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THE EMPLOYMENT TRIBUNALS

Claimant: Mr. Howlader Shamin
Respondent: Sahara Grill Whitechapel Limited
Heard at: East London Hearing Centre
On: 26 June 2018
Before: Employment Judge Brook

Representation

Claimant: Ms Ephraim- Edejumo, Counsel
Respondent: Mr Tom Muirhead, Employment Law Consultant

JUDGMENT ON APPLICATIONS TO AMEND

On hearing the Claimant's applications to amend the existing claim the Judgment of the Tribunal is that:-

1. The Application to amend the Claim to include a claim in direct race discrimination succeeds;
2. The Applications to amend the Claim to include a claim in disability discrimination, and to include a claim in discrimination on grounds of religion or belief, do not succeed and are dismissed.

REASONS

1. This matter came before the tribunal for case management and determination of three applications of the Claimant to amend the existing Particulars of Claim to add claims in race discrimination, disability discrimination, and discrimination on grounds of religion or belief. The Claimant was today represented by counsel, Ms Ephraim- Edejumo, and the Respondent by Mr Tom Muirhead, an employment

law consultant. Mr Muirhead is on the record as representing the Respondent, and I note he also drafted the Response, but it seems that those instructing Ms Ephraim-Edejumo in today's matters are not yet formally on the record for the Claimant. Ms Ephraim-Edejumo told me that she was instructed late yesterday, had today still to take full instructions from the Claimant, and that whether her solicitors would come on the record for the future conduct of the case would be dealt with in correspondence with the Tribunal & Mr Muirhead, though she anticipated her solicitors would act for the Claimant from this point on.

2. It was also not clear that today's hearing had been listed for applications however, by consent, the Claimant's applications were heard once Ms Ephraim-Edejumo had been given time to take her client's instructions.

3. The Claim is currently framed in unfair dismissal, unpaid wages, unpaid accrued holiday pay, and two weeks pay in lieu of notice. The Claimant, a Spanish citizen of Asian origin, drafted his own ET1 and, as correctly observed by Mr Muirhead in his pleaded Response, the particulars of claim require clarification. The Claimant is not to be criticized for this as no doubt he did his best in difficult circumstances, unfamiliar as he is in such matters. The requirement for the Claimant to provide better particulars was dealt with in the Directions given today, with one exception as will become apparent, and which are as set out at the conclusion of this Judgment. As there is a degree of overlap it was convenient to deal with all three applications together.

The Claimant's Applications

4. Ms Ephraim-Edejumo put her applications in the following way. The Claimant is a Spanish citizen of Asian origin. He was employed as a waiter in the Respondent's restaurant for a little over two years and from the start he was told that, as an employee, he would receive free meals at the restaurant on the days he worked. In the event this meal arrangement did not happen and he was always obliged to pay for his meals, in marked contrast he says to his British Asian colleagues. When the Claimant was sick he was still required to attend work or risk losing his job, he was refused holidays and when he did take time off for brief respite he was not paid.

5. The Claimant believes he was underpaid from the beginning of his employment by comparison to his British Asian colleagues who, he says, suffered none of the adverse treatment of which he complains. He also believes that this underpayment was also less than the statutory minimum wage. He was, he says, sworn at by his manager, Mr Jabran Taj, who would refer to him as the 'Bloody European'. All this Ms Ephraim-Edejumo submitted, except the precise phrase 'Bloody European', appears on the face of the pleaded Claim, save that no express race claim is made in the ET1 and no assertion of race/national distinction is made as between the Claimant and his named comparator, Nazib Ullah, who I am now told is a British Asian. I am also told that all British Asians employees were treated more favourably than the Claimant, which difference in treatment he attributes to his not being British Asian.

6. Ms Ephraim-Edejumo argued that the allegations set out in respect of the wages and holiday pay claims, and which gave the background to the unfair dismissal, also supported the claims in race and disability discrimination. The Respondent, submitted Ms Ephraim-Edejumo, had subjected the Claimant to an course of adverse conduct throughout his employment culminating in his dismissal.

7. Ms Ephraim-Edejumo accepted that none of the following allegations appeared on the face of the existing pleaded claim. That the Claimant suffered from stress, that this was as a result of his treatment at work, exacerbated by the requirement to wear a headset and microphone unit for relaying customers' orders to the kitchen, the using of which headset gave him headaches about which he had complained to his Manager but been ignored. That his GP wrote a letter for his employer stating that regular breaks from using this device would alleviate these headaches and help the Claimant to cope. According to the Claimant his manager ignored this letter and no breaks were allowed. The Claimant regards his headaches, which he described as migraines, as a disability. These same allegations in part underpin his claim in race discrimination though, as accepted by Ms Ephraim-Edejumo, these are fresh allegations of fact going to disability and have not been pleaded.

8. From time to time the Claimant would raise these matters with the Respondent. On the last occasion he raised the wages issue he says he was sworn at by Mr Jabran Taj who told him not to come back. This dismissal allegation is pleaded as is that the Claimant regarded himself as dismissed. He believes his adverse treatment and dismissal was because of being Spanish Asian, because in the eyes of the Respondent he was 'not British'. Ms Ephraim-Edejumo did not address me as to how the Claimant's case in discrimination for religion or belief was put save to say that he was a member of the Labour Party & that when a trade union representative had approached the Respondent on the Claimant's behalf regarding his complaints that person was given short thrift.

