Case No: 2600522/18

EMPLOYMENT TRIBUNALS

Between:

Mr M Jones	**and**	BT Facility Services Ltd
Claimant		**Respondent**

At an Open Attended Preliminary Hearing

Held at: Nottingham

On: Tuesday 11 December 2018

Before: Employment Judge Hutchinson (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Mr S Hall, In-house Solicitor

JUDGMENT

The Employment Judge gave judgment as follows:

1. The application to amend the claim to add complaints of whistleblowing and disability discrimination is refused.

2. The claim of unfair dismissal will proceed to a hearing, which will be heard at the Lincoln Hearing Centre on 8, 11, 13 and 14 February 2019.

REASONS

Background to this hearing

1. The Claimant presented his claim to the tribunal on 27 February 2018. He had been employed by the Respondent from 8 December 2014 until 31 October 2017 as a Continuous Improvement Coach. His claim was of unfair dismissal only.

2. The particulars provided in his claim indicated that he had been dismissed by reason of redundancy and that he did not believe that a redundancy situation existed. He complained that the selection process had not been followed and that the internal appeal and grievance procedures had been maliciously conducted. He said that he had been bullied throughout the process but ignored. The claim was accepted and served on the Respondent.

3. Initially, the Respondent did not file a Response and the Claimant provided a schedule of loss which was dated 18 May 2018. The schedule of loss included the following;
   - loss of earnings
   - job seeking expenses
   - future losses
   - loss of statutory rights
   - uplift for failing to follow the ACAS Code.

   There was no mention of any claim for losses under any other head of claim.

4. A default judgment was made by myself on 13 June 2018 and remedy was listed for hearing on 13 August 2018.

5. On 14 June 2018, the Respondent wrote to the tribunal applying for;
   5.1 an extension of time to file its Response;
   5.2 to set aside the default judgment.

6. Attached to that application was an ET3 which indicated that the Respondent wished to defend the claim.

7. Mr Jones objected to the application to reconsider the default judgment and having received the further comments of the Respondent, I wrote to the parties on 7 July 2018 granting the Respondent an extension of time to provide a Response and setting aside the default judgment made in favour of the Claimant.

8. I was satisfied that;
   8.1 the Respondent had not received the original ET1;
   8.2 they had been prompt in dealing with the matter once they became aware of the ET1;
   8.3 they had reasonable prospects of defending the claim;
   8.4 it was in the interests of justice to grant an extension of time to allow them to defend the claim.

9. In then listed the matter for a case management preliminary hearing, which took place on 9 August 2018.

10. On 7 August 2018, the Claimant filed his agenda for case management. He now said that he wished to put forward a claim of disability discrimination, as well as unfair dismissal. He said in his email;
    "*The claimant accepts disability discrimination was not clearly ticked on the original ET1 form but hopes it will be considered, he did tick "if claiming*

discrimination, a recommendation). In the claimant's defence he has been doing his best to understand legal legislation acts but has today obtained qualified legal advice".

11. The Claimant, other than referring to this in the agenda, did not provide any details of his discrimination claim nor did he make an application in writing to amend his claim, other than that email.

12. At the Telephone Case Management Preliminary Hearing on 9 August 2018, Mr Jones confirmed to me that he wanted to add to his claim claims of disability discrimination. He said to me that he was suffering from anxiety and depression and that he had been prescribed medication by his doctor in September 2017 just before his dismissal. It appeared from our discussion that he was claiming;
    - direct disability discrimination
    - discrimination arising from disability.

13. I ordered the Claimant to provide particulars of his discrimination claim and made further directions for case management orders, including listing the hearing.

14. On 13 August 2018, the Claimant wrote to the tribunal. In that letter, he expanded his claims further. He claimed;
    - direct disability discrimination
    - harassment
    - victimisation
    - breach of contract
    - whistleblowing.

15. On 29 August 2018, the Respondent filed its amended Response/Ground of Resistance. They applied for a preliminary hearing to consider these matters. They objected to the application to amend the claim on the following basis;
    15.1 the original claim was for unfair dismissal only;
    15.2 at the preliminary hearing on 9 August 2018, the Claimant stated he wished to add claims of disability discrimination. He had made no reference to any other additional claims;
    15.3 it was submitted that the Claimant should not be permitted to amend the claim to include those additional matters at this late stage in the proceedings. It was pointed out that many of the issues were out of time and that it would not be in the interests of justice or fairness to allow him to do so to avoid the normal rules of limitation.

16. On 9 September 2018, the Claimant responded to this document. This document was 63 pages long and amounted to a further extension of the Claimant's claims. In this document, the Claimant alleged that he was simply relabelling his previous claims and providing further details to them.

17. A preliminary hearing was due to take place on 12 November 2018 to consider the amendment application but this had to be postponed because of the lack of judicial resources and the hearing was reconvened to take place today.

18. On 3 December 2018, the Claimant wrote again to the tribunal setting out written representations detailing his further and better particulars of claim. He said in that letter that he had for the first time been able to take legal advice. Again, the letter sets out further particulars of his whistleblowing claim. In particular, he now set out 7 protected disclosures which had not been set out before and a large number of detriments that he said he had suffered as a result of making those disclosures.

