Case No: 1601876/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr. Russell Tysoe

Respondent: Deloitte LLP

Heard on: Video (CVP) at Wrexham **On:** 1st August 2022

Before: Employment Judge S Evans (sitting alone)

Representation
Claimant: In person
Respondent: Mr. England, Counsel

PRELIMINARY HEARING

RESERVED JUDGMENT

1. The claimant's effective date of termination was 5th August 2021. The claimant was not continuously employed for a period of not less than two years ending with the effective date of termination. Accordingly the claim of unfair dismissal is excluded from the tribunal's jurisdiction and the unfair dismissal claim is dismissed.

2. The claimant's application to amend his claim, to add an additional claim of failure to make reasonable adjustments relating to having to write meeting minutes, is refused.

3. The existing claim of failure to make reasonable adjustments is presented outside the time limits of s.123 Equality Act 2010 and is dismissed due to lack of jurisdiction. It is not just and equitable to extend the time limit.

REASONS

Background

1. The claimant was employed as an Operations and Support Assistant by the respondent. His employment began on 19th August 2019. The date of termination of his employment is in dispute and is addressed below.

2. The claimant began Early Conciliation with ACAS on 17th October 2021. Certificate R181955/21/50 was issued on 5th November 2021. The claimant issued an ET1 claiming unfair dismissal and discrimination on the protected characteristic of disability under the Equality Act 2010 on 5th December 2021. The respondent's ET3 is dated 1st March 2022 and amended grounds of resistance are dated 17th May 2022.

3. At a Preliminary Hearing on 5th April 2022, a number of preliminary issues were identified for determination today. Those were added to subsequently and the issues for determination by me today are set out at paragraph 5 of an amended notice of hearing dated 24th May 2022 as follows:

   (i) What was the effective date of termination of the Claimant's employment (section 97 Employment Rights Act 1996)?

   (ii) Was the Claimant continuously employed for a period of not less than 2 years ending with the effective date of termination?

(iii) If not, is the Claimant excluded from the right to claim unfair dismissal by virtue of section 108 of the Employment Rights Act 1996, such that the unfair dismissal claim should be dismissed?

(iv) Was the Claimant a disabled person at the relevant time by reason of dyslexia?

(v) Whether the Claimant should be permitted to amend his claim to add an additional complaint of failure to make reasonable adjustments relating to him having to write meeting minutes?

(vi) Was any complaint presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including: whether there was "conduct extending over a period"; whether it would be "just and equitable" for the tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about occurred.

4. On 24th May 2022, the Tribunal gave notice to the parties on point (vi) above and directed (page 75 of the bundle) that:

"The claimant must make sure that his written witness statement includes the evidence he wants to give about why he says his reasonable adjustments claims were presented in time, what he says the time limits

for each complaint should be, and any evidence that he wants to give in support of any application that time should be extended on a just and equitable basis)"

5. The adjustments identified in the Order of 5th April 2022 were made during the hearing before me and the claimant confirmed that no further adjustments were needed.

6. I had a bundle before me of 139 pages. In reaching my decision I considered such pages of the bundle to which I was specifically referred. I also had a written witness statement from Mr. Edward Winter for the claimant and heard evidence from the claimant and Mr. Andy Whitton for the respondent. Counsel for the respondent confirmed there was no challenge to the content of Mr. Winter's evidence. I heard closing submissions from the claimant and counsel for the respondent. I have taken all the evidence I was given, along with the parties oral submissions, into careful consideration in reaching my judgment.

Relevant Law

Continuity of employment for a claim of unfair dismissal.

7. The right of an employee, under s.94 Employment Rights Act 1996, not to be unfairly dismissed, is subject to the claimant establishing that they are eligible to purse the claim. Section s.108(1) Employment Rights Act 1996 provides that s.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.

8. I was not directed to any authority on the point but it is established that the effective date of termination is the date on which the employee's notice expires or, if no notice is given, on the date that the fact of dismissal is communicated to the employee.

Protected characteristic of disability

9. Section 6 of the Equality Act 2010 defines the protected characteristic of disability, stating that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities.

