



EMPLOYMENT TRIBUNALS

Claimant
Mr O Ayodele

v

Respondent
Elysium Healthcare No. 2 Ltd

PRELIMINARY HEARING

Heard at: London South

On: 2nd June 2017

Before: Employment Judge Tsamados

Appearances

For the Claimant: In person

For the Respondent: Ms S Raja, Solicitor

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The Claimant's application for leave to amend his claim to include a complaint of disability discrimination is refused.
2. The name of the Respondent is changed to Elysium Healthcare No. 2 Ltd.

RESERVED REASONS

Application and background

1. In order to efficiently use the available time for what was originally preliminary hearing on case management and so as to deal with resultant case management, I gave Judgment but reserved reasons. These are the reasons for my Judgment.
2. The Claimant has made an application for leave to amend his claim to include a complaint that the Respondent failed to make reasonable adjustments in respect of his diabetes and depression. He relies upon his letter of 16th January 2017 as his request to the Tribunal (R1 70-71).
3. The Respondent provided a small bundle for this hearing ('Bundle for Preliminary Hearing' dated 1st June 2017). I refer to this as 'R1' where necessary. Other documents were contained within the Employment Tribunal correspondence file.

4. I heard oral evidence from the Claimant and submissions from Ms Raja on behalf of the Respondent.
5. The Claimant states that he has Type 1 Diabetes and suffers from depression and anxiety. This is supported by letters from his GP at R1 85 & 86. In essence the Claimant states that he was depressed at the time of the disciplinary process and in conjunction with his diabetes this affected the way in which he conducted himself at the disciplinary hearing although he regained 'normal cognition and perception early August (2016) when (he) started putting information together to disprove why he was dismissed' (R1 71).
6. The Claimant was dismissed on 6th July 2016, an appeal hearing took place on 26th July 2016 and he was informed of the outcome on 7th September 2016.
7. He presented his Claim Form to the Employment Tribunal on 18th September 2016. This raised complaints of unfair dismissal, both ordinary and automatic as a result of making a protected disclosure, detrimental treatment as a result of making a protected disclosure, age and race discrimination.
8. The Claim Form only mentions what I will refer to as historic stress (R1 8 and 13) and makes reference to compensation sought in respect of a diagnosis of anxiety and depression (R1 9). It does not raise a complaint of disability discrimination for failure to make reasonable adjustments or provide facts in support of such a complaint.
9. The Claimant provided the Employment Tribunal with a completed Case Management Agenda on 7th September 2016 which again mentions the historic workplace stress and being diagnosed with depression and anxiety.
10. At the Preliminary Hearing held on 9th December 2016, the Claimant told me that he became aware of a possible disability discrimination claim and the Judge referred him to sources of free advice. The record of that hearing does not mention this claim but does indicate that the Claimant was referred to free sources of advice. Ms Raja was not at that hearing and is not able to comment.
11. The Claimant told me that the Monday after that hearing he went to Croydon Law Centre and they advised him to make a claim of disability discrimination and as a result he wrote to the Employment Tribunal on 16th January 2017. In response to my question as to why he did not raise the matter sooner than that, he stated that "you do not come out of depression all at once" and that "I have good days and bad days". He added that he is unrepresented and had to research matters online.
12. However, I can see from the Tribunal file that the Claimant wrote two separate letters to the Tribunal regarding his whistle-blowing claim and his age discrimination claim. These were sent by e-mail on 13th December 2016. He then wrote to the Tribunal again on 18th December 2016 and then again on 5th January 2017. He also sent the Tribunal a document called 'Claimant's Statements' dated 5th January 2017 which only referred to the historic issues. He wrote a further letter on 6th January 2017 about what is referred to as his "ward manager application" complaint. He wrote a further letter on 9th January 2017 headed 'Notification of my Health Conditions' in which he notified the Tribunal of his

diabetes, depression and anxiety and that he has been receiving 'treatments for an acute phase of depression since 6th July 2016, the day he was dismissed from his job'. He included copies of medical certificates dated for the period 1st August 2016 to 1st February 2017 which state that he suffers from 'anxiety, depression & diabetes'.

