EMPLOYMENT TRIBUNALS

Claimant: Mr D J Tuohy

Respondent: Lancashire County Council

HELD AT: Manchester **ON:** 23 November 2018

BEFORE: Employment Judge Franey

REPRESENTATION:

Claimant: In person
Respondent: Mr K Ali, Counsel

JUDGMENT

1. The complaint of breach of contract is dismissed because the Tribunal does not have jurisdiction to consider it.

2. The complaint in respect of holiday pay is dismissed upon withdrawal by the claimant.

3. The complaint of unlawful deductions from pay in relation to sick pay in the period between 18 July 2016 and 12 July 2017 is dismissed.

4. The claimant's application for permission to amend his claims so as to introduce a complaint of disability discrimination is refused.

REASONS

Introduction

1. By a claim form presented on 30 June 2018 the claimant brought a number of complaints arising out of his employment by the respondent as Deputy Head of Care at Wennington Hall School ("the school"), which has boarding and day pupils. His

primary complaint was that the school had failed to follow the relevant procedures during his sickness absence which began in July 2016. He made reference to the recovery of an overpayment by means of a single deduction from pay, to a disciplinary investigation which ended with a first written warning in February 2018, and to his subsequent return to work in April 2018. He also complained that he had not been paid in respect of sleep in payments whilst in receipt of sick pay, and referred to an issue relating to holiday pay.

2. Upon receipt of the claim form Regional Employment Judge Parkin caused a letter to be sent to the claimant asking him to identify the statutory provisions on which his claim was based. The claimant responded on 11 July 2018. He did not identify any statutory provision, but made references to breaches of the sickness, disciplinary and complaints policies, referred to a breach of confidentiality, and asserted there had been unfairness in the process. A core theme of his claim overall was that because of the school's breach of contract in failing to follow procedures, his sickness absence had been unnecessarily protracted, resulting in substantial financial loss.

3. The proceedings were then served on the respondent. By its response form of 12 September 2018, the respondent defended the complaints on their merits. It denied there had been any unlawful treatment of the claimant.

4. The case was listed for a one-day final hearing. The Tribunal did not hold a Preliminary Hearing to clarify the complaints and issues.

5. The parties had agreed a bundle of documents of approximately 600 pages, and had served witness statements on each other. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

6. The claimant had prepared his own witness statement, and also intended to call his wife, Andrea Tuohy, and his former colleague, Joseph Prendergast. The respondent intended to call Steven Lewis, a Human Resources Manager, and Giora Berman, the current Head of the School. I had read the claimant's witness statement before the hearing but as it turned out I did not need to read any of the other statements.

Initial Discussion

7. At the outset of the hearing I sought to clarify the legal complaints with the claimant. He confirmed that there was no longer any issue in relation to holiday pay as that had been sorted out after he lodged his claim. That complaint was withdrawn and I dismissed it.

8. I explained that the Tribunal had no jurisdiction over claims of breach of confidentiality or complaints of breach of the duty of care. Those are matters for the Civil Courts.

9. The claimant's overarching case of breach of contract was also one the Tribunal could not determine. Jurisdiction over breach of contract complaints is given by Article 4 of the Employment Tribunals Extension of Jurisdiction (England &

Wales) Order 1994 only if the claim arises or is outstanding on the termination of employment. Where employment has not terminated the Employment Tribunal has no jurisdiction. Accordingly, I explained to the claimant that whatever the merits of his allegations of breach of contract, they were not matters which could be determined by the Employment Tribunal whilst he remained in employment.

10. I also explained that had he resigned from employment he might have been able to have pursued a constructive unfair dismissal complaint covering the same ground, but there was no unfair dismissal complaint as his employment had not ended.

11. After that initial discussion two matters remained outstanding.

12. The first matter was a complaint of unlawful deductions from pay in relation to the failure to calculate sick pay by reference to payments made for sleep ins. It was agreed that I should hear the evidence and determine that claim on its merits.

13. The second matter was an application by the claimant to amend to introduce a complaint of disability discrimination. He made reference to this in the course of our initial discussion. I decided that I would deal firstly with the sleep ins issue and then address the application to amend.

