Case No: 2601813/2017

EMPLOYMENT TRIBUNALS

Claimant: Miss Catherine Davies

Respondent: Boots Management Services Ltd

PRELIMINARY HEARING

Heard at: Nottingham (in public) **On:** 16 July 2018

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: Mrs S Powell, lay representative (family friend)
For the respondent: Mr G Burke, counsel

RESERVED JUDGMENT & ORDER

(1) This hearing, which was listed as a final hearing, is made a preliminary hearing.

(2) The claimant's application to amend is refused.

(3) Within 14 days of the date this is sent to them, the parties must provide their dates of unavailability between January and September 2019, so that the final hearing can be relisted.

(4) Within one calendar month of the date this is sent to them, the respondent must:

a. examine the documents and other evidence that it is proposed be put before the Tribunal at the final hearing and identify all references to offers made (including offers made by or on behalf of the claimant) and/or discussions held before the termination of the claimant's employment with a view to it being terminated on terms agreed between the claimant and the respondent;

b. if practicable, agree with the claimant what evidence, if any, is caught by section 111A(1) of the Employment Rights Act 1996 ("section 111A(1)");

c. inform the Tribunal in writing that sub-paragraphs a. and b. have been complied with and if matters have not been agreed with the claimant in accordance with b., what the nature of any disagreement is;

d. if it takes the view that no evidence is caught by section 111A(1), state in writing to the Tribunal on what basis it takes that view, given that there are clear references in the documents that were put before the Tribunal at this hearing to offers from the claimant.

(5) Within one calendar month of the date this is sent to them, the parties must inform the Tribunal in writing whether or not they agree to any remaining issues concerning the admissibility of evidence at the final hearing being dealt with at the final hearing rather than at a further preliminary hearing.

(6) By 5 November 2018, the claimant must provide the following information in writing to the Tribunal and respondent:

a. in a numbered list of reasons, why was her dismissal unfair? The list must be split into two parts, the first part headed (and containing) "*Procedural Reasons*" and the second part "*Other Reasons*". Each reason should be no more than a sentence or two long;

b. is it the claimant's case that, around the date she was dismissed, she wanted to return to work for the respondent in any capacity? If that is her case, why did she write to the respondent on 12 July 2017 stating, "*My trust and confidence has been broken …. I believe that if I was to return to work in any capacity within the company, it would have a detrimental effect on my health. … I believe now is the time I truly need to focus on my health and well-being and to move on with my life.*"?

c. is it the claimant's case that, around the date she was dismissed, there were any steps the respondent could reasonably have taken that might have got her back to work within a reasonable period of time? If that is her case, why did she write to the respondent on 12 July 2017 stating, "*I feel that no adjustments would alter the way I am feeling*"?

d. is it the claimant's case that had she not been dismissed in July 2017, she would have been well enough to return to work for the respondent in some capacity within a reasonable period of time? If that is her case: when does she allege she would have been well enough to return to work?; what evidence does she rely on to support that part of her case?

REASONS

1. This started out as day one of what was listed to be a two day final hearing. It ended up as a one day preliminary hearing to deal with an amendment application.

2. In terms of the law, I refer to the guidance given by the EAT in the well-known case of Selkent Bus Co Ltd v Moore [1996] IRLR 661. I must take all relevant circumstances into account; time limits are important but not necessarily determinative, as is the balance of prejudice. My focus must, though, necessarily be on the overriding objective set out in rule 2, which did not, of course, exist when Selkent was decided; albeit there is no conflict between the overriding objective and the Selkent guidance.

3. The claimant was employed by the respondent for over 20 years, latterly as a Store Manager, having started aged 16 as a YTS trainee. From her point of view, significant problems seem to have begun in 2012 in relation to the management of a senior colleague and a related proposal to move from the store at Kingsway Retail Park in Derby to the store at Sutton in Ashfield. This led to the first of a number of periods of sickness absence with stress, anxiety and depression, including being absent (a return to work for a day or two aside) from October 2015 to March 2016. The last of those periods of sickness absence ran from October 2016 until the claimant's employment terminated with effect on 15 July 2017, on the grounds of incapability due to ill health.

