EMPLOYMENT TRIBUNALS

Claimant: Mrs E England

Respondent: MyCSP Ltd

HELD AT: Manchester **ON:** 23 August 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Ms C Souter, Counsel

JUDGMENT AT PRELIMINARY HEARING

The claimant's application for permission to amend her claim so as to seek a remedy for myDevelopment Conversation appraisals concluded in July 2015 and July 2016 is refused.

REASONS

Background

1. This application to amend was made in the course of a preliminary hearing convened to determine the effect of an admission by the respondent of liability in relation to three complaints of disability discrimination under the Equality Act 2010: discrimination arising from disability (section 15), indirect discrimination (section 19) and a breach of the duty to make reasonable adjustments (sections 20 and 21).

2. The complaint pursued by the claimant concerned a myDevelopment Conversation appraisal ("MDC") conducted in January 2016 by her line manager, Helen Reeves, in which the claimant received a rating of "meets standard" rather than a higher rating of "exceeds". In very summary terms, the complaint was that the respondent had taken into account certain negative behaviours and the absence of certain positive behaviours when those matters should have been discounted

because they were a consequence of the claimant's admitted disabilities of depression, dyslexia, dyspraxia and autistic spectrum disorder.

3. Her claim from was presented on 4 July 2016. A response form defending the claim was filed on 3 August 2016. The parties engaged in judicial mediation over two days in October 2016. No agreement was reached.

4. The claimant applied to amend her claim on 24 October 2016, and following confirmation that the application related only to the medical consequences of the alleged discrimination, it was permitted by consent. An amended response defending the claim as amended was filed on 13 December 2016. The final hearing was listed for six days between 18 and 25 September 2017.

5. The respondent admitted liability for the disability discrimination complaints by letter of 18 July 2017.

Application to Amend

6. During the preliminary hearing we discussed the scope of the admission in relation to the reasonable adjustments complaint and the way in which the Tribunal would approach remedy. It became apparent to the claimant that her claim form only took issue with the MDC carried out in January 2016. The claim form presented on 4 July 2016 made no reference to the July 2015 MDC, and nor had the claimant made any application to amend her claim so as to incorporate the MDC conducted after the claim was presented in July 2016.

7. In the course of the hearing she applied for permission to amend her claim form by the introduction of the following paragraph:

> **"The myDevelopment Conversation assessments concluded on 14 July 2015 and 21 July 2016 by Helen Reeves were in breach of the duty to make reasonable adjustments, and amounted to discrimination arising from disability and to indirect disability discrimination on the same basis as asserted in relation to the January 2016 assessment."**

Relevant Legal Framework

8. It is inherent within the general case management power in rule 29 of the Employment Tribunal Rules of Procedure 2013 that the Tribunal has power to refuse to allow a party to amend a claim which has been lodged. Conversely the Tribunal has power to allow such an amendment. 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.

9. 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."**

10. The EAT went on to identify some circumstances which would generally 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.

11. 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. That is not something which can be deferred to the final hearing if permission to amend is to be granted: **Amey Services Ltd & anor v Aldridge and others UKEATS/007/16 12 August 2016**. Consideration of time limits must encompass the applicable statutory provision for extensions. 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."**

12. 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.

13. 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."**

Submissions

14. In support of her application the claimant explained that she had not appreciated that as matter stood she could only be awarded a remedy for the January 2016 MDC. She had thought she had worded the claim form sufficiently broadly to make it clear that she was challenging the basis on which that MDC was carried out, and therefore the previous and subsequent MDC assessments would also be matters within the scope of the claim. Her objection to the basis of assessment in July 2015 had been made clear to Helen Reeves before the assessment was carried out, but the claimant had explained at the time that she was not well enough to pursue any formal challenge to the rating. The July 2016

assessment had been done with the respondent fully aware that she was bringing this challenge to the basis for such assessments. There was no material difference between the basis of the assessments on all three occasions: although there might have been a slight change in the precise wording of some descriptors between the July 2015 and January 2016 assessments, the same person (Helen Reeves) had done all three assessments.

15. The claimant made clear that if permission to amend were granted she would not be seeking any award for financial loss resulting from the two additional assessments: it would be a question of the impact upon an award for injury to feelings only.

16. After a break during which Ms Souter took instructions, the respondent opposed the application. It was suggested that there was no good reason why the July 2015 issue had not been included in the claim when it was presented, and the claimant had not taken the opportunity to amend her claim to incorporate the July 2016 assessment even though she had applied to amend in relation to other matters in October 2016. Ms Souter suggested that the application was made significantly out of time, particularly as far as the July 2015 assessment was concerned. I queried whether the claimant might rely on the principle in **Barclays Bank Plc v Kapur and others [1991] ICR 208** (House of Lords) which suggests that in some circumstances if an underlying policy is itself discriminatory there might be an act extending over a period. Ms Souter responded to say that the application should still have been brought within time.

