Case Number: 1309204/2020
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr J Travis		**PPG Architectural Coatings Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING (RESERVED JUDGMENT)

HELD AT Birmingham **ON** 15 September 2021

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For the Respondent: **Mr O Holloway (Counsel)**

JUDGMENT

1 Pursuant to Rule 29 of the Employment Tribunals Rules of Procedure 2013, the claimant's application, dated 8 June 2021, for permission to amend his claim is refused.
2 Pursuant to Section 111(2) of the Employment Rights Act 1996, the claimant's claim for unfair dismissal is dismissed for want of jurisdiction.

REASONS

Introduction

1 The claimant in this case is Mr Jack Travis who was employed by the respondent, PPG Architectural Coatings Limited, as a Key Account Manager, from 11 April 2016 until 2 October 2018 when he was dismissed. The reason given by the respondent at the time of the claimant's dismissal was capability - the claimant having been continuously absent from the workplace on sick leave since 8 March 2018.

2 By a claim form presented to the tribunal on 4 September 2020, the claimant brings a claim for unfair dismissal. By its response presented to the tribunal on 3 November 2020, the respondent admits that the claimant was dismissed but maintains that the dismissal was fair. Importantly, the respondent asserts that the tribunal has no jurisdiction to hear the claim as it was presented

outside the time limit provided for in Section 111(2) of the Employment Rights Act 1996.

3 On 11 January 2021, the tribunal gave notice to the parties of an Open Preliminary Hearing (OPH) to determine the question of jurisdiction. After a postponement granted to take account of the claimant's ill health, that OPH has taken place before me today.

4 On 8 June 2021, the claimant made an application to amend his claim to include claims for discrimination on the grounds of age and/or disability. At today's hearing, the claimant has clarified that he wishes only to proceed with a claim for disability discrimination (in addition to his original claim for unfair dismissal); he no longer seeks an amendment to include a claim for age discrimination.

5 Although the amendment application has not formally been listed for hearing, both parties are agreed that I should hear that application today along with the jurisdictional issue originally listed.

6 Today's hearing was conducted remotely using CVP. All participants were able to join the hearing electronically with no significant technical difficulties. All participants had access to copies of the hearing bundles.

The Evidence

7 The claimant gave evidence on his own account and was cross-examined by Mr Holloway. The claimant had not prepared a witness statement focusing on the issues to be determined at this hearing, but he had prepared a very lengthy and detailed written submission dealing with the entirety of the respondent's objections to his claim including the jurisdictional objections. The document runs to 274 pages including a number of appendices and copy documents attached. Prior to the hearing, I read the entire document which ultimately stood as the claimant's evidence-in-chief. To his credit, Mr Holloway restricted his cross-examination to the questions of jurisdiction and the amendment application only.

8 I had bundles of documents from both parties. The respondent's bundle ran to some 68 pages; the claimant's bundle ran to 361 pages including the 274-page submission to which I have already referred. Inevitably, there was considerable duplication in the bundles.

9 Essentially, the claimant's evidence was to the effect that, following his dismissal in October 2018, he was suffering from mental illness which culminated in his compulsory admission to hospital on 8 February 2019. The claimant then remained in hospital until 19 July 2019, and, following his discharge, required

help in the community in ordering his financial and other affairs. Against this background, he claimed that he was unable to present his employment tribunal claim until September 2020. And, with regard to the possibility of a discrimination claim, it was his case that this did not really occur to him until shortly before his amendment application on 8 June 2021. The claimant confirmed that he had received pro bono advice from a solicitor as early as June 2020; he had contacted the CAB legal advice helpline at an earlier date than that; and, by 5 August 2020, claimant had contacted ACAS. The claimant also confirmed that in June 2020 he was seeking to make a claim to cover the costs of proceedings from his household insurers.

9 In addition to his oral evidence, the claimant relied on written evidence from a number of medical and other professionals as follows: -

(a) 8 June 2020: Dr Ajay Kotegaonkar – the claimant's GP
Dr Kotegaonkar deals with the claimant's mental health history: explaining that it commenced in June/July 2018. He speaks of the admission to hospital in 2019 but implies that by the time of writing, in June 2020, the claimant was sufficiently recovered to bring his claim.

