EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr S Griffiths		**Department for Work and Pensions**

Heard at: London South Employment Tribunal **On:** 17 February 2020

Before: Employment Judge Hyams-Parish

Representation:
For the Claimant: In person
For the First Respondent: Ms J Gray (Counsel)

JUDGMENT

The Tribunal does not have jurisdiction to hear the Claimant's unfair dismissal claim because he does not have sufficient length of service.

The Tribunal does not have jurisdiction to hear the Claimant's disability discrimination claim as it has been brought out of time.

REASONS

Background

1. By a claim form presented to the Tribunal on 26 June 2019 the Claimant brings a claim of unfair dismissal.

2. By a letter from the Respondent dated 27 September 2019 an application was made to strike out the unfair dismissal claim on the grounds that the

Tribunal did not have jurisdiction to hear it. The Respondent alleges that not only does the Claimant have insufficient length of service to bring an unfair dismissal claim, but the claim is also significantly out of time.

3. The preliminary hearing to consider the above application was held on 17 February 2020. At the hearing, the Claimant applied to amend his claim form to bring an additional claim of disability discrimination.

4. A judgment dated 17 February 2020 ("judgment") was sent to the parties on 7 March 2020 setting out my decisions on the unfair dismissal and disability discrimination claims.

5. The Claimant wrote to the Tribunal on 7 March 2020 requesting written reasons. Unfortunately, due to administrative oversight, this request was not brought to my attention until 9 September 2020. I can only apologise to the Claimant for this oversight which has resulted in him waiting much longer than usual for these written reasons.

6. Upon looking at the judgment again when preparing to write these reasons, I had initially thought that there was an error on it and that it did not accurately reflect the decision made at the hearing in so far as the discrimination claim was concerned, namely whether the claim was dismissed because it was out of time or whether I had refused the Claimant's application to amend the claim. For this reason, I wrote to the parties on 22 September 2020 and invited their comments.

7. Since writing to the parties, I have been able to review my notes of the hearing on 17 February and remind myself of the reasons given orally at the conclusion of it. In the circumstances, and at the request of the Claimant in response to my request for comments at paragraph 6 above, I have reconsidered my decision pursuant to Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237. Having done so, I am satisfied that the original judgment was indeed correct and that the decision below accurately reflects the decision made at the conclusion of the hearing and conveyed orally to the parties. I am further satisfied that the decision is correct and should not be varied or revoked.

Jurisdiction issues and application to amend

Claims

8. In the claim form at paragraph 8 headed "Type and Details of Claim" the Claimant ticked the box stating that he wished to bring a claim of unfair dismissal but did not tick the box indicating that he wanted to bring a disability discrimination claim.

9. In the boxes allowing for text to be inserted, the Claimant provided the following additional information [sic]:

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personal vendetta from a manager. sick leave due to not providing adjustments

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Somehow my employment was terminated for two different reasons.

The first was for absenteeism. This was caused by me being off sick for RSI. I had told the employees that I needed adjustments to use PC and mouse, but it took them many months to do this and get an occupational health assessment. By this time, it had caused problems in my body and I was off sick with the GP note saying RSI PAIN

The second was for misconduct. This was caused by a spiteful manager who deliberately targeted me personally and used every method to terminate my employment. It was a personal attack on me from this manager and was extremely unpleasant. After I left the company they gave me six sessions of counselling to try and recover from the anxiety and stress that was caused by this deliberate attack from a manager. It was disgusting.

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I want as much money as possible for the physical harm which was done to my body through RSI. Employers even paid for six physiotherapy sessions to try and calm my body down from the PC and mouse work which I told them it was going to cause me pain. I also want compensation for psychological stress caused by the deliberate targeted attack from the manager who terminated my employment with extreme prejudice. She singled me out and terminated me through various processes. The employers gave me six counselling sessions to try and relieve the stress and anxiety caused by this woman at work.

10. In their response, the Respondent set out its reply to the unfair dismissal claim. Clearly anticipating from the claim form that there *may* also be a discrimination claim, they included a broad denial of any claim of discrimination but nothing more than that.

11. The Claimant was employed by the Respondent as an administrator. He commenced employment on 21 May 2018. He was employed on an 18-month fixed term contract. He was subject to a probationary period due to end on 18 November 2018. The probationary period attracted a sickness absence tolerance of 4 days. The Claimant's employment was terminated on 30 November 2018 due to the level of sickness absences. At the date of termination, he had been employed for just in excess of six months.

12. The claim form, as I have said above, was presented to the Tribunal on 26 June 2019. The early conciliation certificate showed Days A and B as both being 26 June 2019. Therefore, the latest date that the Claimant should have presented his claim, applying the three-month time limit, was 27

February 2019. On the face of it, the Claimant's claims were therefore presented four months outside the primary limitation date.

