Appeal No. UKEAT/0258/17/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 16 February 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

REUTERS LIMITED — APPELLANT

MR R COLE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS DEE MASTERS (of Counsel) Instructed by: Stephenson Harwood LLP 1 Finsbury Circus London EC2M 7SH
For the Respondent	MR PETER LOCKLEY (of Counsel) Instructed by: Slater & Gordon (UK) LLP Haywood House North Dumfries Place Cardiff CF10 3GA

SUMMARY

PRACTICE AND PROCEDURE - Amendment

The Appellant had issued an ET1 including a claim under section 15 **Equality Act 2010**. He applied out of time to add a claim under section 13 **Equality Act 2010**, contending that it raised no new facts or matters and thus was a mere relabelling exercise (**Selkent**). The Employment Judge accepted that argument and granted leave to amend. Appeal allowed: the section 13 claim involved more than relabelling. The application was remitted to the Employment Judge to consider the exercise of discretion.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal from the decision of the Employment Tribunal (Regional Employment Judge Taylor) dated 29 August 2017, whereby she granted the Claimant, Mr Cole, permission to amend his ET1 claim so as to add claims of direct disability discrimination (section 13 **Equality Act 2010**; "EqA") and indirect disability discrimination (section 19). Permission was granted on the basis that no new facts or matters were relied on in support of the application. The appeal is against the decision to allow the direct disability discrimination claim to be added.

Background

2. Mr Cole has been employed by the Respondent, Reuters, since November 2010 as an Assistant Editor. At all material times, he has admittedly suffered from a disability within the meaning of section 6 of the **EqA**, namely a chronic depressive illness.

3. In September 2015 Mr John Foley became his line manager. Mr Cole reacted badly to comments made by Mr Foley as to the quality of his work. Following a particular exchange on 7 January 2016, Mr Cole has not returned to work and has had periods of hospitalisation. He remains employed under his contract of employment.

4. On 7 April 2016 he contacted ACAS to commence early conciliation in respect of proposed claims of disability discrimination. On 3 June 2016 Mr Cole presented his ET1 complaint to the ET. By the attached "details of complaint" he made claims of discrimination arising from disability (section 15 of the **EqA**), and of failure to make reasonable adjustments (section 21). This document in turn attached a 20-page "*Schedule 1*" entitled "*Robert Cole's*

Grievance". That document also related to an internal grievance process. By an ET3 and grounds of resistance dated 5 July 2016 the claims were denied.

5. The details of complaint had included a request for a stay pending completion of the grievance process which he had commenced. That stay was granted and renewed in January 2017 for a further three months. A Preliminary Hearing was ultimately fixed for 29 August 2017. On 11 August 2017 Mr Cole's solicitors supplied a "*Proposed List of Issues for Agreement*". These extend beyond the pleaded claims and included issues relating to claims under sections 13 and 19 of the **EqA**.

6. As to section 13, the proposed list included a heading "*Direct discrimination and Discrimination Arising from Disability (s.13 and s.15 EA 2010)*" which began:

> **"10. Further, or in the alternative was Mr Cole treated less favourably because of his disability and/or otherwise treated unfavourably for something arising in consequence of his disability (where this was not justified), as the Respondents, among other things: …"**

There followed 17 matters set out as "*substantial disadvantages … which arise in consequence of his disability*".

7. Reuters took objection to this proposed addition of claims under section 13 and also section 19. By email of 15 August 2017 its solicitors responded that, if Mr Cole wished to bring new causes of action, he must make an application to amend his claim. Mr Cole's solicitors responded with an application to amend (23 August 2017) stating that "*These heads of claim arise out of the same or similar facts and circumstances already set out in the claim and Schedule 1 …*".

8. The application letter in particular contended that:

(1) In accordance with the guidance in **Selkent Bus Co Ltd v Moore** [1996] ICR 836, the claims "ari*se from significantly the same facts as the original claims and that the claim form and details appended include the key facts to which the amended claims relate*".

(2) At the time of submission of the original claim, Mr Cole was suffering from significant health difficulties which made it very difficult for him to provide detailed instructions.

(3) At the time there was an ongoing grievance process as evidenced by the Schedule 1 attachment.