4. After going through early conciliation from 14 September to 14 October 2017, the claimant presented her claim form on 31 October 2017. The only complaint made in the claim form was a complaint of unfair dismissal. The claimant also ticked the box in section 12 of the claim form indicating that she did not have a disability. However, the claimant's problems with depression and anxiety, and the respondent's alleged failure to deal with them properly, are mentioned extensively in the document attached to the claim form giving details of the claim ("details of claim").

5. Almost anyone with experience of employment Tribunal litigation reading the details of claim would wonder whether, notwithstanding the tick in the box, the claimant was actually alleging disability discrimination. The respondent's solicitors certainly did: paragraph 5 of its "*Grounds of Resistance*" document, which forms part of the response, includes the following, "*It is unclear from the Claimant's Claim Form if she alleges that the Respondent discriminated against her on the grounds of disability … the Respondent denies any breach of the Equality Act 2010 if alleged …. If the Claimant is alleging that she has been discriminated against, the Respondent reserves the right to amend its Response.*"

6. An Employment Judge looking at a claim form of this kind has a dilemma. On the one hand, the overriding objective requires them so far as practicable to ensure that the parties are on an equal footing. If, as here, the respondent is professionally legally represented and the claimant is not, it may be appropriate for the Employment Judge to ask questions of the claimant that a legal professional advising her would. This would be done to help her so far as possible to put her claim forward in the way it would be put forward by a legal professional acting on her behalf. In particular, if the claimant has alleged facts in the claim form that clearly suggest a particular type of claim and the claimant has simply put the wrong legal label on it, there is nothing wrong with suggesting the correct legal label. On the other hand, an Employment Judge should not create a

claim for a claimant, nor, absent exceptional circumstances, prompt or encourage the claimant to make a claim that, unprompted and unencouraged, would never have occurred to her. Different Employment Judges will, reasonably, make different decisions about where to draw the line and how to tread it.

7. In the present case, I think I would probably have ordered the claimant to clarify her position, had I looked at the claim and response forms on initial consideration under rule 26. The Employment Judge who undertook initial consideration did not, however, do so. I don't know whether or not this was a conscious decision and I certainly don't criticise him for it. If it was a conscious decision, one reason for it may have been that the claimant and her representatives could reasonably be expected:

   7.1 to read the Grounds of Resistance;

   7.2 if the claimant wanted to make a disability discrimination claim, to then write to the Tribunal and the respondent saying that she wanted to do so.

8. Arguably, if the claimant and her representatives said nothing about wanting to make a disability discrimination claim after having received (and presumably read) the Grounds of Resistance, the respondent and the Tribunal could reasonably assume she did not want to make one.

9. The response was sent to the claimant on 13 February 2018. The case had been listed for a one day final hearing in April 2018 from as far back as 30 November 2017. Along the way, both parties corresponded with the Tribunal and each other about various things. The time estimate for the final hearing was increased from one day to two and the final hearing was then postponed from late April to 16 and 17 July 2018. But apart from the hints in the details of claim (mentioned above) that she might have a disability discrimination claim, at no stage before 16 July 2018 did anyone on the claimant's behalf suggest that she wanted to bring one.

10. That this wasn't an effective two day final hearing and ended up as a one day preliminary hearing was partly my fault, if "fault" is the right word. At the start of the hearing, I said something to the following effect:

    10.1 that one of the claimant's main allegations seemed to be that the respondent did things and failed to do things and that this harmed her mental health, as a result of which, ultimately, she was dismissed;

    10.2 that if the claim was about the respondent allegedly breaching a duty to take reasonable care for the claimant's health, that was probably not a claim for the Employment Tribunals;

    10.3 but that if she was bringing a Tribunal claim about this allegation, it appeared to be a disability discrimination claim for breaches of the duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 ("EQA").

