



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Ward

**Respondent:** James Hall & Company Ltd

**HELD AT:** Manchester

**ON:**

5 June 2017

**BEFORE:** Employment Judge Franey  
(sitting alone)

## REPRESENTATION:

**Claimant:** Mrs S Ward (Wife)

**Respondent:** Mr E Morgan, Counsel

# JUDGMENT

1. By consent the claimant has permission to amend his claim form so as to incorporate a complaint of breach of contract in relation to notice pay.
2. The application for permission to amend the claim form so as to bring complaints of direct disability discrimination, harassment related to disability and victimisation is refused.

# REASONS

## Introduction

1. The claim form in this matter was presented on 8 December 2016. It was restricted to a complaint of unfair dismissal. The claimant had resigned from employment on 7 September 2016, and maintained that his resignation should be construed as a dismissal because of a breach of trust and confidence by the respondent in a course of events since the end of July 2016. The issue arose because of the claimant's need for time off to care for his son, who has a long-term condition affecting his immune system. A further factor was that the claimant's mother's medical condition limited the assistance she could provide to the claimant and his wife in caring for their son.

2. The claim form did not contain any complaint of breach of contract in relation to notice pay, but such a complaint was subsequently put forward in the Schedule of

Loss. Helpfully Mr Morgan confirmed that the respondent did not object to permission to amend being granted

3. The claim form did not contain any complaint of disability discrimination. The box in section 8.1 had not been ticked. The response form of 9 January 2017 defended the constructive unfair dismissal complaint.

### **Disability Discrimination Amendment**

4. A preliminary hearing was convened for 10 February 2017 before Employment Judge Wardle. In preparation for that the claimant prepared a list of complaints which included reference to “discrimination by association”. On 10 February 2017 Employment Judge Wardle ordered that the claimant provide further particulars so that the claim would be clear if permission to amend were pursued.

5. Those further particulars were served on 24 March 2017. They made plain that the complaint was based upon the claimant's son and/or mother each being a disabled person under the Equality Act 2010. There were sixteen allegations of direct disability discrimination, and one allegation of harassment related to disability. Those matters all occurred in the period between 23 July and 7 September 2016. Eleven of those allegations which occurred after 1 August 2016 were also raised by way of a victimisation complaint on the basis that the claimant's grievance of that date had been a “protected act”.

6. The respondent made clear its objection to the application for permission to amend but in the meantime filed an amended response form which could stand as its defence if permission were granted.

7. In addition to the documents on the Tribunal's file, I had the benefit of oral submissions from Mrs Ward and Mr Morgan on whether permission to amend should be granted. There was no challenge by the respondent to the relevant facts asserted by the claimant and no evidence was heard.

### **Relevant Legal Principles**

8. The power to permit an amendment to a claim is a case management power of the Tribunal which must be exercised in accordance with the overriding objective in rule 2 of the 2013 Rules of Procedure. The overriding objective is to deal with a case fairly and justly. The leading case on how this discretion should be exercised remains **Selkent Bus Co Limited v Moore [1996] ICR 836** in which guidance was given by the then President of the Employment Appeal Tribunal as to how such applications should be approached. Relevant factors include the nature of the amendment (whether it is a minor matter or a substantial alteration pleading a new cause of action), the applicability of time limits, and the timing and manner of the application. The key point is to balance the injustice or hardship to the claimant if permission is refused against that which will arise for the respondent if permission is granted. The weight given to different factors depends on the circumstances.

9. The important of time limits is a matter which requires particular attention. In **Abercrombie & others v Aga Rangemaster Ltd [2014] ICR 209** the Court of Appeal considered the guidance given in **Selkent** and said that the relevance of an application to amend being out of time had it been presented as a fresh claim depends on the circumstances. They went on to say:

“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 of amendment. But where it is closely connected with the claim originally pleaded – a *fortiori* in a re-labelling case – justice does not require the same approach...”

10. The time limit which applies to complaints under the Equality Act 2010 appears in section 123. It is three months starting with the date of the act to which the complaint relates. Conduct extending over a period is to be treated as done at the end of the period. The Tribunal can allow a longer period if it is just and equitable to do so. The factors to be taken into account in a just and equitable extension are those identified in **British Coal Corporation v Keeble [1997] IRLR 336**, including those factors which appear in section 33 of the Limitation Act 1980. The merits of the complaint can be relevant: **Rathakrishnan v Pizza Express (Restaurants) Limited UKEAT/0073/15**.

## Discussion and Conclusions

11. In considering the matter I took into account the following factors.

### Nature of Amendment

12. Although the factual matters for which the claimant sought a remedy in the amended complaints were matters which already formed part of the constructive unfair dismissal claim, the amendment was not simply a re-labelling exercise. It introduced a significant new area of factual enquiry for the Tribunal relating to the medical position of his mother and his son, and the respondent's knowledge of such matters. Further, the application sought to introduce wholly new causes of action under the Equality Act 2010, in respect of which there was a different burden of proof from the unfair constructive dismissal complaint. I therefore concluded that this application was not a minor matter but a substantial alteration pleading three new causes of action.

