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EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Specos**

Respondent: **Commissioners for HM Revenue & Customs**

Heard at: **East London Hearing Centre** **On: 19 October 2017**

Before: **Employment Judge Prichard (sitting alone)**

Representation

Claimant: Ms S Robertson (Counsel, Direct Access)

Respondent: Mr B Gray (Counsel, instructed by Mr A Sladen GLD, Kemble Street WC2)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that the claimant's application, dated 14 August 2017, to amend her claim is allowed in full.

REASONS

1 The above judgment is stated to be reserved, but the decision itself was given to the parties, with no reasons, so that they could continue with case preparation. These now are the reasons.

2 The claimant, Mrs Karen Specos, has worked for the respondent for 23 years from 1994 to date. She is still currently employed by HMRC and was working from home at the time she started what has been a long period of certificated sick leave since 4 July. Her attendance had been poor recently in any event. Most immediately she had a period of sickness which was followed by a return to work in November 2016 on a phased basis, approximately 90%, and then in 2017 she had a period of sickness, in May, returned in June, but since 4 July 2017 she has been on continuous sick leave. Her pay went down to half pay under the contractual sick pay provisions on 6 October 2017 her sick certificates have stated a diagnosis of stress and anxiety. She is currently prescribed Fluoxetine antidepressant medication at 40mg per day.

3 She is relying upon two separate impairments as disabilities in the current

disability discrimination proceedings. First is dyslexia which was always agreed by the respondent to be a relevant and known disability. Second is stress, anxiety, and depression which was not initially, but is now, agreed to be a qualifying and relevant disability for the purpose of these proceedings.

4 The hearing today is to consider the claimant's amendment application if 14 August 2017.

5 Originally the claimant contacted ACAS on 23 December 2016. The early conciliation certificate was issued on 23 January 2017 and the claim was presented to the tribunal on 21 February 2017. The claimant paid a £250 issue fee which will be refunded in due course.

6 Subsequent to that, on 27 March 2017, there was a validation meeting at which it was decided that her end of year performance ranking was "development needed". These markings are issued on a yearly basis roughly at the end of March. The distribution guide for the grades are that 20% of the workforce will receive an "exceeds expectation", 70% will have a marking of "meets expectation", and 10% will have a "development needed" marking.

7 The claimant states that prior to 2015 she had consistently achieved a "meets expectation" marking and confirmed today that, because her dyslexia slows her down and makes her unable to respond to last minute shifting deadlines, she takes a long time to absorb them. She was never likely to get an "exceeds expectation" marking. Her strengths are strategic planning rather than what she refers to as *ad hoc* management.

8 The claimant has been a member of the senior management team. She supervised colleagues. As is clear from the first claim the claimant had issues with her line manager at the time Ms Chris Irwin. She had previously had a good working relationship with her line manager Mr Hope. Her line manager has changed again now to Ellen Springall. It was clearly stated in the March 2017 validation meeting for the end of year ranking that the end of year marking would have to be subject to HR guidance. That seems correct. There were problems about how the assessment should be possibly discounted for time off work during the claimant's phased return since November 2016 and other periods of sickness absence had fallen in the assessment year 2016/17. She had also been looking at other matters like development (training). That validation hearing which was the second of two meetings did not include the claimant. The claimant only realised what had been said there when she received the notes of that validation meeting which was sent to her by email from John Bentley on 24 May 2017, during these proceedings.

9 The marking has to be finally approved by the overall supervisor manager, Suzanne Newton. The claimant had a formal face-to-face meeting with her on 15 May 2017 to confirm to her regret that the "development needed" marking would stay unchanged. The claimant states that there were still outstanding queries until that became final. The outstanding queries were not fully answered until 17 July 2017.

10 The amendment application has been argued before me today as if it was a jurisdictional time point, but clearly under the *Selkent* principles time limits are one of many considerations, and are no longer strictly jurisdictional. The overriding

consideration is the balance of prejudice under the *Selkent* principles. Other *Selkent* principles have not brought into play for instance the amendment application was made good time relative to the final hearing which is listed for six days commencing on **21 November 2017** this is three months before that. (That final hearing has now been postponed).

11 The claimant's application to amend was sent to the tribunal and the respondent on 14 August. The respondent objected to that amendment by letter of 23 August and by email of 24 the claimant responded.

12 From the start she has been advised by Ms Robertson who is a direct access barrister. Ms Robertson had input into the ET1 claim form. The claimant is fully aware of the time limits. It is tricky complying with them in an evolving live workplace situation such as this. As far as the claimant was concerned the most significant event was her discovering on 15 May 2017 meeting with Suzanne Newton that her "improvement needed" marking was to remain unchanged. Relative to that the amendment is "in time".

13 She did not receive the notes and detail of the validation meeting of 27 March until 24 May 2017. I was referred to the well known case of *Matuszowicz v Kingston Upon Hull City Council* [2009] IRLR, 288, CA that, in a reasonable adjustments case, time can run against a claimant even though the claimant does not know that time is running. Legally that is correct. In paragraph 24 of the judgment Lord Justice Lloyd stated:

> "the issue of uncertainty which I accept is real and may be more substantial in this legislation than in other anti discrimination legislation, is considerably alleviated by the provisions of paragraph 3(2) which creates the opportunity for an extension of time if it would be just and equitable."

