



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Blewitt

v

Waterloo Manor Limited

PRELIMINARY HEARING

Heard at: Leeds

On: 17 October 2018

Before:

Employment Judge Shulman

Appearance:

For the Claimant:

Mrs N Blewitt (Sister-in-law)

For the Respondent:

Mr A Tucker, of Counsel

JUDGMENT

1. Leave to amend is granted in relation to the claim for Direct Discrimination (Claim (5)) and the claim for Disability arising from Disability (Claim (6)).
2. The claim relating to Failure to make reasonable adjustments (Claim (7)) is dismissed on withdrawal by the Claimant.
3. The claim relating to Failure to make reasonable adjustments (Claim (2)), the claims for Direct Discrimination (Claim (5)) and Disability arising from Discrimination (Claim (6)) shall go through to a full hearing, subject to time issues.
4. The claims for Failure to make reasonable adjustments (Claims (3) and (4)) are struck out.

REASONS

Introduction

1. This is an application by the Claimant to amend his claim form by adding three new claims and for the Tribunal to consider strike out/deposit orders in relation to the discrimination claims (of which at the outset of this hearing there were six) (discrimination claims).

2. In addition to the discrimination claims there are claims of unfair dismissal and breach of contract (non-discrimination claims). The parties have informed the Tribunal that it was not their understanding that the non-discrimination claims should be the subject of the strike out/deposit order applications referred to in paragraph 1. above. Employment Judge Keevash made the order convening this hearing and that order does not separate the discrimination claims from the non-discrimination claims. Therefore, the Tribunal will need to clarify the position with Employment Judge Keevash so as to be clear what he intended. If he agrees with the parties' intention as set out above no further action will need to be taken in relation to the non-discrimination claims before any directions or full hearing. If Employment Judge Keevash disagrees, the Tribunal will consider next steps in relation to the non-discrimination claims. The parties will be notified in either event.

Issues

3. The issues are set out in paragraph one above.

The Law

4. Amendment
Leading case on amendment is **Selkent Bus Co. v Moore [1996] ICR 836 Court of Appeal**. It is clear from that case that when considering leave to amend the Tribunal has a wide discretion but the case gives tribunals guidance as to how to exercise that discretion. Mr Tucker for the Respondent has, in particular, raised the helpful rule that:
- (1) amendments designed to alter the basis of an existing claim but without purporting to raise a new distinct head of claim are one type of amendment;
 - (2) Amendments which add or substitute a new cause of action but one which is linked to or arises out of the same facts as the original claim (re-labelling) form a second; and
 - (3) Amendments which add or substitute a wholly new claim or cause of action which are not connected to the original claim represent the third type.
5. Strike out
The rules for striking out can be found in Rule 37 of the Employment Tribunals Rules of Procedure (Rules). The relevant sub-rule here is that at any stage of the proceedings a Tribunal may strike out all or any part of a claim on the ground that it has no reasonable prospect of success.
6. Deposit Orders
The rules for deposit orders can be found in Rule 39 of the Rules. The Tribunal may, if it considers that any specific allegation or argument in a claim has little reasonable prospect of success, make an order requiring a party to pay a deposit not exceeding £1000 per claim as a condition of continuing to advance that allegation or argument.

Rule 39(2) requires the Tribunal to make reasonable enquiries into what is known as the paying party's ability to pay a deposit and have regard as to any such information when deciding the amount of a deposit.

7. Claims and Time issues

The parties identified the following as claims in this matter:

- (1) Unfair dismissal
- (2) Failure to make reasonable adjustments by failing to postpone the disciplinary hearing.

In relation to this claim and in the claims (5), (6) & (7) below there are time issues, in each case the time starting to run on 13 February 2018 and probably expiring on 12 May 2018. Mr Tucker has reminded the Tribunal that it would be inappropriate to deal with time issues per se as they should be dealt with separately in due course should it be necessary, but the Tribunal does have to have regard to issues of time when exercising its discretion in relation to the issues in this case.

- (3) Failure to make reasonable adjustments by failing to allow a written appeal to be submitted on the Claimant's behalf.
- (4) Failure to make reasonable adjustments by not allowing Mrs N Blewitt (the Claimant's sister-in-law) to appear at the Claimant's appeal in person.

Claims (5), (6) & (7) are all new claims and they alone are the subject of the application for leave to amend, although all claims apart from the non-discrimination claims are subject to the question of striking out/deposit order.

- (5) Direct discrimination, the reason of the dismissal of the Claimant which is also the subject of a time issue.
- (6) Discrimination arising from disability because the Claimant was not given a fair and reasonable chance to respond to the disciplinary allegations, also subject to a time issue.
- (7) Failure to make reasonable adjustments in that the Respondent did not provide the Claimant with a different timescale to respond to the disciplinary hearing. There is a time issue here but in any case, during the course of the hearing the Claimant withdrew this claim.
- (8) Breach of Contract.

