representative should work with the claimant's in the spirit of the overriding objective to finalise the list."

13. Pausing there for a moment, prior to the subsequent preliminary hearing before me, Mr Perry had not been made aware of this letter. Subsequently, the respondent's solicitors have confirmed that it was received by them.

14. Employment Judge Foxwell directed that the matter should be listed for a closed preliminary hearing for the purpose of identifying the issues, considering the deposit order application and making such case management orders as may be appropriate, including listing the matter for a final hearing.

15. In the meantime, Mr Prince had received a letter from the respondent dated 16 July 2019 informing him of his dismissal. Interpretation of that letter as to the timing of dismissal is contentious.

16. On 5 August 2019, Mr Prince appealed against his dismissal setting out his grounds of appeal in a four page letter of that date.

17. On 27 August 2019, Mr Prince was informed that his appeal had been unsuccessful.

18. On 6 September 2019, Mr Prince received a letter dated 5 September stating that his employment had been terminated on 16 July, confirming that he would receive 10 weeks' pay in lieu of notice and setting out the respondent's calculation of his accrued due but untaken holiday pay.

19. The matter came before me at a closed preliminary hearing on 8 November 2019 as directed by Employment Judge Foxwell. After initial discussions, I adjourned whilst the representatives conferred in order to agree upon amendments to the list of issues. This they were able to achieve and upon re-convening, I was informed that the respondent withdrew its application for a deposit order. I listed the case for a 7 day final hearing commencing 7 September 2020 and made necessary case management orders.

20. On 5 December 2019, Mr Prince through his representative Mr Strong, submitted a written application to amend his claim so as to include a claim that he had been unfairly dismissed and that the act of dismissal was an act of disability discrimination.

21. One day later on 6 December 2019 Mr Prince, through Mr Strong, submitted a written application for costs in respect of the respondent having withdrawn its deposit order application.

22. On 3 January 2020, Mr Prince issued a second separate claim for unfair dismissal and disability discrimination arising out of the dismissal. The details of the claim appear to be identical in terms to those of the application to amend. This second set of proceedings has subsequently been withdrawn, on the basis that the issues at stake as to whether or not it was out of time, are exactly the same issues at stake in this application to amend. Both representatives agreed care needs to be taken to ensure that no Employment Judge, not appreciating the background, dismisses the second claim upon withdrawal.

23. Further and better particulars of the proposed amended claim were provided by Mr Kirk today.

Application to amend

Law

24. When considering an application to amend, one must have regard to the guidance of Mummery J, (as he then was) in the case of Selkent Bus v Moore [1996] ICR 836. In exercising discretion, a Tribunal should take into account all the relevant circumstances and should balance the relative injustice and hardship of allowing or refusing the amendment.

25. Non-exhaustive examples of what might be relevant circumstances given by Mummery J included:

    25.1 The nature of the amendment, whether it is a minor error, a new fact, a new allegation or a new claim;

    25.2 The applicability of time limits and if the claim is out of time, whether time should be extended, and

    25.3 The timing and manner of the application and in particular, why an application had not been made sooner.

26. On the question of time limits, section 123(1) of the Equality Act 2010 requires that a claim shall be brought before the end of the period of three months beginning with the date of the act to which the complaint relates or such further period as the Tribunal thinks just and equitable. Conduct extended over a period of time is treated as having been done at the end of that period, (section 123(3).

27. On the just and equitable test, the EAT in the case of Cohan v Derby Law Centre [2004] IRLR 685 said that a Tribunal should have regard to the Limitation Act checklist as modified in the case of British Coal Corporation v Keeble [1997] IRLR 336 which includes that:

    27.1 One should have regard to the relative prejudice to each of the parties;

    27.2 One should also have regard to all of the circumstances of the case which includes:

        27.2.1 The length and reason for delay;

        27.2.2 The extent that cogency of evidence is likely to be affected;

        27.2.3 The cooperation of the Respondent in the provision of information requested, if relevant;

        27.2.4 The promptness with which the Claimant had acted once she knew of facts giving rise to the cause of action, and

27.2.5 Steps taken by the Claimant to obtain advice once she knew of the possibility of taking action.

28. In respect of claims of unfair dismissal, Section 111(2) of the Employment Rights Act 1996 provides:

> *"Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*
>
> *(a) before the end of the period of three months beginning with the effective date of termination, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."*

29. The question of whether it was reasonably practicable to bring a claim in time is a question of fact for the Tribunal. The onus is on the Claimant to show that it was not reasonably practicable, (Porter v Bandridge Ltd [1978] ICR 943 CA).

