Case Number 1305877/2019
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss S Carvalho		**(1) Swissport GB Limited** **(2) Birmingham Airport Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON A PRELIMINARY HEARING

HELD AT Birmingham **ON** 27 & 30 November 2020

EMPLOYMENT JUDGE GASKELL

Representation

For the Claimant:	**Mr O Lewis (Counsel) – 27 November 2020** **In Person – 30 November 2020**
For the Respondent (1):	**Mr L Rogers (Solicitor)**
(2):	**Ms L Scully (Solicitor)**

JUDGMENT
(As promulgated on 30 November 2020 -
set out here for ease of reference only.)

The Judgment of the tribunal is that: -

1 The claimant's application for permission to amend her first claim (presented on 7 July 2019) to add the second respondent as a party to that claim is refused.
2 The claimant's second claim (presented on 16 March 2020) insofar as it relates to the second respondent is dismissed for want of jurisdiction.
3 For the avoidance of doubt, the claimant's claims against the first respondent in both the first and second claims are unaffected by this judgement.

REASONS

Introduction

1 The judgement set out above was promulgated on 30 November 2020 following a hearing over two days on 27 & 30 November 2020. Reasons for the decision were given orally on 30 November 2020. An email dated 14 December 2020 the claimant requested written reasons which I now provide.

2 On 7 July 2019, the claimant presented a claim form which named a single respondent (the 1st respondent). It was a claim for unpaid wages and race discrimination. At the time of presentation, the claimant was an employee of the respondent.

3 The circumstances of the claim are that the claimant was employed by the respondent as a Flight Dispatcher. The claimant worked in a secure part of airport; and, in order to perform her duties, she required a security pass issued by the operator of the airport - Birmingham Airport Limited (the 2nd respondent). In February 2019, the 2nd respondent suspended the claimant's security pass and commenced an investigation into a possible security breach. Whilst her security pass was suspended, the claimant was unable to enter the secure part of the airport and accordingly could not undertake her normal duties. The respondent, acting as it claims in accordance with the claimant's contract of employment, effectively suspended the claimant from work without pay and commenced its own disciplinary investigation. The respondent's investigation led to there being no disciplinary action against the claimant – but, because her security clearance remained suspended, the claimant was unable to return to work as normal and she remained absent and unpaid.

4 The 2nd respondent reported matters to the police; there was a criminal investigation; but ultimately, following consideration of the evidence by the Crown Prosecution Service there was no prosecution. Nevertheless, on 2 August 2019, the 2nd respondent decided to permanently remove the claimant's security pass - a decision which was only communicated to the claimant on 3 October 2019. In the meantime, the claimant's position at work remained unchanged - she was absent and unpaid until she resigned on 10 December 2019.

5 On 22 November 2019, Employment Judge Mark Butler conducted a Preliminary Hearing at which the issues in the case were defined; Case Management Orders were made; and the Final Hearing was listed for six days to commence on 23 November 2020. During the course of that Hearing, the claimant advised Judge Butler that she intended to make an application to amend the claim to include the airport authority as a second respondent. Judge Butler indicated that, if this was the claimant's intention, she should proceed quickly with her application so as to avoid jeopardising the trial date which he had fixed.

6 In the event it was not until 16 March 2020 that the claimant made her application to amend. The terms of the amendment sought were as follows: -

(a) To add the 2nd respondent to the claim - but the application contained no specific particulars of the claims to be pursued against the 2nd respondent.
(b) To add claims against the 1st respondent for unfair (constructive) dismissal and for victimisation.

7 On the same date, the claimant presented a second claim form. This named both respondents. The claims against the 1st respondent are for unpaid wages; race discrimination; religious discrimination; unfair dismissal; and victimisation. The claims against the 2nd respondent are for race discrimination; harassment; and victimisation. For reasons which are unclear to me, the tribunal administration did not issue a second Claim Number in respect of the new claim. Both claims have proceeded on the same Claim Number. I will refer to them simply as **Claim 1** (7 July 2019) and **Claim 2** (16 March 2020). Save that requires further particulars of the victimisation claim and that it reserves its position with regard to time points, the 1st respondent does not object to the amendment or to Claim 2.

