



## EMPLOYMENT TRIBUNALS

Claimant

Mr Y Sharafeldeen Abdelrh

v

Respondent

Asda Stores Limited

### RECORD OF AN ATTENDED PRELIMINARY HEARING

Heard at: Leicester

On: Thursday 13 December 2018

Before: Employment Judge Hutchinson (sitting alone)

#### Appearances

For the Claimant:

Dr Ibakakombo, Lay Representative

For the Respondent:

Ms K White of Counsel

## JUDGMENT

The Employment Judge gave judgment as follows:-

1. The application made by the Claimant to amend his claim is refused.
2. There will be a further Preliminary Hearing which will be heard by an Employment Judge sitting alone at the **Tribunal Hearing Centre, 5A New Walk, Leicester LE1 6TE on Tuesday 22 January 2019 at 10:00 am** or as soon thereafter on that day as the Tribunal can hear it. It has been given a time allocation of one day. The matters to be determined are: -
  - 2.1 Whether at the relevant time the Claimant suffered from a disability as defined in Section 6 of the Equality Act 2010.
  - 2.2 Whether any of the claims of disability discrimination are out of time and to determine whether the Tribunal has jurisdiction to hear such claims.

## REASONS

#### Background to this hearing

1. The Claimant presented his claim to the Tribunal on 11 January 2018. He said that he was employed by the Respondents as a Warehouse Operative and had been since 3 August 2009. He claimed disability discrimination only.

2. At the time he was represented by Mr Ian Lewis of Bray and Bray Solicitors in Leicester.

3. He said that he suffered from a long term chest infection problem and that he had also contracted a long term stomach problem whilst on sabbatical leave. He said that both those ailments amounted to physical impairments which amounted to a disability.

4. He also mentioned that he was suffering from a severe stress reaction and had not been able to return to work since the end of August 2017.

5. His complaint was that: -

5.1 The company had withheld his sick pay.

5.2 His membership of the Respondent's share scheme had been cancelled.

5.3 The Respondent's had refused to consider allocating work and duties to the Claimant which would not require him to bend.

6. He complained that these amounted to: -

- Direct disability discrimination
- Discrimination arising from disability
- A failure to make reasonable adjustments

7. The Respondent filed a response to the claim on 18 April 2018. They denied that the Claimant suffered from a disability and/or that the Claimant had been subjected to disability discrimination. They also said that the Claimant's claims were out of time and that the Tribunal did not have jurisdiction to hear the complaints.

8. On 29 May 2018 the Claimant wrote to the Tribunal to say:

"I write to make an application for the Tribunal to consider my complaints about disability claim as well as the same complaints of race discrimination because today 29 05 2018 at the Coventry Central Library, I met a former colleague named Senay Zerehannes who explained to me the bad treatment he's receiving from managers at work which is similar to my problems, and now I understand the reason of the treatment I received was because I am black Africa."

9. At a telephone case management Preliminary Hearing conducted by my colleague Employment Judge Clark he identified the issues in respect of the disability discrimination claims. He ordered the Claimant to provide medical records in respect of his disability. He also identified that the current claim raised allegations arising in: -

- November 2016
- April 2017
- May 2017

10. All those allegations were prima facie out of time and the Claimant would have to satisfy the Tribunal that it is just and equitable for the time limit to be extended.

11. He decided that there should be a Preliminary Hearing to determine: -

- Whether the Claimant's application to amend his claim should be granted to add claims of race discrimination
- Whether the Claimant at the relevant time suffered from a disability
- Whether the claims or any of them were matters which the Tribunal had jurisdiction to deal with because they appeared to be out of time.

12. He also ordered that the Claimant should have the benefit of an Arabic interpreter at the Preliminary Hearing although the Claimant does generally understand English and the Tribunal was assisted at the hearing today by Mr Omar Lamarti, a Court appointed interpreter.

13. The attended Preliminary Hearing took place on 19 September 2018 before my colleague Employment Judge Brewer. At that hearing the Claimant arrived with a disability impact statement and a large number of medical records. He had not provided these documents to the Respondents in advance of the hearing. The Claimant had therefore failed to comply with the orders that Employment Judge Clark had made on 29 June 2018 about producing the impact statement and his medical records.

14. Employment Judge Brewer was left with no alternative but to adjourn the Preliminary Hearing to today's date and ordered the Claimant to pay a contribution of £500.00 towards the Respondent's costs.

15. Employment Judge Brewer ordered the Claimant to comply with the orders made at 1A, 1B and 1C of the orders by Employment Judge Clark by 5 October 2018.

16. The Claimant did not comply with that order. The Respondent's applied to strike out the claims but this was refused and the Claimant eventually provided his impact statement and other documents on 16 November 2018.

17. Also on that date the Claimant produced further particulars of his claims.

18. On 5 December Dr Ibakakombo wrote to the Tribunal to attach further better particulars of his claim. These particulars of claim raise matters that had not been raised at all in any previous claim form submitted by the Claimant.

### **At the hearing today**

19. The Claimant appeared with his representative Dr Ibakakombo and the Respondent was represented by Ms White of Counsel. We first dealt with the issue of the amendment application. There was a bundle of documents provided by the Respondents which appeared to be agreed and there was a supplemental bundle of documents produced by Dr Ibakakombo. Where I refer to page numbers it is from those bundles of documents.