13. It only after this that he writes his letter of 16th January 2017 in which he seeks leave to amend.
14. The Claimant then provided the Employment Tribunal with a skeleton argument dated 21st January 2017 for the forthcoming second Preliminary Hearing set for 23rd January 2017. This documents deals with his disability discrimination complaint but not in the form of an application for leave to amend but on the basis that the application has been accepted.
15. At the second Preliminary Hearing on 23rd January 2017, Judge Crosfill dealt with the issue of the disability discrimination complaint at paragraph 4 of the record of proceedings (R1 44). He stated that no formal application to amend had been made and there was no draft pleading and so he did not deal with the matter but invited the Claimant to apply to amend as soon as possible. The Claimant's position is that he had already made his application, but he accepts that he did not say this to Judge Crosfill at the time (and I note that neither did the Respondent, to be fair).
16. However, the Claimant does not raise the matter again until his letter to the Employment Tribunal dated 6th March 2017 (R1 67-73). I asked him why he waited so long to raise the matter and his response was that he had already applied, he was waiting for the application to be considered, had not heard anything, so he wrote again.
17. I asked the Claimant why he did not return to Croydon Law Centre for further advice. He told me that the Law Centre does not have law sessions at the same place every Monday and because of his depression he could not always leave the house to travel without someone to go with him. He explained, as I have said above, that with his condition there are days when he feels good and days when he feels bad. He takes one day at a time and on the basis of the assistance given.
18. The Claimant sent a second Case Management Agenda to the Employment Tribunal on 21st April 2017 in which he sets out more about the disability discrimination claim (R1 78-81). He also provided a skeleton argument dated 7th April 2017 for this hearing (R1 82-86).
19. The Claimant handed up copies of two letters from the Department of Work and Pensions in respect of his claim for Disability Living Allowance ('DLA'). He had previously e-mailed copies to the Respondent. These indicate that he was entitled to DLA from 11th April 2012 and 29th January 2017 at lower care rate (which I understand is paid for care required during the day). The Claimant told me that this as in respect of his diabetes. The Claimant stated that he is awaiting further assessment for his depression. The Claimant referred me to a letter from his GP dated 13th March 2017 at R1 86.

20. The Respondent set out its objections to the application for leave to amend in a letter to the Tribunal dated 5th April 2017 (R1 76).
21. The Employment Tribunal wrote to the parties by letter dated 7th April 2017 inviting the Claimant to raise the application to amend at this hearing.

Submissions

22. Both the Claimant and the Respondent agreed that this application raises a new complaint based on new facts.
23. The Respondent's position is as follows. To allow the amendment would cause grave prejudice. There would be the need for medical evidence to establish disability at the relevant time. The amendment that the Claimant requires is still not set out in any event and the Respondent would require further particulars of those matters that the Claimant has set out in support of his application. The Respondent would then have to amend its Response. The hearing would be considerably delayed, the memories of witnesses would fade. The appeal officer and witness to the 'ward manager incident' have already left the Respondent's employment.
24. The Claimant position is essentially that he was not able to deal with the matter sooner than he did due to his medical conditions and that he raised the matter on 16th January 2017. He responded to the Respondent's assertion as to witnesses that the witnesses are still working for the Respondent. He identified a number of witnesses at paragraph 16 of his skeleton argument (R1 84) who he states still work for the Respondent. However, I note that the Respondent already proposes to call 6 witnesses (R1 90) and the Claimant has identified a further 3 witnesses as to knowledge of his disability.

