EMPLOYMENT TRIBUNALS

Claimant: Mr M Georgiev

Respondent: Redeem UK Limited

Heard at: Manchester **On:** 8 July 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Miss S Kaur (Consultant)

JUDGMENT

1. The complaint of unfair dismissal is dismissed because the claimant had not been continuously employed for a period of not less than two years at the effective date of termination of his employment and therefore does not have the right to bring his claim under section 108(1) Employment Rights Act 1996.

2. The application made by the claimant for permission to amend his claim to introduce complaints of direct sex discrimination is refused.

3. The case is at an end.

REASONS

Introduction

1. This was a preliminary hearing in public to decide two issues. The first was whether the claimant had been continuously employed for two years at the date his employment terminated, since that is required for him to have the right to complain of

unfair dismissal. The second was whether he should be granted permission to amend his claim to introduce an allegation of direct sex discrimination.

2. Miss Kaur had helpfully compiled a bundle of documents for this hearing which ran to 51 pages. Any reference to page numbers is a reference to that bundle.

3. I did not hear any evidence as the relevant facts were not disputed. I did have regard to a witness statement from Nicola Preston, Head of Group Human Resources.

Background

4. The claim form was presented on 31 August 2018. The only box ticked on page 6 was the box for unfair dismissal. None of the discrimination boxes were ticked.

5. The details of the claim in box 8.2 appeared at page 7. The claimant made clear that he had been forced to supervise a team with no extra pay, and that he was dismissed after he refused to do that. He said he had been dismissed by a person who hated him and who was himself fired a week later for sexual harassment.

6. His claim form said he was dismissed on 10 July 2018. He did not give a start date, but by email of 19 September 2018 he said that he had begun his employment on 25 July 2016.

7. The response form was filed on 10 October 2018. It said that there had been a fair dismissal for misconduct, and that the claimant had been paid in lieu of his contractual notice period. It asserted, however that he lacked the two years of continuous employment required before he could bring a claim of unfair dismissal.

8. The case was listed for a preliminary hearing before Employment Judge Sherratt on 20 March 2019. The Case Management Order issued after that hearing appeared at pages 25a-25b. The hearing was adjourned because the claimant said during it that he wanted to apply to amend his claim to introduce complaints of discrimination contrary to the Equality Act 2010. Miss Kaur told me that the claimant mentioned complaints of age and race discrimination. Although not recorded in the Case Management Order, that is consistent with Employment Judge Sherratt's handwritten notes which have been retained on file. He ordered the claimant to make a written application by 17 April 2019, and for the respondent to reply to it before the matter was re-listed for today's hearing.

9. The claimant's application to amend was dated 15 April 2019. He sought to introduce two complaints of direct sex discrimination. They related to the fact that he had been given supervisory duties without any extra pay in the spring of 2018, and to the decision to dismiss him. In the main he compared himself with a colleague, Ms Zaharieva, whom he said had been given extra duties at the same time as him but received an additional bonus and some extra payments in return. He maintained that this was a consequence of discriminatory treatment favouring women by the manager who dismissed him and who then himself left the company following allegations of sexual harassment.

10. The application also mentioned three other female comparators. Ms Ball and Ms Williams were assigned team leader roles, officially or unofficially, and received extra pay, and a colleague, Ms Krsiakova, had been there a lot longer than him and was on a higher salary yet was not made responsible for the problems that he was told led to his dismissal.

11. By email of 3 May 2019 the respondent opposed the application to amend, arguing that it was a substantial new claim which was well out of time and that the respondent would be unduly prejudiced if permission to amend was given.

Unfair Dismissal Qualifying Period

12. Section 108(1) of the Employment Rights Act 1996 says that the right to bring a complaint of unfair dismissal under section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

13. The effective date of termination is defined by section 97. Where a contract is terminated without notice it is the date on which the termination takes effect. However, section 97(2) provides as follows:

> **"Where –**
>
> **(a) the contract of employment is terminated by the employer, and**
>
> **(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination…for the purposes of sections 108(1)…the later date is the effective date of termination."**

14. Section 86 provides for minimum periods of notice. For an employee whose continuous employment is less than two years the period is not less than one week's notice. In effect section 86 requires a week's notice to be given.

15. The claimant agreed that his employment began on 25 July 2016 and that he was informed that it was ending with immediate effect on 10 July 2018. Under section 86 he was entitled to add a further week because he was not given his statutory minimum period of notice, instead receiving a payment in lieu of his contractual notice period. However, that only took him to 17 July 2018, still a week short of having two years of continuous employment.

16. The claimant said that he had been informed by ACAS that he could add on the notice period and he understood this to mean the contractual notice period, but that is not correct. He can only add on the statutory minimum notice period of one week.

17. I was therefore satisfied that the claimant had not been employed for the two years required in order for him to have the right to complain of unfair dismissal, and I dismissed his unfair dismissal complaint.

Amendment Application

18. I summarised above the application to amend to introduce two complaints of direct sex discrimination relying on four named comparators.