30. The expression, "reasonably practicable" has been held to mean, "reasonably feasible". See Palmer v Southend Borough Council 1984 IRLR 119 CA.

31. In Marks and Spencer v Williams-Ryan 2005 IRLR 565 the Court of Appeal held that regard should be had to what, if anything, the employee knew about the right to complain and of the time limit. Ignorance of either does not necessarily render it not, "reasonably practicable" to issue a claim in time. One should also ask what the claimant ought to have known if he or she had acted reasonably in the circumstances.

32. If a claimant is using a professional advisor, then generally speaking, the claim should be brought in time. The primary authority for that is Dedman v British Building and Engineering Appliances Limited [1974] ICR 53. What Lord Denning said in that case, is:

> *"If a man engages skilled advisors to act for him and they mistake the time limit and present it too late, he is out. His remedy is against them."*

33. In the case of Northamptonshire County Council v Mr Entwhistle UKEAT 0540/09/ZT, the then President of the EAT, Mr Justice Underhill, reviewed the case of Dedman and some subsequent authorities which may have been thought to bring its *ratio* into question. He confirmed that the principle of Dedman which I have just quoted is still very much good law, but with the caveat that one must bear in mind the question is, was it reasonably practicable to bring the claim in time? We are reminded that it is possible to conceive of circumstances where a skilled advisor may have given

incorrect advice, but nevertheless it was not reasonably practicable for the claim to have been brought in time. That said, in general terms, the principle remains that if a claim is late because of a solicitor's negligence, that will not render it not reasonably practicable for the claim to have been brought in time.

34. If the Claimant shows that it was not reasonably practicable to issue in time, he must then go on to satisfy the Tribunal that proceedings were issued within such further period as the Tribunal considers reasonable.

35. As to whether the time between expiry of the time limit and the issue of the claim is a reasonable period calls for an objective consideration of the factors causing the delay, viewed against the background of the expiry of the primary limitation period and strong public interest in claims being brought promptly. See Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10.

36. There is no principle that prevents an amendment to an existing claim in respect of events that have occurred since the issue of proceedings. A tribunal should approach the question of whether or not to allow such an amendment applying the principles set out above, see Prakesh v Wolverhampton City Council UKEAT 0140/06.

37. Selkent was revisited by Underhill LJ in the Court of Appeal in Abercrombie v Aga Rangemaster Ltd [2014] ICR 209 and the guidance of Mummery J approved. Commenting on the now often referred to distinction between label substitution on pleaded facts as compared to substantial alterations pleading new causes of action, Underhill LJ said that it was clear that Mummery J was not suggesting so formalistic an approach that the fact that an amendment pleading a new cause of action, weighed heavily against allowing an amendment. These are just factors likely to be relevant in striking the balance of injustice and hardship. He said that the focus should be not so much on, "formal classification" but more on the extent to which the amendment is likely to involve different lines of enquiry, *"the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".* See paragraphs 47 and 48.

38. Underhill LJ also explains in Abercrombie that just because the amendment relates to allegations that are out of time, that does not mean we should automatically disallow it. It is still in our discretion to amend.

39. Whilst tribunals dealing with an amendment application have to consider whether the proposed amendment contains allegations that are out of time, we do not have to actually decide the time point. We can, if appropriate, grant the amendment subject to any limitation points the respondent may wish to raise at the final hearing. An example of when this might be appropriate, is when the subject of the amendment is an allegation that may be part of a continuing act of discrimination, determination of which is fact sensitive and better decided upon after hearing all the evidence at the final hearing, (see Galilee v Commissioner

of Police of the Metropolis UKEAT/207/16 and Reuters Limited v Cole UKEAT/0258/17).

40. The apparent merits of the proposed amendment may be relevant to the exercise of discretion, see for example Olayemi v Athena medical Centre UKEAT/0613/10 and Herry v Dudley MBC UKEAT/0170/17.