(b) 21 July 2020: Dr Hannah Cappleman - Consultant Psychiatrist
Dr Cappleman confirms that the claimant was admitted to hospital under Section 2 of the Mental Health Act 1983 on 8 February 2019. She states that he had been experiencing symptoms of a first episode of psychosis from "*some time before that*". She states that, following his discharge on 19 July 2019, the claimant remained unable to organise his affairs "*until the very recent past*"

(c) 21 July 2020: Ms Meghan Dearden - CPN/Care Coordinator
Ms Dearden explains why it would not have been possible for the claimant to present his claim whilst in hospital or immediately upon his discharge. She states that his mental health had been improving steadily since March's 2020.

(d) 10 August 2020: Dr Kotegaonkar
In this letter, Dr Kotegaonkar again speaks in general terms of the claimant's mental health difficulties during 2018 and then more specifically regarding his admission to hospital in 2019.

(e) 26 August 2020: Dr Adeola Akinola - Consultant Psychiatrist
Dr Akinola confirms the period of the claimant's detention in hospital and that for a period following his discharge he required support with day-to-day activities such as his finances, paying his bills, employment, and the activities of daily living.

(f) 18 December 2020: Ms Lauren Leigh - Bolton Mental Health Services

Ms Leigh confirms that, on 27 July 2020, supported the claimant with his bills and an application for a reduction in his council tax. When giving evidence the claimant stated that the information provided by Ms Leigh was inaccurate.

(g) 29 April 2021: Dr Joanne Green – Clinical Psychologist to claimant's GP
Dr Green provides a summary of the claimant's therapy with the Bolton Early Intervention Team: she speaks of the claimant's slow recovery between 12 September 2019 and 27 May 2020. Dr Green's involvement with the claimant did not commence until 20 August 2020.

(h) 4 June 2021: Ms Dearden
This email related only to a change in medication following the claimant's attendance at an outpatient clinic on 24 May 2021.

(i) 7 September 2021: Dr Kotegaonkar
In this letter Dr Kotegaonkar explains that, despite the claimant's mental health problems in June/July 2018, by 1 October 2018, he was expressing the opinion that the claimant was fit to return to work. The doctor states that this period of fitness was quite short lived - he does not indicate when he next saw or assessed the claimant. He appears to be relying on a reported history given by the claimant many months later.

(j) 8 September 2021: Dr Cappleman
Dr Cappleman explains how mental psychosis would adversely affect the claimant's ability to commences tribunal claim this letter does not assist me in determining the periods of time during which the claimant would be unable to proceed.

(k) 13 September 2021: Dr Samantha Bowe - Principal Clinical Psychologist.
In this letter Dr Bowe summarises therapy sessions undertaken with the claimant commencing on 9 December 2020.

The Facts

10 The claimant worked for the respondent from 11 April 2016 until 2 October 2018 when he was dismissed. At the time of his dismissal, the claimant had been continuously absent from work since March 2018. The claimant was dismissed at an ill-health capability meeting held on 2 October 2018; the claimant attended that meeting and was well able to articulate his position. Prior to the meeting, on 18 September 2018, the claimant also composed a detailed written submission as to his position. At the meeting, the claimant stated that he was ready to return to work the following day; and he produced evidence from his GP in support of that position. The decision to terminate the claimant's employment was

confirmed to him by letter dated 5 October 2018; he was advised in that letter of his right to appeal.

11 By a letter dated 12 October 2018, the claimant submitted an appeal. I have not seen the letter of appeal but both parties agree that the letter was articulate and detailed and presented the basis of the claimant's appeal. There was no reference in the letter to discrimination.

12 The appeal was originally fixed to take place on 30 October 2018. It was then rescheduled for the 2 November 2018, but the claimant contacted the respondent to say he was unwell and could not attend. The meeting was again rearranged for 13 November 2018, but on that day the claimant left a voicemail to say he no longer wished to proceed with his appeal. Accordingly, on 15 November 2018, the respondent wrote to the claimant advising that they had tried to contact him following the receipt of his voicemail but had been unsuccessful; and that, as the appeal had been withdrawn, the decision to dismiss was confirmed with no further right of appeal.

