



EMPLOYMENT TRIBUNALS

Claimant: Mr A A Dahou

Respondent: J W Lees & Co (Brewers) Ltd

Heard at: Manchester

On: 11 June 2018

Before: Employment Judge Hill

REPRESENTATION:

Claimant: Mr Henry, Counsel

Respondent: Mrs K Hodson, Adviser

JUDGMENT ON PRELIMINARY HEARING

1. Following a preliminary hearing held on 9 April 2018, today's hearing was listed the purpose of which was to:

- A. To determine whether or not the claimant is required to amend his claim in order to pursue a complaint of harassment related to disability;
 - a. If so, to determine whether or not the amendment should be granted;
- B. To consider any dispute about the admissibility of the audio-recorded conversations, and to determine such a dispute if it is capable of being determined before the final hearing;
- C. To consider whether expert medical evidence is necessary and, if so, what case management orders are required;
- D. To clarify the issues; and
- E. To make further case management orders.

A. Amendment Application

2. The Claimant conceded that the amendments sought were not merely a relabeling exercise and that the allegations amounted to a new claim of harassment requiring an amendment.

3. The allegations relied on are set out in paragraph 8 of the 'Amendment to Particulars of Claim' (page 73A of the Tribunal file). The Claimant set out that all allegations/events that took place after 16 November 2017 were capable of being in time at the date of the ET1.
4. Helpfully, Mr Henry, for the Claimant, divided the allegations into 3 categories for the purposes of this application and the Respondent agreed with this categorisation of the allegations/events.
5. Category 1 - Paragraph 8 (i). Events that happened in 2014 relating to Mr Hugh Smith that would require oral evidence to be given by both the Claimant and Mr Smith.
6. Category 2 - Paragraph 8 (ii) and the first 3 bullet points of (iii). All these allegations happened before 16 November 2016 so were out of time at the date the ET1 was submitted. These events however, are statements of fact and the first three bullet points of (iii) are matters that are referred to directly in the transcript of recordings so there are no evidential issues, although they are out of time.
7. Category 3 – Paragraph 8 (iii) bullet point 4 to the end. These allegations/events would have been in time at the date of the ET1 and the evidence in respect of these incidents forms part of the evidence to be determined by the Tribunal in respect of the Unfair Dismissal Claim and reasonable adjustment claim.
8. The Claimant reminded the Tribunal that at the date the ET1 was submitted the Claimant was not legally represented and that there had been a 'stay' in place from May 2017 until 23 February 2018. A Preliminary Hearing was listed for 9 April 2018 where the Claimant made his application to amend.

Submissions

9. The Claimant argued that when a Tribunal is considering an application to amend where it is not merely a relabelling exercise that it is required to consider the balance of hardship or injustice test and where allegations/events are out of time to give consideration as to whether time can be extended. In this case the test of considering whether to extend time is whether it is just an equitable to do so.
10. In respect of the test of hardship and injustice the Tribunal is required to consider the injustice that would be caused to the Claimant against the hardship that could be caused to the Respondent in allowing the amendment. The Claimant accepted that the category 1 allegations/events would indeed cause greater hardship to the Respondent than the category 2 or 3 allegations/events because of the need for oral evidence relating to events that occurred in 2014/2015. However, the Claimant argued that exchange of witness statements had not yet taken place this would not disadvantage the Respondent.
11. In respect of the category 2 allegations/events the Claimant argued that the evidence was not something that was in dispute. The transcript of the recordings and now been produced and given to the Respondent, so it would be the case that the evidence itself was not in dispute but rather 'why said' rather than 'what said' and this was an issue that could easily be dealt with in cross examination.

12. The category 3 allegations/events, the Claimant argued, were allegations/events that would need to be dealt with in any event in the context of the other claims already before the Tribunal. The matters raised in these allegations go directly to the claims of unfair dismissal and failure to make reasonable adjustments.

13. Therefore the Claimant submitted that the evidence in both category 2 and 3 would be put in evidence at the substantive hearing and that the Tribunal will be required to consider the evidence in any event. It cannot therefore be argued that amending the claim to include harassment on these points would cause any hardship to the Respondent, but that the disadvantage in injustice to the Claimant would be great in that his claim for harassment would not be heard and would go to remedy.

14. The Respondent argued that in respect of the category 1 allegations/events that the disadvantage would be substantial and that the Claimant had never raised the allegations at all during his employment and related to events 4 years ago. The Respondent submitted that it has a grievance procedure that the Claimant did not avail himself of and further he never raised any concerns during the dismissal process or indeed the appeal hearing. The Respondent had no records from 2014 in regard to these allegations and further that the amended particulars were still vague and lacked detail for example who, what, where and when. The Respondent argued that to allow the amendment in respect of the category 1 claims would cause the respondent substantial disadvantage.

15. The claimant stated that the reason no grievance was raised was because he was trying to keep his job.

16. In respect of category 2 allegations/events the Respondent conceded that these matters were in the transcripts and were a matter of fact and not disputed but argued that the claims the evidence goes to is in respect of the unfair dismissal and reasonable adjustment claims and there was no need for a further harassment claim. The Respondent argued that the principal was the same in respect of the category 3 claims as well.

17. The Respondent further argued that the merits of the amendment were low and that the allegations/events relied upon do not fulfil the definition of harassment but merely go to the reasons behind the dismissal and or reasonable adjustment claims.

18. The Respondent said that the right way to deal with the merits of the harassment claim was for a full panel to determine unless the claim was absolutely hopeless.

