EMPLOYMENT TRIBUNALS
at a Preliminary Hearing

Claimant: Mrs A Avison

Respondent: Boots Management Services Ltd

Heard at: Lincoln

On: Thursday 20 June 2017

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: In person, assisted by her husband
Respondent: Miss P Leonard of Counsel

JUDGMENT

THE FIRST ISSUE

The application of the Claimant to amend her claim to include that the dismissal was an act of disability discrimination is refused.

THE SECOND ISSUE

It is just and equitable to extend time in relation to the disability discrimination based claims short of dismissal, the last act being relied upon being 30 December 2015. Thus, these claims will proceed.

REASONS

THE FIRST ISSUE

1. Prior to this hearing today that part of the claim relating to disability had not encompassed the dismissal of the Claimant. This could not have been made plainer than by this Judge at paragraph 16 in particular of the very extensive reasons which I gave at the open attended preliminary hearing on 26 January 2017.

2. But now there is before the tribunal an application by the Claimant to amend her disability based claim to include the actual dismissal of her on 27 January 2016 and the hearing of the subsequent appeal. Encapsulated today by her she alleges that the Respondent wanted to get rid of her not only because

she was a whistle blower[1] but also because she is a disabled person and in that sense inter alia because she had persisted with her contentions about a failure to make reasonable adjustment for her and thus the Respondent viewed her, my summarisation, as an "awkward squad".

3. The claim in this case was presented to the tribunal as long ago as 23 June 2016. At almost the first anniversary of the presentation of the claim there is this application made. The application to amend is opposed by the Respondent.

Factual scenario and observations as to the application

4. The original claim has no reference whatsoever to the dismissal being an act of disability discrimination.

5. There was a first case management discussion by telephone in this matter heard by my colleague Employment Judge Heap on 9 September 2016. She endeavoured to seek to clarify the claims but decided, quite properly in my view, that the best way to proceed was that the Claimant would provide what is known as a Scott Schedule. The Claimant did this on 17 October 2016. This is a most substantial document and it makes no reference to the dismissal being a further act of disability discrimination.

6. Against that background, this Judge held a very lengthy attended preliminary hearing on 26 January 2017. Suffice it to say I went through the entirety of the Scott Schedule; and with the Claimant's leave dismissing elements of claims which were brought under the wrong label so to speak under the Equality Act 2010 (the EqA); defining what were the claims, and setting all that out in a 9 page set of reasons. As to that Scott Schedule, there is no reference whatsoever to the dismissal being a further act of disability discrimination, albeit that the Claimant in the disciplinary process prior thereto was pleading two acts of disability discrimination relating to the suspension issue on 9 December 2014 and the holding of an investigatory meeting with her on 30 December 2014. The Claimant was able to fully set out the factual matrix of those two heads of claim.

7. I made orders at that hearing to the effect that the Claimant would now put what remained of the Scott Schedule in a clear chronological fashion and also provide, by way of the final further and better particulars, so to speak, a detailed statement. She did all of that.

8. In neither the statement, which runs to 45 pages, or the refined Scott Schedule, also running to 45 pages, was any reference made whatsoever to the disability being engaged in terms of the dismissal.

9. That brings me back to the following observations that I made at the hearing on 26 January. First the end of paragraph 7:

> "*... At present there are not any further claims and I have given the Claimant every opportunity to give me more particulars today. Thus I am with Mr Rowbotham* (Counsel for the Respondent on that occasion) *that she cannot be given more bites of the cherry, except in exceptional circumstances because she has now had, if I include today, at least 3 attempts to get her case in order, at least in terms of the factual allegations.*"

[1] Claims relating to the whistle blowing including automatic unfair dismissal are before the tribunal: see Para 1 of the introduction to the last PH and also those of EJ Heap of 9 September and 7th November 2016.

10. And at paragraph 16, I said:
"*... I would then observe that there is no linkage on those pleaded scenarios to the actual dismissal scenario other than the treatment of the Claimant alleged to have happened at the investigative hearing on 9 December*."

11. In that respect, I would add (as I actually missed it) that there is this allegation in the existing Scott Schedule relating to 30 December.

12. Why is it that the Claimant has been unable to articulate what is in many ways a seminal point of her claim in relation to disability discrimination? After all what she is really telling me is that if I take the pleaded scenario prior to the dismissal as in the Scott Schedule as refined, then this dismissal is the final example of her being discriminated against because of her disability.