(4) The claim had been served on a protected basis when he was unable to participate because of his health and had been stayed accordingly. He remained unfit to work and was hampered in giving instructions, but wished to progress the claim.

(5) The amendment 'relabelled' the existing claims.

9. The Case Management Hearing took place on 29 August 2017 before Regional Employment Judge Taylor. Mr Cole was represented by his solicitor; the Respondent by counsel, Ms Dee Masters, who also appears today. By Order dictated at the hearing and sent to the parties on 6 September 2017, the Judge granted the application to amend the claim in respect of sections 13 and 19, stating:

> **"5. Having considered the parties' submissions on the Claimant's application to amend the claim to include claims of direct disability discrimination and indirect disability discrimination the Claimant's application was granted. Whether the claims have been presented outside of the applicable time limits and/or whether it is just and equitable for an extension of time to be granted are matters to be determined by the Tribunal at the final hearing. In granting this application the Tribunal had regard to the Claimant's submissions that no new facts or matters are being relied upon."**

A The amended details of complaint supplied on that day added to the existing paragraph 7 "*c. Less favourable treatment because of the Claimant's disability*". I need not deal with indirect discrimination.

B

10. On 8 September 2017 the Respondent's solicitors requested Written Reasons for the decision. By those Reasons, dated 12 October 2017, the Judge stated:

> **"The Claimant was granted leave to add direct discrimination and indirect discrimination (if so advised) because the Claimant's submission that no new facts or matters to those set out in the claim form were relied upon was accepted."**

C

11. Ground 3 of the appeal arises from a different matter and has been rendered irrelevant. The two surviving grounds for appeal are these:

D

> **"(1) The Tribunal erred in law, or alternatively reached a perverse conclusion, when it granted the Claimant's application to amend to add a direct disability complaint; it was a new claim which was "out of time", no evidence had been presented by the Claimant in support of an extension of the time limit which meant that any amendment would have prejudiced the Respondent by forcing it to defend a claim that would otherwise be time barred.**
>
> **(2) The Tribunal erred in law in that it failed to provide sufficient reasons for its decision to grant the amendment application to add a direct disability discrimination claim."**

E

12. The central question which arises on the appeal is whether the Judge was wrong to accept that the amendment depended on no new facts or matters, and thus implicitly to accept the Claimant's submission this was merely a relabelling exercise. The word "relabelling" of course arises from the seminal decision on applications to amend, namely **Selkent**, where Mummery J distinguished "*the addition or substitution of other labels for facts already pleaded*" from "*the making of entirely new factual allegations which change the basis of the existing claim*" (page 843G-H).

F

G

13. Turning to the applicability of time limits, he continued:

H

> **"If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions …" (Pages 843H to 844A)**

14. The relevant time provisions are now in section 123 of the **EqA**, which I need not read.

15. It is common ground between the parties that if the proposed amendment is simply relabelling, there is no need to consider the question of timings. See, for example, the decision in **Foxtons Ltd v Ruwiel** UKEAT/0056/08 (18 March 2008) per Elias P at paragraph 13. See also the Presidential Guidance note under the heading "*Relabelling*" at paragraph 8:

> **"Re-labelling**
>
> **8. Labelling is the term used for the type of claim in relation to a set of facts (for example, "unfair dismissal"). Usually, mislabelling does not prevent the re-labelled claim being introduced by amendment. Seeking to change the nature of the claim may seem significant, but very often all that is happening is a change of label. For instance, a claimant may describe his or her claim as for a redundancy payment when, in reality, he or she may be claiming that they were unfairly dismissed."**

16. For this purpose, it is necessary to compare the provisions of sections 13 and 15 of the **Equality Act**. These provide as material:

> **"13.** ***Direct discrimination***
>
> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**
>
> **…**
>
> **15.** ***Discrimination arising from disability***
>
> **(1) A person (A) discriminates against a disabled person (B) if -**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

17. As Elisabeth Laing J explained in **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893, section 15 was enacted in order to restore the position which had prevailed under its predecessor (**Disability Discrimination Act 1995** section 5(1) as subsequently amended) before the decision of the House of Lords in **London Borough of Lewisham v Malcolm** [2008] IRLR 700. The effect of **Malcolm** was that it was necessary to establish that

the employer knew of the disability and that this had played a motivating part in his treatment of the employer, see e.g. Lord Scott at paragraph 29. The consequence was that a claim of disability related discrimination added nothing to a claim of direct discrimination. Section 15 thus departed from **Malcolm** and loosened the causal connection which is required between the disability and any unfavourable treatment: see **Hall** at paragraphs 30 to 35; also **JP Morgan Europe Limited v Chweidan** [2012] ICR 268 per Elias LJ at paragraph 7.

