



EMPLOYMENT TRIBUNALS

Claimant

Mr J Black

Respondent

**v Foreign and Commonwealth Office -
FCO Services**

PRELIMINARY HEARING

Heard at: Bury St Edmunds

On: 2 October 2017

Before: Employment Judge G P Sigsworth

Appearances:

For the Claimant: Mr O Tahzib, Counsel.

For the Respondent: Mr C Stone, Counsel.

RESERVED ORDER

1. The Claimant's application to amend is allowed in part. Full details are given in the reasons below.

RESERVED REASONS

1. The Claimant's application is to amend his claim to include three claims of disability discrimination, under sections 15, 19 and 20 of Equality Act 2010. The application is opposed by the Respondent.
2. The Claimant originally brought claims of constructive unfair dismissal, unlawful deduction from wages and breach of contract. A claim for automatic unfair dismissal for whistle blowing was subsequently withdrawn. The Claimant resigned from his employment on 28 July 2016, and his claim form was issued on 26 September 2016. Following issue of the claim form, on 25 January 2017, the Claimant's GP referred him to Practice MK to be assessed for autism spectrum disorder (ASD). The Claimant contends that he had no suspicion or

knowledge prior to this point that he might be suffering from ASD. Information had come to him from minutes contained in a record of interviews that the investigating officer for his grievance had conducted with a number of individuals who had managed the Claimant over a period of several years. Although the grievance report had been provided to him prior to his resignation, the Claimant had not seen the interview minutes appended to the report and these were only disclosed as part of the present tribunal proceedings on 30 March 2017. The minutes contained material that, according to the Claimant, suggested that the Respondent's managers suspected that the Claimant might be suffering from ASD or Asperger's Syndrome or similar condition from as early as 2014. The Claimant underwent an ASD assessment and on 19 April 2017 was formerly diagnosed with the condition. Having received that diagnosis, the Claimant then made an application to amend the claim on 5 May 2017, having in the meantime taken advice on the prospects of such a new claim. Even at this stage, he had not received a copy of the full diagnostic report from the assessor, and that has since been received. The assessor concludes that the ASD had a "significant impact" on relationships which needs to be addressed. The report also states that the Claimant had difficulty with some aspects of the activities of daily life including processing sensory information. At no time in his employment was the Claimant referred to occupational health for an assessment of any condition that he might be suffering from.

3. Case law was cited in support of the application:-

3.1 In Selkent Bus Co Limited v Moore [1996] IRLR 661, EAT, it was held that relevant circumstances to the consideration of granting an amendment would include the nature of the amendment, the applicability of time limits, and the timing and manner of the application. I was also referred to Abercrombie & Others v Aga Range Master Limited [2013] ICR 209, CA, which held that, when considering applications to amend which arguably raise new causes of action, the tribunal should focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry rather than the old. The greater the difference in the facts and legal issues raised by the new claim in contrast to the old, the less likely it is that amendment will be permitted.

3.2 I was also referred to the case of Hewett v Motorola Ltd [2004] IRLR 545, EAT, where the tribunal erred in holding that an employee with Asperger's Syndrome was not disabled within the meaning of the Disability Discrimination Act 1992, because the difficulties in communication and social interaction that his impairment caused were not specifically included in the capacities listed in the schedule to the Act that was relevant at the time.

3.3 I was referred to the EHRC Code:-

“5.14 It is not enough for the employer to show that they did not know that the disabled person had a disability. They must also show that they could not reasonably have been expected to know about

it. Employers should consider whether a worker has a disability even where one has not been formally disclosed as, for example, not all workers who meet the definition of disability may think of themselves as a “disabled person”.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment“

