EMPLOYMENT TRIBUNALS

Claimant: Mr R Urmston

Respondent: Network Rail Infrastructure Limited

Heard at: Manchester (by CVP) **On:** 27 November 2020

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: Mrs Urmston (Wife of claimant)
Respondent: Ms R Levene, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim was brought out of time but it is just and equitable to extend time under s.123(1)(b) of the Equality Act 2010. His claim will proceed to a final hearing.

REASONS

1. This was a public preliminary hearing conducted by CVP. There were two matters which I needed to decide. The first was whether a proposed amendment to the claim should be granted, and the second was whether the claim as a whole should be allowed to proceed despite seemingly being filed out of time.

2. The background to the claim is set out in the Case Management Order made by Employment Judge Horne on 29 April 2020 following a preliminary hearing on 27 April 2020. In brief, the claimant complains that the respondent failed to make reasonable adjustments when he returned to work following a period of mental health illness.

3. I gave my decision orally at the hearing and they were requested in writing. At the hearing I dealt with both the amendment and time limit issues in one decision because of the overlap of relevant facts. For convenience I have therefore included my reasons for refusing the amendment in this judgment. I cross refer to them in the Case Management order of today's date.

The Relevant Law

Amendment

4. In the case of **Selkent Bus Company Limited v Moore [1996] ICR 836** the Employment Appeal Tribunal ("EAT") set out the test to be applied by a Tribunal in deciding whether to exercise its discretion to grant an amendment. It said the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The EAT in **Selkent** also set out a list of factors which are certainly relevant, which are usually referred to as the "**Selkent** factors". In brief they are:

(1) The nature of the amendment i.e. whether the amendment sought is one of the minor matters or is a substantive alteration pleading a new cause of action;

(2) The applicability of time limits. If a new complaint of cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended; and

(3) 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 in the rules for making amendments, but delay is 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).

5. In the case of **Vaughan v Modality Partnership UKEAT/0147/20/BA** the EAT reminded parties and Tribunals that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequences of allowing or refusing the amendment. That balancing exercise is fundamental. The **Selkent** factors should not be treated as if they are a list to be checked off.

6. Although **Selkent** says it is essential for the Tribunal to consider whether a complaint is made out of time and if so whether the time limit should be extended, in **Galilee v Commission of Police of the Metropolis [2018] ICR 634** the EAT held it is now always necessary to determine time points as part of an amendment application. A Tribunal can decide to allow an amendment subject to limitation points. That might be the most appropriate route in cases where there is alleged to be a continuing act.

7. The assessment of the balance of injustice and hardship may include an examination of the merits but there is no point in allowing an amendment if it will subsequently be struck out. That extends to cases not only which are utterly hopeless but also to ones where the proposed claim has no reasonable prospect of success. The authority for that is **Gillett v Bridge 86 Limited [2017] 6 WL UK 46**.

Time Limits

8. Turning to time limits under the Equality Act 2010, time limits under section 123 of the 2010 Act usually run from the date of an act or omission and end three months afterwards. When it comes to a failure to do an act, that failure is treated as happening when there is a decision not to carry out the omission or when a party does something inconsistent with the omitted act. If there is no inconsistent act time runs from the expiry of the period in which that person might reasonably have been expected to do the omitted act (sections 123(3) and 123(4) respectively).

9. If the discrimination claim under the 2010 Act is out of time the Tribunal may extend time if it thinks it just and equitable to do so. The discretion is a wide one. Unlike section 33 of the Limitation Act 1980, the 2010 Act does not specify any list of factors to which the Tribunal has to have regard. Although it has been suggested that it may be useful for the Tribunal to consider the list of factors specified in section 33, the Court of Appeal has made it clear that the Tribunal is not required to do that.

10. As was made clear recently in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, matters which are almost always relevant to consider when exercising any discretion whether to extend time are firstly the length of and the reasons for the delay, and secondly whether the delay has prejudiced the respondent, for example by preventing or inhibiting it from investigating the claim while matters were fresh.

11. In **Morgan** the Court of Appeal also considered the submission that the Tribunal had made an error or law by failing to place the burden on the claimant in that case to satisfy the Tribunal that it was just and equitable to extend time in her favour. The Court of Appeal rejected that argument. It said there was no justification for reading into the language of the 2010 Act any requirement that the Tribunal must be satisfied there was a good reason for the delay let alone that time cannot be extended in the absence of an explanation for a delay.

