



# EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr R Elwin

Poundland Limited

Heard at: London South  
Employment Tribunal

On:

27 November 2020

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:

For the Claimant: In person (assisted by his mother)

For the Respondent: Ms D Scales (Solicitor)

# JUDGMENT ON PRELIMINARY ISSUE

The Tribunal does not have jurisdiction to hear the discrimination claims as they have been presented outside the applicable time limits and it is not just and equitable to extend time. The claims are therefore dismissed.

The claim of unfair dismissal is struck out as it has no reasonable prospects of success.

The application to amend is refused.

## REASONS

1. This case was listed for a preliminary hearing on the above date (“this

hearing” or “the hearing”) to consider the following issues:

- a. Have the claims been presented to the Tribunal within the applicable time limits; if not, should the time limits be extended?
  - b. Should the Claimant be permitted to amend his claims?
  - c. Should all or any of the claims be struck out on the grounds that they have no reasonable prospects of success?
  - d. If the Claimant is permitted to proceed with his claims, should a deposit order be made?
2. The hearing was conducted using CVP video conferencing, with the consent of the parties. Aside from some initial delay setting the parties up, there were no technical difficulties during the hearing and I was able to hear the parties well throughout.
  3. There was a slight delay in starting the hearing, which eventually commenced at approximately 10.25 am. I then spent the majority of the hearing speaking to the Claimant and his mother so that I could better understand his complaints.
  4. At the beginning of the hearing I explained to the parties what decisions I would need to make. The hearing did not finish until 1pm and therefore due to a lack of time, I informed the parties that I would need to reserve my decision.

### **Background**

5. On 14 November 2019, the Claimant presented his first claim form (“first claim”) to the Tribunal.
6. An ACAS EC certificate was referred to on the claim form. The EC period commenced on 19 September 2019 and ended on 19 October 2019.
7. The Claimant commenced employment on 1 December 2018 as a sales assistant. As at the date of the above hearing, the Claimant was still employed by the Respondent.
8. At paragraph 8.1 of the claim form, the Claimant ticked the following boxes to indicate he was bringing these claims:
  - a. Unfair dismissal
  - b. Disability discrimination

c. Pregnancy and maternity discrimination

9. At paragraph 8.2 the Claimant gave details of his claim, which appears to have been cut and paste from a grievance letter. This said as follows [sic]:

*Dear Ashley*

*Subject: Discrimination, Victimisation and Failure to make reasonable adjustments.*

*Please accept this letter as a formal grievance.*

*On the 28th of March around the time of 12:56pm, I was told to go on break by the head cashier, as my usual time for break is 1pm and the till area was quiet.*

*I walked out to the front of the shop, however, on my way out I was abruptly asked where I thought I was going by Rob the supervisor.*

*I replied and said I was on break and continued walking. He then followed me out of the shop which will be on camera*

*When we got outside Rob then aggressively demanded that I get back in the shop and do as I'm told as he is my manager, at this moment my initial response was confusion as I was on break so I asked him to leave me alone.*

*Before I could get back inside the store, he stood in my way pushed me back and shoved his walkie talkie at me and pressed a button.*

*I felt threatened and was forced to push past him as there was no other way to get back into the store, in the process his walkie talkie became tangled up between us and the wire snapped and also crushing my cigarette as he continued to physically stop me from passing*

*Throughout the situation I felt threatened, intimidated and confused.*

*I only have 15 minutes for a break and I was using this time to meet my partner who had witnessed everything from afar.*

*Once back inside the store I approached you to make a complaint about Rob, Rob followed and proceeded to make a scene on the shop floor. You then took us to the back of the store to discuss what happened.*

*When you had heard both sides of the story Rob threatened to make a complaint to the area manager Mike about you and then stormed off and refused to finish his shift whilst demanding I buy him a new walkie talkie.*

*On the 29th of March 2019 I sent you an email making a formal complaint about the supervisor Rob, in the email I stated that I felt threatened by his behaviour towards me and harassed I also explained that I have special needs and I was confused by the mixed messages about who should tell me when to go on break and who I should be listening to, you*