11. For the claimant's benefit, it may be helpful for me to set out the relevant parts of the EQA, which I explained at length to her representative during the hearing.

    20 Duty to make adjustments

    (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

    (2) The duty comprises the following three requirements.

    (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage….

    21 Failure to comply with duty

    (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

    (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

12. I also note:

    12.1 paragraph 20(1)(b) of schedule 8 to the EQA, which states that the employer is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the employee is a disabled person and/or that she is likely to be placed at the disadvantage referred to in EQA section 20(3), set out above;

    12.2 EQA section 123, which sets out a three month time limit for bringing claims, subject to a discretion to extend time if the claimant persuades the Tribunal it is "*just and equitable*" to do so.

13. Part of the reason I raised the potential for a disability discrimination claim is that I had and have misgivings about the unfair dismissal claim. The claimant's arguments on unfair dismissal seem to boil down to two things:

    13.1 an allegation that the respondent was responsible for the claimant's ill health and therefore that it was unfair to dismiss the claimant because of her ill health;

    13.2 an allegation that the respondent failed to follow the proper procedures when dismissing her.

14. As I explained to her representative, there are real problems with both of those arguments.

15. Even if an employer has caused the employee to become mentally or physically incapacitated through the grossest negligence imaginable, the employer is not obliged to

keep employing her indefinitely: see McAdie v Royal Bank of Scotland plc [2007] EWCA Civ 806. In the present case, my understanding is that, at the time of dismissal: the claimant was not asking the respondent to take any particular practical steps and was not suggesting she would or could return to work if the respondent took them; she had reached the end of her tether and did not want to return to work for the respondent.[1] If there is no reasonable chance of an employee returning to work in the foreseeable future whatever reasonable steps the employer takes, the employer will almost always be within its rights to dismiss her. Even if the way the respondent went about dismissing the claimant was unfair because of procedural mistakes, if there was no reasonable chance of the claimant returning to work in the foreseeable future her dismissal sooner or later would have been inevitable. And because she had exhausted her sick pay entitlement, this would probably mean no compensatory award under section 123 of the Employment Rights Act 1996 ("ERA") and a basic award under ERA section 119 only: see Polkey v AE Dayton Services Ltd [1987] UKHL 8 and paragraph 54 of the EAT's decision in Software 2000 Ltd v Andrews [2007] ICR 825.

16. Another thing that may, with the benefit of hindsight, have influenced me to raise the potential for a disability discrimination claim is the concerns I had about whether I was being asked to take into account, in relation to the unfair dismissal claim, evidence that ERA section 111A ("section 111A") would have stopped me from taking into account. Respondent's counsel had, in his opening note, proposed that if I deemed that that section did apply, I should "*ignore the relevant materials to the extent appropriate*". My understanding is that that would not normally be an appropriate thing to do; that decisions about section 111A in a case where the only complaint is one of unfair dismissal should be made at a preliminary hearing and that the trial judge in such a case should not even see any evidence excluded by section 111A. Although the claimant and the respondent have apparently agreed to 'waive' so-called 'without prejudice privilege' in this case, section 111A can't be got around so easily in a pure unfair dismissal case.

17. Where, however, there is a disability discrimination claim to which the evidence excluded by section 111A is relevant, section 111A only 'bites' on the unfair dismissal complaint. The Tribunal looks at any relevant evidence excluded by that section when considering the disability discrimination claim but ignores it when considering the unfair dismissal complaint.

18. I fully appreciate that the potential problems created by section 111A, and the fact that they would stop being real problems if there were a disability discrimination claim

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[1] To quote from one of her last pre-dismissal communications with the respondent, sent on 12 July 2017, "*My trust and confidence has been broken …. I feel that no adjustments would alter the way I am feeling … I believe that if I was to return to work in any capacity within the company, it would have a detrimental effect on my health. In the last five years, I have suffered from depression and anxiety which has been caused by work related stress and I believe now is the time I truly need to focus on my health and well-being and to move on with my life.*"

connected with dismissal, are not in and of themselves relevant considerations when deciding whether or not to allow an amendment to bring such a claim. Those problems do exist, though. And they are particularly acute in the present case because identifying what evidence is potentially covered by section 111A is tricky and may not be soluble without having evidence from witnesses; it is not just a question of looking at some documents.