12. Having said that, the Court of Appeal have also confirmed that granting an extension of time should be the exception rather than the rule (**Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**).

Findings of Fact

13. In this case the claimant returned to work in November 2018 after a period of mental health illness, which included an inpatient stay. Although the claimant suggested that the matter complained of, i.e. a failure to make reasonable adjustments, was a continuing act, I am satisfied that the way the case is put in the claimant's particulars of claim and as it is summarised at paragraphs 34 and 35 of

Employment Judge Horne's Order, mean that the complaint relates to the point at which the claimant returned to work in November 2018.

14. I accept that at paragraph 37 of Employment Judge Horne's Case Management Order there appears to be a concession that that is the case. The claimant at the start of this hearing and in his witness statement suggested that there was a continuous act, but I am satisfied that in this case the failure to make reasonable adjustment had occurred at the latest by 22 November 2018. I refer to that date because it is clear from the Occupational Health report at page 101 of the bundle that by that date the claimant had returned to work. Since the complaints are about what happened at the start of his return to work, time must have begun to run at the latest by 22 November. By my calculation that means that the claimant should have contacted ACAS to begin the early conciliation process which would have triggered an extension of time by 21 February 2019. In fact ACAS was not contacted until 30 December 2019. That means that there is a delay in this case of some ten months or so.

15. Given that the claim was made out of time I then need to make findings of fact about why that was. These findings of fact are also relevant to the claimant's application to amend.

16. The primary reason put forward by the claimant for the delay in bringing a claim is his mental health issues. I do accept that the claimant had and has serious mental health issues. They began from the middle of 2018 when he had a major depressive episode. Subsequent to that he has experienced three inpatient treatment periods at The Priory in Altrincham. In the bundle there was also a letter from the claimant's Consultant Psychiatrist, Mr Bamrah, confirming that he has serious mental health issues. Although that letter is dated 22 October 2020 and is written in support of the application for the claim to proceed out of time, I have no reason to doubt the truth of its content.

17. Having observed the claimant giving evidence I am also satisfied that his mental health state would not be sufficient to enable him to pursue a claim to the Employment Tribunal unaided. There was some evidence in the bundle which at first sight seemed to contradict that. That included in particular emails sent to Cat O'Brien of the respondent in June 2019. Those are at pages 122 and 124 of the bundle. They are emails dealing with complex matters, including references to the Equality Act and reasonable adjustments. They are signed by the claimant. However, I accept his evidence and that of his wife that although written in his name they were actually written by his wife. I do find that he had some limited degree of involvement with the process, but accept that it was Mrs Urmston rather than the claimant who was responsible for writing them. I do not find therefore that they provide grounds for disputing the claimant's own evidence that he was unable to file a claim from the period when he went off sick in January 2019 until around November/December 2019.

18. What is clear, however, from those emails is that the claimant was able to engage with fairly complex matters with the assistance of Mrs Urmston. In those circumstances it seems to me it is relevant for me to make findings about Mrs

Urmston's knowledge, both of the Equality Act and of Tribunal procedure, in order to decide what the reason for delay in this case was.

19. I accept the submission made Ms Levene that the emails in June 2019 do show a clear understanding of there being obligations on an employer under the Equality Act to make reasonable adjustments. I accept the evidence from the claimant that Mrs Urmston did not at that point know what Tribunal time limits were nor what the process was for initiating Tribunal proceedings. Her evidence was the information she had gleaned about reasonable adjustments was gleaned from the employee handbook at her own place of work which explained how that organisation applied reasonable adjustments. I do not think that the references to reasonable adjustments in those emails in June therefore lead me to necessarily have to conclude that the claimant's wife was at that point aware of Tribunal's procedures and time limits.

20. I do find, however, that the claimant's wife, Mrs Urmston, was aware of the next step to be taken in employment proceedings by the time that the final severance meeting took place with the respondent on 20 December 2019. At that meeting there is an exchange between Mrs Urmston and Rebecca Bayes of the respondent. Mrs Urmston says, "how do we proceed with legal action potentially?" and the response is, "if you did decide to take legal action against Network Rail this would need to be done through the early conciliation process through ACAS in the first instance and then potentially Employment Tribunal". Mrs Urmston's response is, "ok, I didn't want to have to put Ricky through that, but we do feel we potentially wouldn't have come to this point of Ricky having to leave the business if he was managed properly". When asked about this Mrs Urmston's evidence was that she was looking for a settlement at that point as the best way forward. She mentioned in her evidence that she was aware of ACAS and it does seem to me that Ms Levene's submission that the wording of her response to Rebecca Bayes' comment supports a finding that by that point Mrs Urmston was aware that the next step was early conciliation via ACAS followed by Tribunal proceedings.