*are also aware of my special needs and knew that instructions from various people would cause me confusion and turmoil as store manager you never tried to ensure that there were clear messages about who I should take instructions from and this lead to bad feelings within the team and caused the team to treat me differ*

10. The above claim was listed for a telephone case management hearing before me on 19 May 2020. It would normally have been an in person hearing but due to Covid19 all in person hearings were converted to telephone hearings.
11. At that case management hearing, when speaking to the Claimant about his claim, he referred to facts and allegations which were not anywhere in his claim form.
12. I commented that the Claimant could not bring an unfair dismissal claim if he had not been dismissed. I also said that I was struggling to understand how he could bring a pregnancy/maternity discrimination claim.
13. I further commented that the only actionable claim that could be identified from the claim form was a disability discrimination claim, but even that was not clear. It was most likely a direct discrimination claim at most; I could not identify from the particulars a failure to make reasonable adjustments.
14. I considered that a telephone hearing was not particularly conducive to understanding the claim the Claimant was bringing and therefore decided to adjourn the case and relist for an open preliminary hearing. I said to the Claimant that as many of the matters he was raising were not in his claim form, he would need to apply to amend his claim form if he wished to pursue them. I further indicated that as there were time limit issues and questions about the merits of the claims, that I would deal with all those issues as well.
15. On 2 June 2020, the Claimant presented a further claim form to the Tribunal ("second claim"). At paragraph 8.1 of the second claim the Claimant ticked the following boxes indicating that he was bringing these claims:
  - a. Unfair dismissal
  - b. Age discrimination
  - c. Race discrimination
  - d. Disability discrimination
  - e. Arrears of pay
16. At this hearing, the Claimant confirmed that he ticked age discrimination in

error. He confirmed he was not pursuing an age discrimination complaint. This claim was therefore dismissed upon withdrawal.

17. At paragraph 8.2 of the second claim, the Claimant wrote the following:

***My racial and protective characteristics with my employer date back from May 2018 but the last straw was on 9th of June 2018, when I was accused of stealing a one pound water bottle, even tho I provided receipts and proof of purchase. before any investigation took place I was instantly dismissed which goes directly against my employers company procedure.***

***I have much more detailed info regarding this specific issue but I am saving space so I'm able to finish filling the box.***

***I feel and truly believe that my store manager terminated my contract because of the colour of my skin and my special needs.***

***I feel that because I have special needs my store manager thought he could get away with terminating my contract without investigation, assuming I would not be able to escalate things further because of my disabilities. directly taking advantage of one of my protective characteristics.***

***I also strongly feel and believe my store manager terminated my contract because of the colour of my skin. the reason I say this is because on numerous documented occasions I have made complaints irectly to my store manager about staff verbally and physically attacking me and on every documented occasion I have been ignored by my store manager and forced to continue working with the same members of staff who segregated themselves and ostrichsize me.***

***I believe my store manager terminated my contract because of my protected characteristics due to his blatant disregard for me as a human being and as a member of staff.***

18. The new claim form did not have a new ACAS EC number and it was initially rejected by me for this reason, but noting that the Claimant could still apply to have the new claim treated as an amendment. This decision was subsequently reconsidered by me and the claim was accepted, on the basis that it was arguable that a new ACAS certificate was not needed. By accepting the second claim, the jurisdiction issue relating to whether a new ACAS EC Certificate was required, could still be raised by the Respondent if appropriate.
19. At this hearing, I informed the Respondent that the Tribunal had not yet received a response to the second claim, to which Ms Scales said she had understood there to be no requirement to respond pending the application to amend. I accepted that there had been some confusion about whether the new claim was to be treated as a new claim or an application to amend.