4. The Claimant argues that the proposed additional claims are intimately bound up with the existing claim. It is said that one of the Claimant’s basic complaints as part of his grievance (which feature essentially in the original claim as pleaded) was the fact that he had been tasked with fewer assignments than his colleagues who were of an equivalent level of experience and grade. This is one of the central complaints raised as part of the disability discrimination claims that the Claimant seeks to be added. The Claimant’s grievance and the investigation that followed it were part of the chain of events that lead to the Claimant’s resignation. The Claimant argues that there is significant overlap in the unfavourable treatment that he suggests that he has suffered as between the new and original complaints. The Claimant points to the fact that much additional material has been pleaded by way of background facts giving rise to the discrimination claims. As far as the time limit is concerned, then the Claimant had no inclination of his disability at the point at which he issued his original claim. It is in the very nature of a condition such as ASD that individuals who possess the condition may not be aware that they do so. The Claimant argues that disability should be relatively easy to establish as should constructive knowledge of that disability, for the reasons set out above. Although the tribunal at this hearing cannot determine the merits, it is a fact that the grievance report acknowledges that the Claimant was tasked with fewer assignments than his colleagues, and also that there were a number of team leaders and project managers who would not have the Claimant on their teams. Such reluctance stems from the Claimant’s difficulties in social interaction, a consequence of his ASD. This gives rise to a s.15 case, according to the Claimant. In the context of failing to make reasonable adjustments, and the indirect discrimination complaint, the grievance report admits that the constant change of team leaders and fairly frequent line management changes have not helped the Claimant, and there has been little consistency in his treatment, with team leaders having different expectations and different ways of managing people and a lack of specialist management training. As for balance of prejudice, the Claimant argues that he would be severely prejudiced by rejection of the application, as a significant part of his potential claim would be lost. The Respondent, on the other hand, would not be so prejudiced. Even if they no longer employ certain individuals who dealt with the Claimant’s allegations, they would still have faced this problem even if the claims had all been brought together from the start. No specific individuals are identified by the Respondent or the dates on which they left.
5. The Respondent objects to the application. They say that the case is weak, and moreover there is a massive expansion of the enquiries the tribunal will have to make. The original claim was a fairly narrow and ordinary constructive

unfair dismissal claim, with a grievance as relevant background information only, and the handling of that grievance is not cited as an allegation in the constructive dismissal case. The new acts sought to be pleaded go back over some twelve years, or at least six years, and expand the nature of the time limits of the claim. Many of the factual allegations now sought to be added do not rely on knowledge acquired of disability or the grievance report. They must have been known to the Claimant before that. In so far as prejudice to the Respondent is concerned, then the Respondent would have to deal with the whole history of the assignments to the Claimant. Other complaints are raised by him in the grievance process. Relevant managers have left. The Respondent concedes that an alternative would be to permit amendment to allow some amendments but not others, and in particular to allow the alleged acts of discrimination in the unfair dismissal claim. This would mean that the factual enquiry would not have to go back years in time, and could focus on the knowledge of the managers in recent times. Even now, the Claimant has not produced proper evidence of his disability, for the tribunal's purposes. In so far as knowledge is concerned, then there is no concept of corporate knowledge as far as the s.15 claim is concerned. There is no specific evidence that relevant managers had such knowledge. So far as the reasonable adjustments case is concerned, then the relevant managers would not necessarily have knowledge that substantial disadvantage would arise. The Claimant somewhat down played his difficulties, and did not wish to see occupational health because he did not want anything on his record. In so far as merits are concerned, then the Respondent alleges that the new allegations are weak. The value of the amended claim would increase substantially over the original claim, as the Claimant's alleges that he was denied overseas assignments on the basis of discrimination arising as a consequence of disability, and those overseas assignments are lucrative.

Conclusions

6. As far the nature of the amendment is concerned (the first Selkent factor to be considered), there are some new facts but they relate to recent events only, as others are supplied by the grievance report. The Respondent was therefore alive to the complaints being made by the Claimant at an earlier stage and investigated them. These grievance issues go to the heart of the proposed new disability discrimination claim. Although there will be some additional inquiry there is considerable overlap between the old and new claims, and the grievance investigation and the new claims. Although the new claims are out of time (the second Selkent factor), given that the Claimant was not aware of his disability when the original claim was issued and reasonably not aware, it would be just and equitable to extend time. I find that the Claimant acted swiftly once he knew of the diagnosis of ASD and put his claim in as soon as was reasonably practicable (the third Selkent factor).
7. Given what is said in Hewett and EHRC Code, it is likely that the Claimant's ASD will qualify as a disability under the statute. There is certainly ground for believing that constructive knowledge might be capable of being established of the disability, likewise of the substantial disadvantage. If the Respondent had investigated the Claimant's condition by reference to occupational health or otherwise, then they would have become aware that the Claimant had

difficulties with social interaction with others etc. The tribunal cannot make a detailed assessment of the merits at this stage, and it is not a Selkent factor in any event.