13. As I have said above, the purpose of the preliminary hearing on 17 February was to consider whether the Tribunal had jurisdiction to hear the unfair dismissal claim given the Claimant had less than two years' service and had presented his claim form out of time. At the hearing, the two-year rule was explained to the Claimant, together with the exceptions. The Claimant said he felt the two-year requirement should be set aside in his case but he could not provide a legal basis for doing so.

14. At the hearing, the Claimant also made clear that he wanted to bring a disability discrimination claim. He therefore sought to amend his claim to add a claim of disability discrimination. The Respondent opposed any application to amend the claim, saying that it was a completely new claim. However, even if the amendment was allowed, the Respondent averred that it was a claim that was still significantly out of time.

Law

15. The service requirement for bringing a claim of unfair dismissal is set out at clause 108 of the Employment Rights Act 1996 (ERA) which states:

> ***(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.***

16. When deciding whether a formal amendment is required, case law makes clear that reference must be made to the claim form as a whole.

17. If a formal amendment is required, the factors I must take into account are those which the court stated in the case of **Selkent Bus Co Ltd v Moore [1996] IRLR 661** which include:

(a) The nature and type of amendment.

(b) The applicability of time limits.

(c) The timing and manner of the application.

18. As well as the above factors, it is important to balance the hardship and injustice of allowing the amendment, against the injustice and hardship of refusing it.

19. The time limits for bringing claims of discrimination are set out in s.123 Equality Act 2010 which states:

> ***(1) Subject to [sections 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.

20. What is clear from s.123(1)(b) EQA is that the three-month time limit for bringing a discrimination claim is not absolute: tribunals have a discretion to extend the time limit for presenting a complaint where they think it is 'just and equitable' to do so. Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases. That said, in the case of **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA** the Court of Appeal stated that when employment tribunals consider exercising the discretion "*there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*". Of course, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable.

21. In exercising a discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in s.33 of the Limitation Act 1980 (as modified by the EAT in **British Coal Corporation v Keeble and Others [1997] IRLR 336**). Section 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Analysis and conclusions

(a) Unfair dismissal

22. Given the Claimant's length of service, being less than two years, I concluded that the Tribunal does not have jurisdiction to hear the claim of unfair dismissal pursuant to s.94 ERA. The Claimant has not suggested that his claim is brought under any other provision that does not have a minimum service requirement, and neither is one apparent. The claim of unfair dismissal is therefore dismissed.

(b) Does the addition of a disability discrimination claim require amendment?

23. It is not immediately apparent from paragraph 8.1 of the claim form that it includes a claim of disability discrimination because the relevant box is not ticked. I therefore turned to look at the claim form as a whole. In the text provided in the claim form, the Claimant does not mention the word disability or that he is a disabled person or suffering from a disability. However, he does refer to the reason for his dismissal being because of his absenteeism caused by RSI. He also refers to the Respondent failing to make adjustments for the RSI. I therefore conclude that, looking at the claim form as a whole, it pleads facts which are capable of being interpreted or labelled as complaints under s.15 and 20/21 of the EQA. I bear in mind that the Claimant prepared the claim form without any legal assistance. For the above reasons I conclude that the claim form includes a claim of disability discrimination and that no formal application to amend is necessary to add this claim.

(c) Is it just and equitable to extend the time limits to allow the Claimant to pursue his claim?

24. Of course, that is not the end of the matter. Having found that the claim form includes a claim of disability discrimination, I conclude that, even taking the latest discriminatory act, which is the dismissal, the claim has still been presented significantly outside the time limits permitted by s.123 EQA. I therefore have to decide whether it is just and equitable to extend time pursuant to s.123(1)(b) EQA.

25. During the hearing, I heard reasons for the Claimant's delay in lodging proceedings which I do not find completely convincing. He referred to mental health issues as the reason for the delay, but today is the first time there is mention of this, he brings no supporting evidence of it, and it is not the disability relied on as part of the claim. He brings no evidence with him to support his contention that he could not present his claim in time; I am not satisfied on the evidence that he could not have brought his claim much earlier than he did and before the expiry of the time limit.

26. I remind myself that I should not simply concentrate on the reasons for the delay. Importantly, I have to consider the balance of prejudice; that is weighing up the prejudice of not allowing the Claimant to proceed with his claim, as against the prejudice to the Respondent of allowing it to proceed. I bear in mind that the claim of disability discrimination, whilst in the claim form, is not well particularised and therefore further particulars are going to be needed. That in turn will require further work by the Respondent and incur additional costs. I am told by the Respondent that one of their witnesses is due to leave their employment, which creates a risk that they may not be able to secure that person's assistance at the final hearing. In this case, taking all of the above into account, I find that the balance of

prejudice is in favour of the Respondent and conclude that it is not just and equitable to allow the disability claim to be brought out of time. For this reason, the claim of disability discrimination is also dismissed.

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Employment Judge Hyams-Parish
2 October 2020