Respondent's Submissions

9. For the Respondent Mr Muirhead denied all the allegations. He pointed out that no dates or times are cited by the Claimant, in the pleading or today by Ms Ephraim-Edejumo, and that some, if not most, of the allegations are likely to be out of time. He submitted that the Claim makes no mention of race discrimination, nor in particular any mention of disability or, if the Claimant in fact persisted with this though he noted no real argument was advanced today, was there any mention or basis in the Pleadings or given in argument today for a claim on grounds of religion or belief. What, he asked, was the disability on which the Claimant relies? What was the belief? If the belief be 'membership of the Labour Party' then this was not evident in the original claim, nor did Miss Ephraim-Edejumo really argue for this. The 'belief' claim he submitted must fail, but then so too must the race and the disability claims.

10. Furthermore, when filling out his Claim albeit unaided, the Claimant had ticked the relevant sections dealing with unfair dismissal & claims in wages but had also expressly ticked the box stating he did not have a disability. Nor did he tick the box for race or any other discrimination claim, yet it was plain on what Ms Ephraim-

Edejumo submitted that had he believed he had such claims then all the relevant information was known to him at the time he lodged his ET1.

11. Mr Muirhead accepted that the principles for amendment set out in **Selkent Bus Company v Moore [1996] ICR 836** apply, namely that if facts are pleaded that support a cause of action then the 'lack of a label' should not usually prevent that claim from proceeding. However, quite apart from this he submitted that it was not in the interests of justice to extend time for causes of action not even hinted at in the original claim but, whether familiar or not with the law, as matters of fact would have been known to the Claimant when he made his claim. Whilst there are time issues in respect of the whole claim so far pleaded these, he accepted, are so far probably matters for the final hearing. As matters stood on the applications today there was no basis to grant them, it was for the Claimant to show they were in time and if not, then why time should be extended. He submitted that, as put today, the Tribunal could not be satisfied on these counts and that in any event they had no project of success.

The Tribunal's Findings

12. In my view there are sufficient factual allegations in the existing pleadings to grant leave to the Claimant to amend his Claim to expressly plead race discrimination in respect of those factual allegations already pleaded. In further support of that view I noted that at Section 9.1 of the ET1 the Claimant had ticked the box asking that, if successful in 'claiming discrimination', the Tribunal make a recommendation to the Respondent as to future conduct. That, it seems to me, could not have been asked in respect of disability discrimination as at Section 12.1 the Claimant expressly states that he does not have a disability, but by the same token it indicates an intention to bring claims in discrimination. In my view the only recognisable discrimination on the pleaded allegations of fact is in race discrimination. It makes no difference that the matters complained also 'stand-alone' as claims in unpaid wages and/or holiday pay as that is no bar to a mixed motive claim encompassing discrimination. That said the Respondent is on any view entitled to further particulars of the pleaded allegations and upon receipt of these the Respondent is free to make applications as it may be advised to, though at this stage it is premature to consider strike out or deposit applications until such dates etc are provided. Even then it might well be consistent with the overriding objective that such issues be reserved to the full merits hearing.

13. The Claimant is thus permitted to amend his Claim to plead race discrimination in respect of existing pleaded complaints but is not permitted to add further factual allegations. As the Directions make clear when amending his Claim, the Claimant is to provide further particulars as to time and date in respect of each factual allegation.

Disability & Religion or Belief

14. I was not persuaded that the Claimant ever intended to bring a claim in disability discrimination not least because, save for reference to sick leave being denied, at Section 12.1 of the ET1 he expressly states that he did not have a disability. Nor was I persuaded that there is a good factual basis for bringing such a claim now. For the same reason extending time in the interests of justice to bring

such a claim does not arise. I do not regard the factual basis of such a claim as advanced today to have any prospect of success.

15. As to the application to amend to plead discrimination on the grounds of 'religion or belief' again I do not accept that there was any original intention to bring such a claim, there was no basis at all for this on the existing pleadings, and no plausible basis or argument was advanced today in respect of such a claim. Thus, the only application that succeeds is that in race discrimination in respect of allegations already pleaded.

Further Action

16. The Respondent asked for leave to amend its Response upon receipt of the Amended Particulars of Claim, which leave was granted, along with other directions going to the List of Issues and the future conduct of the matter. These directions are now recorded below, but with one significant change. The Parties doubtless recall that at the end of the hearing, immediately after fixing the trial dates for 13, 14, 15 and 19 February 2019, the Tribunal was evacuated on a fire alarm warning after which there was no need for us to reconvene. Unfortunately, when I came to confirm those trial dates with Listing, these had already been allocated elsewhere. The Trial has therefore instead been listed for 13, 14, 15 and 19 March 2019. If these dates present difficulties then there is provision in the Directions to apply to change these though hopefully this will not be necessary.

Employment Judge Brook

27 July 2018