18. As Simler P further explained section 15 in **Pnaiser v NHS England & Another** [2016] IRLR 170:

(i) in considering whether A treated B unfavourably in the respects relied on by B, no question of comparison arises;

(ii) in considering whether the alleged 'something' was an effective cause of the unfavourable treatment, the focus is on the reason in the mind of A and his conscious or unconscious thought processes "*just as it is in a direct discrimination case*"; but

(iii) it is not necessary to establish that the alleged discriminator knew that the 'something' that caused the treatment arose in consequence of the disability. Had this been a requirement "*there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15*": paragraph 31.

Thus section 13 imposes more stringent tests both as to knowledge and causation; and also involves a comparative exercise.

19. In respect of this appeal and the response, it was necessary for the parties to cite quite a number of decisions in respect of applications to amend. Both parties in particular relied, albeit for different reasons, on the observations of the Court of Appeal in **Abercrombie & Others v Aga Rangemaster Ltd** [2014] ICR 209. In particular, per Underhill LJ:

> **"48. Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted …"**

Underhill LJ continued:

> **"50. … 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 - and a fortiori in a re-labelling case - justice does not require the same approach …"**

20. Counsel then cited the decision in **Foxtons**, where Elias P observed, citing the Court of Appeal in **Bryant v Housing Corporation** [1999] ICR 123:

> **"11. … The Court held that in order for the claimant to be able to allege that this was a mere re-labelling exercise it had to be shown that there was a proper factual substratum for the claim now being made. That in turn required there to be a causative link between the making of the allegation of sex discrimination and the dismissal. If that causative link was not present then that was fatal to the issue of whether the originating application made a claim in respect of victimisation. …"**

21. In **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/0092/07 (6 June 2007), Underhill J compared the existing claim for unfair dismissal and proposed new claims under section 189 of the **Trade Union and Labour Relations (Consolidation) Act 1992** and Regulation 11 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006**. He observed:

> **"18. First, although, as already established, the claim for breach of the statutory consultation obligations is unquestionably a new claim, it is very closely related to the claim originally pleaded. Both claims depend centrally on the allegation of defective consultation, and all, or almost all, the facts which will be material to the new claim will already have been in play in the old. I am not sure that I would describe it as a mere "re-labelling" of the facts already**

pleaded: though that is in one sense true, it tends to gloss over the fact that, as the Chairman rightly decided, the claim for breach of the consultation obligations is a claim of a different nature to the claim already pleaded, with different (and additional) consequences. But whether or not it is right to describe the new claim as "mere re-labelling" is not decisive. The important point is that it depends on facts which are, substantially, already alleged. If these proceedings were in the High Court, an amendment to add the new claim would have no difficulty satisfying the requirements of CPR 17.4(2)."

22. Mr Lockley submits that these authorities demonstrate that a new claim involves a relabelling where it fends on facts which are the same or are substantially the same. He submits in particular that (1) as demonstrated by the amended "details of complaint", the section 13 claim is introduced on the basis of precisely the same facts and matters as were relied on in respect of the section 15 claim; (2) the only difference between the two claims is the alleged reason for the treatment. Although a claim of direct discrimination requires the Claimant to have been treated less favourably than a non-disabled comparator (not merely unfavourably), in practice comparative treatment is very likely to be established if it can be shown that the reason for the treatment was the disability itself: because in that case, a comparator who was not disabled would not have been treated in the same way; (3) the scope of the enquiry demanded by the two claims is almost identical. The two claims require the Tribunal to draw different inferences as to the reason for the treatment, but these inferences are no more than alternative possibilities arising from the same factual matrix.