8 The 2nd respondent objects to being joined as a party to Claim 1 by Amendment. And has applied for the strike-out of Claim 2 against it for want of jurisdiction. The jurisdictional objections are that the relationship between the claimant and the second respondent's was not an employment or work relationship; and accordingly, a complaint about how the 2nd respondent has discharged its duties regarding airport security is not for determination in the Employment Tribunal. Further, it is the 2nd respondent's case that the Employment Tribunal lacks jurisdiction because the claims against it have been presented out of time. So far as the amendment application is concerned, the 2nd respondent's position is that the jurisdictional objections are such that it would be wrong for the tribunal to grant to the amendment.

9 In the light of the 2nd respondent's objection to the amendment and its application for the strike-out of Claim 2, the cases were listed for a further Preliminary Hearing before Employment Judge Hindmarsh on 16 October 2020. Judge Hindmarsh vacated the listed trial date and directed that the 2nd respondent's applications should be determined at an Open Preliminary Hearing listed before me on 27 & 30 November 2020.

The Law

Jurisdiction of the Employment Tribunal

10 The jurisdiction of the Employment Tribunal to deal with breaches of the Equality Act 2010 (EqA) is conferred by Section 120 of that Act. It is limited to contraventions of Part 5 (Sections 39 – 83) of the Act and to contraventions of Sections 108,111 and 112 which relate to Part 5. Part 5 is concerned with relationships between employers and workers; the holders of public office such as police officers; the regulation of partnerships; professional bodies; the offering of professional qualifications; employment services (such as employment agencies); trade organisations; and memberships of local authorities. The Part also deals with occupational pensions and equal pay.

11 Essentially, Part 5 prohibits discrimination in the field of employment; and Section 120 confers jurisdiction on the Employment Tribunal to enforce that prohibition. Section 108 governs employment relationships which have ended and where there is an ongoing prohibition against discrimination. And Sections 111 & 112 prohibit incitement causing, inducing or aiding such contraventions.

12 In his skeleton argument Mr Lewis referred me to Section 109 EqA (and I have also considered the provisions of Section 110). These Sections confer liability on an employer (or other organisation or individual to whom the Part 5 prohibition applies) for acts/omissions on the part of other employees or agents.

Time Limits

13 Section 123 EqA states that an Employment Tribunal may only consider a complaint for the contravention of Part 5 if the claim is brought within three months of the act/omission complained of or such other period as the Tribunal considers to be just and equitable. Where the complaint relates to conduct extending over a period, for the purpose of determining the time limit, the act is to be treated as done at the end of the period.

14 ***Robertson -v- Bexley Community Centre*** **[2003] IRLR 434 (CA)**
An Employment Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercise strictly in employment cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary, a tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule.

Amendment

15 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order: Rule 29. Although there is no specific reference to amendment in the Rules, no doubt such an order may include one for the amendment of a claim or response.

16 In ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836 (EAT)** the EAT gave the following general guidance as to the exercise of the Employment Tribunal's discretion and the factors which might be taken into account: -

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on

the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that application is out of time, and, if so, whether the time limit should be extended under the applicable statutory provisions.

(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down … for the making of amendments. The amendments may be made at any time – before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

17 The paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

18 Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form were presented to the tribunal out of time, the tribunal would consider whether time should be extended, either on the basis of the "not reasonably practicable" test (for example, for unfair dismissal) or on the basis of the "just and equitable" test (for example, for unlawful discrimination). If time were not so extended, the tribunal would lack jurisdiction to entertain the complaint, and it would fail. However this does not mean that the mere fact that a claim would be out of time should automatically prevent it being added by amendment. The relevant time limits are an important factor in the exercise of discretion but they are not decisive.