Unlawful Deductions – Sleep Ins

14. The claim form contained a complaint that sick pay had been based on his basic salary alone, without any account having been taken of payments he had been receiving for sleep in shifts at the school. To help me determine this issue I heard oral evidence from the claimant and Mr Berman, and I was referred to a few pages from the bundle of documents.

Legal Framework

15. The right not to be subjected to unlawful deductions from pay appears in Part II of the Employment Rights Act 1996. Section 13(3) provides that any occasion where the total amount of wages paid is less than the total amount properly payable shall be treated as a deduction. The definition of wages in Section 27(1) includes any payment referable to employment, which must include contractual sick pay.

16. The time limit for bringing a complaint to an Employment Tribunal is three months from the date of the alleged unlawful deduction. Section 23 goes on to provide that if there is a series of deductions, time runs from the last deduction in the series. Section 23(4) provides as follows: -

> **"Where the Employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable."**

Relevant Facts

17. Having heard the evidence, I found the relevant facts to be as follows.

18. The claimant had been employed at the school since June 1991, in later years as Deputy Head of Care. His contract of employment issued in 2010 appeared at pages 82C – 82M. It incorporated the nationally negotiated conditions of service known as the "Green Book".

19. An extract from the Green Book appeared at page 68P – 68Q. It provided that pay during sick leave would be six months of full pay and six months of half pay. In each period the amount payable to the employee would be the amount which, when added to statutory sick pay and relevant state benefits, would secure the equivalent of "normal pay", or half that figure during the relevant period. Normal pay was defined in Clause 10.7 as follows: -

> **"Normal pay includes all earnings that would be paid during the period of normal working, but excluding any payments not made on a regular basis."**

20. In the years up to 2016 the claimant worked two sleep-in shifts each week he was not on leave. There was no written requirement for him to undertake that work, but it was expected of him as a senior member of the care staff. He would be paid each month for his sleeping in shifts in addition to his basic pay. The pay slips for June and July 2016 at page 582 showed a figure of £274.72 per month for his sleeping in shifts.

21. The claimant went on sick leave on 18 July 2016 suffering from depression. He did not return to work until April 2018. He was paid full pay until 11 January 2017, and then half pay until 12 July 2017. He went on to no pay from 13 July 2017. During his periods of full pay and half pay his pay was based on his basic salary, excluding the amounts he had been receiving in respect of sleeping in.

22. The claimant did not raise this at any stage during his absence, even when he lodged a grievance in February 2018. Nor did he raise it with Mr Burman when he returned to work in the Spring of 2018. It was not raised until he started these proceedings.

23. During his sickness absence the claimant had accessed advice from his trade union. Being frustrated with the union he had also taken legal advice from March 2017. He had also been contacting ACAS for advice around that time and thereafter.

Submissions

24. For the respondent Mr Ali argued that the claimant did not have any entitlement to have sick pay calculated by reference to sleep in payments. The claimant volunteered to do sleep in shifts, and the proper interpretation of Clause 10.7 of the Green Book excluded such payments from "normal pay". In any event, even if the claimant had been entitled to receive payments on that basis, his claim was out of time because the last alleged unlawful deduction would have occurred in July 2017 and it was not presented until almost twelve months later.

25. The claimant argued that he was receiving sleep in payments at the rate of two each week for several years, save for periods when he was on holiday, and that

therefore this formed part of his normal pay. He said he had not pursued his claim within time because he did not know about his entitlement. When he took legal advice in March 2017 there were much bigger issues facing him. A lot was going on and he had been off sick with depression. He had not sought advice about this issue.

Decision

26. I was satisfied that the definition of "normal pay" in Clause 10.7 did include the sleep-in payments. The clause did not expressly restrict normal pay to payment for work which the claimant was required to do under his contract. The only exclusion was for payments not made on a regular basis: I found as a fact that these payments were made on a regular basis. I did not agree that the clause was ambiguous, but even if it was any ambiguity should be construed against the interests of the party which drafted the clause, effectively in this case the respondent.