19. Mr Hall for the Respondent provided me with a letter that the Respondent had received on 6 August 2017 from Chattertons Solicitors who had been instructed by the Claimant just prior to his dismissal. It was clearly not correct that he had taken legal advice for the first time only at the end of November 2018 about the matters he was complaining about.

20. That letter from his solicitors complained only about his unfair redundancy. There was no mention of any whistleblowing claim or indeed any claim for disability discrimination.

The hearing today

21. I first of all heard from the Claimant who said to me;
    - it was in the interests of justice to allow him now to amend his claim;
    - he had been diagnosed with suffering from stress and anxiety;
    - it would in the interests of justice to allow him to amend his claim and to have all his matters dealt with at the hearing.

22. Mr Hall pointed out;
    - he had taken legal advice prior to his dismissal and at no stage had mentioned any issue relating to discrimination or whistleblowing;
    - the first mention of any whistleblowing claim had been made in his letter of 13 August 2018. Even then it only referred to one protected disclosure and now there were seven;
    - the discrimination claim was only mentioned on 7 August 2018, more than 9 months after his dismissal;
    - this was not a relabelling exercise because he had not mentioned these matters in his claim at all;
    - his claim of unfair dismissal was a straightforward one of being unfairly selected and now he wanted to amend his claim substantially;
    - the matter had already been listed for hearing and to hear these claims would take considerably longer than the 4 days that the case is currently listed for;
    - looking at his claims as mentioned now, there will be considerable prejudice to the Respondent who would have to investigate matters that had not been even considered before.

The law

23. I have a broad discretion to allow amendments at any stage of the proceedings under rule 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

24. When exercising my discretion, I must have in mind rule 2 of the Regulations, namely the overriding objective. That provides;
"*The overriding objective of these rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, 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.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

25. The leading case of ***Selkent Bus Co Ltd v Moore [1996[ICR 836 EAT*** provides guidance as to how tribunals should approach application for leave to amend. Mr Justice Mummery explained relevant factors would include;
- the nature of the amendment;
- the applicability of time limits;
- the timing and manner of the application.

26. I must always carry out a careful balancing exercise of all the relevant factors. There may be other relevant factors other than those referred to above. I have to have regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment.

My conclusions

27. I am satisfied that the relevant factors in this case are as follows:

27.1 The original claim was for unfair dismissal only. There was no claim for whistleblowing detriment or disability discrimination. This is not a case of relabelling or providing further particulars or making minor amendments to the claim. These are entirely fresh claims of a completely different character to a claim of unfair dismissal.

27.2 The Claimant had been dismissed on 31 October 2017 and submitted his claim to the tribunal on 27 February 2018. Whilst his claim referred to being bullied, it could not possibly be interpreted as being a claim of

anything other than unfair dismissal. The first mention of disability discrimination was on 7 August 2018 and the first mention of whistleblowing was on 13 August 2018. These matters are raised as fresh matters which had not been referred to before and were more than 9 months after he had been dismissed from his employment. I have to bear in mind time limits and these claims are well out of time.

27.3 I take into account the timing of the application, which was made after the case had been listed for hearing in February 2019. If I granted the application, the hearing would take considerably more than 4 days. The case would have to be postponed whilst the Respondent carried out an investigation into these entirely fresh allegations. The case would not be heard therefore until later in 2019, almost 2 years after the Claimant's dismissal.

27.4 I take into account the manner of his application. I am satisfied that the Claimant did have access to legal advice. He had taken legal advice from solicitors before his dismissal and in their letter to the Respondent, they had made no mention at all of any claims other than unfair dismissal. There was no mention of disability discrimination or whistleblowing. The Claimant had referred to taking legal advice in his letter on 7 August 2018 but has only provided his further particulars of claim on 3 December 2018, just a matter of days before this hearing.

27.5 I am satisfied the new claims are extremely weak. I am satisfied that the Claimant would have great difficulty in convincing a tribunal that his alleged disclosures were protected disclosures; that he had suffered the detriments that he says that he suffered or that there was any connection between the disclosures and the detriments.

27.6 Most importantly, I am satisfied that there will be substantial prejudice to the Respondent, who would have to investigate matters that were not raised during his employment and only now raised more than 12 months after his employment had ended.

27.7 I am satisfied that the prejudice to the Respondent fair outweighs the prejudice to the Claimant, who will still have his claim of unfair dismissal that will be determined in February.

28. For all these reasons, the application to amend his claim is refused.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Respondent will be responsible for the preparation of the bundles. The agreed bundle will be forwarded to the Claimant by **21 December 2018**.

2. The parties are to exchange witness statements by **18 January 2019**.

3. The Respondent will be responsible for delivering 2 copies of the bundles and 2 copies of the witness statements to the Nottingham Employment Tribunal by **4 pm on 7 February 2019**.

Listing the hearing

1. I confirm that the claim will be heard by an Employment Judge sitting alone. The first day will be a reading day and will be conducted at the **Nottingham Hearing Centre on Friday 8 February 2019**. The parties will attend the **Magistrates Court, 358 High Street, Lincoln LN5 7QA on Monday 11 February 2019, Wednesday 13 February 2019 and Thursday 14 February 2019** at 10 am each day. A total of 4 days has been allocated to hear the evidence and decide the claim.

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Employment Judge Hutchinson

Dated 15 January 2019

Notes

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so".* If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Order sent to Parties on

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