13. The Claimant's answer to me is that she thought she had already made it plain. I have to bear in mind, although the Claimant may be a disabled person, that she has nevertheless been able to very extensively indeed plead the narrative of her case. There has been no impediment in that respect whatsoever. It is not being said by her today that there was sort of mental impairment that stood in the way of her being able to articulate this very important point prior to this day. Indeed, all the evidence suggests the contrary.

14. That brings me to the judicial exercise of determining an application to amend. I of course rely upon and am guided by the seminal judgment of Mr Justice Mummery, as he then was, in ***Selkent Bus Company Ltd -v- Moore [1996] ICR 836 EAT***.

15. Applying the same, this is not a simple relabeling, correction of a clerical or typing error or an additional factual detail to existing allegations. It is a new allegation. It is obviously well out of time. If I was looking at it in terms of just and equitable to extend, which is only one of the factors in the balancing exercise, I can find no reason why, for the reasons I have already given, that the Claimant would not have been able to plead this part of her case well before now. This application is being made at the fourth preliminary hearing and well over a year since the presentation of the claim. It will clearly cause the Respondent prejudice because it will now have the regroup its defence and undertake further investigations and plead to a wholly new issue. Of course, the Claimant will be prejudiced by my not permitting the amendment but this is a balancing exercise. I am with Ms Leonard, the interests of justice weigh in favour of the Respondent for the reasons I hope I have now made clear. I had already made plain that the Claimant cannot be given continued bites of the proverbial cherry and therefore, given she has had so many opportunities before today to make plain her claim, I therefore find it is not in the interests of justice to permit this amendment.

16. It is therefore refused.

THE SECOND ISSUE

17. As is clear from my judgment on the amendment point, the last act of disability discrimination, which is permitted to proceed, is 30 December 2015. Pursuant to Section 123 of the EqA, a claim of disability discrimination, for which also read the last act complained of, must be presented to the tribunal within 3

months thereof unless it is just and equitable to extend time.

18. That therefore leads me first of all to bring in the mechanics so to speak for the purposes of presentation post Section 18A of the Employment Tribunals Act 1996 which brought in the ACAS early conciliation procedure. Suffice it to say that a claimant cannot bring a claim to a tribunal unless one of the exceptions apply (as to which see the ACAS 2013 Early Conciliation Regulations)[2] without having first gone through ACAS early conciliation and on presentation of the claim supplied an ACAS early conciliation certificate. In this case, the Claimant did just that. When she presented her claim on 23 June 2016 she supplied an ACAS early conciliation certificate which runs from 13 April to 27 May 2016. If ACAS early conciliation is entered into before the end of the 3 month time limit, then the period of the ACAS early conciliation certificate (in other words ending with the last day as certified thereof) has the effect of extending the time for presenting a claim from one month after the ACAS early conciliation certificate. Thus as to the unfair dismissal claim, it is in time because the effective date of termination being 27 January 2016, three months would have run out on 26 April 2016 thus the ACAS early conciliation period started prior thereto thus the time for presenting the claim extended to 27 June 2016. Therefore the claim, when presented, was in time.

19. However, the jurisprudence which has built up is quite clear that the ACAS early conciliation cannot ride to the rescue to extend time if the 3 month time limit has already run out when ACAS early conciliation starts. Of course in this case, the last disability act permitted to proceed is 30 December 2015. Therefore time ran out on 29 March 2016, thus the ACAS EC period did not start until thereafter so the claim is out of time.

Findings of fact and application of the jurisprudence

20. Therefore I have to determine whether it is just and equitable to extent time. For the purposes of so doing I have heard the Claimant give evidence under oath and also her husband Richard Avison. I bear in mind as the parties will know from my previous hearing that the Claimant is a profoundly disabled person. She lives in a bungalow which is adapted for the purposes of her disabilities. She is much reliant upon her husband. She has clearly been throughout on very strong painkillers, as to which see the latest medical report from her GP in April 2017, and I am persuaded by Mr Avison (who I found the most honourable and credible of witnesses) that thus in the period that I am now going to deal with, the Claimant having been mentally knocked by being suspended on 9 December 2015, that he very much took charge of matters in relation to what I am about to discuss.

21. I have no doubt whatsoever from hearing him, and which corroborates his wife, that prior to the inception of the suspension against the Claimant (which was 9 December 2015) and thus the chain of events which led up to her dismissal, that neither had any knowledge whatsoever of employment tribunal procedure, save that many years ago Mr Avison, when employed by Lincolnshire County Council, was one of several witnesses called to give evidence in a tribunal case.