41. In exercising my discretion, I must have regard to the Overriding Objective and must seek to balance the relative prejudice to the parties. Rule 2 sets out the Overriding Objective as follows:

> *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

Discussion

42. I will work through the above guidance step by step.

43. The nature of the amendment is to introduce two new claims: unfair dismissal and discrimination in the act of dismissal. That is a substantial amendment.

44. The key issue is the applicability of time limits. For the purposes of the claim of unfair dismissal, one needs to know the effective date of termination as defined in s.97 of the Employment Rights Act 1996, for it is from that date that the 3 month time limit in s.111 runs.

45. The letter of dismissal dated 16 July 2019 reads as follows:

> "This letter is therefore formal notice that you are dismissed from the company, as of today's date. You will receive payment for your notice period and any annual leave entitlement."

46. The respondent says that the meaning of those words is that Mr Prince's employment is terminated on 16 July 2019. Mr Kirk argues for Mr Prince, that the meaning of those words are ambiguous, that he took them to mean that he was being given notice with effect from that date, that he knew he was entitled to 10 weeks' notice and that therefore the effective date of termination was the expiry of that notice on 24 September 2019. Alternatively, says Mr Kirk, it may be taken that the effective date of termination was 6 September 2019, when Mr Prince received the letter from the respondent making reference to his having been dismissed on 16 July.

47. There are therefore three potential dates upon which the 3 month time limit might have expired:

47.1 3 months after 16 July 2019, which is 15 October 2019;

47.2 3 months after 6 September 2019, which is 5 December 2019; and

47.3 3 months after 24 September 2019, which is 23 December 2019.

48. The application for amendment having been made on 5 December 2019, if the effective date of termination was 15 October 2019 it is out of time, if the EDT was 6 September or 24 September 2019, the application is in time.

49. Central then is Mr Kirk's argument that the wording of the letter dated 16 July 2019 is ambiguous and therefore does not dismiss Mr Prince with effect from that date. He cites three paragraphs, (paragraphs 57, 58 and 59) of the Judgment of Baroness Hale in the case of Société Générale v Geys [2013] ICR 117. In essence, these are to the effect that if an employer is dismissing an employee immediately and making a payment in lieu, its language must be clear and unambiguous.

50. The case of Geys is Supreme Court authority that resolved the controversy over whether in respect of employment contracts, a fundamental breach has to be accepted before employment is terminated. The Supreme Court held that it does, in respect of the common law. So, summary dismissal without notice, in breach of contract, did not end the contract of employment in that case as the claimant had not, "accepted" the breach. The contract was terminated later when pursuant to the contract's terms, the employer terminated with pay in lieu of notice.

51. However, in the field of unfair dismissal, we are concerned with a statutory right, not the common law. In this case we are concerned with whether the claimant's claim for unfair dismissal is out of time, governed by statute in the form of the Employment Rights Act 1996 at sections 97 and 111. S.97(1)(a) and (b) provides that the effective date of termination is, where notice is given, the expiry of that notice and where no notice is given, on the date the termination takes effect.

52. In the case of Robert Cort & Son Limited v Charman [1981] ICR 816 Mr Justice Browne-Wilkinson held that the effective date of termination for the purposes of the unfair dismissal statutory framework is the date termination takes effect; the date on which the employee is actually dismissed. As Mr Perry submitted, (and Mr Kirk accepted) there are a sequence of EAT cases post Geys which confirm that Geys does not alter the position in terms of the statutory framework; summary termination by the employer does not require acceptance by the employee before the contract is terminated.

53. As I have indicated, Mr Kirk entirely accepted that. His point was, in referring to Baroness Hale's judgment, the communication of dismissal and when that is to take effect must be clear and unambiguous. As a proposition, that must be right. His Honour Judge Richardson said in Feltham Management Limited & Others v Feltham & Others UKEAT/0201/16 at paragraph 39 as follows:

> "However, given its statutory setting and importance, section 97(1)(b) in my judgment requires words or conduct which in their context amount to a plain and unambiguous termination by an employer. The termination may be by words or conduct or a mixture of the two; but it must unequivocally convey to the employee on an objective reading or understanding that the employer is terminating the contract. Words or conduct which reasonably leave the employee in doubt as to whether the employer has terminated the contract will not trigger the effective date of termination."