23. In argument he inevitably accepted that an inference, if drawn, is nonetheless a matter of fact. Whilst acknowledging at least the additional fact as to the reason for the unfavourable treatment, he pointed out that the Judge would of course be very well aware of the differences between sections 13 and 15. Given the close similarities in the two types of case, there was no good reason to challenge her conclusion. In this respect, he also pointed to the observation of Buxton LJ in **Bryant v Housing Corporation** that "*it was not open to the appeal tribunal to differ from [the Judge's] conclusion unless it was plainly unreasonable*" (page 129H).

24. Conversely, Ms Masters submits that the authorities demonstrate that an amendment will only be classified as relabelling in stringent circumstances. A relabelling exercise is where the proposed new claim is dependent on the same facts as the existing claim. The references in the authorities to the degree of factual difference relate to the circumstances where it is not a mere relabelling and the Tribunal is weighing up the extent of the differences as part of the exercise of its discretion to allow or refuse the amendment.

25. The proposed section 13 claim involved a wider factual enquiry, in particular as to whether Mr Cole was treated less favourably, i.e. the comparison exercise, and if so, whether this was on the grounds, conscious or unconscious, of his disability.

26. Citing **Foxtons**, there was no proper factual substratum in the existing claim for those matters. That was demonstrated by Mr Lockley's acknowledgment that the two claims require the Tribunal to draw different inferences as to the reason for the treatment.

Conclusion

27. I am persuaded that the addition of the section 13 claim is not a mere relabelling exercise in the sense understood in the authorities. First, I do not accept that the authorities establish that a mere relabelling exercise extends beyond a new claim based on facts which are already pleaded. Their discussion about the degree of difference in the factual area of enquiry, see e.g. **Abercrombie & Others v Aga Rangemaster Ltd** at paragraphs 48 and 50, relates to the exercise of discretion when it is not a mere relabelling.

28. Secondly, I consider that the section 13 claim does involve a greater area of factual enquiry and thus takes it outside the relabelling category. Thus:

(1) section 13 involves a more onerous test than section 15, and thus a more demanding factual enquiry. The set of facts which is necessary and sufficient to establish liability under section 15 will not be sufficient to satisfy section 13.

(2) the existing claim has been framed to establish the ingredients of a section 15 claim not a section13 claim. Thus, it does not contend, expressly or by implication, that Mr Cole suffered direct discrimination by Mr Foley or otherwise, because of his disability.

(3) to the extent that inferences can be drawn which establish the further ingredients of a section 13 claim, they are inferences of new fact.

29. I conclude that the Judge was wrong to hold that the section 13 claim involved no new facts or matters and was a mere relabelling exercise. Although ground 2 is unnecessary for my decision, I accept that the Judge's conclusion needed rather more explanation.

30. In these circumstances, it is agreed that the Judge should have considered the exercise of her discretion, having regard to all the relevant factors. These include the degree of difference in the factual enquiry and the fact that the new claim has been made outside the primary three-month time limit. On the basis of the list of issues, the last possible act was on 3 June 2016. The application to amend was made on 23 August 2017. Accordingly, as part of the exercise of discretion, it is necessary to consider the just and equitable ground for the extension of time.

31. In this respect, a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (**Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge & Others** UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a *prima*

facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (**Galilee v The Commissioner of Police of the Metropolis** UKEAT/0207/16 (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in **Galilee**, I would follow the latter approach.

32. However, it is agreed between the parties in the present case that, if there is to be a remission, the question of how and when the time point should be determined must be left to the Judge, having heard submissions from the parties. Ms Masters submits that there should be no such remission since Mr Cole provided no evidence (e.g. a medical report) in support of a just and equitable extension of time; and that accordingly there is only one answer, namely the refusal of the application to amend.

33. I do not accept that this would be the just course. The application was supported by a detailed letter which sought to explain the delay and made particular reference to Mr Cole's state of health and to consequent difficulties with giving instructions. Given the Judge's acceptance of the submission that it was a relabelling exercise alone, it had been unnecessary to give any real consideration to the exercise of the discretion. In the light of my conclusion, it is necessary for that exercise to be undertaken.

34. Contrary to Ms Masters' submission, I see no basis to require the application to be remitted to a fresh Tribunal. The application will accordingly be remitted to Regional Employment Judge Taylor on the basis that involves a new claim, rather than a relabelling. For that purpose, the parties will be free to put in such evidence and submissions as they wish.