14 The respondent has argued today that it would not be just and equitable because the claimant could have submitted a claim in respect of subsequent events through the presentation of the original claim before she did. While that is true the claimant has relied upon three sets of arguments to oppose that contention. First the amendment application was in time relative to the meeting with Suzanne Newton 15 May 2017. Further, the claimant has been suffering with anxiety and depression as was confirmed by an occupational health report which I was shown dated 14 July 2017 when the claimant was found unfit to return to work at the beginning of this lengthy period of sickness absence. I accept that the effect of her condition can be to make her shut out everything but the bare minimum necessary to keep the litigation going.

15 The further argument put forward is that the claimant was working towards judicial mediation. On 2 June a mediation hearing was listed for 27 July. The claimant had hoped very much that that might be an end to the litigation. She is painfully aware, as many litigants are, that the mere existence of litigation is not helping her depression. Litigation is well known to be a stressful and depressing experience.

16 Mediation did not succeed in resolving the dispute and the case remain listed for a 6-day final hearing. Shortly after the judicial mediation the amendment application was submitted. It was overseen and amended by Ms Robertson who represents the claimant today, and previously at the case management hearing before Judge Hyde.

17 The parties have referred to the well known case of *Prakash v Wolverhampton City Council* UKEAT/0140/06 a case that states clearly that an amendment in the employment tribunal is permissible even if the acts and events which are the subject of the amendment postdate the date of the original ET1. The regime here is not like the High Court.

18 The only claim which is new in the draft amendment, rather than a continuation claim, is a claim for victimisation. That arises from the claimant's knowledge of the notes of the performance validation meeting which she received on 25 May 2017. At that meeting her manager Chris Irwin stated to the meeting that the claimant's grievance appeal had not been upheld. At least that is how the notes read. That was at least misleading. The appeal apparently was upheld and the grievance appeal manager on 13 February 2017 Jim Harra told the claimant he recommended that the performance marking be reconsidered in the light of the findings of Mr Harra that the reasonable adjustments put in place for the claimant during the assessment period were not adequate. Mr Irwin also informed the members present at the validation meeting that the claimant had live tribunal proceedings also for disability discrimination/reasonable adjustments as well as the grievance. This was not strictly irrelevant as these were diverting a good deal of the claimant's working energy and time in his view.

19 The respondent has not taken a major point on why this is an amendment rather than a fresh claim. At that stage the tribunal fee regime had been scrapped before 14 August so it would have cost nothing. But the claimant's counsel was on holiday in Greece for the whole month of August. They were dealing with it by email between them and found it a lot easier to email an amendment application because a new claim would have needed a new conciliation certificate and represented more administration work than emailing an amendment application. I have some sympathy with that although if it had been me I would have considered a fresh claim to be a safer way of achieving it. It can also be said that an amendment to a claim is a way of avoiding the full rigours of jurisdictional time limits because it is a softer consideration to consider time limits as a one of several potentially relevant factors under the *Selkent* criteria.

20 In the event, I have had little hesitation in rejecting the respondent's contentions. First and foremost I do not consider that amendment will actually lengthen the narrative that the tribunal will have to hear at the final hearing. The claimant was always within her rights to adduce relevant evidence as to what has happened to her situation since the date her claim was submitted. Most of the amendment is a reasonable adjustment amendment and a straightforward continuation amendment such as was envisaged in the *Prakash* case.

21 I consider that the addition of a victimisation cause of action relying upon (a) the grievance and (b) the ET1 claim, are part of a continuing narrative even though victimisation is a different legal cause of action under a different section. The amendment will not add to the length of the hearing. The allegation is simple and can be as quickly dealt with in evidence by the claimant as it can be by the respondent's witness, Chris Irwin, then her line manager.

22 Nor do I consider that the respondent will have a larger financial exposure as a

result of this. I accept that the nature of a victimisation complaint may have increased the reputational stakes certainly for Chris Irwin and other members present at the validation meeting on 27 March, but in the overall scheme of things it is unlikely to significantly affect quantum.

23 I consider that it would be just to allow this amendment. If it were a truly jurisdictional point, it would not be just and equitable not to extend time in circumstances where the claimant was unaware that the meeting had been told misleading things by Chris Irwin which might have exerted some influence on the final marking. I cannot respondent's counsel's contention that the "vast bulk" of events which are subject to the amendment are out of time in any event. I accept the claimant's evidence that the final marking became more final on 15 May, and it became even more final on 17 July when there were final answers to some of HR's queries about the claimant's attendance during the assessment period. In all the circumstances therefore I allow the amendment in full.

24 The same people involved as would have been involved by reason of the first claim i.e. John Bentley and Chris Irwin.

25 The effect of this amendment application and my allowing is effectively deciding the jurisdictional time point. That will not therefore have to be decided by the tribunal panel at the final hearing.

Employment Judge Prichard

27 November 2017