54. That seems to reflect the views of Baroness Hale, in the statutory context.

55. Richardson J refers to considering the words or conduct of dismissal objectively, but in context.

56. The context is as follows:

    56.1 Mr Prince's contract provided that he was entitled to 10 weeks' notice but there was no provision for pay in lieu of notice.

    56.2 In two letters of 20 March and 21 May 2019 discussing Mr Prince's continuing prolonged absence, the respondent stated that it was considering dismissing him on notice due to ill-health, and

56.3 Having been absent for such a long period of time, Mr Prince's entitlement to sick pay was exhausted, he was not receiving any pay at all.

57. Notwithstanding that context in my view, on an objective reading of the letter of 16 July 2019, it is clear and unambiguous; Mr Prince was informed that his employment was being terminated as of that date. The argument the letter can be read as giving notice as of that date is ingenious, but without merit. It is a clever argument, putting on the letter a strained, semantic interpretation. In my judgment, the meaning of the letter objectively viewed is clear; the recipient is dismissed as of the date of that letter. The 3 month time limit within which the unfair dismissal proceedings should have been brought therefore expired on 15 October 2019 and the application to amend was 7 weeks late.

58. The question then arises, whether it was reasonably practicable for the claim to have been brought in time? Mr Kirk's first argument is that the wording of the letter was ambiguous, making it not reasonably practicable. In my view, it was not ambiguous.

59. Mr Kirk argues on behalf of Mr Prince, (as was argued by the advisor Mr Strong in the application on 5 December 2019) that Mr Prince relied upon an unskilled advisor, (referring to himself). I do not accept that. Mr Strong holds himself out as a person with HR expertise. Anybody working in the field of employment law will be aware of the 3 month rule. As I heard in evidence from Mr Prince, Mr Strong sells his services to people with employment related problems. I also heard that Mr Strong resorts to a firm of solicitors called Hine Legal for advice when he thinks he needs it. In my view, Mr Strong is a skilled advisor charging people for his advice and must take responsibility if he gets it wrong. As in the case of Dedmen; if there is a loss accruing to Mr Prince because the time limit has been missed, his remedy is against Mr Strong.

60. Mr Kirk argues that the letters of 20 March and 21 May 2019 misled Mr Prince. That is a circular argument about the ambiguity of the letter of dismissal and I have already explained, I considered it to be unambiguous. Furthermore, relying upon a skilled advisor, he ought not to have been so misled.

61. It is argued that Mr Prince was confused by Aviva's letter of 5 November, which said that they had been told he had left the company pension scheme on the 2 October. I do not see that there is anything necessarily particularly surprising or confusing about that and in any event, at the time he received the letter from Aviva, the time limit had already expired.

62. I have considerable sympathy with the submission that Mr Prince was in a poor state of mind, with his mother having died a week before the letter of 16 July and that at the time, he was focussed on looking after his 87 year old father and arranging the funeral of his mother. However, Mr Prince acknowledged in evidence that he was relying on advice from Mr Strong,

he had sent the letter to Mr Strong in July, Mr Strong subsequently helped him prepare his grounds of appeal against dismissal and helped him prepare for the preliminary hearing on 8 November. Therein I am afraid, lies the rub; Mr Strong should have advised Mr Prince to ensure the he made his claim within 3 months of the letter dated 16 July 2019.

63. Further, I observe that on Mr Prince's own case, by 6 September when he received the letter of 5 September 2019, he knew that the respondent's position was that he had been dismissed on 16 July. At that point he could still have ensured that the application to amend, or the issue of a fresh set of proceedings, was made in time.

64. In my view therefore, it was reasonably practicable for the claim of unfair dismissal to have been issued in time.

65. In summary, this is a new claim, it is out of time, time should not be extended, the application has been made late and should have been made sooner. The prejudice to the Claimant if I refuse the claim is that he loses the right to claim that he was unfairly dismissed, ameliorated by the fact that he had the opportunity to bring his claim in time had he been properly advised and that he has extant a discrimination claim in respect of the way he had been treated in light of his illness prior to dismissal. The prejudice to the respondent if I grant the application to amend is that it will lose the benefit of a strict time limit that may only be extended under strictly limited circumstances imposed by Parliament. The balance of the prejudice in those circumstances favours the respondent.