Application to amend

10. The Tribunal has a discretion under Rule 29 The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to permit amendments to a party's statement of case. In *Selkent Bus Company Limited v Moore* 1996 ICR 836, the Employment Appeal Tribunal stated that, when exercising its discretion in an amendment application, a Tribunal must do so in accordance with the over-riding objective and taking into account all the circumstances, including:

    (i) the nature and extent of the amendment,

    (ii) the applicability of time limits

    (iii) the timing and manner of the application and

(iv) the relative prejudice/hardship to the parties of either granting or refusing it.

Time limits

11. Section 123 Equality Act 2010 provides that 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.

Counsel for the respondent referred me to the authority of *Matuszowicz v Kingston upon Hull City Council* [2009] EWCA Civ 22 which states that the date on which time for bringing a claim of failure to make reasonable adjustments will start to run, will be at the end of the period within which the employer might reasonably have been expected to make the reasonable adjustment.

I was not referred to any authority relating to just and equitable extensions but take into account the established principles that the onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit and that the exercise of the Tribunal's discretion to extend time should be the exception, not the rule. In considering the exercise of the discretion, I should assess all the factors in the case which I consider relevant to whether it is just and equitable to extend time, including in particular the length of, and the reasons for, the delay and the need to consider the prejudice which each party would suffer as a result of the decision reached.

Findings of Fact

Effective date of termination

12. The claimant gives the effective date of termination in paragraph 5 of the ET1 as 5th August 2021. His details of claim attached to paragraph 8 of the ET1 refer to an "understanding that while my final working day with the company was the 5th of August I was only being asked to not attend work due to security issues…"

13. The claimant was asked to attend a disciplinary hearing ("the Hearing") on 5th August 2021. He attended the Hearing with a colleague, Mr. Eric Winters. The meeting was conducted by Mr. Andy Whitton, a partner in the respondent's Risk Advisory team. Also in attendance was Mr. Matthew Roberts, HR representative who prepared the minutes of the meeting (pages 122 - 125 of the bundle).

14. The Hearing began at 15:00 and was adjourned at 15:55. It was reconvened at 16:04 when the minutes record that Mr. Whitton said to the claimant:

    "I am going be terminating your employment with immediate effect. You will be paid 4 weeks lieu."

15. There was then a discussion between the claimant and Mr. Whitton as to any access by the claimant to the office being with the "leavers' team" and the need for the claimant to provide personal contact details as his access to the respondent's computer system would be removed, possibly that

day.

16. The claimant was asked if he had any questions and replied:

"I understand that I have been terminated with immediate effect, anything on Deloitte Laptop will be lost, wont be able to access anything etc and you will supervise me to retrieve all stuff from the Cardiff office."

The claimant went on to express his frustration with the process of dismissal.

17. The claimant contended in evidence that he was placed on 4 weeks' notice on 5th August and that his employment ended in September 2021. He relied in support of his evidence on the P45 received from the respondent (pages 138 – 140 of the bundle) stating a leave date of 3rd September 2021. He also gave evidence that he had been placed on garden leave to avoid access to sensitive information and that, if had understood the meaning of payment in lieu of notice, he would have refused.

18. The evidence of Mr. Whitton conflicted with that of the claimant. Mr. Whitton accepted that the claimant had access to sensitive information but denied the claimant was placed on garden leave. The claimant could not recall all the details of the meeting whereas Mr. Whitton was very clear that he terminated the claimant's employment with immediate effect so that he could not access information and so that steps could immediately be taken to replace him. There is no evidence in the minutes of reference to garden leave and no reference to any such discussion in Mr. Winter's written statement. I find that there was no decision to place the claimant

on garden leave or any other indication that he would serve the notice period. The employment was ended with immediate effect on 5th August 2021.

19. The outcome letter (pages 126 – 127 of the bundle) included the detail below:

"Your dismissal is effective immediately and your final day of employment is therefore 5th August 2021. You will receive 4 weeks' pay in lieu of notice, subject to normal deductions of tax and National Insurance contributions."

20. A second outcome letter (pages 128 – 129 of the bundle) came to light as part of the disclosure process of this claim. This letter included the detail below (my emphasis in bold):

" Your dismissal is effective immediately and your final day of employment is therefore **3rd September 2021**. You will receive 4 weeks' pay in lieu of notice, subject to normal deductions of tax and National Insurance contributions."

21. It is accepted by the claimant that the second letter (pages 128 – 129) was not sent to him and that he did not have sight of it before these proceedings.