8. Balance of prejudice. The Claimant will suffer substantial prejudice if the amendment is not allowed, and would lose this important cause of action, that cause of action not being known to him until mid April 2017. Although he had not taken medication or gone to counselling earlier, there is no evidence that ASD would have been helped by this. In so far as prejudice to the Respondent is concerned, then inevitably the factual enquiry will be extended. However, many of the complaints now raised by the Claimant were canvassed in the grievance investigation and report. The Respondent has not identified those managers they say they no longer employ who would be able to respond to the disability discrimination claim, but even if the claim had been brought at the outset they still might be without those managers. The fact that the Claimant chose not to plead background facts now sought to be pleaded for the constructive unfair dismissal case does not mean that he cannot rely on them for the disability discrimination case. Those facts may not have been relevant to his constructive unfair dismissal case. It is right, however, to consider the time which the Claimant should be allowed to go back to with his allegations (see below).
9. I propose to allow some amendments to the factual complaints, but not others, as the Respondent suggested could be the case. Further, I will not allow the Claimant to add a s.19 legal claim, as it adds an unnecessary complication and one that is onerous to the Respondent. The s.19 claim as pleaded is too vague and has complete overlap, anyway, with the s.15 and s.20 complaints. Further, sub paragraphs c, d and e of paragraph 64(iii) in the new pleading are unlikely to be capable of being reasonable adjustments. The guidance, training and support from managers is not an adjustment that obviously avoids or reduces the disadvantage to the Claimant – see Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT. It is not the sending of the Claimant on courses to manage ASD, it is putting in place an adjustment that mitigates the substantial disadvantage on him. It is not providing the Claimant's colleagues with guidance on his ASD, but in fact ensuring that he was not sent on fewer assignments. It was not the training of the Claimant's managers, but the provision of a tangible adjustment to remedy the disadvantage pleaded at paragraph 64(ii). The duty on the Respondent is to actually make adjustments that reduce or eliminate the substantial disadvantage. There is no duty on them to consult with, guide or train the Claimant or others in how to put in place those adjustments. Thus, those amendments will not be allowed.
10. I referred to the proposed new pleading, and the proposed new paragraphs:-
 - 10.1 I do not allow the amendment at new paragraph 15. The new facts go back to 2012. Only one specific example of lack of progression is given. That is not sufficient to found such a generalised claim.
 - 10.2 New paragraph 17. I do not allow this amendment. The Allegations of gossip and rumours being spread are much too vague and unparticularised.

- 10.3 As far as new paragraph 18 is concerned, then I allow the allegation concerning negative annual appraisals, but not the formal written warning in 2014.
- 10.4 New paragraph 19, this gives rise to new facts not pleaded, but they are part of the grievance report and therefore this factual allegation will be allowed.
- 10.5 New paragraph 44. This relates to the grievance report, and simply sets out the contents of that report. The amendment is allowed.
- 10.6 New paragraph 45, ditto.
- 10.7 New paragraph 47, I allow this, as it is an allegation of a relatively recent event in April 2016.
- 10.8 New paragraph 48 is allowed.
- 10.9 New paragraphs 58 to 62. These simply set out the sequence of events concerning the Claimant's diagnosis, and as part of the narrative or background are unobjectional. Allowed.
- 10.10 New paragraph 63. This is an allegation of post employment discrimination, possibly victimisation - it is not entirely clear. In its current form it is not allowed as it is not fully understood.
11. I therefore allow the Claimant to bring new claims of failure to make reasonable adjustments, and discrimination arising as a consequence of disability. I do not allow a claim for indirect discrimination.
12. Paragraph 64(iii) (c), (d) and (e) will not be permitted as amendments.
13. On the application of the parties, directions will be given, either at a further hearing or by way of telephone discussion or as advised.

Employment Judge G P Sigsworth

Sent to the parties on:

.....22 November 2017

Case Number: 3400990/2016

For the Tribunal:

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