66. For these reasons and having regard to the overriding objective, the application to amend to include a claim of unfair dismissal is refused.

67. Further considerations however are applied in respect of the application to amend to include a claim that the act of dismissal amounted to discrimination. The further and better particulars clarify that the act of dismissal is alleged to be an act of discrimination arising from disability contrary to s.15 of the Equality Act 2010 and a failure to make reasonable adjustments. The date of the act of discrimination is the date of the letter, 16 July 2019. I note that the proposed amendment does not argue that the outcome of the appeal was an act of discrimination and Galilee is not therefore brought into play. Time is still measured from the date of dismissal, 16 July 2019, but the test to be applied by me is whether it is just and equitable to extend time. I consider this by considering all the circumstances of the case but in particular, running through the British Coal Corporation v Keeble checklist:

    67.1 I have already explored above the length and reason for delay. Mr Prince says the delay, the reason for it, was reasonable and understandable, given in particular that he was grieving at the time. As I have observed, he was receiving advice, was able with that advice to prepare his appeal against dismissal and prepare for a preliminary hearing.

67.2 The parties agree the cogency of evidence is unlikely to be affected.

67.3 There is no suggestion of any lack of co-operation in the provision of information by the respondent.

67.4 Mr Prince did not act promptly after receiving the letter of dismissal. Nor did he act promptly after realising on 6 September 2019 that the respondent's position was that he had been dismissed on 16 July.

67.5 Mr Prince had the benefit of advice and those advising him failed to ensure that he issued his claim, (or made his application to amend) in time.

68. This leaves the test for consideration the balance of prejudice. If I am to refuse the application to amend, Mr Prince will lose the opportunity of claiming that the act of dismissal amounted to disability discrimination.

69. The potential quantum of his claim may be limited, given that he had not been at work, for as I understand it, some 4 years. However, his case is that if reasonable adjustments had been made, he would have been able to return to work earlier and that such adjustment would have been possible even at the time of his dismissal. If that argument succeeds, his loss of earnings consequent upon discrimination can continue beyond the date of dismissal. It would be an odd situation if Mr Prince were to be able to successfully argue that there had been a continuing course of disability related discrimination and a failure to make reasonable adjustments for which he was entitled to compensation up to the date of dismissal, but that he was not able to seek remedy thereafter, even though it might have been the case that discrimination continued to and included the act of dismissal.

70. The respondent argues that the claims are of little merit, which goes to the degree of prejudice against the claimant. The respondent refers to an Occupational Health report quoted in the grounds of resistance, dated 19 January 2019, which indicate that there was no prospect of a return to work in 3 months of that date, making reference to multiple health conditions, depression and Mr Prince's perception of the situation at work being the main factor. The same response could be offered for Mr Prince; his case is that if reasonable adjustments had been made all along and at the stage of dismissal, he would have been able to return to work. These are of course matters for evidence. Excluding the discrimination claim will prevent him from putting that argument.

71. Of the prejudice to the respondent; if I allow the amendment, the case is expanded to include dismissal and the respondent is denied the opportunity to take advantage of a time restraint placed upon proceedings put in place by Parliament. That is always the case, equally it may be said that if the act of dismissal was indeed an act of discrimination, they will

have received an unmerited windfall because of the time limit. Parliament's time restraint in a case of discrimination is the subject of a more lenient, less stringent, exemption: time can be extended if it just and equitable to do so, rather than the twofold not reasonably practical/such further period as is reasonable test for out to time unfair dismissal claims.

72. The case is listed for hearing in September, it ought to be possible to organise the evidence on dismissal so that it may be considered at that hearing. The respondent is already having to answer a case which is broadly the same.

73. In my view the balance of prejudice is in favour of the claimant.

74. Having regard to the foregoing and to the overriding objective, I allow the amendment as to discrimination, as it appears in the application to amend and as clarified in the further and better particulars.