19 Under the general power of case management a Judge may at any time, on the application of a party or on his own initiative, make an order (among other things) that any person who he considers has an interest in the outcome of the proceedings be joined as a party to them. This power is often used where the claimant's employer has been wrongly identified or where, in a complaint of unlawful discrimination, a named individual against whom allegations are made is added as a respondent in addition to the employer.

The Claimant's Case

20 The claimant's case is that the decision taken by the 2nd respondent firstly to suspend, and then to permanently withdraw, her security pass prevented her

from undertaking her contractual employment duties. As such, a remedy should lie against the second respondent if it has acted in a discriminatory fashion.

21 In an opening skeleton argument, Mr Lewis specifically relied on the provisions of Section 109 EqA suggesting that, for the purpose of security clearance, the 2nd respondent was acting as an agent of the 1st respondent.

22 Accordingly, the claimant argues that, because of the impact of its decision on her employment, the Employment Tribunal has jurisdiction to determine her complaint of race discrimination against the 2nd respondent. And that she should be permitted to amend Claim 1 to include the 2nd respondent and to proceed with Claim 2 against both respondents. The claimant does not accept that the claims are presented out of time; but, even if the tribunal finds this to be the case, she argues that it would be "*just and equitable*" for time to be extended.

23 In support of her claim for a "*just and equitable*" extension of time, the claimant asserts that on 2 December 2019 she retained the pro-bono services of a trainee barrister who she believed was dealing with the presentation of Claim 2 and the application to amend. On 20 January 2019, she received information that the trainee could not, in fact, assist her and this accounts for the delay.

24 The claimant also relies on the fact that on 19 February 2020 she obtained ECCs against both respondents (in each case this was the 2nd ECC). It is her case that this validates her claim presented on 16 March 2020.

The 2nd Respondent's Case

25 On behalf of the 2nd respondent, Ms Scully argues that the relationship between the claimant and the 2nd respondent, as effectively the licensing authority for security clearance, is not a relationship encompassed within Part 5 EqA; and, accordingly, pursuant to Section 120 EqA, the Employment Tribunal does not have jurisdiction to determine the claimant's complaint against the 2nd respondent. If the tribunal lacks jurisdiction to hear the complaint, then Claim 2 should be dismissed; and, lack of jurisdiction would be a significant ground to refuse the amendment of Claim 1.

26 In any event, with regard to Claim 1, and the proposed amendment there are no allegations to be found in Claim 1 against the second respondent; and nothing has been particularised in the amendment application.

27 Regarding both claims, Ms Scully argues that against the 2nd respondent they are clearly out of time. On any view, the latest act of discrimination which could be attributed to the 2nd respondent is the permanent withdrawal of the claimant's security pass. This decision was taken on 2 August 2019 although it appears to be conceded that the claimant was unaware until 3 October 2019. Taking a start date of 3 October 2019, the primary time-limit would expire on 2

January 2020. The claimant consulted ACAS regarding her potential claim against the 2nd respondent on 15 November 2019 and an Early Conciliation Certificate was issued on 15 December 2019. Allowing for the conciliation period, the time-limit would still expire on 2 February 2020; but neither the amendment application, nor the Claim 2 were presented until 16 March 2020.

Discussion & Conclusions

The Jurisdiction of the Employment Tribunal

28 I have considered the whole of Part 5 EqA and the various types of relationship which are provided for. Principally, the relationship must be between an employer and a worker; but other types of relationship are also in frame including the holders of public office; elected representatives; qualification authorities; professional bodies; employment agencies. In my judgement, the relationship between the claimant and the 2nd respondent does not fall within the provisions of Part 5. There was no employment relationship of any description. For the purposes of security clearance, the 2nd respondent was carrying out statutory duties - there are documents in the bundle showing that this was done under an agreement between the 2nd respondent, the Civil Aviation Authority and the Department for Transport. Individuals may require security clearance at the airport for reasons other than employment - all that the 2nd respondent was concerned with was the individual's suitability.