27. I was therefore satisfied that the calculation of holiday pay in 2016 and 2017 should have included the sleep-in element. The fact the claimant had not pursued this argument at the time, or the fact that he was content with holiday pay which did not include such payments, did not undermine the proper interpretation of the contract. In any event the claimant could not be expected to understand the proper contractual interpretation of the Green Book. Further, the fact that practice had changed after his return to work in 2018, since when he had performed very few sleep-in shifts, was not material as the position had to be judged as it was at the time the payments should have been made.

28. However, I concluded that the claim was out of time. The unlawful deductions began in July 2016 and the last deduction was in late July or August 2017. There were no unlawful deductions once he went on to nil pay. Time started to run against him in the summer of 2017.

29. There was nothing to stop the claimant getting advice on this point during his absence. He had a perfect opportunity to do that in March 2017 when he sought legal advice. In addition he was being advised by the union in the period prior to that. I accepted that things were very difficult for him whilst he was off sick for so long with depression, but there was no evidence that he was unable to manage his affairs in that period. Indeed, the fact that he was able to seek legal advice in March 2017 whilst the unlawful deductions were continuing suggested he was able to do so.

30. Accordingly, I was not satisfied that it was not reasonably practicable for a complaint to have been brought in time. In my judgment it was reasonably practicable for the claimant to have ascertained his rights and to have presented a claim within three months of his last payment of half pay in the middle of 2017.

31. The complaint was therefore dismissed.

Application to Amend – Disability Discrimination

32. This matter arose because in the course of the discussion about the issues at the start of the hearing the claimant mentioned disability discrimination.

33. After discussing the matter with him I was satisfied that it was not a claim already raised by the claim form. He had not ticked box 8.1 to indicate that there was any disability discrimination complaint; he had ticked "no" in box 12 where he was asked whether he had a disability, and there was no reference to disability discrimination in the document accompanying his claim form. The closest he came was a passing reference to the "discriminatory actions" of managers, but there was nothing to indicate this was discrimination because of disability as opposed to any other protected characteristic. Nor was there any reference to disability discrimination in his further document of 13 July 2018. It therefore followed that he would require permission to amend his claim so as to introduce this.

Scope of proposed new claim

34. I took some time to clarify with the claimant the scope of the proposed new claim. Mr Ali agreed that it was proportionate to do this during the hearing rather than adjourn so that the claimant could make a written application. Based on that discussion the proposed complaint of disability discrimination can be summarised as follows.

35. The claimant maintains that he was a disabled person by reason of long-standing depression, which he had managed by means of medication. He alleged that the following factual allegations in the claim form were disability discrimination:-

(a) He alleged that on 25 July 2016 the Governor Mrs Tilburn telephoned him at home about a week into his sick leave and told him to "walk away" i.e. resign his employment. She told him he was viewed as an "old warhorse". He says that if it was her practice to telephone members of staff who were on sick leave to ask them to resign, that was a provision, criterion or practice ("PCP") which put him at a substantial disadvantage due to his depression, in that the effect on him was more severe, and therefore the reasonable adjustment would have been not to make that call. Alternatively, he suggested it was discrimination contrary to Section 15 Equality Act 2010: unfavourable treatment designed to force him out of employment which was done because Mrs Tilburn perceived that he was vulnerable to such pressure, that perception arising in consequence of his disability of depression.

(b) In November 2016 the respondent sought to recover a three-month overpayment of salary from him by means of a single deduction rather than phasing it over a three-month period. Although that was eventually rectified, the attempt to recover it a single deduction was also a breach of Section 15 Equality Act 2010 for the same reason. It was part of a campaign to force him into resigning because of his length of service, but exploiting his disability in doing so.

(c) It was alleged that in March 2017 a severance package was offered and then withdrawn, and this again was said to be a breach of Section 15 Equality Act 2010 for the same reason.

(d) The pursuit of a disciplinary matter in 2017/2018, and the lack of communication about the venue for a particular meeting was also a breach of Section 15 Equality Act 2010 for the same reason.

(e) A lack of support during his sickness absence between July 2016 and October 2017, including a failure to assist with the counselling, amounted to a failure to make a reasonable adjustment in that period. The PCP was not providing support to employees absent on long term sick leave, and because of his depression this placed him at a substantial disadvantage as it made him feel even worse. The reasonable adjustment would have been to have provided that support.