75. I make provision in the orders below for the parties to agree on appropriate amendment to the lists of issues. I would respectfully suggest that instructing the two very able counsel that appeared before me to liaise and agree the amendments to the list of issues will be cost effective in the long run.

Costs Application

The Law

76. Rule 76 of the Employment Tribunal's 2013 Rules of Procedure provide that a costs or time preparation order may be made and a tribunal shall consider whether to do so, where it considers that:

> *"(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
> *(b) any claim or response had no reasonable prospect of success."*

77. The costs ordered may include the costs of lay representative as well as those of a legal representative and may include the costs of a party attending a hearing, see rule 75.

78. In Gee –v- Shell UK Limited [2003] IRLR82 Sedley LJ said:

> *"It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs".*

79. Costs remain the exception rather than the rule in the Employment Tribunal. That applies as much to respondents as it does to claimants.

80. In Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise, which I would paraphrase as follows:

    80.1 Has the putative paying party behaved in the manner proscribed by the rules?

    80.2 If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

    80.3 If it decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

81. In McPherson v BNP Paribas (London Branch) 2004 ICR 1398 CA it was suggested that in deciding whether to make an order for costs, an Employment Tribunal should take into account the "nature, gravity and effect" of the putative paying party's unreasonable conduct. On the other hand, in Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 (paragraphs 39 – 41) it was emphasised that the tribunal has a broad discretion and it should avoid adopting an over-analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings such as "nature", "gravity" and "effect". The words of the rule should be followed and the tribunal should:

    > *"look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*".

82. McPherson concerned a withdrawal by a claimant. The logic of the observations on such withdrawals assist in considering the appropriate approach to the respondent's withdrawal of its deposit order application. I refer to paragraphs 28, 29 and 30 of the judgment:

    82.1 At paragraph 28 it is explained that it would be unfortunate if we had a regime as to costs whereby Claimants who withdrew would automatically face an order for costs thus discouraging anybody from ever withdrawing. The same might be said of a regime that withdrawn applications automatically led to an order for costs.

82.2 At paragraph 29 is set out the other side of the argument, equally valid, which is that we ought not to adopt a practice which encourages speculative claims, only for them to be withdrawn in the last week or two before the hearing, when no offer of settlement has been made. By the same reasoning, we ought not to adopt a practice which encourages unmeritorious applications for strike out or deposit order.

82.3 Finally, I quote from paragraph 30:

"The solution lies in the proper construction and sensible application of Rule 14 as it then was. The crucial question is whether in all the circumstances of the case the Claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim in itself is unreasonable".

83. That, it seems to me, applies in this case in considering the respondent's withdrawal of its deposit order application.

Discussion

84. It is sometimes the case, too often the case, that solicitors acting for respondents, contrary to the overriding objective, make inappropriate applications for unless orders, strike outs and deposit orders in circumstances where, as experienced employment lawyers, they will know very well there is no prospect of those applications succeeding. The purpose often appears to be to intimidate and harass the claimants, who are often litigants in person. It is an all too common tactic which is to be deprecated. The respondent's solicitor's application for a Scott Schedule and an unless order set out in the letter of 14 March 2019 appeared to be just such an application, which is doubtless why it attracted the approbation of Employment Judge Laidler, as set out in the letter written on her instructions on 4 April 2019.

85. The issue at hand however, is the respondent's solicitor's letter of 1 April 2019 asking for an order requiring the claimant to provide a Scott Schedule and an order for a deposit. I make the observation that where there is a well drafted list of issues, there is no need for a Scott Schedule. However, that is beside the point.

86. The respondent's position in the case in summary is that it was managing the claimant's many and prolonged periods of absence, making adjustments from time to time as it did so. He had been taken to hospital with chest pains on 19 July 2016 and had not returned to work since then. Employment Judge Laidler had found that he was disabled from June 2016. The respondent submitted an application through insurers Legal & General for income protection in favour of Mr Prince, pursuant to its policy held with Legal & General. The application was refused because Legal & General decided that Mr Prince's absence was due to work

related matters. The respondent sees Mr Prince's motive for these proceedings as stemming from the fact that this application was refused.

87. The solicitor's letter of the 1 April 2019 is not well written. It is confusing and contains errors of law. However, one can see that the respondent takes the view that the claimant has little reasonable prospects of success. It is entitled to make its deposit order application.