19. Without wanting to go into too much detail, my understanding of the parties' positions is that: from the respondent's point of view, section 111A does not apply because there never were any "*offers made or discussions held, before the termination of employment … with a view to it being terminated on terms agreed between the employer and the employee*" (ERA section 111A(2)); the claimant alleges that she was encouraged by the respondent to come up with a figure she would accept to end her employment and that she came up with a figure. I note that there is clear evidence in the trial bundle (e.g. an email from Sheila Powell to Shaun N Hulin of 22 June 2017 – page 345A) of the claimant having made at least one offer. Section 111A, on my reading of it, applies to any offers made with a view to bringing employment to an end, even if there are no other discussions or any negotiation. It looks to me as if, when thinking about this issue, the respondent has confused the law that applies to so-called 'without prejudice privilege', by which evidence of settlement negotiations is excluded but which only applies if there are actual negotiations.

20. There were, then, serious concerns around section 111A. That section might have meant I would have to postpone the final hearing anyway even if there was no amendment to the claim, because I had potentially looked at evidence I was not allowed to look at. This meant the problems / concerns around section 111A were relevant to any amendment application, because one reason that supported not allowing an amendment application was the danger that it would lead to the final hearing having to be postponed. If the final hearing might have to be postponed anyway, that reason would lose much of its power.

21. There was a further reason why I was concerned that there might have to be a postponement come what may: given the state of the claimant's health, and the likelihood of her needing frequent breaks when giving evidence, and her evident desire to explore in her evidence events going back to 2012, two days might not be enough time for the final hearing.

22. There was some discussion and I then asked the claimant's representative whether she wanted to apply to amend to add a disability discrimination claim. I made clear that she could not assume I would permit any amendment and that I was not saying there was necessarily a good and strong disability discrimination claim. After a short adjournment to enable her to consult with the claimant[2], she said she did. That was at about 11.25 am.

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[2] Unfortunately, the claimant felt unable to be in the Tribunal room at the same time as the respondent's representatives and was not present for any part of the hearing; she remained in the claimants' waiting room

Regrettably, for various reasons, it then took the whole of the rest of the day – finishing at 4.50 pm – to work out what the proposed disability discrimination claim was and to hear submissions from both parties on the application to amend. It seemed to me that whatever my decision on amendment, and even if I was able to make that decision overnight and give it first thing in the morning, nothing could usefully be achieved the following day – which was to have been day two of the final hearing – so I converted the hearing to a preliminary hearing, sent the parties away, and reserved my decision.

23. I shall now explain as best I can what disability discrimination complaints the claimant wishes to add to her claim. They all rely on the claimant being at all relevant times a disabled person because of anxiety (causing, amongst other things, panic attacks) and depression. It is alleged that the respondent ought to have known the claimant was a disabled person from shortly after the claimant sent a letter to regional management on 1 April 2012 that appears in the trial bundle from page 41. It is said that the claimant should have been referred to occupational health immediately upon receipt of that letter and that had she been referred to occupational health, the respondent would have become aware that she was a disabled person. (The respondent has not responded to the proposed disability discrimination claim. Although I am prepared to assume for present purposes that it would ultimately conceded that the claimant was and is disabled, knowledge of disability is a different matter).

24. Pausing there, I note that I am, in considering this amendment application, in the unusual position of having a full witness statement from the claimant (albeit one written for an unfair dismissal claim and not a disability discrimination claim) and most or all of the relevant documents. Normally, I would be in no position to assess the merits of a claim the claimant was proposing to add by amendment; and I would not take the merits into account in deciding whether or not to grant permission to amend unless the proposed claim was plainly misconceived. But in the present case, I can reasonably reliably assess the merits of parts of the proposed claim and I think they are relevant to the amendment application, at least to some extent. I mention this now because I think, having read the letter of 1 April 2012, that there is no reasonable chance of a Tribunal deciding the respondent could reasonably have been expected to know that the claimant was a disabled person because of it; nothing in it ought to have triggered an occupational health referral.