20. On 6 July 2020, the Claimant submitted a written application to amend the first claim. In it, the Claimant said "*I have now taken time to seek legal knowledge and some advice*". At the beginning of the above preliminary hearing, I asked who had written the document. The Claimant confirmed that he had written it but his mother had typed it up. Whilst it is a well written document grammatically, it is very lengthy (extending to 11 pages) and does not succinctly identify the claims being made – even in a non-legal sense. Having looked at the document again since the hearing, I had difficulty reconciling some of it with what the Claimant told me at the hearing. At the hearing, the Claimant summarised his claims for me as follows:
- a. He suffers from dyspraxia and ADHD, which he relies on as disabilities to support his disability claims. In his formal application to amend, the Claimant does not mention ADHD but refers to mental health issues.
  - b. He said there was an assumption by his employer that because of his disability, the Claimant would not understand what was happening and he would not think or have the capacity to complain or take matters further. Essentially, he argued that his employer took advantage of him.
  - c. During formal meetings he was invited to, he was not assisted to enable him to be accompanied; for one meeting in particular, he was asked to go and find someone off the shopfloor to accompany him.
  - d. When the Claimant complained about the outcome of a grievance he raised in connection with the altercation with Rob in March 2018, he was allegedly told "*what is wrong with you people, you're never satisfied*".
  - e. Colleagues referred to the Claimant as "stormsey" which the Claimant considered to be demonstrative of racist attitudes, or at worst an act of discrimination in itself. The Claimant did not mention this in his formal application to amend, but only during this hearing.
  - f. The Claimant referred to being told by 'Ashley' that he was dismissed, only to be told later by HR that he was being suspended. The Claimant relies on this as an act of discrimination.
21. In the Claimant's application to amend, he also withdrew the unfair dismissal claim in the first claim. I was surprised to see the unfair dismissal claim repeated in the second claim, given that the Claimant was still employed by the Respondent as at the date of the above hearing.

## Law

### (a) Time limits

22. The time limits for bringing discrimination claims are set out in s.123 Equality Act 2010 (“EQA”) which states:

*(1) Subject to [sections 140A and 140B] 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.*

23. What is clear from s.123(1)(b) EQA is that the three-month time limit for bringing a discrimination claim is not absolute: tribunals have a discretion to extend the time limit for presenting a complaint where they think it is ‘just and equitable’ to do so. Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases. That said, in the case of **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA** the Court of Appeal stated that when employment tribunals consider exercising the discretion “*there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*”. Of course, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable.
24. In exercising a discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in s.33 of the Limitation Act 1980 (as modified by the EAT in **British Coal Corporation v Keeble and Others [1997] IRLR 336**). Section 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. In addition to the above factors, I must also consider the balance of prejudice to the parties; this means weighing up the prejudice caused to the Respondent if

I extend time, as against the prejudice to the Claimant if I refuse to extend time.

**(b) Amendments**

25. The Tribunal has a wide discretion to allow amendments to pleadings at any stage. The key principle to be applied when exercising that discretion, is to have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it. In doing so, the Tribunal should consider the factors set out in the case of **Selkent Bus Co Ltd v Moore 1996 ICR 836**, EAT as follows:

**a. Nature of the amendment**

Applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations that change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

**b. Applicability of time limits**

If a new claim or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

**c. Timing and manner of the application**

An application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the identification of new facts or new information from documents disclosed on discovery.

**(c) Strike out**

26. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“ET Rules”) sets out the following power to strike out:

***(1) At any stage of the proceedings, either on its own initiative or on the***

*application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

*(a) that it is scandalous or vexatious or has no reasonable prospect of success;*

*(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

*(c) for non-compliance with any of these Rules or with an order of the Tribunal;*

*(d) that it has not been actively pursued;*

*(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

*(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

27. When considering whether to strike out, a Tribunal must (a) consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established (first stage); and (b) having identified any established ground(s), the Tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule (second stage).

#### **(d) Deposit**

28. Rule 39 of the ET Rules provides as follows:

*(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

#### **Decision**

##### **(a) Extension of time**

29. The first claim refers to an incident on 28 March 2019. The latest date by which the Claimant ought to have presented his claim form was 27 June 2019. There is no extension caused by early conciliation because the EC period did not commence until 19 September 2019. The claim was presented on 14 November 2019, which was four and a half months after the primary limitation period ended.
30. The second claim refers to an incident on 9 June 2019 (the claim form

erroneously refers to this incident being on 9 June 2018) when the Claimant says that he was dismissed for theft of a one pound water bottle. The Claimant refers to this being an act of disability and race discrimination. The Claimant conceded during this hearing that he ticked age discrimination in error. The latest date by which the Claimant ought to have presented his claim form was 8 September 2019. The claim form was presented on 2 June 2020, which was just under nine months after the three month primary limitation period ended.