(f) The final act of unlawful disability discrimination was a refusal three times to postpone a disciplinary meeting scheduled for 30 January 2018. Although the respondent did eventually agree on 22 January to postpone it (page 337) there had been a breach of the duty to make reasonable adjustments. The PCP was not postponing disciplinary hearings; the substantial disadvantage due to his depression was the additional stress placed upon him, and the reasonable adjustment would have been to have postponed it at the first request.

36. I assumed in favour of the claimant that he would be able to show that these allegedly unlawful acts were linked so that time would only start to run from 22 January 2018 when the last alleged act of discrimination ended. That meant that the primary time limit for bringing a claim (or "stopping the clock" by initiating early conciliation) expired on 21 April 2018, a couple of weeks after he returned to work.

Relevant Legal Framework

37. It is inherent within the general case management power in rule 29 of the Employment Tribunal Rules of Procedure 2013 that the Tribunal has power to refuse to allow a party to amend a claim which has been lodged. Conversely the Tribunal has power to allow such an amendment. In common with all such powers under the rules, the Tribunal must have in mind the overriding objective in rule 2, which is to deal with the case fairly and justly. That includes, so far as practicable, ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and important of the issues, avoiding delays, so far as compatible with proper consideration of the issues, and saving expense.

38. The leading case on how this discretion should be exercised remains **Selkent Bus Co Limited v Moore [1996] ICR 836**, in which the then President of the Employment Appeal Tribunal, Mr Justice Mummery, gave guidance on how Tribunals should approach applications for permission to amend. At page 843 at F, the EAT said:

> **"Whenever the discretion to grant an amendment is invoked, the Tribunal should take account of all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."**

39. The EAT went on to identify some circumstances which would certainly be relevant, although such a list could not be exhaustive. It will be important to identify the nature of the amendment, distinguishing between minor amendments such as the addition of factual details to existing allegations, or major amendments such as the making of entirely new factual allegations which change the basis of the existing claim. A substantial alteration which pleads a new cause of action may have to be treated differently from a minor amendment.

40. It is also essential for the Tribunal to consider whether a new complaint would be out of time as at the date of the application to amend. Consideration of time limits must encompass the applicable statutory provision for extensions.

41. The fact that an application would be out of time if lodged as a fresh claim is not an absolute bar to permission to amend being granted, but depending on the circumstances it can be an important consideration. In **Abercrombie and others v AGA Rangemaster Ltd [2014] ICR 209** the Court of Appeal said in paragraph 50 that

> **"Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way or amendment. But where it is closely connected with the claim already pleaded – and *a fortiori* in a re-labelling case – justice does not require the same approach."**

42. The timing and manner of the application is also relevant. An application should not be refused solely because there has been a delay in making it, but delay is relevant to the exercise of discretion. It is relevant to consider why the application was not made any earlier.

43. The EAT in **Selkent** concluded that passage with the following:

> **"whenever taking any factors into account, 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".**

44. The time limit for bringing a disability discrimination claim appears in section 123 Equality Act 2010 as follows:-

> **"(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –**
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> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
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> **(b) such other period as the Employment Tribunal thinks just and equitable**.
>
> **(2) …**
>
> **(3) for the purposes of this section –**

> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

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45. The case law on the application of the "just and equitable" extension includes **British Coal Corporation -v- Keeble [1997] IRLR 336**, in which the Employment Appeal Tribunal (Smith LJ presiding) confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. It is a question of balancing the prejudice on both sides taking into account the length of and reasons for the delay, the effect of the delay on the cogency of the evidence, the promptness with which the claimant acted once aware of the facts giving rise to the claim, and steps taken to obtain professional advice. That is not an exhaustive list of factors that might be relevant: **Department of Constitutional Affairs v Jones [2008] IRLR 128.**

Decision

46. Having heard oral submissions from the claimant and from Mr Ali, I considered the relevant factors and weighed up the balance of prejudice on both sides.