21. What I find, therefore, is that by the severance meeting on 20 December 2019 at the latest Mrs Urmston was aware that the next step was early conciliation and initiating Tribunal proceedings. Given that she would have had to do some preparation for the severance meeting I think it realistic to make a finding that by the beginning of December 2019, or at latest the middle of it, she would have been aware of the next steps she would have to take if settlement negotiations failed.

22. In terms of the reasons for the delay, Mrs Urmston's evidence was that she was not fully aware of the circumstances of her husband's case until around December 2019 which is when he started to open up about what had happened to him. Mrs Urmston was cross examined about this and it was put to her by Ms Levene that given the obviously long and supportive marriage that they had it was surprising that these matters had not been discussed before December 2019.

23. There is some support in the documentation for the submission made by Ms Levene that Mrs Urmston had prior to December 2019 already decided that her husband had not received the support that he should have when he returned to work. In the report from Optima Health dated 12 November 2019 (page 112) it is

noted that Mrs Urmston attended that face to face assessment with her husband and stated that he did not receive any support from his managers whilst he was at work with full knowledge of his condition, and that that had contributed to the exacerbation of his condition.

24. I do find that at by the latest the beginning of November 2019, and certainly by 12 November 2019, Mrs Urmston had formed the view that Network Rail had failed to provide the necessary support for her husband. Given that I have already found that in June 2019 Mrs Urmston had demonstrated a familiarity with the notion of reasonable adjustments, it seems to me that by that time she would have been aware that there was a potential legal claim to be brought in relation to a failure to make reasonable adjustments when Mr Urmston returned to work in November 2018.

25. That being the case, the question arises why ACAS was not contacted until 30 December 2019. In making findings about that I step back and take into account the claimant and Mrs Urmston's circumstances at the time. I have accepted, and it is clear to me, that the claimant had serious mental health issues up to around November 2019 or December 2019 when they may have slightly alleviated. During that time Mrs Urmston was representing him but she is obviously not a professional representative. She confirmed that she had received assistance both from an employment law barrister who was a client of hers, albeit remotely rather than by way of direct assistance or representation, and she had also received some help from her employer's HR department in-house lawyers. Even given that, I accept Mrs Urmston's evidence that she does not have a legal background, that she was working herself during this period, and that her main concern was to ensure her husband's recovery during this period. That seems to me to be accurately reflected in her statement at the final severance meeting on 20 December 2019 that she did not want to put her husband through the ACAS and Tribunal process.

26. While I find that in this case there was a delay in bringing a claim, therefore, also find that the reasons for it were tied up with the claimant's mental health illness. I accept that it prevented him from bringing his own claim. I also find that it was her focus on the claimant's mental health which meant Mrs Urmston did not focus on bringing a claim earlier, even though at least by June 2019 she was aware of the concept of reasonable adjustments, and that by November 2019 she had formed the view that her husband had not had sufficient support when he returned to work.

27. There is then a delay from November/December until when the claim was filed at the Tribunal on 27 January 2020. I find, based on the notes of the meeting of 20 December 2019 and Mrs Urmston's evidence at the hearing that she had decided not to take action at least until she had ruled out the possibility of a settlement at that meeting. She asks the question, "what about settlement negotiation?" at that meeting, and it is only when that is ruled out that she asks about the next step. I find that reflects her true mindset at that point.

28. In terms of the delay after that meeting, ACAS was contacted on 30 December 2019, which I do not find to be an excessive delay from 20 December 2019 particularly given that there was a Christmas period in between. The early conciliation certificate was issued on 15 January 2020, and the claim from submitted

12 days' later. I note that that 12 days would mean that the claim form was filed within the relative time limit for a claim in the Tribunal because that usually runs for a month from the date of the early conciliation certificate. I also note that the claim form in this case is extensive and detailed and I therefore accept that there was a reasonable reason why there was a 12 day delay before the claim was actually filed. Nonetheless my fundamental finding is that there was in this case a delay of ten months before proceedings were initiated.