88. I reiterate that the preliminary hearing on 8 November 2019 was to determine not just the deposit order application but also to facilitate finalising an agreed list of issues, making case management orders and listing for hearing. It is standard practice in a discrimination case for there to be a preliminary hearing to deal with these matters. They needed to be attended to at a third preliminary hearing because of the way the case had unfolded procedurally.

89. For the preliminary hearing on 8 November 2019, Mr Kirk prepared a skeleton argument. He set out compelling arguments as to why the deposit order application should not succeed.

90. From the skeleton arguments before me today, I gather I may have during my initial discussions with the parties on 8 November given some indication of which way the wind was blowing on the deposit application, before I adjourned to allow counsel to discuss and agree appropriate amendments to the list of issues. During that initial discussion, I drew to Mr Perry's attention the letter written on Employment Judge Laidler's instructions which had not been provided with his brief.

91. I can see from the list of issues in the bundle, where the amendments agreed between Mr Kirk and Mr Perry appear in blue, that the list of issues was sensibly agreed between them and that being so, I can see why Mr Perry would have sensibly taken the view that the deposit order application was unlikely to succeed.

92. Respondent's, (and claimant's where appropriate) are entitled to make applications for deposit orders where they think that the case that they face has little reasonable prospects of success. If they do so in a situation where they are unlikely to truly believe that, where the tactic is really designed to bully and intimidate the opponent, contrary to the overriding objective, then that would be unreasonable conduct which would pass the first threshold test for a costs order. I do not think that that is the situation here.

93. The deposit order application was not the strongest and it may well be that faced with Mr Kirk's skeleton argument, I gave some indication to the parties that it was unlikely to succeed. The respondent's subsequent withdrawal of the application is to be commended, not criticised. It would be unfortunate if a culture evolved whereby if an Employment Judge makes some observations about an application before an adjournment, giving the parties an opportunity to reconsider and perhaps withdraw an

application, only to be faced with costs orders as a consequence. That would give rise to a situation where parties will always persist with weak applications, taking up Tribunal time and parties resources.

94. There is a judgment call to be made when deciding whether or not to make a deposit order application and part of that judgment call is the potential costs to the applicant of making the application, which will not be thought of kindly by the client if the application does not succeed. In this case, a poor judgment call was made. However, it was not an application that was hopeless and entirely without merit. It was not an application that was unreasonable or contrary to the overriding objective. For these reasons, I decline to make the costs order applied for.

Case management orders

95. The parties agreed that if in my reserved Judgment, I was to allow amendment, a tight timetable for preparation is appropriate in order to preserve the current listing for a hearing starting 7 September 2020. This is particularly important given the parlous state of the lists as a result of the coronavirus crisis and the chronic shortage of Judges in this region. The timetable set out below is tight, but achievable. I will do all I can to try and ensure that this reserved decision is sent out to the parties quickly, so that they can comply. If there is delay in these orders being communicated to the parties, I expect them to cooperate in accordance with the overriding objective and agree between themselves a timetable so that the case can start on 7 September. If that does not happen and one party appears to be at fault, they can expect to face an order for costs.

ORDERS

Made under the Employment Tribunals Rules of Procedure 2013

1. The respondent has leave to file and serve Amended Grounds of Resistance dealing with the claimant's amendments only by no later than **23 July 2020**.

2. The parties are to agree on amendments to the currently agreed list of issues and to reflect the claimant's amended claim and the amended grounds of resistance by no later than **30 July 2020.**

3. Further disclosure arising from the amended claim and amended grounds of resistance is to take place on or before **6 August 2020**.

4. The parties are to agree on amendments to the agreed bundle by no later **13 August 2020**.

5. Witness statements are to be exchanged by no later than **27 August 2020**.

Public access to employment tribunal decisions

The parties should note that all judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

President's guidance

The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: *www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/*

Other matters

(a) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(b) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(c) You may apply under rule 29 for this Order to be varied, suspended or set aside.

_____
Employment Judge M Warren

Date: 8 July 2020

Sent to the parties on: 16.07.2020.....

...T Yeo.....
For the Tribunal Office