The Law

19. When exercising any power under the 2013 Rules, the tribunal must seek to give effect to the overriding objective, Rule 2, dealing with cases fairly and justly and so far as practicable –

- (a) ensuring that the parties are on an equal footing;

- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

20. In *Selkent Bus Company v. Moore* [1996] ICR 836, guidance was given on whether or not to allow an application to amend. The overarching principle was stated by Mummery J paragraph (4) (p843):

“Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.”

21. The case also set out a non-exhaustive list of factors relevant to the Tribunal in exercising its discretion:

- (a) the nature of the amendment;
- (b) the applicability of time limits; and
- (c) the timing and manner of the application.

Time Limits

22. In *Selkent Bus Company v. Moore*, Mummery J also observed that:

“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...”

23. Although the time limit point is an important factor, and potentially a decisive one, it is not an absolute bar, even where the amendment introduces a new cause of action.

24. If the proposed amendment introduces a complaint that is out of time, the tribunal should consider whether the time limit ought to be extended, applying the relevant statutory test (“reasonably practicable” or “just and equitable”).

25. Amendment disputes are usually decided at a preliminary hearing. They often involve historic discrimination or detriment going back several months or years prior to the claim. There will be a dispute as to whether the majority of the incidents formed part of an act extending over a period. These disputes are fact-sensitive and, where reasonably arguable, ought to be determined at the final hearing: *Arthur v. London Eastern Railway* [2006] EWCA Civ 1358 and *Aziz v. FDA* [2010] EWCA Civ

304. In such cases, it is now reasonably clear that the tribunal may allow the amendment and leave the time limit point to be determined at a later stage.

Timing and manner of application

26. An application for an amendment should be made in a timely manner. Although not specifically argued by the Respondent I am satisfied that the Claimant made an application to amend as soon as was reasonable after the stay on proceedings had been lifted and after the benefit of legal advice.

Tribunal Orders

27. The Tribunal orders that the claim be amended to include a claim for harassment on the basis of category 2 and 3 allegations/events.

28. Category 1 type claims are significantly out of time and the hardship/disadvantage to the Respondent outweighs the benefit to the claimant. The Respondent had no knowledge of these allegations prior to the amendment application and the Claimant had not raised them during the course of his employment or included them in the ET1. The respondent is therefore a significant disadvantage in that it has had no opportunity to investigate the allegations that go back at least 4 years.

29. In respect of category 2 and 3 claims much of the evidence is known to the respondent and will be used in evidence to support the claims of unfair dismissal and reasonable adjustments and will therefore be adduced in order for the Tribunal to determine liability on the existing claims. I therefore find that the disadvantage to the claimant in not allowing the amendment outweighs the disadvantage to the Respondent.

30. I have considered whether the time limit point in respect of category 2 and 3 claims and consider that it is just and equitable to extend time in respect of category 2 claims. There is no dispute between the parties regarding the facts and it will be for a full tribunal to consider whether the events amount to harassment.

B. Audio Recording

31. The parties had already agreed the admissibility of the audio recording. Transcripts had been made and exchanged.

C. Expert Evidence

32. The parties had agreed that expert evidence was not required.

D. The Issues

33. The parties agreed the following issues were to be determined by the Tribunal:

Unfair Dismissal (section 98(4) Employment Rights Act 1996)

Did the respondent act reasonably taking into account all the circumstances (including the size and resources available to it) in dismissing the claimant on grounds of capability?

Disability Discrimination

(1) *Direct discrimination – section 13*

Did the respondent treat the claimant less favourably than it would others by dismissing him/placing another employee into his role on a permanent basis?

(2) *Failure to make reasonable adjustments – section 20(3), (4) and (5)*

Did the respondent fail to take reasonable steps so far as the PCP was concerned for the claimant to undertake his normal contractual duties which the claimant shall state placed him at a substantial disadvantage compared to his non-disabled colleagues?

The following adjustments are relied upon from 20 April 2014 until his dismissal:-

- Failure to consider a different place of work;
- Failure to delegate parts of existing role;
- Failure to offer alternative role;
- Failure to offer lighter duties;
- Failure to alter shift patterns/rotas;
- Failure to obtain appropriate medical advice in a timely manner;
- Failure to undertake appropriate workplace assessment/obtain occupational health advice/report in timely manner;
- Failure to provide appropriate training and support;
- Failure to alter layout of kitchen to accommodate his disability (section 20(4)); and
- Failure to adopt equipment and provide additional auxiliary aids (section 20(5)).

The claimant relies upon a hypothetical comparator.

(3) *Harassment – section 26*

Did the respondent engage in unwanted conduct as set out at category 2 or 3 (above) related to the claimant's disability that had the purpose of effect of:-

- (a) violating the claimant's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

E. Case Management Orders

34. By or before 4.00 pm on 25 June 2018 the parties shall send each other a list and copies of all the documents in their possession relevant to this case and on which they intends to rely upon at the final hearing.

35. By or before 4.00 pm on 9 July 2018 the Respondent shall prepare and produce the bundle of documents with an index at the front and each page numbered consecutively and send a hard copy to the Claimant. The Respondent shall produce sufficient copies for use by the tribunal on the first day of the hearing.

36. By 4.00pm on 6 August 2018 the parties shall exchange witness statements for each person giving evidence to the Employment Tribunal. Each statement should be signed and dated and should include all the evidence the parties intend to rely upon. Each party should bring sufficient copies to the hearing.

37. By 4.00pm the Claimant shall produce an updated schedule of loss and send a copy to the Claimant. The Claimant shall bring sufficient copies for use at the full hearing.

Employment Judge Hill

Date 11 July 2018

JUDGMENT AND ORDERS SENT TO THE PARTIES ON

20 July 2018

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.