13 The factual position between 15 November 2018 and 8 February 2019 is extremely vague. It is the claimant's case that he was experiencing a psychotic episode during the whole of that period but there is no evidence of him seeking or requiring any medical intervention until he was admitted to hospital on 8 February 2019.

14 The claimant was detained in hospital from 8 February 2019 until his discharge on 19 July 2019. Upon discharge, it is apparent that the claimant's personal and financial affairs was somewhat in disarray. He required assistance in the community to deal with debts, housing, and benefit claims. It is also apparent that he knew how to access legal advice: indeed, his evidence is that he contacted many solicitors taking advantage of a short period of free initial advice before moving onto the next solicitor for further free advice.

15 The claimant's GP indicates that, by June 2020, he was fit to deal with his employment tribunal claim. It is apparent that during June/July 2020 the claimant was well able to contact professionals seeking written confirmation from them as to his difficulties following discharge from hospital.

16 On 5 August 2020, the claimant contacted ACAS with an EC notification and the ACAS certificate was issued the same day. It was not until 4 September 2020 that the claimant presented his claim for unfair dismissal. In January 2021, he was put on notice that the tribunal would be considering the question of jurisdiction because of late presentation of the claim; but it was not until 8 June 2021 that the claimant sought an amendment of the claim to include his claim for disability discrimination.

The Law

Time Limits - Unfair Dismissal

17 **The Employment Rights Act 1996 (ERA)**

Section 111: Complaints to Employment Tribunal

(2) .....an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

18 I have considered a number of decisions of the appellate courts: ***Capita Health Solutions Ltd -v- McLean*** **[2008] IRLR 595*; Wall's Meat -v- Khan*** **[1978] IRLR 499*; Dedman -v- British Building and Engineering Appliances Ltd*** **[1974] ICR 53*; Croydon Health Authority -v- Jaufurally*** **[1986] ICR 4*; London International College Ltd. -v- Sen*** **[1993] IRLR 333*; Riley -v- Tesco Stores Ltd & Another*** **[1980] ICR 323*; Northumberland County Council & Another -v-Thompson*** **UKEAT/0209/07/MAA; *Marks & Spencer Plc -v- Williams Ryan*** **[2005] ICR 1293; *Chohan -v- Derby Law Centre*** **[2004] IRLR 685; *Royal Bank of Scotland Plc -v- Theobald*** **UKEAT/0444/06; *Octopus Jewellery Limited -v- Stephenson*** **UKEAT/0148/07; *Palmer and Saunders -v- Southend on Sea Borough Council*** **[1984] 1 All ER 945; *Schultz -v- Esso Petroleum Ltd*** **[1999] 3 All ER 338**

(a) *'Reasonably practicable'* means nothing more than '*reasonably feasible'*.
(b) What was reasonably feasible is a matter of fact for the tribunal to decide.
(c) Ignorance of the facts or of one's rights and obligations can render it not to be reasonably practicable to meet a deadline but the ignorance itself must be reasonable. The tribunal must consider what the claimant could or should have known with reasonable diligence.
(d) It follows that that the claimant must have taken such advice as was reasonably available.
(e) There are of course claimants who have come before the tribunal who

have not been able to take advice because of funding problems, language problems, other communication problems, ill-health and many other reasons, all of which, in different cases, which turn on their own facts, have been found to render it not reasonably practicable for the proceedings to have been commenced in time.

(f) In a case where a professional adviser has accepted a retainer which includes the presentation of a claim on behalf of a client if the failure to meet the deadline or the other default is attributable to the negligence of the adviser, then this must defeat in the claim that it was not reasonably practicable; quite simply because, but for the adviser's neglect the deadline would have been met.

(g) In a case where a claimant has taken legal advice but has retained the responsibility to present the claim in person, if the legal advice is erroneous - particularly as to the time limit for presentation or the date of expiry thereof, and the claimant has reasonably followed such advice, this may render it not reasonably practicable for the claimant to present the claim in time. The same applies if erroneous advice is given by tribunal staff.