Determination of the issues for leave to amend and strike out.

8. Claim (1) – Leave to amend and strike out do not apply to this claim.

9. Claim (2) – The Tribunal has received no representations as to whether or not this claim should be struck out and it exercises its discretion not to do so. There is also a time issue relating to this claim.
10. Claim (3) – The claim as presently drafted recites a failure to make reasonable adjustments by failing to allow a written appeal to be submitted on the Claimant's behalf. The Tribunal has seen a letter dated 10 July 2018 by which the Claimant is invited to an appeal hearing. He is given a number of alternative ways of this appeal taking place but most relevant to Claim (3) is that the Claimant was given the opportunity to appeal in writing and he elected not to take it up. There was an email dated 18 July 2018 from the Claimant to the Respondent, although Mrs N Blewitt says she drafted it. Although the email does not say so in so many words Mrs N Blewitt told the Tribunal that the intention of that email was not to take part in the appeal hearing. In the circumstances the Tribunal is of the view that the claim can have no reasonable prospect of success and is therefore struck out.
11. Claim (4) – This is drafted as a failure to make reasonable adjustments by not allowing Mrs N Blewitt to appear at the Claimant's appeal in person. The Tribunal has seen the disciplinary policy of the Respondent. At paragraph 4.8 it makes clear that staff members (which would include the Claimant for these purposes) should be informed that they are entitled to be represented by their union representative, a representative from their professional body or a staff colleague (for emotional support only). The staff colleague will be allowed to speak at the meeting but not to answer questions on behalf of the staff member. More importantly the policy states that no other form of representation is permitted. Mrs N Blewitt tells us that there were extenuating circumstances for allowing her to appear at the Claimant's appeal in person. She maintains correctly that the Claimant was not a member of a union or professional body and indeed did not know a staff colleague. There were other alternatives provided to the Claimant in the Respondent's letter dated 10 July 2018 should the Claimant have wished to have avail himself of them, and in particular, the Claimant could and Mrs N Blewitt could on his behalf, put in an appeal in writing. It is the view of the Tribunal that this claim has no reasonable prospect of success and is therefore struck out.
12. Claim (5) – It is probably helpful here, although it also relates to Claims (2) and (6) to visit the disability of the Claimant. Though Mr Tucker did not concede disability as he was particularly concerned to consider the evidence around how long the impairment was likely to last he did concur in the identification of the disability type namely, sclerosis of the liver, caused by alcohol consumption, which in turn was caused by long term depression. Mrs N Blewitt referred the Tribunal to an occupational health report dated 10 April 2014, which appears at pages 72 – 76 of the bundle and drew the attention of the Tribunal to the top paragraph of page 73 of the bundle. Additionally, she drew the Tribunal's attention to page C39, which is an indefinite sick note for the Claimant, dated 8 June 2018, relating to alcoholic sclerosis of the liver. Claim (5) is the first claim where the Tribunal has to consider leave to amend and the Tribunal is of the view that this amendment falls into the second category referred to at paragraph 4. above. Indeed, there is a reference to it in the original claim. There is a clear conflict on the evidence in relation to this claim in relation to a phone conversation which is alleged to have taken place between the Claimant's wife and the Respondent and there is also an allegation about a backdated letter. The Tribunal does not feel able to refuse leave to amend

in the absence of these conflicts being tested at a full hearing and for that and the same reasons in relation to striking out leave is given to amend claim (5) and the Tribunal will not make an order striking it out. There is also a time issue in relation to this claim.

13. Claim (6) – Again this is in the middle category, as referred to in paragraph 4. above and the Respondent accepted that leave should be given to amend and in the circumstances, it is not appropriate for the Tribunal to consider strike out. There is also a time issue in relation to this claim.
14. Claim (7) – As the Tribunal has already recognised this claim has been withdrawn by the Claimant.
15. Claim (8) – This is a claim for breach of contract and is not presently subject to the consideration of the Tribunal.

Determination of the issues relating to a Deposit Order

16. The Tribunal has made enquiries into the Claimant’s ability to pay a deposit. Those yield that he is in receipt of a small pension but not presently any benefit and does not have disposable income or capital to meet any deposit order and in the circumstances even if the Tribunal were to find that a deposit order would otherwise be appropriate no order will be made.

Summing Up

17. Leave to amend is given in relation to claims (5) and (6), claim (7) has been withdrawn, to go through to a full hearing are claims (2), (5) & (6), subject to time issues, and struck out are claims (3) & (4).

Case management

18. The Tribunal would ordinarily consider matters of case management at the end of a hearing such as this but in view of the Tribunal’s comments at paragraph 2 it is thought to be more sensible to await Employment Judge Keevash and there will also be, if appropriate, the question of a Preliminary Hearing for time issues to consider.

Employment Judge Shulman

Dated 2nd November 2018

For the Tribunal:

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