Law and findings

25. In considering whether to allow or disallow this amendment, the Tribunal has to consider the law relating to amendments to claims and time limits in which to bring claims.
26. An Employment Tribunal claim can be amended at any time, but the Claimant needs the Tribunal's permission. The Tribunal has a broad discretion to consider amendments under rules 29 and 30 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
27. In deciding whether to allow an amendment, the Tribunal must take account of all the circumstances and balance the hardship and injustice of refusing the amendment against that of allowing it (Selkent Bus Co Ltd v Moore [1996] IRLR 661, EAT; Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07).
28. Where the amendment is to add new facts and grounds, the Tribunal must decide if the new claim is in time and, if not, whether the amendment should now be allowed. If the claim arises out of the same facts as the original claim but simply adds factual details or attaches a new legal label, the Tribunal would very readily allow the amendment even outside the time limit.

29. On the other hand, if the amendment is to introduce an entirely new cause of action dependent on quite different facts, it is more difficult. The greater the difference between the factual and legal issues raised by the new claim and the old, the less likely it is that an amendment will be allowed, but it is always a matter for the Tribunal's discretion.
30. Factors to consider include, whether the new claim would be out of time if it were a free-standing claim (including whether the test for extending time for the relevant claim would be satisfied; why the new claim was not originally included; how late in the day the amendment is now sought; whether the Respondent would be surprised by the new allegation or prejudiced by its late addition and, the balance of hardship to each party.
31. The Claimant's application falls into this latter category, it raises an entirely new cause of action dependent on new facts. Whilst the Claimant has provided the factual matrix of the amended complaint he has not provided the actual wording of the amendment sought.
32. Section 123 of the Equality Act 2010 governs time limits in which to bring claims of disability discrimination. It states as follows:
- '(1) [Subject to section 140A,] proceedings on a complaint within section 120 may not be brought after the end of—*
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) such other period as the employment tribunal thinks just and equitable...*
- (3) For the purposes of this section—*
- (a) conduct extending over a period is to be treated as done at the end of the period;*
- (b) failure to do something is to be treated as occurring when the person in question decided on it.*
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
- (a) when P does an act inconsistent with doing it, or*
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.'*
33. Clearly, the complaint that the Claimant wishes to add to his claim is out of time. The latest date that it could be based on is the date of his dismissal which was on 6th July 2016. The Claimant notified ACAS under the Early Conciliation process on 17th August 2016, the Early Conciliation Certificate was issued on 17th September 2016 and so the extended time limit in which to present a claim to the Tribunal expired on 5th November 2016. The Claimant presented his claim on 18th September 2016.
34. An Employment Tribunal may allow a complaint outside the time limit if it is just and equitable to do so. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for Tribunal cases. Factors to take into account (as modified) are these:

- 34.1 the length of, and reasons for, the worker's delay;
 - 34.2 the extent to which the strength of the evidence of either party might be affected by the delay;
 - 34.3 the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
 - 34.4 the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
 - 34.5 the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.
35. The Tribunal should also consider whether the Respondent is prejudiced by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.
36. Having considered this matter, I am concerned as to why the Claimant did not raise his disability discrimination sooner than he did. He states that he regained 'normal cognition and perception early August (2016) when (he) started putting information together to disprove why he was dismissed'. Whilst I appreciate the debilitating effects that depression and anxiety can have, as the Claimant said he had good days and bad days. It is clear from the correspondence that he was able to deal with this claim on a relatively continuous basis from the date of issue of his claim to date. He is a litigant in person but has been able to set out relatively complex factual and legal matters relating to his claim in numerous letters and documents. He clearly has been able to conduct his affairs notwithstanding the effects of his depression and anxiety combined with his diabetes. He was directed to take legal advice at the first Preliminary Hearing and did so. He continued to write about aspects of his claim but did not pursue his application to amend to include a disability discrimination claim for several weeks after that Preliminary Hearing. He further continued to write about aspects of his claim but did not chase the Tribunal for a response as to his application and did not raise it at the second Preliminary Hearing. He did not raise the matter until several months after that hearing.
37. I am also concerned by the extent to which this matter has already been outstanding, the extent to which it will be further delayed in dealing with issues arising from a new complaint of disability discrimination and the failure to make reasonable adjustments.
38. As the Respondent has indicated this involves consideration of whether the Claimant is a disabled person for the purposes of the Equality Act 2010, which involves different considerations to those required to qualify for Disability Living Allowance. This would mean that medical evidence would be required. The Claimant would need to set out the wording of the amendment sought. The Respondent would require further particulars of those factual matters the Claimant has already raised in his skeleton argument for this hearing and would need to speak to its witnesses and thereafter amend its Response. The Claimant has named further witnesses as to the issue of knowledge of disability alone. The Claimant and Respondent have already indicated that they require a nine day