(h) If the claimant has a genuine and reasonable misunderstanding as to the facts, this too may render it not reasonably practicable to present the claim in time. This is particularly the case if the claimant has been given inaccurate or inconsistent information as to the effective date of termination.

(i) Finally, when looking at the role of advisers the tribunal should have regard to the nature of the adviser who was actually giving the advice and in what circumstances.

(j) Where ill-health is relied upon the tribunal must make specific findings regarding the claimant’s health and its impact on reasonable practicality.

Time Limits - Discrimination

19 Section 123 EqA states that an Employment Tribunal may only consider a complaint for the contravention of Part 5 if the claim is brought within three months of the act/omission complained of or such other period as the Tribunal considers to be just and equitable. Where the complaint relates to conduct extending over a period, for the purpose of determining the time limit, the act is to be treated as done at the end of the period.

20 ***Robertson -v- Bexley Community Centre*** **[2003] IRLR 434 (CA)**
An Employment Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercise strictly in employment cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless

they can justify failure to exercise the discretion. On the contrary, a tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule.

Amendment

21 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order: Rule 29. Although there is no specific reference to amendment in the Rules, no doubt such an order may include one for the amendment of a claim or response.

22 In ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836 (EAT)** the EAT gave the following general guidance as to the exercise of the Employment Tribunal's discretion and the factors which might be taken into account: -

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that application is out of time, and, if so, whether the time limit should be extended under the applicable statutory provisions.
(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down … for the making of amendments. The amendments may be made at any time – before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

23 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.

24 Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form were presented to the

tribunal out of time, the tribunal would consider whether time should be extended, either on the basis of the "not reasonably practicable" test (for example, for unfair dismissal) or on the basis of the "just and equitable" test (for example, for unlawful discrimination). If time were not so extended, the tribunal would lack jurisdiction to entertain the complaint, and it would fail. However, this does not mean that the mere fact that a claim would be out of time should automatically prevent it being added by amendment. The relevant time limits are an important factor in the exercise of discretion, but they are not decisive.

Discussion & Conclusions

Time Limits

25 Pursuant to Section 111(2) ERA, the primary time limit for the presentation of the unfair dismissal claim expired on 2 January 2019 (1 January 2019 date upon which the tribunal office was closed). Pursuant to Section 123 EqA, it is arguable that the primary time limit for the presentation of a discrimination claim would not expire until 14 February 2019 if the alleged discrimination could be said to have continued until the dismissal of the claimant's appeal.

26 In my judgement there are four timeframes under scrutiny: -

(a) 2 October 2018 - 2 January 2019: the primary limitation period for the presentation of the unfair dismissal claim.
(b) 15 November 2018 - 14 February 2019 the latest primary limitation period for the presentation of the discrimination claim.
(c) 20 July 2019 - 2 September 2020 being the period of time elapsed following the claimant's discharge from hospital before the presentation of the claim form.
(d) The period from 2 September 2020 - 8 June 2021 being the period from the presentation of the claim form to the application to amend.

27 It is accepted by the respondent and by the tribunal that the claimant was unable to present his claim during the period of his detention in hospital 8 February 2019 - 19 July 2019.

28 As to period (a) above, there is a dearth of evidence to support the proposition that the claimant was unable to present his claim. His GP was ready to certify him as fit to return to work on 3 October 2018. The claimant thereafter dealt with the preparation and presentation of his appeal; and engaged with arrangements for the appeal meeting. There is no evidence to suggest that the claimant sought further advice or intervention from his GP or from any other medical professional in the period from 3 October 2018 until his detention in hospital on 8 February 2019.

29 The same can be said about period (b), albeit that it is accepted that during the last few days of that period the claimant was in hospital and unable to present a claim.