22. Thus what happened is that once his wife was suspended on 9 December 2015 and then thinking (as it turned out accurately) that the likely outcome would be her dismissal, he decided to research as to what they could do about this. He

[2] The exceptions do not apply in this case.

went on the Google website and researched that he could utilise ACAS. He also became aware that there are time limits. Neither he nor his wife could afford to use lawyers for lack of resources. Therefore, they engaged the services of ACAS starting with the helpline and thence in due course being appointed a conciliation officer, who I understand is Judy Barnaby.

23. Also in early 2016, and thus following the investigatory meeting on 30 December 2015[3], they also took advice from the PDAU, which is the pharmacists trade union. The Claimant did that herself, although she is not a qualified pharmacist, a colleague having told her that the PDAU might be prepared to give her advice. The Claimant has never been a member of a trade union. That advice, as with that of ACAS, was that they should await the outcome of the internal disciplinary process but they would be well advised to issue a grievance, given what the Claimant was complaining about, against the alleged perpetrators and thus that this might stop in its tracks the disciplinary process at least for the time being. This explains why the Claimant issued a grievance to the Respondent against 5 named perpetrators on 6 January 2016.

24. Unfortunately it did not do the trick and the disciplinary procedure continued. The Claimant was summarily dismissed without notice for gross misconduct. The Claimant has always maintained that this was unfair[4].

25. The Claimant then appealed that process having been dismissed on 18 January 2016, confirmed in writing on 26 January. She lodged her appeal on 2 February 2016. That appeal was heard by Mr Bygraves and he rejected the appeal on 8 March. In the meantime, the Claimant's grievance went its separate way. It was rejected by Ms Ali Mohammed on 24 February. The Claimant appealed that and the outcome was that the decision to reject her grievance was upheld. This was confirmed in writing on 24 March 2016. By now of course the Claimant was no longer an employee and that communication was sent to the Claimant by post. The letter would have been written on a Thursday. Mr Avison has confirmed they received the letter at the latest the following Tuesday.

26. This of course takes me (and which is important in this case) to circa 29 March. Mr Alison tells me that as soon as they got the letter (which therefore meant on the advice they had received from ACAS - they were at the end of the process so to speak) that he immediately contacted ACAS to incept early conciliation but which was delayed for about a fortnight because Ms Barnaby was on leave and thence went part-time. On the evidence of Mr Avison, that explains why ACAS EC did not start until 13 April.

27. I appreciate, as Miss Leonard has pointed out, that I have no corroborative evidence from ACAS but I have to go on the evidence I have before me and as I have already said, I find Mr Avison to be a credible witness.

28. What does that mean? Essentially it is that Mr Avison has made plain to me that he made clear to ACAS from the very start that part of what they were contending was disability discrimination and that they saw the inception of the disciplinary process as being part and parcel of that. In other words, it is back to the point that was rehearsed before me in the amendment point issue, namely they were about getting rid of the Claimant because of her disability, apart from anything else.

[3] Apropos Boot's disciplinary procedure.

[4] The Respondent wishes to make clear that it had good grounds for finding that she was guilty of bullying and harassment.

29. Unsurprisingly, him having told ACAS that was the case, it advised that first of all the internal processes must be explored and taken to their conclusion. Why would ACAS advise that? Apart from the fact that it would be good employment practice, I suspect that they would have had in mind the impact of Section 207A of TULRA 1992 and that if a claimant does not exhaust the relevant ACAS procedure but later wins a related claim before the tribunal, he or she may find themselves having their award deducted by 25%. Thus logically, it would make sense for ACAS to so advise.

30. That brings in another factor. Miss Leonard refers me back to the amendment issue and the fact that the Claimant had never claimed before today that there was this continuing act so to speak from 20 December up to and including the end of the appeal processes. However, does that undermine credibility? I draw a distinction. I have refused to permit the amendment because the Claimant has had several bites of the cherry to get her case in order. It does not mean that I disbelieve the Claimant or Mr Avison when they say that from the start they had already thought this to be the case; it is an entirely different issue. If they told ACAS that this is what they believed and ACAS informed them that therefore they should go through the internal procedures first, then ACAS was giving correct advice. That is important in terms of being guided in terms the checklist, so to speak, apropos ***British Coal Corporation -v- Keeble & others [1997] IRLR 336 EAT***. This is not a case where ACAS therefore gave the wrong advice. It is also not a case where the Claimant is ignorant of the time limits but she was being advised that she had to go through the internal procedure first.

31. Then I come back to 29 March. That is because there is no doubt that if ACAS had immediately incepted the ACAS EC on 29 March, then the claim would not be out of time.