Legal Framework

19. The general case management power in rule 29 of the Employment Tribunal Rules of Procedure 2013 means that the Tribunal has discretion whether to permit amendment of a claim.

20. In common with all such powers under the rules, the Tribunal must have in mind the overriding objective in rule 2, which is to deal with the case fairly and justly. That includes, so far as practicable, ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and important of the issues, avoiding delays, so far as compatible with proper consideration of the issues, and saving expense.

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

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

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

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

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

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

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

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

> **"Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."**

27. The time limit for bringing a discrimination claim appears in section 123 Equality Act 2010. It is three months from the act of discrimination save where the Tribunal considers that it would be just and equitable to allow a longer period.

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

Claimant's Submission

29. Mr Georgiev said that he had raised in his appeal meeting his belief that there had been discriminatory treatment of him when compared with Ms Zaharieva, even though the notes of that meeting did not record that part of the discussion. When he completed his claim form he thought that the boxes at section 8.1 (page 6) were alternatives and he could only tick one box. He thought that the phrase "unfair dismissal" would include a discriminatory dismissal. He had spoken to Ms Zaharieva about a week before his amendment application of 15 April 2019 and she told him then about the circumstances of the other women named in his application. He emphasised that he had thought that his appeal would have succeeded given that the manager who dismissed him left the company himself under a cloud following allegations of sexual harassment, but that had not happened.

Respondent's Submission

30. Miss Kaur referred me to her email of 3 May 2019 at pages 25e-25f. She emphasised that the claim was a substantial matter raising an entirely new cause of action and new factual issues and it was well out of time. It should have been raised on the claim form because box 8.1 makes it clear that the claimant can tick more than one box. The claimant had only raised this at the preliminary hearing before Employment Judge Sherratt when he realised that his unfair dismissal complaint was likely to be dismissed, and because he had not pursued any grievances of complaints at the time about these matters the respondent would be left in the position of having to investigate them 12 months on when at least one of the individuals concerned had left the company. She also submitted that the allegations of differentials in pay lacked any merit based on the contents of Ms Preston's witness statement and a list of bonus payments made to various members of staff at page 48a.

Conclusion

31. I considered the factors relevant to the exercise of discretion in accordance with **Selkent**.

32. I took into account the timing and manner of the application. In a sense it was made in good time because no date for the final hearing has yet been set. The application was made in an appropriate manner: the claimant had put his case clearly in his email and it was easy to understand the nature of his allegations. Broadly those factors suggested that permission to amend could fairly be granted.

33. Next was the nature of the amendment. This was not a minor amendment. It was an entirely new type of legal claim raising new factual matters. There had been no suggestion in the claim form that there was any breach of the Equality Act 2010. A complaint of direct sex discrimination is quite different from an unfair dismissal complaint. The Tribunal has to make findings of fact for itself, rather than assess whether the employer's actions fell within the band of reasonable responses.

34. That meant that the question of time limits weighed heavily in the exercise of my discretion. Assuming in the claimant's favour that there was a link between the decision to give him more work without extra pay and his subsequent dismissal, time had expired in October 2018. The application was about 6 months out of time. That is a considerable period when the original time limit is only 3 months.

35. I considered whether the claimant would have any prospect of establishing that it would be just and equitable to extend time. It was clear that the claimant had in his mind when he completed the claim form that he had been treated differently from Ms Zaharieva in a way that was discriminatory as I accepted his assertion that he had mentioned that during the appeal during. As Miss Kaur pointed out, the heading to box 8.1 of the claim form explains that one or more of the boxes can be ticked. I was satisfied that there was nothing preventing the claimant making a complaint of discriminatory treatment at the time he completed the claim form, and I concluded that he had chosen not to.

36. It also seemed to me likely that his position had changed when he realised at the last preliminary hearing that the unfair dismissal claim was likely to be dismissed. That seemed to be the only explanation for his proposed discrimination complaint not having been raised any earlier.

37. I accepted his evidence that he did not know the details of the other comparators until he spoke to Ms Zaharieva in early April 2019, but the core comparison on which his claims were based was with her, and that was a matter of which he had been aware at the time he completed his claim form. In those circumstances I concluded that it was very unlikely that he would establish that it was just and equitable to extend time even if I granted permission to amend subject to time limits.

38. On that basis the claimant would not be significantly prejudiced if I were to refuse permission to amend, since he would be losing the chance to pursue a claim which is out of time in any event. However, it seemed to me the respondent would be substantially prejudiced if I granted permission. It would have to investigate allegations of discriminatory treatment more than 12 months after they were said to

have occurred. It would also have to do so when the same witnesses would not be required to give evidence in the unfair dismissal complaint because that is to go no further. It was unlikely that the respondent would recover its legal costs or the costs of management time from the claimant.

39. The prejudice or hardship to the respondent if permission were granted outweighed that to the claimant if it were refused. I refused permission to amend.

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Employment Judge Franey

8 July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 July 2019
FOR THE TRIBUNAL OFFICE