30 Regarding period (c), it is clear that, on his discharge from hospital, the claimant needed help in ordering his affairs. He sought and received help to deal with his finances, his housing situation, and his entitlement to benefits. It is unclear why he did not also seek help in the completion and presentation of a claim form. The claim form in employment tribunal proceedings is a simple form. There is no evidence to support the proposition that throughout the whole of the period the claimant was unable to proceed. It is also clear from the evidence that the claimant took advice from a range of sources, and I do not accept his assertion that he believed he could only present a claim form through a solicitor. The evidence from the claimant's GP indicates that he was fit to deal with the matter by June 2020 if not before. Furthermore, during June/July 2020, the claimant expended considerable energy in obtaining confirmation from a variety of professionals as to the help of therapy which he had been receiving. The fact that he was able to order himself in such a way indicates to me that, by then, he was well able to complete and submit a claim form.

31 With regard to period (d), the claimant has provided no satisfactory explanation for his failure to include any potential discrimination claim in his original claim form. Even when, in January 2021, he was aware that the tribunal would be examining his compliance with the time limits, the claimant still waited a further five months before presenting an application to amend and include a claim for discrimination.

Amendment Application

32 I have considered the ***Selkent*** principles:

(a) The amendment sought in this case is a highly significant amendment adding a new cause of action and an entirely new jurisdiction. Further, its addition has been totally unheralded: at no time prior to 8 June 2021 has the claimant given any indication of a potential discrimination claim. Thus, the first the respondent knew of any such claim was two years and eight months after the termination of the claimant's employment.
(b) As stated, the claimant has given no indication as to why he waited a further nine months after the commencement of this claim to apply for such a fundamental and significant amendment. Certainly, this is not a case where information came to light after the commencement. All of the information upon which the claimant purports to rely was known to him when the claim form was presented.

(c) So far as time limits are concerned, I have examined the relevant time periods in Paragraphs 26 – 31 above. In my judgement, the claimant has not established that there was anything preventing him from presenting his claim before 8 February 2019 when he was admitted to hospital. But, more importantly, he has not established that it could not have been presented more promptly after his discharge from hospital and certainly by June 2020 - a year before the actual presentation of the discrimination claim. I remind myself of the case of ***Robertson***; time limit in the employment tribunal are to be applied strictly and it is for the claimant to satisfy me that it would be just and equitable to extend time. The test of justice and equity applies equally to the respondent as to the claimant: and, in my judgement, it would not be just or equitable to allow a discrimination claim to be presented more than two years out of time absent it being established that the claimant could not have presented the claim earlier - and that has not been established in this case. The position may potentially have been different if the respondent was alert to the possibility of a discrimination claim for example if it had been foreshadowed in the claimant's appeal following his dismissal.

33 My conclusion is that balancing fairness to the claimant and fairness to the respondent, the claimant's application to amend his claim should be ,and accordingly is, refused.

Jurisdiction – Unfair Dismissal

34 The primary time-limit for the presentation of the unfair dismissal claim expired on 2 January 2019. I can only look beyond that date if I am satisfied that it was not reasonably practicable for the claim to be presented in time. In my judgement, the claimant is not established such to be the case. We know that his GP was certifying him as fit to return to work at the beginning of October 2018; the claimant pursued an appeal until 15 November 2018; and it was not until 8 February 2019 that he was admitted to hospital. The evidence before me does not support the proposition that there was anything to prevent the presentation of his claim form before 2 January 2019.

35 Even if I am wrong, and even if I am to consider looking beyond the primary time-limit, I must be satisfied that the claimant presented his claim within a reasonable period after the expiry of the time limit. In this case it is accepted that, if it was not reasonably practicable to present the claim in time, then it is likely that it would not have been possible to present the claim before the claimant's discharge from hospital on 19 July 2019. But I am not satisfied that he presented the claim within a reasonable period thereafter. Following his discharge, the claimant had much to sort out, but, pursuing this claim was one such thing - and there was no reason for other things to take priority. The

evidence is clear that the claimant had people who could assist him in completing a simple claim form. And the medical evidence suggests that he was fit to do this by June 2020 at the latest.

36 In my judgement, either by reference to the primary time-limit or by reference to what was a reasonable period after its expiry, the claimant has presented this claim out of time. Accordingly, the tribunal has no jurisdiction to hear it.

37 The unfair dismissal claim will be dismissed for want of jurisdiction.

Employment Judge Gaskell
16 November 2021