29. When it comes to the proposed amendment, Employment Judge Horne identified that at paragraphs 34.3 and 35.3 of his Case Management Order. For each of them what is said is that the respondent should not have allowed the claimant access to the railway track until a psychiatrist's report was obtained. When I asked the claimant about this he said he did not know anything about it. When I asked Mrs Urmston why that complaint had not been included in the original claim form she suggested it was because she had not had an opportunity to discuss that with her husband or that he had not flagged up that as a possibility. When I asked when she first became aware of it as a possibility her answer was not clear: she initially said February 2020. When I asked why the application to amend had not been made then she suggested that it may not have arisen until the preliminary hearing, so around April 2020.

30. In terms of how important that complaint is to the claimant's claim as a whole, Mrs Urmston's evidence was that had a psychiatrist's report been obtained that might have meant that the claimant would have been entitled to say that he should only do an office job, and that that might have led to him being unable to continue in work.

Submissions on Prejudice

31. Turning then to the relative prejudice to the claimant and to the respondent, in terms first of all of the two claims which are already part of the claim, these are the failure to make reasonable adjustments by failing to conduct a return to work interview and failing to arrange a phased return to work starting with reduced hours. In relation to these matters, the respondent in its amended grounds of response (paragraph 2.5) denies that the claimant was expected to "walk straight back into his role as if he'd never been absent", which is the way that the particulars of claim put it. The respondent says that the claimant and Cat O'Brien agreed that the claimant would return on a phased basis, working shorter days not seven days a week; that it was further agreed he would not work alone; that he would work primarily in the office and that he would be provided with additional supervision. The respondent also says (paragraph 2.6) that the claimant was seen by Occupational Health in November 2018 and they advised that the claimant felt confident to return to his full hours, and that Occupational Health's recommendation was that he was fit to do so but that the claimant should work accompanied in safety critical environments, and that if he reported any symptoms of anxiety at work he should inform his manager and seek his doctor's advice. The respondent says that those adjustments were proposed for an initial period of two months and were accommodated by the respondent. In relation to those two claims, therefore, what the respondent says is that it did implement reasonable adjustments.

32. In submissions Ms Levene suggested that because of the delay in bringing this claim memories would have faded. I asked whether this was a case where documentation would assist in providing evidence and her submission was that although there was some documentation it was likely that there would also need to be reliance on live evidence. That live evidence would be around what had actually been put into effect.

33. When it comes to the suggested amended reasonable adjustment of not allowing the claimant access to the railway until a psychiatrist's report was obtained, the respondent's position in its amended grounds of response (paragraph 2.7) is that it disputes there was any obligation on it to obtain a psychiatrist's report: in other words, it is not saying that it did do what was suggested, it is saying that there was no requirement for it to do so. When it comes to prejudice in relation to this, Ms Levene suggested that there would be prejudice because witnesses would not be in a position to remember why something had not been done.

34. For the claimant, Mrs Urmston suggested that there was very little prejudice in this case because there would be significant documentation relating to the matters in it and all the witnessed were still employed by Network Rail.

Conclusions

Proposed Amendment

35. Looking at the factors in **Selkent** I take the view that the nature of the amendment in this case is pleading a new cause of action. When it comes to time limits, I find that the new complaint is out of time since it too would have had to be brought in relation to 22 November 2018 and so should have been begun by contacting ACAS in February 2019.

36. When it comes to whether it is just and equitable to extend time in relation to the amended complaint, I find it more convenient to deal with that in the round with the other complaints.

37. In terms of the timing and manner of the application, the application was not made until April 2020 at the preliminary hearing. That was a further three months after the claim had been filed and therefore over a year out of time. There was no suggestion that new documentation had come to light which promoted this complaint, but Mrs Urmston did suggest that her husband had not discussed this matter with her until around April 2020. I do not find that a convincing explanation for not including that complaint in the original claim form. This is not a case where new information would be provided in terms of an incident that had happened or in terms of something that was said or done: instead it is simply a complaint that something else had not been done. It seems to me given how comprehensive the claim form is that there is no real explanation as to why this was not included to begin with.

38. In terms of prejudice to the respondent, I do accept the submission that in relation to this matter there is a prejudice to the respondent. That is because the witnesses would be asked why they did not do something or did not consider doing something. There is unlikely to be a record of that, and in the circumstances it does

seem to me there is a significant prejudice to the respondent in relation to this amendment.