25. I also note that part of the way through the hearing, the claimant's representative changed tack and suggested that the respondent's date of knowledge of disability was

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throughout. Although her representative assured me that the claimant would come in to the Tribunal room to give her evidence and (once it became clear that an adjournment was on the cards) that the claimant would be able to cope with any final hearing in the future, this does not bode well. I should make clear that I am not criticising her at all for any of this. It is not her fault she is very ill. I am merely thinking about the practicalities of the situation, as well as whether her own best interests are really served by trying to fight a Tribunal claim, given the state of her health.

actually before April 2012. She was, though, unable to make me understand the basis of her argument that the respondent ought to have known the claimant was a disabled person before April 2012.

26. It is possible a Tribunal would decide that the respondent ought to have known the claimant was a disabled person following her first significant period of sickness absence because of anxiety / depression. In her witness statement, she refers to a particular event in 2012 being the "*real start of my depression and anxiety*", that she went of sick and "*was prescribed anti-depressants for the first time in my life*" and that she did not return to work until "*just before Christmas 2012*". I doubt the claimant would persuade any Tribunal that the respondent's date of knowledge of disability was before that return to work. She may not even have been a disabled person until this sickness absence.

27. Another factor to be weighed in the balance in deciding whether or not to permit the claimant to amend is how clear, or unclear, the claimant's proposed claim is. Bearing in mind the very late stage at which the amendment application is being made and the fact that we spent virtually a whole Tribunal day on it, it would not be in accordance with the overriding objective in rule 2 to give permission to amend to add a complaint that was less than clear.

28. All of the proposed complaints seem to be reasonable adjustments complaints, if they are potentially valid disability discrimination complaints at all. (As above, it seems to me to be that what the claimant is really alleging is that the respondent failed to take reasonable care for the claimant's health and safety, causing her personal injuries, a claim that would belong not in the Tribunal but in the County or High Court if it belonged anywhere[3]).

29. As set out in EQA section 20, a reasonable adjustments complaints starts with a "*provision, criterion or practice*" ("PCP") which causes substantial disadvantage to the claimant because of her disability. One reason why the proposed reasonable adjustments complaints might not be valid is that most or all of them are, arguably, about one-off acts that could not reasonable be described as provisions or criteria. But, "*"Practice" has something of the element of repetition about it*.": <u>Nottingham City Transport Ltd v Harvey</u> [2012] UKEAT 0032_12_0510, [2013] Eq LR 4. It is generally accepted that something that happens once and just to the claimant and to nobody else normally can't be a breach of the duty to make reasonable adjustments.

30. Proposed complaints 1 and 2 are reasonable adjustments complaints concerning, respectively, a problem with a member of staff called Howard Ainsworth and a

[3] The claimant should not take anything written here as an encouragement to bring a personal injury claim in the civil courts. I express no opinion on how strong any personal injury claim might be. I can only suggest she takes expert legal advice.

requirement that the claimant move stores at short notice[4]. Both things are mentioned in her witness statement. The claimant's representative was not able to help me with when these things happened, except in broad terms. From the documents, both things seem to have happened before the respondent could have had knowledge of disability, even if the claimant were right about the 1 April 2012 letter triggering knowledge.

31. Proposed complaint 3 is a reasonable adjustments complaint to the effect that the claimant was put under pressure to accept the post of Store Manager at Ilkeston in January 2014. The facts relied on are set out in paragraph 18 of the claimant's witness statement, but are not mentioned in the claim form. In paragraph 19, she states that, "*Against my better judgement I took the post and despite a constant struggle with confidence and anxiety I was able to achieve Store of the Year for the division.*"

32. The next complaint concerns events of mid-2015. Given the gap in time between January 2014 and then, and the fact that no other complaint concerns or stems from the move to Ilkeston, it is very difficult to see complaint 3 as part of a course of discriminatory conduct rather than as a one-off act. Because of this, even if I gave permission to amend in relation to it and even if the complaint were in all other respects a strong one, it would be very likely to fail because of time limits.