hearing based on the evidence for the existing complaints. Whilst this would mean that the Employment Tribunal could not list the case for hearing until next year, it would be delayed even further if the Claimant's amendment was allowed. The Respondent has indicated that two witnesses have already left its employment and there is also the further concern that memories will fade all the more. The events in question took place prior to July 2016.

39. In balancing out the prejudice and hardship to each party, I find that the Respondent would be caused the greater prejudice and hardship if I allowed the Claimant's amendment. I also take into account that the Claimant has not persuaded me that he could not have raised the complaint within the time limit or sooner than he did given that his medical conditions were not completely debilitating as he has indicated and as the correspondence contained within R1 and the Tribunal file demonstrates.
40. I therefore refuse the Claimant's application for leave to amend.
41. I realise that the Claimant will find this disappointing but this is about striking a balance and about what is just and equitable.

Name of the Respondent

42. The Respondent's solicitor explained that the business of the Respondent company has been taken over by Elysium Healthcare No.2 Ltd and this should be the correct name of the Respondent to this claim. This has been previously notified to the Employment Tribunal but apparently not acted upon.
43. I therefore order that the name of the Respondent to his claim be changed to Elysium Healthcare No.2 Ltd.

CASE MANAGEMENT

Listing the hearing

1. It was agreed that the hearing in this claim would be completed within 9 days. It has been listed at London South Employment Tribunal, Montague Court, 101 London Road, West Croydon, CR0 9RF to start at 10am or so soon thereafter as possible on **Tuesday 5th June 2018** (5th to 8th June and then 11th to 15th June 2018). The parties are to attend by 9.30 am. The hearing may go short, but this allocation is based on the on the Claimant's intention to give evidence and the Respondent's to call six. The time will be used as follows:-
- 1.1. Claimant's evidence 1.5 days
 - 1.2. Respondent's evidence 5 days
 - 1.3. Submissions 0.5 day
 - 1.4. Tribunal's deliberations 1 day
 - 1.5. Remedies 1 day.

The complaint(s) and issues

2. The complaints remaining after the Preliminary Hearing held on 23rd January 2017 and the issues arising in those complaints are as set out in the List of Issues at R1 92 – 94 and appended hereto.

Other matters

3. The Claimant has already provided a Schedule of Remedy and documents have been exchanged. I made the following case management orders.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Statement of remedy/schedule of loss

- 1.1 The Claimant is to provide to the Respondent and to the Tribunal, so as to arrive on or before **5th May 2018**, an updated Schedule of Remedy, properly
- 1.2 The Claimant is ordered to include information relevant to the receipt of any state benefits and income from further employment.

2. Bundle of documents

- 2.1 It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the Hearing.
- 2.2 The respondent is ordered to provide to the Claimant a full, indexed, page numbered bundle to arrive on or before **26th June 2017**.
- 2.3 The respondent is ordered to bring sufficient copies (at least five to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

3. Witness statements

- 3.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 3.2 The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
- 3.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 3.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

- 3.5 It is ordered that witness statements are exchanged so as to arrive on or before **5th May 2018**.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge **Tsamados**
Date: 16th June 2017