22. I accept the evidence of Mr. Whitton that there was an administrative error

in the respondent's HR system which generated a series of documents endorsed with a termination date of 3rd September 2021. The dates in the second letter and in the P45 were erroneous. The date of termination was 5th August 2021.

23. There is no PILON clause in the claimant's contract of employment (pages 110 – 119 of the bundle.)

Disability

24. The claimant was tested in 2008 by a practitioner in SpLD (specific learning difficulties). The report is at pages 95 – 105 of the bundle). The report does not identify the specific learning difficulty but makes recommendations as to the need for extra time in assessments and lessons.

25. The claimant's evidence is that, after that report in 2008, he was diagnosed with dyslexia, and received extra time at university and adjustments in his workplaces because of dyslexia. This is substantiated by the documents produced (pages 76, 78, 83, 85 – 88 and 92-94 of the bundle). I accept the claimant's evidence that he has a neurodiverse condition which amounts to an impairment for the purpose of the definition of disability under Equality Act 2010. The claimant gave evidence that this is a lifelong condition and that was not contested by the respondent.

26. The claimant struggles to communicate orally and in writing in certain

situations. When he is stressed, he stutters and cannot focus on what words to use. He forgets what he is saying during social conversations and makes notes to mitigate his memory issues. He has been told by his GP and by the health team at his University that "there are memory issues with dyslexia". Whilst further medical evidence would have been useful, I do accept the claimant's evidence and also take account of the general awareness of the impact of dyslexia on written communication and the contents of the 2008 report at pages 95 – 105 of the bundle. His impairment has an adverse effect on his ability to carry out normal day to day activities, including reading and writing and having a conversation. I also find from the claimant's evidence that the adverse effect on those day-to-day activities is substantial as it has a more than trivial effect on his ability to read, write and communicate without making significant adjustments to accommodate the effects, such as screen and software changes and making notes to address his memory issues.

<u>Proposed claim of failure to make reasonable adjustments relating to minute taking</u>

27. The claimant was tasked with taking minutes of a meeting which was originally scheduled for once a fortnight but when COVID-19 impacted in March 2020, it declined to no more than once a month. The last meeting for which the claimant was required to take minutes was held on or before 7th July 2021. The role was then taken from him and re-allocated.

28. The claimant expressed his concern from the outset of his employment that this task would be difficult because he cannot listen and write at the

same time. It took him up to 6 hours to record the minutes of a meeting lasting 2 – 3 hours. The last time he raised his concerns was in the final meeting to discuss his informal performance plan on 2nd July 2021.

29. The claimant did not include a claim of failure to make reasonable adjustments relating to minute taking in his ET1 as he did not think about it as he was focused on the unfairness of the decision to dismiss him.

Existing claim of failure to make reasonable adjustments

30. The respondent set key performance indicators ("KPIs") for the claimant to meet in relation to communication and ticket completion. In June 2021 he was placed on an informal improvement plan to improve his KPIs. The claimant was required to improve his performance throughout the informal performance plan that concluded on 2nd July 2021.

31. The claimant attended weekly meetings with his managers in relation to the improvements required of him and requested written minutes of the meetings. These minutes were only supplied on one occasion between May 2021 and July 2nd, 2021.

32. The claimant was given one hour's notice of the final meeting held under the informal performance plan on 2nd July 2021. He was unable to organize or request a minute taker for the meeting.

33. In evidence, the claimant agreed that the last date of complaint with regard to his claim of failure to make reasonable adjustments was the date of his final meeting under the informal improvement plan which was on 2nd July 2021.
34. At the Hearing on 5th August 2022, the claimant was told there was no right of appeal against the decision to dismiss him.
35. The claimant nevertheless appealed the decision on 18th August 2022 (pages 134 – 5 of the bundle). He received an email reply in August (not produced at the Hearing) to say he had no right of appeal.
36. The claimant has Internet access at home and researched the claim of unfair dismissal online. He found information that told him that if an appeal was unsuccessful, the next step was to contact ACAS. He gave no evidence of when that research was conducted.

Conclusions

Eligibility to claim unfair dismissal

37. The claimant's employment with the respondent began on 19th August 2019. The effective date of termination of his employment was 5th August 2021. The claimant did not have the required two years' continuous service to be eligible to bring a claim of unfair dismissal. The fact that the employer may have dismissed in breach of contract as there was no PILON clause in the contract does not assist the claimant in establishing the continuity required for a claim of unfair dismissal.