33. Proposed complaint 4 is a reasonable adjustments complaint, relying as the PCP on the appointment of Darren Jones as the claimant's new line manager in June 2015. This is another complaint relying on facts that are set out in the claimant's witness statement but are not in the claim form. The "*substantial disadvantage*" relied on is (quoting from the claimant's witness statement): "*I felt unsettled as he was the person who had dealt with the Howard* [Ainsworth] *situation and I couldn't get it out of my mind it brought it all back. This triggered a great deal of anxiety and stress. My confidence was shattered as all the issues related to the situation with Howard returned. My mental state began to breakdown once again resulted in me being unable to cope.*" [*sic*]

34. The claimant is not alleging that Mr Jones should not have been appointed, but that she should have been consulted with and provided with support in relation to his appointment, whether the support consisted of mentoring or something else.

35. Complaint 4 has obvious time limits difficulties. But even if there were no other problems with it, I am afraid that if I permitted the claimant the add it to her claim, it would almost inevitably fail because how could the respondent possibly have known the claimant was "*likely to be placed at the disadvantage*", i.e. known that appointing Mr Jones might cause the claimant to have a breakdown?

[4] I think the application to amend to add this complaint was withdrawn, but I have included it here 'just in case'. Because I have included it, some of the numbers I give to the proposed complaints in these Reasons are different from those used during the hearing.

36. Proposed complaint 5 relies on a PCP of causing or permitting the claimant to return to work on 14 December 2015 after a period of sickness absence, and (following another period of sickness absence) in or around late March 2016, without any particular adjustments or measures or processes being put in place, e.g. a proper return to work plan, with a phased return to work, perhaps an induction, and other support. This is not in the claim form but is in the witness statement. The substantial disadvantage is said to be that the claimant was caused additional stress and anxiety by this practice of the respondent over and above that which would have been caused to someone without her condition. The same alleged disadvantage is relied on in relation to all the rest of the proposed complaints.

37. Proposed complaint 6 relies on a PCP of failing to hold a structured meeting with the claimant or otherwise formally address her sickness absence during her periods of sickness absence from October 2015 to March 2016. The reasonable adjustment she alleges should have been put in place is the holding of a structured meeting. There is not really anything in the claim form about this, and only a vague hint in the witness statement that this might be a source of complaint.

38. Proposed complaint 7 relies as the PCP on a requirement or expectation that, following her return to work from sickness absence in late March 2016, the claimant should provide cover for all the store managers across her area when they were on leave or otherwise absent. The facts behind this proposed complaint are not in the claim form but are in the witness statement, in paragraph 24.

39. Proposed complaint 8 concerns pressurising the claimant to apply for a Store Manager position in Wyvern, between her return to work in March 2016 and her eventually giving into the pressure and applying in mid-June 2016. It is not in the claim form, but is in the witness statement: paragraphs 27 to 28.

40. The PCP for proposed complaint 9 is failing to provide adequate support, particularly structured support, to the claimant upon her appointment to the Store Manager position in Wyvern, on 1 July 2016, in particular mentoring, training, counselling, and regular meetings and updates to see how she was progressing. It is in the statement – paragraphs 28 to 29 – but not the claim form.

41. Proposed complaint 10 relies on a PCP of failing in good time to hold a structured meeting with the claimant or otherwise formally address her sickness absence from 20 October 2016. She alleges a meeting should have been held sooner than 4 January 2017 and that the meeting that was held on that date was unstructured. Much of this is in the claim form.

42. Proposed complaint 11 relates to SSP. The respondent (as it admits) made a mistake in relation to the payment of SSP and ended up overpaying her and having to 'claw it back'. This proposed complaint relates in particular to the failure to inform the claimant that her

sick pay had run out and the fact that the respondent was unable to give her accurate information about her SSP entitlement at the meeting on 4 January 2017. Much of this is in the claim form.