### **The Claimant's position**

20. Dr Ibakakombo submitted as follows: -

20.1 That the race discrimination matters had already been pleaded.

20.2 They required the same evidence as the existing claim of disability discrimination.

20.3 There was no prejudice to the Respondents if I allowed the amendment.

20.4 The same witnesses would give evidence which would cover the other complaints.

20.5 The Claimant had only realised on 29 May 2018 that he had suffered race discrimination as well as disability discrimination.

20.6 I should allow him to present what Dr Ibakakombo described as a good case of direct race discrimination.

21. Dr Ibakakombo produced to me the case of **New Star Asset Management Holdings Limited v Evershed** [2010] EWCA Civ 870 which he said supported his contention that I should grant the amendment to allow him to proceed with a claim of race discrimination.

### **The Respondent's contentions**

22. Ms White pointed out as follows: -

22.1 Until 29 May 2018 the Claimant had not mentioned anything about a claim of race discrimination.

22.2 When he had made his original claim to the Tribunal he had been in receipt of legal advice and as at 11 January 2018 there had been no mention of suffering from race discrimination.

22.3 In the Claimant's letter of 29 May 2018 he had not particularised his complaints.

22.4 The first time that he had particularised complaints of race discrimination were on 16 November 2018.

22.5 These had been further particularised once the Claimant had his current representative on 5 December 2018.

22.6 Although the claimant mentions unfavourable treatment and the persons who he says were perpetrators he names no comparator and even at the hearing today he was not able to properly identify who his comparators were simply saying when questioned that there were 2 colleagues named Katarena and Crowe.

22.7 Time is relevant to my consideration because the race discrimination complaints are hugely out of time.

22.8 Even now the Respondent could not respond to the claims because they have not been particularised as discrimination complaints.

### **The relevant law**

23. Rule 30 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 gives me the power to deal with applications for case management orders which includes the power to allow the Claimant to amend his claim.

24. The case of **Selkent Bus Company Limited v Moore** [1996] ICR 836 gave guidance as to how I should approach applications for leave to amend. The case emphasised that in deciding whether I should exercise my discretion I must carry out a balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Those factors include: -

24.1 The nature of the amendment. Amendments vary from correction of clerical and typing errors to making entirely new factual allegations which change the basis of the existing claim.

24.2 The applicability of time limits if a new claim or cause of action is proposed it is essential for me to consider whether the claim or cause of action is out of time and if so whether the time limit should be extended.

24.3 The timing and manner of the application. I should not refuse solely because there has been a delay in making it. This is a discretionary factor and I must consider the reasons why the application was not made earlier and why it has now been made. In particular whether there has been a discovery of new facts or new information appearing from documents disclosed on discovery.

25. I remind myself that the above-mentioned factors are not an exhaustive list and in particular I can consider such matters as whether on the face of it the claim has reasonable prospect of success.

### **My conclusions**

26. I am satisfied on the balance that it would not be just and equitable to allow the Claimant to amend his claim to add a claim of race discrimination.

27. Even at the stage of this hearing where he appeared represented by an experienced lay representative he could not identify to me why he had said that he had suffered less favourable treatment rather than unfavourable treatment. Until the hearing today he had not named any comparators and it was only when I asked his representative about who his comparators were that he came out with 2 first names only of individuals who he said were his comparators. Apart from not being Black African he could not explain to me why these were appropriate comparators.

28. He still cannot explain to me why he considers that his complaints amount to less favourable treatment than his comparators being unable to identify the particular circumstances of any comparators who he says that he was treated less favourably than.

29. His explanation for the timing of his application was that he had met a former colleague at a library on 29 May and only then realised that he had been discriminated against because of his race.

30. At no stage during the course of his employment has he ever complained that he has suffered from race discrimination either formally or informally.

31. Any claim of race discrimination is entirely a new claim and a new cause of action. It is not simply a relabelling of the current claim as described by his representative. His representative says that the matters are "already pleaded". They are not. They relate to matters that occurred in March/April 2017. They are events that occurred almost 2 years ago.

32. I am satisfied that if I allowed the claim there would be considerable prejudice to the Respondent. Witnesses would have to be asked about a race discrimination complaint which has not been raised with them at any time before by the Claimant. There is no documentary evidence in respect of these complaints and people would have to rely on their memory.

33. The Employment Tribunal works to strict time limits. A complaint of discrimination has to be raised within 3 months of it occurring for good reason. The burden is on the Claimant to establish that it would be just and equitable to extend the time. The Claimant has provided no good reason to me as to why I should extend the time in this case.

34. Whilst the Claimant has some limitations on his understanding of English it is a relevant factor that when he made his claim to the Tribunal on 11 January 2018 he was represented by a solicitor and he had not mentioned to his solicitor at the time that he felt that he had suffered race discrimination.

35. I am satisfied that he only thought about making a claim of race discrimination at the end of May 2018, some 4 months after he had presented his claim and 13 months after the events had occurred.

36. In the circumstances I am satisfied that it would not be in accordance with the overriding objective and the interests for the Claimant to be allowed to amend his claim to add a fresh claim of race discrimination and the application is therefore refused.

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**Employment Judge Hutchinson**

Date: 8 January 2019

Sent to the parties on:

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For the Tribunal:

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