



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Mitchell

Respondent: BUPA Insurance Services Ltd

HELD AT: Manchester

ON: 5 April 2017

BEFORE: Employment Judge T Ryan

REPRESENTATION:

Claimant: Miss H Garnett, Solicitor

Respondent: Miss B Wilson, Solicitor's Clerk

JUDGMENT having been sent to the parties on and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Tribunal on 14 November 2016 Mrs Mitchell, who was then representing herself, brought a complaint of unfair dismissal. The claim, it is common ground, raised no issue of discrimination. The respondent responded to that complaint and has resisted it.

2. On 11 January 2017 Mrs Mitchell instructed Ramsdens Solicitors of Huddersfield, and on the same day her solicitors wrote to the Tribunal setting out the claimant's Schedule of Loss and making an application to amend the claim to include a complaint of direct race discrimination.

3. That was set out in a draft, in proper form, and it consists of a four paragraph claim asserting that between 2014 and 2016 the claimant, who is black, was one of four black telephone counsellors employed by the respondent at their premises at Salford Quays, and she said, to the best of her knowledge three of the four black

telephone counsellors were subject to disciplinary action, and two including her had been dismissed, and no other racial or other group was subject to such disproportionate action. She said she believed the reason why she was unfairly and summarily dismissed was because she was black, and she compares herself to an actual or hypothetical white telephone counsellor employed to do the same work in respect of whom issues in relation to performance had arisen but who was not dismissed.

4. The respondent, by a letter of 13 January 2017, wrote to the Tribunal resisting the application to amend, submitting that no facts to support such a claim were included in the claim form, and relying upon the time limit as having passed to bring the claim, and saying that the ACAS early conciliation certificate had no effect because race discrimination was neither pleaded nor alluded to in the facts included in it. They said there were no circumstances that would make it just and equitable to grant the extension of time that was needed. A second point was made about the timing and manner of application. It refers to the fact that the claimant made no reference to needing to amend her particulars of claim before her letter of 11 January 2017. The respondent could not see why the claimant only raised the distinct and entirely new claim now, and the claimant has not demonstrated any reason as required by the Presidential Guidance in the case law. It says that in accordance with the principles in **Selkent Bus Company v Moore [1996] IRLR 661** the Tribunal may consider the timing and manner of the application. The claimant did not provide any notice of the application that was sent to the Tribunal two days before lists of documents were due to be exchanged.

5. The matter was listed before me today. The claimant had provided a skeleton argument. Prior to coming into Tribunal I had considered the dates in this case, and the relevant dates it seems to me are these.

6. The claimant was dismissed on 2 September 2016. The three month time limit for both unfair dismissal and in fact race discrimination would expire on 1 December if not extended by early conciliation. The claimant had entered into early conciliation on 15 September. The certificate was issued on 28 October. It is apparently common ground, and I believe it would be right, that the clock was paused by this for 44 days. If that is right, the new time limit set by the early conciliation process, if relevant, would expire on 14 January 2017. That is therefore 3 days after the application to amend was intimated.

7. I put to the representative for the respondent this proposition: if the claim form had been submitted on 11 January 2017, in other words two months' later, and accordingly within time having regard to the early conciliation extension, and it had contained both the unfair dismissal complaint as set out in the original claim form that I have, and it contained the paragraphs that I have referred to asserting race discrimination, could the respondent have mounted any objection about the Tribunal's jurisdiction? Miss Wilson frankly conceded when she considered the point that no such objection should be made.

8. Because of the Presidential Guidance and the principles in **Selkent v Moore**, recognising that this is a new claim but nonetheless requiring that overall the Tribunal has to balance the hardship, I invited Miss Wilson to address me as to what

prejudice arose. She asserted that this was a new claim, the particulars were defective and that the facts set out in the proposed amendment were quite vague. She agreed that that could be remedied by an order for further particulars. She said that it was relevant for the claimant to indicate why it was not raised earlier.

9. On behalf of the claimant Miss Garnett points to the fact that the claimant was representing herself and asserted in the skeleton argument she did not feel able to raise it at the time. ACAS had advised her that she could amend her claim form at a later date but she was not aware that there were time limits in relation to that. Miss Garnett indicated that the solicitors' firm were instructed on 11 January. Mr Booth of that firm advised the claimant and the application to amend was therefore drafted and lodged the same day. Miss Garnett also accepted that the claimant could give further particulars.

10. The respondent's riposte was that an allegation of discrimination is serious and if the claimant felt able to raise it, as it appears she had done to some extent at least while she was within the employment, paragraph 7 of the claimant's skeleton refers, and according to Miss Garnett a further assertion was raised at the point of appeal, it is not a good reason to say she did not feel she could put it in the claim.

11. Miss Wilson accepts, of course, that the test is that set out in the Presidential Guidance and in particular the decision of Mummery J, as he then was, in **Selkent v Moore**, namely that the Tribunal is required to see where the balance of hardship lies.

12. The respondent cannot rely on any actual prejudice. They do not say that cannot respond to this claim. They say it should be particularised and they are entitled to say that. There is no specific prejudice identified to me.

13. On the face of it, the claimant's amendment gives rise to the potential for a claim but I cannot say today whether that claim is a good one or a bad one. The merits might be a relevant factor but I simply do not know where they lie.

14. If the application is refused, it being accepted that there is no jurisdictional issue, then the claimant loses the right to bring forward a claim in respect of which the Tribunal has jurisdiction and loses the possibility of the claim which may be well-founded.

15. If the application is granted, the respondent is required to meet this element of the claim as well as the unfair dismissal claim.

16. It appears, from what the claimant says if this be right, that she had raised issues of racism at least on two if not three occasions during the course of the process leading to her dismissal, and therefore one might suspect that that is a fact that is at least within the thinking of the respondent's witnesses, although it is said in the skeleton argument at paragraph 8 there was no evidence that was addressed by the respondent.

17. In all the circumstances it seems to me that the balance of hardship militates in favour of granting this application to amend. The principal objection raised by the

respondent, namely the time limit issue, effectively having fallen away. In those circumstances it seems to me that it would be just and equitable to grant this application. The proceedings are still at a relatively early stage. The claimant can give further particulars.

18. I conclude by apologising for the time taken to send this written version of these reasons to the parties. The delay is due to the volume of other judicial work.

Employment Judge T Ryan 6 July 2017

REASONS SENT TO THE PARTIES ON

10 July 2017

FOR THE TRIBUNAL OFFICE