43. Proposed complaint 12 is an allegation that the respondent continued, after 4 January 2017, to contact the claimant directly rather than through Mrs Powell, as requested and as they had agreed to. This is neither in the claim form nor in the claimant's witness statement.

44. Proposed complaints 13 and 14 rely on PCPs of giving inadequate notice of meetings, respectively, on 3 March and 4 May 2017. There is nothing about this in the claim form.

45. That is the beginning and the end of the proposed disability discrimination claim.

46. Most of the proposed complaints rely on information that was not in the claim form at all. Of the complaints based on facts that are mostly in the claim form, 12, which dates from January 2017, is the most recent one. The most recent one of all – not in the claim form - is complaint 14, dating from the start of May 2017. She didn't go to early conciliation until 14 September 2017, so even if all of the complaints were "*conduct extending over a period*" in accordance with EQA section 123(3)(a) and had been included in the claim form, the proceedings would still have been brought more than a month outside the primary 3 month time limit.

47. There is no substantial evidence before me explaining why the claim wasn't brought sooner, why there was no disability discrimination claim in the claim form, why the box in the claim form indicating that the claimant positively did not have a disability had been ticked, or why nothing had been said about the possibility of a disability discrimination claim until I raised the subject at this hearing. Mrs Powell on the claimant's behalf suggested, simply, that it was all due to her and the claimant's ignorance. This is, at best, only a partial explanation.

48. When I raised the possibility of a disability discrimination claim, what I was anticipating was an application to amend to add one or more disability discrimination complaints relating directly or indirectly to dismissal. At one point during the hearing, I almost said at much, causing respondent's counsel – properly and understandably but not, I think, justifiably – to level an accusation at me to the effect that I was actively encouraging the claimant to make such an application in a way unfair to the respondent. I did raise the possibility of a dismissal-related disability discrimination claim a number of times during the hearing. In this respect at least, it could fairly be said of me that I took my duty under the overriding objective in rule 2 of, "*so far as practicable ensuring the parties are on an equal footing*" as far it could reasonably be taken. It therefore came as some surprise to me that – as above – none of the complaints of disability discrimination the claimant wishes to add by amending her claim is about dismissal.

49. One of the factors I have to bear in mind in deciding whether to permit the claimant to add a discrimination claim is the prejudice that giving permission would cause to the respondent, i.e. the prejudice caused to the respondent by the fact that the discrimination claim comes in now, at this stage in the proceedings, rather than being included in the original claim form. The respondent has been defending an unfair dismissal claim and not a discrimination claim. It has fully prepared for trial. Permitting the claimant to amend would inevitably mean some of the work the respondent and its legal team has put in preparing for trial would have to be re-done. That is perhaps the most obvious prejudice that would be caused to the respondent by allowing the application to amend. But if the application to amend were limited to an application to add a discrimination complaint or two concerning dismissal, potentially only a small amount of work that would have to be re-done on the respondent's behalf, because the respondent is already dealing with a complaint about dismissal, albeit a complaint of a different kind.

50. It is possible that the claimant's case is to the effect that if some or all of the allegedly discriminatory things she complains about had not happened, she would not have been dismissed. However, this has not been said on the claimant's behalf in terms, and the clear impression I get from what I have read of the evidence is that by early 2017 at the latest, the claimant's health and her feelings about the respondent were such that there was no real prospect of her returning to work, whatever reasonable steps the respondent took.

51. In summary, in relation to the amendment application:

    51.1 it is made very late in the day;

    51.2 the explanations for why no discrimination claim was made in the claim form and why no application to amend was made sooner are unsatisfactory;

    51.3 it changes the claimant's claim very significantly, meaning the respondent will have to re-do much of the work it has already done preparing for trial. The overlap between the existing unfair dismissal complaint and the proposed new complaints is minimal;

    51.4 most of the complaints the claimant wishes to add rely on facts that are not even mentioned in the claim form;

    51.5 the complaints the claimant wishes to add are all out or time – that is, would have been presented outside the primary 3 month time limit (extended for early conciliation) even if included in the original claim form, many of them by years;

    51.6 many of the complaints the claimant wishes to add appear very weak on their merits. Taking time limits issues into account, at least some of them appear to me to have no reasonable prospects of success and all of them have at best little reasonable prospects of success.