31. The Claimant was asked during this hearing why he did not bring his claims sooner. The Claimant did not have an explanation for the delay and therefore I find as fact that there is no good reason for the delay, or indeed why the Claimant did not refer to the water bottle incident in the first claim. I listened carefully to what the Claimant said to me about his disability, notwithstanding there was no proof before me of any diagnosis or the affects of the disabilities relied on by the Claimant. During this hearing, the Claimant was able to identify what his complaints were, and it was clear from the amendment document that the Claimant was capable, even with the assistance of his mother, to set out the details of his claim in detail when required to.
  
32. I considered the balance of prejudice between the parties and noted the following:
  - a. The delay in bringing the claims and the lack of detail in the claim forms means that there is still much work to do before the case is ready for hearing, which is now likely to be well into 2021, over two years since the events occurred which are the subject of the complaints. This affects the Respondent's case in two ways. Firstly, the quality of the evidence provided by its witnesses is bound to be affected by the delay in bringing the claims. Those witnesses will be required to recall events that happened months or years previously. Because the Respondent is still not clear as to the claims being brought and allegations made, it has not even been able to secure draft witness statements from these witnesses whilst matters may be fresher in their memory. Secondly, I was told by the Respondent that one of their witnesses (Rob) is no longer employed by the Respondent and this presents additional problems for the Respondent in terms of gaining his cooperation to give instructions and attend any future hearing.
  
  - b. The Claimant's case appears to be continually changing. The Claimant's application to amend contains a significant amount of factual allegations relating to the first and second claim which ought to have been contained in those claim forms. There is no good reason why it was left out, in my view, even taking into account the

Claimant's alleged disability. However, the bigger problem is that when I spent time going through the Claimant's claim at this hearing, there were details and allegations revealed by the Claimant which were not even in the application to amend. That means if I were to allow the claims to proceed, there is much work still to do by the Respondent to understand precisely the case it needs to answer, which would involve a further case management discussion, at the very least, and requests for further particulars etc. This all involves further significant cost for the Claimant.

33. Taking all of the above into consideration, including what I consider to be greater hardship to the Respondent if I extend time, I am not persuaded that it is just and equitable to extend the time limits to enable the Claimant to bring his first and second claims.

**(b) Application to amend**

34. Notwithstanding my above decision, I then considered carefully the application to amend. As I have said above, the application extended to 11 pages and introduced a number of new claims, both relying on some facts already pleaded in the first and second claims, but also introducing a completely new factual basis in respect of others. What was more worrying, was that during the hearing when the Claimant was telling me about the amendment, he referred to further claims and factual matters that were not even in the application to amend, thereby leading me to conclude that there might even need to be a further application to amend, and certainly an application for further and better particulars. I conclude that there was no good reason for the delay in providing the additional factual material and claims in the form of the amendment.
35. Taking into account the **Selkent** factors and the greater balance of hardship to the Respondent for the reasons set out above, I conclude that the amendment application should be refused.

**(c) Strike out**

36. I deal with the unfair dismissal claim for completeness as it is clear that the Claimant withdrew the unfair dismissal claim referred to in the first claim, but it is less clear whether the unfair dismissal claim in the second claim was also withdrawn or whether it is still a live claim. As the Claimant has not been dismissed, I consider this claim has no reasonable prospects of success and that it should be struck out.

## ORDER

37. The arrears of pay claim was not discussed at the hearing and there are no particulars of this claim in the second claim. The Claimant is therefore required, **within 14 days of the date this order is sent to the parties**, to do the following:
- a. Confirm whether he wishes to continue with his arrears of pay claim; and
  - b. If so, explain what sums he is owed, when such sums fell due, why they are due and how such sums are calculated.

.....  
**Employment Judge Hyams-Parish**  
**07 December 2020**