32. I have not been asked by the Respondent to adjudicate upon the merits of this claim in terms of the assessment as to whether it is just and equitable to permit the claim to proceed. Doubtless this is because I made plain in the previous hearing that prima facie, on the pleaded scenario there appeared to me a viable case to proceed: I observed no more than that.

33. Therefore, this is a case where I start from the following standpoint. I accept that it is the exception and not the rule to exercise my judicial discretion to allow a claim to proceed when it is out of time under Section 123. Thus, it is for the Claimant to convince me that it is just and equitable to extend the time limit. It is very much a matter for findings of fact by me undertaking a balancing exercise as to where the interests of justice lie in the proper exercise of my judicial discretion. I hope it is now abundantly clear that I have therefore addressed the issue in a structured matter apropos **Keble;** albeit it is not necessarily the be all and end all.

34. Thus I further factor in that it is not pleaded by the Respondent that it could not deal with the disability discrimination claim. Indeed, the Response (as amended) addresses those issues.

35. I have rehearsed the reasons for the delay in presenting the claim. The length of the delay as such is not inordinate; the tribunal is dealing with a period of about 3 months. The issue of whether or not the Respondent has co-operated with any requests for information is not engaged. The issue of promptness once the Claimant knew of the facts giving rise to the cause of action is subsumed into what I have had to say about what the Claimant and Mr Avison thought this claim

was all about. Failure to take steps to obtain appropriate advice also does not engage because they did.

36. Thus, I am left with one issue only and that is reliance upon the ongoing internal procedure. Miss Leonard has extracted from Mr Avison (or rather he has fully admitted it) that they had little or no confidence that by exhausting the internal procedures, the outcome would be other than rejection of the grievance and the dismissal being upheld.

37. On the other hand, I have already referred to the importance of Section 207A and the advice ACAS would give. I appreciate that it is not a hard and fast principle that continuing with the ongoing internal procedure is a "get out card", so to speak, under the just and equitable principles. I accept as per the jurisprudence, as Miss Leonard has said to me, that there is "no general principle that it would be just and equitable to extend the time limit where the Claimant was seeking to address though the employer's grievance procedure before embarking on legal proceedings. The general principle is that a delay caused by a claimant awaiting completion of internal procedure may justify the extension of the time limit but it is only one factor to be considered in any particular case".

Conclusion

39. However, In this particular case for the reasons I have now made clear and overall approaching this matter in terms of considering where the balance of prejudice which each party would suffer as a result of the decision reached lies, I have concluded that it is just and equitable to extend time.

THE WAY FORWARD

40. What it therefore means is that the case can now proceed to the main hearing.

41. Although the Claimant has now provided further particulars as directed by me, and I am sure she has done her best to put them in a chronological and understandable format, I am with Miss Leonard that what we need is the provision of short bullet point schedules for the claims. To put it simply and to give an example, the whistle blowing claims: In a sentence summarise the particular episode of whistle blowing or reaction; put the date; put who the disclosure was made to or the detriment suffered and from whom.

42. The same is to be done in relation to the discrimination claims that remain. This means that Miss Leonard's team will be able to address, and the Tribunal understand, by way of summarised bull points what the core issues are.

43. There is no need to do this on the unfair dismissal claims because this is clearly set out already by Employment Judge Heap in the first preliminary hearing that she heard on 9 September - see paragraph 7 onwards and then encapsulated in paragraph 14.

44. The Claimant will provide all of this to the Respondent by 14 days from tomorrow, **ie 20 June 2017.** The Respondent is not obliged to reply thereto.

45. At the same time, there will be a revised schedule of loss. I have advised the Claimant as to what is meant by Vento bands and how to set out claims for existing and future loss, as well as to where to find out on the internet how to calculate a basic award.

46. The Respondent is again not required to reply to the same.

47. The tribunal **will now list this matter for a telephone case management discussion to give final directions on the first available date 6 weeks hence**, prior to which the tribunal would be obliged, in particular to receive from the Boots Legal Department its proposed agenda, including time estimate and dates to avoid. When the Respondent supplies this, it will have liaised with the Claimant over who is calling what witnesses and therefore what the parties agree is the likely time estimate for a liability only hearing before a full tribunal. This Judge anticipates then being able to agree those directions. He will want to list the main hearing at that TCMD. The parties should therefore, and in particular Boots, liaise with the clerks prior thereto as to available slots for the hearing.

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Employment Judge P Britton

Date: 19 July 2017-07-19

JUDGMENT AND REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE