Case Number: 2374916/2011

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Smith	**v**	Pimlico Plumbers

PRELIMINARY HEARING

Heard at: **London South Employment Tribunal** **On:** **26 November 2018**

Before: **Employment Judge Martin**

Appearances For the Claimant: **Mr Stephenson - Counsel For the Respondent:** **Mr Smith – Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that

RESERVED REASONS

1. This was a hearing to determine whether the Clamant needed to amend his claim and if he did whether an amendment should be granted. Both parties gave submissions which I have considered. I reserved judgment to consider the previous orders made at preliminary hearings in 2011 before this case was stayed pending the appellate process regarding the worker status issue.
2. This case has a long history having started in 2011 with judgment of the Supreme Court on the employment status issue, given in June 2018. A brief chronology (relating to the issues only) is below:

1 August 2011 Claim presented

21 October 2011 Preliminary hearing: EJ Emerton. The order sets out that the issues have been agreed and are '*as set out in the track-changed draft list of issues emailed by the Claimant to the Tribunal on 20*

October 2011, subject to the addition of issues referred to in a further email that day".

23 January 2012 Preliminary hearing: EJ Corrigan. Promulgated on 17 April 2012. This hearing found that the Claimant was not an employee but was

	a worker of the First Respondent. This decision was appealed up to the Supreme Court.
31 May 2012	Preliminary hearing: EJ Baron. Case management orders were made. In relation to the issues it orders that the parties agree a list of factual and legal issues to be determined by 30 November 2012.
8 October 2012	Leave to appeal on preliminary matter granted
29 October 2012	Proceedings stayed pending appellate process

3. The amendments that the Claimant seeks to make are to include the following detriments ('the disputed detriments'):
    a. Failing to pay sick pay in January 2011 to May 2011
    b. Dominic Ceraldi refusing to reduce his hours on 21 April 2011 and 3 May 2011
    c. R1's refusal to allow the Claimant to go home on 28 April 2011 due to feeling unwell
    d. Suspending the Claimant on 3 May 2011
    e. Dismissing and/or terminating the Claimant on 3 May 2011
    f. Removing the company van and work equipment from the Claimant's drive on 4 May 2011
    g. Failing to offer and/or refusing to allow the Claimant to work on and after 4 May 2011.

Is an application to amend required?

4. The Claimant had written outline submissions and the Respondent relied on its letter to the Tribunal dated 4 October 2018 which sets out the Respondent's position on the amendment issue. There were other documents in the bundle setting out the parties' respective positions.

5. <u>The Claimant's submissions</u>
    a. The Claimant's primary position is that no amendment is necessary. In support of this the Claimant submitted that the facts giving rise to the proposed amendment are in the body of the claim form.
    b. The Claimant referred to the ET1 particulars of claim paragraph 24 in which reference is made to the Claimant having a heart attack and not getting paid whilst he was on sick leave. This is one of the detriments that the Claimant relies on and is subject to this application.
    c. Paragraph 26 refers to the Claimant requesting that he reduce his hours to three days per week which was refused by Mr Ceraldi. There was reference to paragraph 29 when his request to reduce his working hours was refused again. These are detriments that the Claimant relies on and are subject to this application
    d. Further reference was made to paragraph 27 when the Claimant was told he could not go home (he requested this as he felt unwell). This is one of the detriments that the Claimant relies on and is subject to this application.

e. Paragraphs 30 – 32 refers to the removal of his company van. This is one of the detriments that the Claimant relies on and is subject to this application. Paragraph 32 refers to his suspension from work.

f. The Claimant submitted that it was important that paragraph 43, which relates to remedy, says compensation was sought on various grounds including detriment on grounds of disability, was considered.

g. The Claimant's primary position is that is it clear, when one takes the ET1 as a whole, that the detriments identified include the dismissal and the detriments which are the subject of the hearing today. The Claimant says on this basis there is no need for an application to amend. The Claimant submitted that the normal course of events if matters in a claim form were unclear was for the Respondent to request additional information. The submission was that the Respondent did this in the body of its proposed list of issues and the Claimant replied demonstrating that the Respondent had these detriments in its mind at the time the ET1 was presented. These items it was submitted are the detriments in dispute at this hearing.

6. <u>The Respondent's submissions</u>

a. The Respondent submitted that an application to amend was required for the disputed detriments to be included in the claim. It submitted that there is a fundamental difference between pleading something in particulars of clam which is background information in support of claims e.g. unfair dismissal, and on the other hand saying that the detriments occurred, and they amounted to unfavourable treatment on the grounds of discrimination whether direct, arising etc.

b. It was submitted that it was not for a Respondent to try to discern or distill what the Claimant's subjective intentions had been when the ET1 was presented and that the Respondent responded to claim as pleaded. It was pointed out that the Claimant was represented by specialist solicitors and Counsel throughout including when his claim was presented.

c. The Respondent submitted that it denied the claims in general terms in its response as is common practice. The Respondent specifically denied in the ET3 that the dismissal was unlawful and did not specifically respond to the 7 disputed detriments as this was not how the Respondent understood the claim. If the amendment was permitted the Respondent would have to amend its defence incurring costs and time.

d. The Respondent responded to the Claimant's reference to the request for additional information saying that the request related to the claim as pleaded which did not contain the seven disputed detriments and that it was not asking for additional information in relation to alleged detriments but was asking in relation to the dismissal claim.

e. The Respondent referred to the list of issues which was put forward by the Claimant in 2011 before the case was stayed. Those issues did not include these disputed detriments. The Respondent referred to tab 9 of the bundle, the Claimant's wording in the list of issues and the Claimant's tracked changes made at this time, noting again that the Claimant was legally represented at all stages in the process.

f. The Respondent referred to the structure of the Claim Form noting that up to paragraph 32 is narrative and then there is a specific heading of '***Disability Discrimination'***. Under this heading it was put forward that the allegation is that the Claimant was dismissed for a reason connected with his disability, which the Respondent accepts encompasses discrimination arising from disability. The point being made by the Respondent is that the pleaded allegation is about the dismissal and that this is what the Respondent responded to. The 2011 draft list of issues compiled by the Claimant refers to dismissal and reasonable adjustments thus confirming what his claims were. It was submitted that this was the basis of how the Respondent has dealt with this claim throughout until the preliminary hearing in September 2018 which resulted in this hearing being listed.

g. The Respondent says that the Claimant has illustrated why an amendment is necessary by virtue of the proposed amendments set out in the draft proposed list of issues which constitute a change to the pleaded case, so it is artificial and wrong to say that no amendment application is necessary.

h. The Respondent also responded to the Claimant's reliance on a fall back residual statement in the ET3 which uses the word '*detriment'*. It was submitted that this does not benefit the Claimant as one has to read this in the context of claim as originally pleaded where the primary case for the Claimant was whether he was an employee or worker. The Claimant's case from the original pleading is that his contract was terminated with his primary case being that he was an employee for the purposes of an unfair dismissal claim pursuant to the Employment Rights Act 1996 and that if he was not an employee, he was a worker so terminating was a detriment for which he made a complaint.

i. The Respondent submitted that the case of ***Remploy Ltd v Abbott*** UKEAT/0405/14 held that it was inappropriate and impermissible to seek to introduce new complaints of disability discrimination by the back door, via a list of issues document and the correct approach was to look at the pleadings.

j. The Respondent referred to ***Chandok v Tirkey***, which emphasised that a Claimant's ET1 "*is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Employment Tribunal Rules of Procedure 2013, the claim as set out in the ET1*".

k. The Respondent's case is that it is manifestly clear that an amendment application is required.

7. The Tribunals conclusions on whether an amendment application is required

a. I have considered the submissions from both parties and have carefully read the original pleadings, the previous case management orders and the draft list of issues previously prepared by the Claimant together with the draft list of issues prepared for the preliminary hearing on 18 September 2018 and the documents provided in the bundle.

b. I first considered the original ET1 and particulars of claim. Paragraphs 1 to 21 deal exclusively with the employment status issue. Paragraphs 22 to 32 are under the heading '***Termination of Employment or Engagement***'. Paragraph 22

sets out that the Claimant contends he was "*dismissed unfairly or wrongfully on 3 May 2011 by R1 suspending me from work on no fair or reasonable basis. I was dismissed without notice*". Paragraphs 24 to 32 give a history of what happened in the period from his heart attack leading to the termination of his 'employment' and refer to the seven disputed detriments.

c. The next section has a heading "***Disability Discrimination***" in which the allegations are that the Claimant was dismissed because of his disability or for a reason connected to his disability and that the Respondent failed to make reasonable adjustments by reducing his hours or allowing him to be absent on sick leave to recover.

d. The remainder of the particulars of claim refer to matters not related to this hearing.

e. I accept the Respondent's submission that the original particulars relate solely to the termination of his employment and a reasonable construction is that the only claims are for this, with the references to suspension, no sick pay, the refusal to reduce his hours etc as background to the termination. The Claimant has helpfully set out his claim using headings. These headings make it abundantly clear that the claim relates to the termination of this employment and that there is no claim in the original ET1 of detriment due to disability during his employment. I therefore find that an application to amend is necessary.

The Claimant's application to amend

8. <u>The Claimant's submissions</u>

a. The Claimant submitted that this is no more than a relabelling exercise and that in accordance with the overriding objective it is fairly and justly appropriate to allow the amendment. It was submitted that where the Claimant provided further clarification of his existing claim, it was open to the Respondent to make a request for additional information, but this was not done until recently. It was submitted that the context was important in that in 2012, proceedings were stayed pending resolution of the employment status issues which ultimately went to Supreme Court, and therefore in reality the issues regarding substantive matters are relatively young with the stay only being lifted in August 2018. It was put forward that the Claimant, rightly because of the stay, did not pursue applications regarding substantive issues as this was not in accordance with the overriding objective and the Claimant should not be penalised now.

b. The Claimant made submissions regarding time limits saying that the Claimant should not be criticised and putting forward that there are good reasons to exercise discretion as the balance of hardship lies heavily in the Claimant's favour. If the amendments were not allowed, it was submitted that the Claimant would be denied from bringing meritorious claims. The Claimant's position is that there is no prejudice to the Respondent with the same individual dealing with dismissal and the detriments.

c. The Claimant referred to the case of ***Rawson v Doncaster NHS Primary Care Trust*** UKEAT/0022/08 in which the EAT held that the effect of an amendment is to backdate the new claim to the date on which the original claim form was presented.

d. The Claimant submitted that there are good grounds to extend time as it is just and equitable to do so and that the application was made early in the substantive proceedings before disclosure and before exchange of witness statements.

e. Reference was made to the well-known case of ***Selkent Bus Company v Moore*** [1996] ICR 836, CA in which principles to be exercised when exercising discretion on an application for leave to amend were set out and a summary is below:

   i. 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.

   ii. The Tribunal should take account of the nature of the amendment namely was it a relabelling or an entirely new factual allegation, whether the proposed amendment is minor or a substantial alteration pleading a new clause of action.

   iii. The applicability of time limits is essential for the tribunal to consider, and if it is out of time should time be extended under the applicable statutory provisions.

   iv. The timing and nature of the application is relevant with an application not being refused solely because there has been a delay in making it. It is relevant to consider why the application was not made earlier and was now being made; for example, are there new facts discovered or new information appearing from documents disclosed on discovery.

9. <u>The Respondent's submissions</u>

a. The Respondent submitted that the purported amended grounds of claim are defective as it does not properly explain the claim the Claimant wants to advance. It was submitted that if the Claimant wanted to pursue the detriments, he could have done so when the ET1 was presented and if suddenly became apparent to him or to his representatives in the case management process before case went through the appellate system, this could be addressed in 2011 at any of the preliminary hearings when formulating the list of issues. However, the Claimant formulated the issues exclusively with reference to dismissal. It was submitted that it was unsustainable to say he had just thought of it. The Claimant chose not to amend his claim at that stage.

b. The Respondent referred to the history of this case and referred to the Presidential Guidance on amendments saying that there was no satisfactory explanation as to why this was not addressed earlier. The Respondent referred to the list of issues prepared by the Claimant in 2012 which does not include these proposed detriments and pointed out the amendment shown by tracked changes were made by the Claimant who therefore had addressed his mind to the issues at that time.

c. The burden is on the Claimant to say why this application is begin made now and that explanation is lacking. It was submitted that the Claimant is not a litigant in person but an individual who has had specialist advice from solicitors and Counsel throughout.

d. In relation to time limits, the Respondent referred to the Claimant's submissions in relation to the Rawson case which is set out above. In reply, the Respondent referred to the more recent decision of the Employment Appeal Tribunal in ***Galilee v Commissioner of Police of the Metropolis*** UKEAT/207/16 (decided in 2018) and in particular to paragraph 19 which under the hearing "*My conclusions*" states that Rawson

was wrongly decided and that *"amendments to pleadings in the employment tribunal, which introduce new claims or cusses of action take effect for the purposes of limitation at the time permission is given to amend and there is no doctrine of "relation back" in the procedure of the employment tribunal".*

The Claimant responded to this submission saying that both decisions were decisions of the Employment Appeal Tribunal.

e. The Respondent submitted that in this case, were permission to be granted, it would be granted seven years after the event and that is it not enough just to say it would be just and equitable to extend time, this is against the amendment.

f. In relation to prejudice, it was submitted that if additional allegations of detriment were added, time and money would need to be incurred to replead the defence, to address each detriment, the scope of witness evidence. Whilst Mr Ceraldi would be giving evidence anyway, additional information would need to be added to his witness statement, and an additional witness 'Katy' would need to be called as she is criticised in not allowing the Claimant to go home. This is a new person accused of discrimination and it was submitted that this is a serious matter for her to now be so accused so long after the event. She would need to give evidence as far as she can recall, and this represents a material change to the scope of witness evidence.

g. The Respondent referred to the effluxion of time and that the Respondent is now in the in position where witnesses will be asked to give evidence on oral discussions they had seven years ago. It was submitted that there are factual issues regarding the discussions which those witnesses will be expected to remember specifics of and if they have difficulties, will be held against them by the Claimant. It was submitted this was a material factor where nothing is in writing.

h. The Respondent reminded the Tribunal that it does not have to adopt all or nothing approach. It has discretion to allow some of the detriments and not others.

i. The Respondent submitted that to allow the amendments would have a knock-on impact on the hearing itself, which has been listed for a full merits hearing for three days commencing June 2019. This was listed based on the claims as agreed. It was submitted that if the amendments were allowed to allow additional detriments, this may prejudice the timetable. It was put forward that with robust case management it may be possible to deal with evidence and submissions in three days, but it would be difficult for the Tribunal to give judgment for all issues if claim expanded in existing listing. The three days has been listed for deliberation and judgment. The detriments would add significantly to the hearing as there would need to be cross examination on each point whereas presently the only issue is in relation to the cessation of the relationship between the parties, why it happened and whether it was because the Claimant had a particular disability or something arising from that disability. The amended case would on any analysis be a significant shift in scope of the judicial enquiry.

j. The Respondent submitted that the proposed amendments are not properly analysed by the Claimant, for example, no comparators are identified. In relation to the issue regarding the refusal to pay sick pay which is put forward as a direct discrimination claim, but the Claimant also put forward a positive case that the Respondent did not give statutory rights to its workforce as it regarded them as self-employed independent contractors. The Respondent posed the question of how the Claimant now says the reason is not because of this classification but because he had a specific heart condition. It was submitted that this part of the Claimant's claim was misconceived and not properly set out. The Tribunal was invited to take this into account.

k. The Respondent submitted that the prejudice to the Respondent was substantial but minimal to the Claimant who has his claim of dismissal, and this will be argued about. The Claimant also has his claims for reasonable adjustments relating to similar types of issues. However, the monetary value of the Claimant's claim is in connection with the termination of employment ad if the Claimant is successful the Tribunal will assess his losses. There is no suggestion of an addional injury to feeling as a remedy. Therefore, if one steps back there is no prejudice to the Claimant.

10. <u>The Claimant's response</u>

a. In terms of law, the Claimant is entitled to pursue injury to feelings for separate detriments with the Tribunal looking holistically at the allegations and the extent of the injury to health claim, which is a remedy sought.

b. The Claimant submitted that the issues drafted in January 2012 is a list of proposed issues, not an agreed document with a definitive list and the reason it was not finalised is that matters were overtaken by the appeals that followed thereafter.

c. In relation to prejudice it was put forward that the Claimant would be prejudiced as he would not be able to pursue claims and that the Respondent was overegging the impact on its witnesses as there was documentary evidence regarding reducing hours and suspension. The Claimant disputed that the point about 'Katy' giving evidence was a narrow point and it could not seriously be suggested that that this one matter will prejudice them as now suggested.

d. In relation to the case of Chandok the Claimant does not dispute the Respondent's submission but said that what this case does not say is that a party is unable to make an application at any time in the proceedings and that this case was designed to prevent parties dealing with matters for the first time in witness evidence.

e. In so far as the Respondent suggests that it is unclear from amendment application what the specific claims relate to this is nothing to defeat the application as the Claimant can give additional information in the form of a Scott schedule. The Respondent responded that the suggestion of a Scott schedule suggests that the Claimant is materially altering the scope of his claim.

11. The Tribunal's conclusions

    a. As part of my deliberations I reviewed the preliminary hearings from 2011 and 2012. The table above summarises those hearings. I find that up to the proceedings being stayed there was ample opportunity for the Claimant to amend his claim to include the detriments that are the subject of this hearing. For some reason, given that it was recorded by Judge Emerton that the issues had been agreed, the question of the issues was re-opened before Judge Baron who gave orders that the issues be agreed by 30 November 2012. I appreciate that the stay happened in October 2012, however there was ample time for the Claimant to amend his claim or to provide a list of issues at that time identifying the claims now sought. If that had been done, then the application to amend would have been dealt with then and the Respondent would have been able to know what the claim was it had to meet and to ensure that it had the information from its witnesses while it was relatively fresh in their minds.

    b. I am mindful of the principles set out in Selkent and have considered each matter referred to in turn.

The balance of injustice and hardship of allowing the amendment against the injustice and hardship of refusing it

12. The Claimant submits that to refuse to allow the amendment would swing the balance of hardship against him as he would be deprived of a remedy. The Respondent refers to the difficulty its witnesses will have remembering the detail of conversations that have taken place so long ago. Although the Claimant says that there may be some documentation for example in relation to the decision not to reduce the Claimant's hours, this is not the same as recalling why a decision was made. The balance of injustice is therefore against the Respondent.

13. Given the Claimant's other claims I do not consider he is unduly prejudiced if the amendments are not allowed.

The nature of the amendment

14. My finding is that the proposed amendment is an entirely new cause of action and is not a relabelling for the reasons set out above.

Time limits

15. The statutory provision is whether it is just and equitable to extend time. I am mindful that the application is being made seven years after the claim was brought - whatever the reasons for that delay. This causes problems for the Respondent whose witnesses will have to try to recall conversations that happened a very long time ago. I note the Claimant's submission that there is some documentary evidence for example regarding the refusal to reduce hours, however, the witnesses would still need to remember why a decision was made. There have been many opportunities for the Claimant to have applied to amend his claim before the proceedings were stayed. The Claimant talks about this being relatively early in the case if one discounts the period of the stay of proceedings, however I note that the last preliminary hearing was in May 2012 and the stay did not happen until October 2012. That is a long period when the Claimant should have addressed the matter of the issues. If this had been done, then the Respondent

would have been able to get the required information from its client while matters were relatively fresh in their minds.

The timing and nature of the application

16. The Tribunal has found that there was ample opportunity for the Claimant to have identified the matters before me in 2012. There are no new facts discovered or new information appearing from documents disclosed on discovery. Whilst I appreciate that delay is not a good reason in isolation to refuse an application to amend, it is one of the items I have considered.

17. Taking all of this into account and balancing the respective positions of the parties, I refuse the Claimant's application to amend.

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Employment Judge Anne Martin

Date: 08 January 2019

Sent to the parties on 16 January 2019

Mr J Azam

For the Tribunal