52. I am afraid that in the circumstances, I do not think it would be in accordance with the overriding objective to give the claimant permission to amend.

Case Management

53. Given my decision on the amendment application, the claim stays as one purely of unfair dismissal. The final hearing will need to be relisted. There are, though, two things I think need to be considered before the case will be ready for trial:

    53.1 whether there is evidence before the Tribunal that should be excluded by section 111A;

    53.2 the basis upon which the claimant is arguing her dismissal was unfair and whether she is relying upon anything other than alleged procedural failings.

54. In relation to section 111A, I repeat paragraph 19 above. I simply cannot understand the basis upon which it is contended that section 111A does not apply at all. In his opening note, respondent's counsel referred to the alleged lack of any settlement offer during employment from the respondent, but section 111A is not limited to offers from an employer and applies equally to offers made by the employee. I have therefore, as above, ordered the respondent to review the documentation in the bundle and, if it remains of the view that the section does not apply, to explain that view.

55. If there is still potential for argument on the issue of whether or not section 111A applies, a decision will have to made as to how and when the Tribunal decides that issue. Normally, as already mentioned, issues about the admissibility of documents are dealt with at a preliminary hearing separate from the final hearing and the Judge who decides those issues is a different Judge from the one dealing with the final hearing. However, my – preliminary and provisional – view in this case is that it would be better all round for there not to be a further preliminary hearing. This is mainly for two reasons. First, I don't think anyone wants more hearings than is absolutely necessary. Secondly, again as already mentioned, it will likely be difficult to resolve the section 111A issue without hearing evidence and effectively having a 'mini-trial'.

56. In the circumstances, I wonder whether the parties would agree to the Judge at the final hearing dealing with any admissibility point as part of their overall decision? This could involve the Judge looking at documents, deciding they are inadmissible, and then having to ignore them for the purposes of making their decision. It would, of course, be up to the Judge dealing with the case to decide whether they felt they could decide both whether documents were admissible and whether the claimant was unfairly dismissed; but I don't think there would be anything wrong in principle with the Judge doing this; certainly not if the parties agreed to the Judge doing so.

57. Turning to the second point that I think needs sorting out before trial, I have already expressed my concerns about the strength of the claimant's case. There are two main problems with it, as I understand it to be:

    57.1 the claimant's entire claim seems to be based on a misunderstanding of the law, in that an employer <u>is</u> entitled to dismiss someone for ill health if there is no prospect

of them returning to work in the foreseeable future, even if the employer has caused the ill health;

57.2 at the time of dismissal, the gist of what the claimant was telling the respondent was that she did not want to return to work, that she would not be returning to work, and that there were no steps she wanted the respondent to take that might facilitate a return to work. On what basis, therefore, could the respondent reasonably be expected to do anything other than dismiss her?

58. It is, of course, possible that I have misunderstood the claimant's unfair dismissal claim. I have therefore ordered her to provide some further information about it, so that the Tribunal and the respondent can understand it properly.

59. This is a sad case and what has happened procedurally is unfortunate. I am concerned that, because of the claimant's ill-health, it may never be possible to have an effective trial; and that even if there were an effective trial in the Tribunal, the claimant would not get any satisfaction out of it because if she has a valid claim at all, it is most likely a personal injury claim for the civil courts. I urge her and her representatives, preferably with some expert legal assistance, to consider carefully whether whatever it is she wants to achieve by this Tribunal claim is really achievable; and whether whatever benefit she might realistically hope to get out of the Tribunal proceedings outweighs the stresses and strains and potential for psychological harm inevitably involved in the Tribunal process.

Employment Judge Camp

11 September 2018

SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE