EMPLOYMENT TRIBUNALS
at an Open Preliminary Hearing

Claimant: Mr A Giles

Respondent: Camphill Village Trust Ltd

Heard at: South West Region (By Cloud Video Platform)
On: Thursday 24 February 2022
Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: In person
Respondent: Ms J Patel, Solicitor

JUDGMENT

1. The Claimant is a disabled person for the purposes of these proceedings.

2. The claim for disability discrimination confined by the Claimant to his dismissa,l is permitted to proceed, it having been presented out of time but it being just and equitable to extend time.

3. The application to amend the claim to include one of dismissal by reason of whistleblowing is dismissed.

4. Directions as to the way forward are hereinafter set out.

REASONS

Introduction

1. Consequent upon a case management hearing heard by Employment Judge (EJ) Rayner on 18 November 2021, this Open Preliminary Hearing was listed. The agenda being :

   1.1 To determine whether or not the Claimant is a disabled person by reason of what is described as Asperger's Syndrome.

   1.2 Dependant upon the decision, to determine whether the current claim of disability discrimination pursuant to the Equality Act 2010, it being

acknowledged by the Claimant to be out of time, should be permitted to proceed it being just and equitable in all the circumstances so to do.

1.3 Depending upon my decision on that, to decide whether or not to grant an application to amend the claim to include one of automatic unfair dismissal by reason of whistleblowing pursuant to section 103A of the Employment Rights Act 1996.

Issue 1

4. After an extensive discussion and consideration of the medical notes of the Claimant and his impact statement, the Respondent concedes that the Claimant is disabled by a combination of Asperger's Syndrome and Obsessive Compulsive Deficit Disorder (OCD).

Issue 2

5. I have had regard to an agreed bundle of documents placed before me; it includes the pleadings. Second to the competing skeleton arguments of the Claimant and the Respondent. Third, to the Claimant's statement explaining why he did not present his claim until he did. Fourth, received very late in the proceedings today but that is not the fault of the Claimant as he sent it in to the Tribunal on the 22nd, a statement from a work colleague for part of the material time, namely Helen O'Donnell.

6. As per the skeleton argument of Ms Patel in which she set out accurately the relevant jurisprudence, the approach to be taken in a case of a claim being out of time and whether it is just and equitable to extend time is as per ***Robinson v Bexley Community Centre trading as Leisurelink [2003] IRLR 434 CA.*** Also there is the guidance in ***British Coal Corporation v Keeble and others [1997] IRLR 336 EAT,*** noting of course that I do not have to slavishly follow it but that it is a helpful guide as per ***Southwark London Borough Council v Afolabi [2003] ICR 800 CA***.

7. I have heard the evidence of the Claimant under affirmation. He has been cross-examined by Ms Patel. I have carefully considered all the circumstances of which I am thus now aware. I find the following.

8. I have no doubt whatsoever from consideration of the medical notes, and in particular the psychiatric report of 6 December 2020, that the Claimant has longstanding profound disabilities diagnosed back in 2010, namely Asperger's' Syndrome combined with Obsessive Compulsive Deficit Disorder (OCD) and it is quite obvious also other mental health illness, as to which see the psychiatric report and thence cross-reference to the extensive raft of prescription medication that the Claimant has been prescribed for many years, other than Diazepam which is more recent. In particular, I note the drugs prescribed to counter psychotic episodes. So, this is a profound mental health disability. I am well aware of how Asperger's and OCD can manifest itself. I note that in the statement which the Claimant's parents gave in May 2021 for the purposes of supporting him in his application for a PIP, which was successful, they set out longstanding serious problems in terms of the Claimant's disability.

9. Put simply, the Claimant is an obsessional; it is part and parcel of Asperger's/OCD. It means that he cannot multitask very well, and he will become completely bunkered in mentally in terms of any particular task. He is prone to anxiety, which is obviously apparent from the prescription history and the psychiatric report and so, the more the stress obviously the more likely it will impact upon his ability to focus and prioritise and, in that sense, deal with matters quickly because he becomes obsessed.

10. I am wholly persuaded by the Claimant's evidence in that respect and the psychiatric report.

11. As to the factual circumstances in this case and insofar as it assists me for the purposes of today, suffice to say that the Claimant brought his claim (ET1) to the tribunal on 14 April 2021.He ticked the boxes to denote claims for unfair dismissal and disability discrimination. He had been employed by the Respondent, which runs a group of homes for mentally and physically disabled people and is quite a substantial organisation, as a Team Leader between 16 March 2020 and 2 October 2020 whereat he was dismissed basically for performance concerns and therefore capability, him still being on a six month probation period. The narrative to his claim essentially was about the unfairness of that dismissal and in the context of his disability. Nothing in that narrative indicated any claim related to whistleblowing. I will come back to that. It meant that the then claim for unfair dismissal pursuant to the Employment Rights Act 1996 (the ERA) could not proceed for want of jurisdiction as he lacked the required two years qualifying service. So that would leave a claim based upon disability related dismissal pursuant to the provisions of the Equality Act 2010 (the EqA).

12. He went into ACAS early conciliation on 15 February 2021 which completed on 15 March 2021. It logically follows that section 203A of the ERA and its equivalent provision in the EqA cannot ride to the rescue in extending time because the ACAS early conciliation period commenced after the requisite three month time limit for bringing this claim, which would be from the effective date of termination which was 2 October 2020. That applies whether this be an unfair dismissal claim or a claim based upon disability discrimination because obviously the last act in the chain in that respect would be his dismissal.

13. Thus, it means that this claim which at present is the claim of disability discrimination. on presentation was out of time by about 4 months; that is not in dispute. The issue, therefore, is whether in the circumstances it is just and equitable to extend time.

14. I find as follows.

15. When he was suspended from the employment because of performance concerns in September 2020, the Claimant was immediately placed on sick notes[1] by his doctor and which were clearly for mental health reasons. He had been additionally prescribed Diazepam by that time. I bear in mind that he was already on a raft of strong prescription only anti-depressants and other medications to treat his mental health. I have no doubt that strip away the

[1] Nowadays curiously referred to as fit notes.

beneficial effects of those medications and thus him not taking them and he would have been very poorly indeed. But he was of course taking them and it is a different test from whether he is disabled; it is therefore whether, given the benefit of his medications, he was actually able to function sufficiently well to have dealt with bringing this claim within time.

16. Consequent upon his suspension for what were prima facie serious capability concerns an investigatory was conducted by Ms Charlie Remnant. She found that there was a case to answer. On 28 August 2020 the Claimant was invited to a capability hearing. The invitation meets ACAS CP best practice. The hearing took place on 4 September 2020 and was chaired by Tracy David-Jones. The Claimant had the right to be accompanied, which he did not take up. He was dismissed (and I have seen the dismissal letter) on one month's notice. The Claimant then submitted an appeal. That document which is before me in the bundle is lucid and well put together. That does not surprise me given the Claimant has a Batchelor of Arts degree. The issue is how is it that he was able to do that but not put his claim into tribunal in time, and to which I shall return.

17. He then had an appeal hearing at which again it seems he was able to conduct himself well; he does not argue that he was not able to. He received the decision dismissing his appeal circa 19 October 2020. The Claimant was thereafter able to engage in some communication with the Respondent over the collection of his belongings, as part of his job involved sleeping in at one of the homes, namely the Farmhouse. It seems that there was also a further communication from him to the effect that he felt the process was unfair.

18. Then there is nothing until 15 February 2021 when he notified the Respondent that he was now planning to bring a claim to Tribunal and that therefore he first of all would have to go through the ACAS conciliation process. I cover this letter in more detail in due course.

19. So, what happened between say the end of October 2020 and the communication to the Respondent on 15 February 2021 and the commencing of the ACAS EC process? I look to the psychiatric report of 6 December 2020[2]. I bear in mind that the prescription record shows that there was also an increase in one or more of the prescription medications he was on to keep his mental health stable. That referral was because a nurse in the Psychological Triaging Service of the relevant NHS Trust was sufficiently concerned to refer him to the psychiatrist. It refers to long-standing problems. In a way it assists the Respondent because in effect the psychiatrist, having recited the long mental health history of the Claimant, was able to state that on presentation (see page 68 paragraph 2 under the heading current situation): "*His OCD symptoms have recently worsened since May time, however he still feels he is functioning relatively well although he has lost his job and having period of time off which he is finding beneficial*."

20. The psychiatrist then gives a brief summary of what the Claimant thinks about his dismissal, which he clearly thought was unfair but then he says: "*… this anxiety from this is likely triggering for short time worsening of his presentation*".

[2] P67-69 in the bundle of documents placed before me.

21. So, what he says there is a bit of a mixed bag. His main concern is the need to address the very high level of medication that the Claimant is on; that in particular he does not want to come off his anti-psychotic medicines (see page 69) or the high dosage of fluoxetine, which is an anti-depressant, but there was a need to address the medication regime nevertheless. The Claimant was throughout this period on fit notes, to which I have referred, hence being prescribed diazepam and had clearly been sufficiently unwell to be referred to the psychiatrist. I come out of that part of the case concluding on the balance of probabilities that the Claimant was mentally quite poorly.

22. That brings me into the early part of 2021. The Claimant has very eloquently explained to Ms Patel just how he does not function; the obsessionalism and how he cannot multi task; and that for a while he was very low so he could not really focus at all. I note from the prescription history insofar as I have got it that from time to time he was prescribed anti-depressants. The Claimant tells me that he suffers from significant mood swings in terms of his disabilities, which is mirrored by what his parents said in the statement vis PIP.

23. Drawing this together I conclude that the Claimant's condition in the period up to 15 February 2021 was one whereby due to his disabilities, he was not properly functioning and which explains why he did not start the process of bringing his claim to tribunal prior thereto. As to starting it on 15 February when he was clearly feeling mentally better as is obvious from the letter he wrote to the Respondent, Ms Patel queries why continue with ACAS EC rather than present the claim earlier than he did. I observe that the whole purpose of ACAS early conciliation is to see whether employment tribunal litigation can be avoided. Thus, if the ACAS officer, in this case Paul, considered it is worthy of endeavouring to pursue conciliation for a period, usually of up to one month in the first instance, then he is permitted so to do under the ACAS regime and it cross-references into the ACAS EC procedure before the tribunal. It is quite clear from an email that the Claimant read me from Paul that up to a few days before the end of the ACAS EC period, Paul was still hopeful he might get some response from the Respondent. It follows that I accept that this would be a legitimate delay in the process to see if ACAS early conciliation could resolve the need to come to tribunal.

24. That then leaves me with why the Claimant did not bring his claim to tribunal more promptly than he did thereafter bearing in mind the ACAS EC ended on 15 March and he did not present his claim to the tribunal until 14 April.

25. I am back to the explanation he has given and in the context of his severe mental health disabilities and that he spent a considerable period of time, far more than a non-disabled person would, in putting things together. I bear in mind that he wrote an extensive explanation of his claim in the second document (starting Bp 17) which is before me presented at the same time. That obviously took him some time to put together.

26. Thus as to this period I am again persuaded on the balance of probabilities that this was the reason for his delay for presenting his claim until he did.

27. However, I remind myself that I must also factor in, in terms of having regard to

all the circumstances where the balance of prejudice lies. Obviously in that respect if in all the circumstances I decide that it is not just and equitable to permit the claim to proceed out of time, then the prejudice to the Claimant is that he will not be able to pursue his claim. But what about the prejudice to the Respondent? Ms Patel submits that because of the lateness in bringing this claim, adding to which the Claimant had not raised the link to his disability in terms of his dismissal in the investigation internally which led to the disciplinary hearing or in his letter of appeal, that therefore only knowing he was bringing a disability based claim on presentation of this claim on 14 April 2021, it then being some 4 months out of time, deeply prejudices the Respondent because two of its key witnesses in this matter, namely Vicky who seems to have been a line manager extensively involved with the Claimant and the principal person raising the performance concerns, and Tracy who heard the disciplinary hearing, have left its employ. But the Respondent of course still has in its employ Ms Charlie Remnant and the senior executive who heard the appeal[3] and the ability to deploy documentation in support of its case as is obvious from the bundle before me. It was stated by Ms Patel that they are also hampered because Helen O'Donnell has left.

28. However, in fact Helen O'Donnell circa 19 January 2022 has given as at a singularly helpful statement to the Claimant. If correct, her evidence flies in the face of the Respondent's contention that it was never made aware by the Claimant during this employment that he was disabled. It also flies in the face of any suggestion that concerns about the running of these establishments was not being raised at the material time, particularly it seems by Helen, albeit also from what she says possibly jointly with the Claimant.

29. The fact that Vicky or Helen may not want to come to tribunal because of the circumstances of their dismissal is not really a valid concern because the issue then becomes is when did they leave? Was it after the ET1 was received by the Respondent? Did the Respondent therefore have time to get evidence from them? The Respondent must have got something because in the ET3, it being clear from ET1 and the particularisation to which I have raised that disability discrimination was a claim, it was able to reply to it in some detail.

30. What it therefore means is that I am not persuaded by the Respondent that it is so hampered by the lateness of the claim that it is unable to defend the claim.

31. Accordingly, I have decided that it is just and equitable to permit the claim to proceed.

The amendment issue

32.. On 18 August 2021, the Claimant wrote to the Tribunal making plain that he wished to bring a claim for dismissal by reason of whistleblowing. This was treated as an application to amend as is self-evident from paragraph 5 of the case management record of EJ Rayner, hence it being on the agenda today. Such a claim, which would be pursuant to s103A of the ERA, does not require two years qualifying service unlike a claim for unfair dismissal pursuant to s95

[3] Ms Patel has not said that they are no longer employed.

and 98 of the ERA. But it nevertheless must be presented within three months of the effective date of termination namely 2 October 2020.[4] Thus as at the date of the application it was some 10 months out of time.

33. The approach to dealing with an application to amend is a per the seminal judgment of Mummery J, as he then was, in ***Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT.*** Ms Patel has accurately set this out in her skeleton argument. I have also considered Mr Giles' written and oral submissions and his statement.

34. As is now clear from my previous findings the Claimant had mental capacity when he presented his ET1. He did not tick the box at section 9 of the ET1 form to denote he was bringing a whistleblowing claim. It could not be deduced from looking at the ET1 and its particularisation that there was such a claim. That the Claimant knew that certain types of claim for unfair dismissal did not require two years qualifying service is apparent and because he listed them in in the particularisation. He covered the gamut, including such things as health and safety and trade union related duties as well as whistleblowing. But he did not therein claim a specific head of claim for unfair dismissal because of whistleblowing. He provided no particulars to indicate that he was.

35. Furthermore, at the start of the ACAS early conciliation process, the Claimant wrote a letter to his former employer which is at Bp[5]122. The last four paragraphs could not be clearer. He was making plain that he had raised:

> "… *a lot of concerns about the Charity's handling of incidents and management over a number of years*[6] *and I feel a part of the decision was to cover up my allegations … Obviously I would appreciate that only those that need to know about this process is aware of this. I wouldn't like others to find out.*
>
> *Obviously if we cannot come to some form of consensus, however, I am more than willing to go to court (tribunal) as I have been informed that if this goes to tribunal it could become public knowledge.*
>
> *I do have a question do I have to inform the Charity Commission about this.*"

36.. So, read objectively, the clear inference was that if the Respondent did not settle with him, then he would be raising his whistleblowing concerns in his claim to the tribunal. Today, he has told me of a whole list of the most serious of issues relating to shortcomings by the Respondent in terms of safeguarding.

37. Yet he did not raise these matters at all when he presented the ET1. He only raised them by way of amendment on 18 August 2021, but then again not in the same particularisation as I have heard today.

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[4] In itself time cannot be extended unless a tribunal finds, with the burden of establishing the same on the Claimant, that it was not reasonably practicable to have brought it within time and that it was presented within a reasonable time thereafter. Time limits are intended to be construed strictly.

[5] Bp = bundle page.

[6] That is because he had worked for them on an agency basis prior to the employment.

38. It follows from those findings that applying Selkent, in terms of the nature of the amendment it is not a relabelling or additional details to an existing head of claim or the additional substitution of labels to facts already pleaded to. It is the making of entirely new factual allegations and thus an entirely new head of claim.

40. That as a claim it is substantially out of time. Albeit not fatal, it is a significant factor in deciding whether to grant the amendment. The Claimant was fit enough to proceed with the ACAS early conciliation back in February 2021, as to which I have already dealt with. He was well enough to then proceed with an ET1 presentation with detailed particularisation and able to then participate in the proceedings. Indeed, his record of compliance with such as case management orders has been first-rate. It follows that I have no reasons put forward by him to show that there was an impediment, such as the relapse of him into further serious mental ill heath, which meant that he was in a state where he could not proceed or present; and there is no medical evidence to that effect.

41. There is then of course the fact that he had the knowledge to bring such a claim well before he did and which I have now rehearsed.

42. If granted, it would put the Respondent to substantial additional enquiry. It is much wider than simply having to address the issue of whether it knew about his disability at the material time. This would engage requiring the Claimant to provide full further and better particularisation of every single incident upon when he made a disclosure; by date and to whom and what he said; why it would constitute a public interest disclosure; what happened as a result to him and why there is a chain of causation leading to his dismissal. This is additionally important as no hard on allegation to this effect was made in his appeal letter, to which I have already referred. The Respondent would then be put to having to go back over old records; interviewing so far as it could case workers at all the material times. This would be a very significant exercise. It also follows that the time required for the main hearing, which is yet to be listed, would be considerably greater thus putting the Respondent to additional expense.

Conclusion

43. For all those reasons I conclude that it is not in the interests of justice to allow the amendment. Accordingly, the application is dismissed.

Labelling the disability discrimination claim and the core issues

44. Confirmed by the Claimant at the hearing before EJ Rayner is that his claim of disability discrimination is confined to the actual dismissal.

45. If it is meant to be a claim of direct discrimination pursuant to s15 of the EqA, the Claimant has not provided any comparators. Second engaged would be the the seminal judgment of their Lordships in ***Mayor and Burgesses of the London Borough of Lewisham v Malcolm 2008 IRLR 700, HL.*** Thus if a non disabled person similarly underperforming would have been dismissed, then it cannot be direct discrimination. On analysis this is a claim based upon s15

of the EqA. Thus, in being dismissed was the Claimant treated unfavourably because of something arising in consequence of his disability? That is to say if the Claimant's disability impacted upon his ability to perform to the level the Respondent required and ie because he was obsessional in his working practices. The Claimant agrees that I have currently identified this to be the claim and that it engages s15. If that is prima facie made out on the facts at the main hearing, then the Respondent can of course deploy the justification defence. It has in effect pleaded that. Of course, a core issue is going to be whether the Respondent had actual or constructive knowledge of the disability.

46.. Not perhaps spelt out before Judge Rayner is that s.20-22 – failure to make reasonable adjustments – has to be engaged. It invariably is in circumstances such as these relating to performance based alleged disability discrimination by way of dismissal. Thus if the working practices of the employer (the PCP), in this case having to deal with safeguarding issues in challenging circumstances, placed the Claimant at a substantial disadvantage because of his disability, then the employer had a duty to consider making reasonable adjustments to those working practices for him. So, if in this case there was a link in terms of his disability to the performance issues, then the employer would be obliged to consider whether to make reasonable adjustments as opposed to dismissing at first instance the Claimant. That is the second limb of the Claimant's case. The Claimant again agrees that I have the labelling correct.

Observation and the need for further and better particulars

47. Albeit I have allowed the disability discrimination claim to proceed, what has concerned me, and which goes to the merits, is why did the Claimant not nevertheless raise the all-important the link between his disability and the dismissal at the material time? Why not spell it out at the disciplinary hearing? Why not put it in the appeal letter, which he has not done? The Claimant has told me three things today, which Ms Patel and I were not aware of until he raised them. I am not necessarily criticising him because he has never been ordered to provide further and better particulars of this claim. Essentially what he says is that flowing on from the evidence that I have referred to of Helen O'Donnell, at the disciplinary hearing those presiding were sufficiently concerned at his mental state, knowing he was on diazepam, to query as to whether or not he would be fit to drive himself home. So, this may go to knowledge of the disability, and which is currently denied by the Respondent. Second, there was a break at that stage whereby the Claimant went outside with Vicky for a cigarette and, if the Claimant is correct, he told Vicky a lot more about the impact of his disability and the effect therefore that the working regimes, stresses etc had had on him and in terms of any alleged performance concerns. He says that Vicky told him that he was not to worry because Tracy was very fair. Third, his point being that when they resumed the hearing Vicky did not impart any of that to Tracy. He was too distressed to be able to do so.

49. The point would then become as to why Vicky, who I am informed by the Claimant was the Service Manager and therefore with responsibility for the

place where he worked, did not inform the disciplinary hearing. [7]

50. The next point of course is that the Claimant is telling me he did not raise it on appeal as he thought he would succeed. This still troubles me. He was able to put together a cogent letter of appeal. So it makes no sense to not raise his disability; the conversation with Vicky; and that this had not been imparted to Tracy thus undermining the process.

51. That is a core issue for the main hearing and for which reason I am ordering in that respect further and better particulars of the Claimant. I also consider that it is essential that we now have from him clear particularisation as to how the disability relates to his performance and what he says the employer should have done rather than dismiss him. To that end, I am ordering Ms Patel to send the Claimant a properly structured request for further and better particulars. I also provide for the Claimant to reply to it

52. Consequent upon that having occurred, I am listing a further preliminary hearing to consider first any issues that arise out of the further particularisation and replies thereto; second to make directions for the main hearing and list the same.

ORDERS OF DIRECTIONS

(made pursuant to the Tribunal's 2013 Rules of Procedure)

1. The Respondent will send the request for further and better particulars to the Claimant not later than **21 days from the issuing of these orders**.

2. Having received the same, the Claimant will then reply copying in the Tribunal by **21 days thereafter**.

3. A further preliminary hearing, currently for case management, is **to be listed for the first available date two weeks thereafter** with a time estimate, allowing for the Claimant's disability, of 3 hours. It will be heard by CVP.

Judicial Mediation

4. At present, the Respondent reserves its position, as of course it is entitled to. I have explained the process to the Claimant, who would agree to it. He has already served his schedule of loss. At the next case management hearing if the Respondent is willing to undertake Judicial Mediation, then the Judge will be able to discuss it with the parties and hopefully list the same..

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[7] **Initiated by me there was a discussion as to therefore this potentially engages *Royal Mail Group Ltd v Jhuti [2009] UKSC 55*. On reflection it does not as part of the Claimant's case is that the Respondent , including Tracy, already knew that he was disabled.**

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':
https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(iv) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge P Britton
Date: 7 March 2022

Judgment sent to parties: 17 March 2022

FOR THE TRIBUNAL OFFICE

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