### Time Limits

13. For the purposes of this decision I assumed in favour of the claimant that he would succeed in showing that there was an act extending over a period ending on the day he resigned, 7 September 2016. On that basis the primary time limit expired on 6 December 2016.

14. The first mention of a disability discrimination complaint was 7 February 2017, approximately two months later, and the proposed complaint was not spelled out until the application to amend on 24 March 2017. The application was more than three months out of time. It could only be regarded as in time if it would be just and equitable to allow a longer time period.

15. I considered the factors derived from **Keeble**. The delay was significant. It was not simply a few days late but more than three months. The application was made more than twice as long after the last discriminatory act as the legislation envisaged.

16. The reason it was made out of time was explained by Mrs Ward. She had been closely involved in dealing with the case for her husband. There was no challenge to what she said and I accepted it as factually accurate. The claimant had

been aware of the relevant facts and had considered that there had been disability discrimination when he left employment, but she said that the box had not been ticked on the claim form because he did not want to give false information. Following the discussion at the preliminary hearing on 10 February when Employment Judge Wardle explained the way forward, the claimant had gathered together the money to fund legal advice and consulted solicitors in late February 2017. Advice had been received and some assistance provided with drafting the further particulars of 24 March 2017. It must be said, however, that although a desire to avoid providing misleading information is laudable, there was nothing to prevent the claimant ticking the box in respect of disability discrimination on the claim form. Further particulars could have been provided at a later stage.

17. The delay did not have any impact on the cogency of the evidence.

18. In my judgment the claimant had not acted as promptly as he ought to have done. The advice he sought in February 2017 could and should have been sought prior to lodging the claim form on 8 December 2016. He had been able to secure alternative employment within a few days of resigning, albeit not paid at the same rate.

19. I concluded that the claimant had not established any grounds for a just and equitable extension. He had not identified any material factor which had prevented him from doing by 8 December 2016 what he eventually did by 24 March 2017. The application was therefore one which was made out of time, a significant factor weighing against the grant of permission.

#### Timing and manner of the application

20. The application was made in very clear terms and there could be no criticism of the claimant for how clearly he spelled out his case.

21. As to timing, for reasons summarised in the previous section I considered that it should have been made at an earlier stage. There was no new fact or discovery of new information which had promoted the application to amend. It was based upon information and a belief known to the claimant at the time he left employment.

22. I recognised, however, that the proceedings were at an early stage so the respondent would have time to defend itself if the amendment were to be permitted.

#### Merits of the Claims

23. In submissions I explored the merits of the direct discrimination complaint with Mrs Ward. She said that the claimant believed that the attitude of the respondent towards him changed when he needed to take more time off more frequently because of his son's illness, combined with his mother's illness. It seemed to me that whether his son or his mother had the status of a disabled person was irrelevant to that situation, since the hypothetical comparator would be an employee needing increasing time off to look after for his son but whose son and mother were not disabled. It seemed to me that a complaint under section 13 was lacking in any merit. It might have formed the basis of a complaint of discrimination arising from disability but that had not been raised.

24. The same was not true, however, of the victimisation and harassment complaints. They would ultimately turn on the evidence and I did not take into account the merit of those complaints in deciding whether to grant permission.

Balance of hardship

25. The Schedule of Loss provided by the claimant for the unfair dismissal complaint alone was below the statutory cap. Success in a disability discrimination complaint would therefore bring no extra benefit save for an award for injury to feelings and interest. In my judgment the prejudice to the claimant of denying him the opportunity for those awards was outweighed by the prejudice to the respondent if permission were to be granted. The respondent would have time to defend itself fully, but the proceedings would be more complicated and costly. The respondent would have to consider detailed medical evidence about the claimant's son and mother, and might have to attend a further preliminary hearing to deal with the question of whether either of them was a disabled person. Preparation for the final hearing and the hearing itself would take longer than otherwise. Although a Tribunal can in principle make an award of costs if there has been unreasonable conduct, such awards are the exception rather than the rule. The respondent was likely therefore to be put to significant unrecoverable expense if permission to amend were granted.

Conclusion

26. Given the fact that this was a substantial alteration pleading three new causes of action, the question of time limits weighed heavily. The application was made out of time and it would not be just and equitable to extend time.

27. There were no special circumstances which justified allowing the amendment. The respondent would be more prejudiced if permission were granted than the claimant would be prejudiced if permission were refused.

28. I therefore refused permission to amend the claim to pursue complaints of disability discrimination.

Employment Judge Franey

7 June 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 June 2017

FOR THE TRIBUNAL OFFICE