29 I would find it surprising if there was not some redress available to the claimant following the withdrawal of her security pass if this was done unlawfully. But I am satisfied that such redress does not lie within the jurisdiction of the Employment Tribunal. It is not for me to research the matter and advise the claimant, But, from experience, I would imagine that such redress would lie with the First-tier Tribunal (General Regulatory Chamber) or by way of Judicial Review. In my judgement, the best analogy would be that of an employee for whom it is a precondition to be the holder of a valid driving licence. If that employee's driving licence were revoked by DVLA unlawfully resulting in a loss of employment, there would be no remedy against DVLA in an Employment Tribunal but doubtless a remedy would lie elsewhere. Likewise an employee who loses employment because of an unlawful decision by the Immigration Authorities.

30 There is nothing in the claimant's pleaded case to suggest that she alleges that the 2nd respondent caused, induced or aided the 1st respondent to act in a discriminatory way. It is the claimant's case that the 2nd respondent discriminated directly and of its own volition. In my judgement, Sections 111 & 112 EqA are not engaged. Sections 109 & 110 EqA, if engaged, would fix the 1st respondent with liability for the acts/omissions of the 2nd respondent. But those provisions would not give rise to direct liability on the 2nd respondent. Mr Rogers for the first respondent, is aware that the application of Section 109 & 110 remain

in play in this case and will have to be determined at the trial of the case against the first respondent.

31 Accordingly, I find that the tribunal has no jurisdiction to consider the claimant's claim against the 2nd respondent and accordingly Claim 2 is dismissed for want of jurisdiction.

Time Limits

32 Had I not found that the tribunal lacked substantive jurisdiction to consider the claim against the 2nd respondent, I would have had to consider whether the tribunal was deprived of jurisdiction because of the presentation of Claim 2 out of time. I agree with Ms Scully's analysis of where the deadlines lie based on time running from 3 October 2019. (Ms Scully does not accept this date; and would argue instead for 2 August 2019). But, even taking the later date, it is clear that Claim 2 was presented several weeks late.

33 It is unclear to me why the claimant obtained second EC Certificates against both respondents in February 2020. But I am certain that the claimant cannot extend time simply by the device seeking a second EC Certificate. And, in any event, by the time she consulted ACAS for the second time the claim against the 2nd respondent was already out of time.

34 On the question of whether or not it would be just and equitable to extend time, I remind myself that it is for the claimant to satisfy me of the justice and equity of so doing and the hurdle which she must overcome is high. The claimant has explained the position with regard to the trainee barrister; but she was aware of that position by 20 January 2020; she has provided no explanation for the delay between then and 16 March 2020. She may have had a credible case if Claim 2 had been presented late by just a few days in early February 2020. But, in my judgement, she has not satisfied me that there is a just and equitable case to extend time until 16 March 2020.

35 Accordingly, I find that, even if the tribunal did not lack substantive jurisdiction, it would still be deprived of jurisdiction by reference to the time limits set out in Section 123 EqA.

Amendment

36 I have found on two separate grounds that the employment tribunal does not have jurisdiction to consider the claimant's claim against the 2nd respondent. On the first of these, the substantive jurisdiction point, in my judgement, of itself justifies the refusal of the amendment application - the tribunal lacks substantive jurisdiction to hear Claim 1 against the 2nd respondent.

37 Whilst the time point would not automatically prevent the grant of an amendment, my judgement is that, in this case, it would not have been in the interests of justice to allow an amendment to join the 2nd respondent some ten months after the presentation of the claim in respect of causes of action (the suspension of the security pass and the commencement of an investigation) which were well known to the claimant when Claim 1 was presented.

38 Accordingly I refuse the application to amend Claim 1 to join the 2nd respondent.

39 All claims against the 2nd respondent are accordingly dismissed.

Employment Judge Gaskell
14 January 2021