47. I considered first the nature of the amendment. Although the facts upon which the claimant relied were already part of the case, this was still a substantial amendment raising a cause of action wholly different to those already raised. Bearing in mind that the Tribunal never had any jurisdiction over his breach of contract claim, and bearing in mind that there was no constructive dismissal complaint he could pursue whilst he remained in employment, the matters raised in the claim form over which there was jurisdiction were very limited. A complaint of disability discrimination was a wholly different matter. It would require consideration of whether he was a disabled person, whether the respondent knew or ought reasonably to have known of this, and of the reason for the various actions which the claimant maintained were unlawful. It was not a minor amendment such as a technical relabelling.

48. The timing of the application was relevant. It was made at the final hearing of the case that was presented in June 2018. That is very late indeed in the process. However, I also took into account that the claimant was representing himself in these proceedings and had difficulty articulating the disability discrimination complaint even with my assistance. I also observed that had he raised these matters in his claim form there would have been a Preliminary Hearing at which the complaints and issues would have been clarified, and it is possible that the case would still have been listed for a final hearing in in 2019, which would be the position if I were to allow the amendment.

49. The manner of the amendment was not ideal. There was no written application to amend. However, I did not hold that against the claimant. He did not have access to professional representation during these proceedings. He had responded candidly to the questions I asked him about what claims he was pursuing,

and it was agreed on behalf of the respondent that I should formulate the proposed new claim as part of this hearing rather than adjourn and require a written application from him. I therefore discounted the fact that this was not a formal written application to amend.

50. I then turned to the question of time limits. These weigh particularly heavily in the balance where the amendment raises a new cause of action which would be out of time if it were presented as a new claim form. Even assuming that the claimant would be able to establish that there was a continuing course of discriminatory treatment, which is far from clear, the last date for bringing the complaint was 21 April 2018. By making the application on 23 November 2018 he was approximately seven months late. Further, it was more than two years since the telephone call which he said was the start of the discriminatory treatment. The delay appeared to be due to the fact that the claimant had not appreciated that he might have a disability discrimination complaint. He said in submissions that he had not regarded himself as disabled even though his depression had been a long-standing condition controlled with the help of medication. He had not sought advice on disability discrimination from his union or from his solicitors. It just had not occurred to him until the discussion at the start of this hearing.

51. In addition to these factors Mr Ali also invited me to take into account the difficulty the respondent would face if the amendment was allowed. There has been a significant change in staff in recent times at the school. Mrs Tilburn is long gone as a Governor, and there is a new Head with no link to the previous management team. The delay has therefore had a significant effect on the cogency of the evidence which would be available to the Tribunal if the claim were allowed to proceed.

52. Further, submitted Mr Ali, it was evident that the claims as articulated by the claimant lacked merit, as he appeared to suggest that the reason the school wanted him out was because he was seen as a “old warhorse” whereas the school wanted a more modern approach. If that perception was the basis for his case, that was not a complaint of disability discrimination[1].

53. Putting these matters together I concluded that the balance of prejudice favoured refusing permission to amend. I did not attach much weight to the fact that the application was made at the final hearing, as it was clear that the claimant had not appreciated his claim might be put in this way any earlier. However, it was a substantial amendment raising a new cause of action, and therefore it seemed to me that allowing the amendment to the existing claim would enable the claimant to circumvent the statutory time limits for bringing a discrimination complaint in Section 123 of the Equality Act 2010. Further, it would be significantly more difficult for the respondent to defend itself fairly against these allegations than if they had been brought within time because of the turnover of staff and the age of some of the allegations.

54. In contrast if I were to refuse permission that would be an end to these proceedings: the claimant would have lost the chance to pursue a disability

[1] It might be alleged to be some form of age discrimination but that was never suggested by the claimant.

discrimination complaint but would not be significantly prejudiced by that because it was a complaint that he had not raised at any time prior to the hearing today, and one which he had had difficulty articulating in any event in the course of his application to amend. I had a strong sense that the claimant considered he was being forced out because he was seen as an "old warhorse", and that his depression was relevant simply because the effect on him of that treatment was worse than if he had not been depressed. That is in essence not a complaint of disability discrimination. Refusal of permission would therefore deprive him of the chance of pursuing a case which is an artificial interpretation of his factual account, which is no great hardship.

55. In those circumstances the balance of prejudice favoured refusing permission to amend.

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Employment Judge Franey

26 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

30 November 2018

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FOR THE TRIBUNAL OFFICE

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