17. Ms Souter also relied upon the fact that significant resources had already been allocated to this litigation. There had been a mediation over two days and two preliminary hearings. The case was now at a stage where directions were being given to bring it to a conclusion. If these new matters were to be introduced, the concession made on liability would need to be revisited and the process would be derailed. There would be a significant impact on the respondent's time and resources. The prejudice to the respondent in allowing the amendment application would be significant. In contrast, submitted Ms Souter, the claimant would not be significantly prejudiced because she had made clear that this only related to the extent of an award for injury to feelings. The impact in the claimant's favour, if any, would not be significant.

18. In a brief response the claimant submitted that the preparation for the case as it stood had incorporated the documents relating to these assessments anyway. The respondent should have admitted liability earlier rather than denying it between August 2016 and July 2017.

Discussion and Conclusions

19. The overriding objective requires the parties to be put on an equal footing so far as possible. It was appropriate, therefore, for me to take into account that the claimant did not have access to legal advice. She was a person representing herself.

20. I then considered the factors identified by **Selkent** before addressing the balance of prejudice and hardship.

Nature of the amendment

21. The amendment seemed to me to be a reasonably substantial one. It was not simply the addition of factual details to an existing allegation, or a re-labelling exercise. It sought to bring into the ambit of the claim two matters which at best were background only: the basis on which the assessments in July 2015 and July 2016 were carried out. That said, I recognised that this was not a wholly new matter because the legal basis for those complaints was identical to the claim as currently pleaded, and the basis of assessment on each occasion did not differ materially from the January 2016 MDC.

Applicability of time limits

22. On the face of it the application was made almost two years out of time for the July 2015 assessment, and approximately nine months out of time for the July 2016 assessment. However, it seemed to me at least arguable that these were instances of the application of a discriminatory policy which remained extant and therefore that there was still an act extending over a period on an ongoing basis pursuant to **Kapur**. Indeed, if the claimant were to be assessed on the same basis by the respondent at the next MDC a fresh claim at that point would be possible, in respect of which the claimant might argue that there had been a continuing act encompassing the July 2016 assessment, even if permission to amend so as to introduce it into this complaint were refused.

23. Taking into account the nature of the amendment, it seemed to me that this was a factor which was broadly neutral. It did not tip the balance appreciably in favour of either party. The complaints should have been brought earlier on, despite the **Kapur** argument, but the passage of time was unlikely to cause the respondent any significant difficulties in gathering the evidence as it was substantially the evidence already gathered for the existing claim.

Timing and manner of the application

24. The application was made orally at a preliminary hearing. Although it is generally preferable for applications to amend to be made in writing, that should not count against the claimant in this case because of her status as a litigant in person. It was clear to me that she simply had not realised that these two assessments were not within the scope of the matters for which a remedy could be awarded in these proceedings. As soon as she realised that (during the hearing) she made the application very promptly, and with my assistance she formulated the text of her proposed amendment as recorded in paragraph 7 above.

25. However, the stage of the proceedings at which the application was made was a significant concern. Subject to clarification of the precise scope of the admission in relation to reasonable adjustments, liability had been conceded and a judgment by consent was to be issued shortly. Essentially this was a case now proceeding to remedy only. For the claimant to introduce two different assessments at this late stage in the proceedings would put the respondent to considerable hardship. It will need to consider in more detail the circumstances which gave rise to those assessments and whether it can make an admission of liability or will seek to defend the claims for those matters. As Ms Souter point out, potentially that process

could derail the litigation and result in a liability hearing on the two new matters if permitted to proceed. Although the respondent can in principle seek an order for costs against the claimant, orders of that kind are not usually made in Employment Tribunals. Allowing the amendment is therefore likely to introduce significant delay and further cost for the respondent at a stage in the proceedings at which the Tribunal ought to be addressing remedy matters only.

26. In contrast it seemed to me that the claimant would not be unduly prejudiced if I were to refuse permission. Her express purpose in making the application is to ensure that she obtains a higher award for injury to feelings. To her credit she made it clear that she was not seeking to argue that there was any financial loss from the proposed new matters. The award for injury to feelings, however, can take account of the context within which the discriminatory actions occur. The Tribunal will consider how the employer dealt with the matter once it was drawn to its attention. That will encompass not only consideration of how the grievance was handled, but also the effect on the claimant's feelings of having the assessment conducted on the same basis (by way of email while she was on sick leave) in July 2016. Although no separate award for the July 2016 assessment can be made as matters stand, the impact of that assessment on her existing injury to feelings from the January assessment is a matter within the scope of the Tribunal's enquiries at the remedy stage. The claimant is already seeking an award for injury to feelings of £20,000 in her Schedule of Loss, and whilst I make no comment as to the likely award in this case it seems to me that adding in the previous and subsequent assessments is unlikely to make a significant difference to the size of any award.

Balance of prejudice

27. Putting these factors together I concluded that the balance of prejudice and hardship favoured refusing the amendment. My main concern was that it was made at such a late stage in the proceedings, and that the benefit to the claimant if the application was granted would be relatively small whereas the disadvantage to the respondent and the effect on the proceedings could be significant. The application was refused.

Employment Judge Franey

29 August 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 September 2017

FOR THE TRIBUNAL OFFICE