Disability

38. The claimant has established that he has the protected characteristic of disability under the Equality Act 2010. His dyslexia is an impairment which is long term as it is a lifelong condition. It has a substantial adverse effect on his ability to carry out normal day to day activities, including reading and writing and holding a conversation as the effects are more than minimal. He has to adjust his behaviour to accommodate this impairment, by using adapted technology so that he can read information on screen, taking time to process information and keeping written notes of conversations so that he does not forget them.

39. However, for the reasons given below, the claims under the Equality Act 2010 cannot proceed.

Application to amend claim to add in claim of failure to make reasonable adjustments in relation to minute taking

40. The nature and extent of the amendment is to raise a new claim of failure to make reasonable adjustment not previously raised. The claimant did not include it in his ET1 as he did not think about it as he was focused on the unfairness of the decision to dismiss him.

41. The ET1 was issued on 5th December 2021. The claimant first raised the issue of the proposed amendment at the Preliminary Hearing held on 5th April 2022.

42. The proposed claim relates to the requirement to take minutes of

meetings. The last meeting where this was expected was on or before 7th July 2022. The claimant had raised his concerns about his ability to complete the task throughout his employment. The last time he raised a concern was at the final meeting of the informal improvement plan on 2nd July 2022. The claim, if the amendment was granted, would be out of time as it should have been made, at the latest, on 6th October 2022, three months less one day from the end of the period within which the employer might reasonably have been expected to make the reasonable adjustment.

43. The claimant will suffer hardship in not being able to procced with the proposed amendment. However, I was required to balance this hardship against that suffered by the respondent if the amendment was allowed. That hardship would be the need to investigate and respond to a new claim in circumstances where the claimant has given no reasonable explanation for his initial omission of the claim, nor of his delay in making the application. Further, the claim would be out of time so the points below were also taken into account in reaching my decision.
44. Having regard to all the circumstances and on a balance of prejudice, the application to amend is not granted.

<u>Existing claim of failure to make reasonable adjustments</u>

45. On 24th May 2022, the claimant was directed that the written witness statement prepared for this Hearing should include evidence as to why he says his reasonable adjustments claims were presented in time, what he says the time limits for each complaint should be, and any evidence that he wants to give in support of any application that time should be

extended on a just and equitable basis). No such evidence was included in the written statements submitted by the claimant. No oral evidence was given on these points apart from stating, in response to my question, the reason why the proposed claim of failure to make reasonable adjustments in relation to minute taking was not included in the ET1, namely that he did not think about it as he was focused on the unfairness of the decision to dismiss him.

46. The claimant agreed that the last date relevant to the existing claim of failure to make reasonable adjustments was the date of the last meeting of the informal improvement plan. That was 2nd July 2021.

47. The claim of failure to make reasonable adjustments is out of time. The claimant did not begin Early Conciliation with ACAS until 17th October 2021. This was beyond the three month less one day period within which the step should have been taken, namely no later than 1st October 2021.

48. The burden is on the claimant to persuade the tribunal that it is just and equitable to extend the time limit. The claimant has taken no steps to do so and presented no evidence to support any such argument. He was aware of the possibility of raising a claim soon after his dismissal. He searched the Internet and found information about appeals and about the need to refer a dispute to ACAS. His evidence was that he proceeded to ACAS once he discovered there was no internal appeal. He was aware of the fact there was no appeal from 5th August 2021.

49. I bear in mind that the exercise of the Tribunal's discretion to extend time should be the exception, not the rule and, in considering the exercise of the discretion, I assessed all the factors in the case which I consider relevant to whether it is just and equitable to extend time. The claimant has given no explanation for the delay before referring the matter to ACAS and made no submissions to the Tribunal as to the prejudice he would suffer if time was not extended. The prejudice to the respondent of allowing the matter to proceed is based on time and expense and in the absence of any evidence or submissions from the claimant as to why it would be just and equitable to proceed, my conclusion must be that the Tribunal has no jurisdiction to hear the claim and it is dismissed as out of time.

Employment Judge S. Evans

Date 17th August 2022

JUDGMENT SENT TO THE PARTIES ON 19 August 2022

FOR THE TRIBUNAL OFFICE Mr N Roche