39. I remind myself that what I need to do is to step back and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Looking at things from the claimant's point of view if I did reject this particular complaint, the claimant would still be able to pursue his claim in relation to the allegations at 34.1, 34.2, 35.1 and 35.2 of Employment Judge Horne's Case Management Order. Mrs Urmston did submit that this was an important part of the claim. I do not see that that is the case. The fact that it was omitted from the original claim seems to bear that out.

40. On balance therefore, and taking all the factors into account, I find that the balancing of injustice and hardship in this case is against granting the amendment. When it comes to that amendment, therefore, I refuse permission to add it to the claim.

Time Limits

41. When it comes to the broader question of whether the claim should be allowed out of time, I remind myself of the two central questions which **British Coal Corporation v Keeble [1997] IRLR 336** says will always be relevant. They are the extent of delay and the reason for it, and the prejudice to the respondent.

42. When it comes to the delay and the reason for it, I have found that the delay in this case is a significant one of some ten months. When it comes to the reason for it, I do accept that the evidence means that Mrs Urmston acting on behalf of her husband might have been in a position to bring the claim around November 2019. By then she had formed the view that her husband had not had adequate support when he returned to work, that there was such a thing as "reasonable adjustments" and I find from a short time later was also aware of the need to start early conciliation proceedings. There is therefore an explanation for the delay, particularly given the extremely difficult circumstances which the claimant and Mrs Urmston found themselves in through 2019. Those circumstances are, I remind myself, the claimant on more than one occasion having inpatient psychiatric treatment including ECT. I can see that Mrs Urmston's focus during this period of time would be on her husband's wellbeing. I have considered whether the fact that she was writing complex letters in relation to reasonable adjustments in June 2019 undermines this finding, which means that the claims should have been brought earlier. I find that they do not undermine it. Those letters were written in relation to an immediate problem, namely the imminent termination of the claimant's sick pay. As such it would have a direct and immediate impact on the claimant's mental health and wellbeing. I find that different considerations would apply to the more remote issue of a reasonable adjustment going back to when the claimant had returned to work.

43. I do find therefore that there is a reason for the delay and that up until the final severance meeting on 20 December the thing uppermost in Mrs Urmston's mind was to try and reach a resolution to put the least possible pressure on her husband and help rather than hinder his wellbeing. Nonetheless, the claim is out of time. I therefore need to consider the prejudice to the respondent.

44. Although Ms Levene submitted that memories fade, it is not clear to me in this case that the delay will have a central and fundamental impact on the respondent's ability to defend the claim. Although there was relatively little evidential documentation in the pre-hearing bundle, it is clear that there were regular Occupational Health reports and also clear that there were email conversations between the claimant and the respondent. I remind myself that the respondent's defence to the two complaints which I am allowing to proceed states that it did take the steps required, those steps being agreeing that the claimant would not work alone and that he would return to work on a phased basis. It seems to me that there would be documentary evidence relating to that, not least because the phased basis would be reflected either in timesheets or in other employment documentation. Similarly, it seems to me likely that there would be further documentation relating to the second adjustment referred to in paragraph 2.6 of the amended grounds of response. At the very least I think it is clear that this is not the sort of case where the allegations are of the type in a harassment case where the Tribunal is entirely reliant on conflicting and undocumented witness recollection. If I were to refuse the claim then this would bring the claimant's claim to a complete end. That would clearly have a massive impact on the claimant.

45. When it comes to my decision, ultimately I need to try and balance all these factors. It clearly would have been preferable if the claim had been brought earlier, however I do find that there are clear circumstances explaining why the claimant, assisted by his wife, did not do so. I do take the view that while there may be some prejudice to the respondent in defending the claim because of the passage of time, that is not such in this case as to outweigh the prejudice to the claimant were I to decide not to allow the case to proceed.

46. On balance therefore, and taking into account all those factors, my decision is that it is just and equitable to allow the claim to proceed in this case. That relates to the complaints at 34.1, 34.2, 35.1 and 35.2 of the Case Management Order made by Employment Judge Horne.

47. Having made that decision, the next step will be to list a final hearing for the case and to make Case Management Orders.

Employment Judge McDonald

Date: 14 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 January 2021

FOR THE TRIBUNAL OFFICE