



EMPLOYMENT TRIBUNALS

Claimant

Mr P Lemanowicz

Respondent

BBC Club Sport & Leisure Limited

AND

HEARD AT: London Central

ON: 17 October 2018 and in Chambers
on 14 January 2019

BEFORE: Employment Judge Hemmings

Representation

For Claimant: Ms E Walker (Counsel)

For Respondent: Mr B Randle (Counsel)

RESERVED JUDGMENT AND ORDERS ON A PRELIMINARY HEARING

The Judgment of the Employment Tribunal is that the Claimant's Claim Form includes a claim of harassment, that it does not include a claim of victimisation and leave to add such a claim is refused; that the application to add a claim of disability discrimination is refused, and that the Claimant's claims of sex discrimination and for payment of a statutory redundancy payment are dismissed upon withdrawal by the Claimant.

The applications by the Respondent to strikeout the Claimant's claims, for Deposit Orders to be made, and for an Order for Costs against the Claimant are refused.

REASONS

1. This is a Preliminary Hearing in public to determine:
 - (1) The Claimant's application to amend
 - (2) Identification of the issues in dispute
 - (3) If considered appropriate by the Employment Judge, any application for Strikeout or Deposit Order
 - (4) If considered appropriate by the Employment Judge, whether any of the claims were submitted out of time
 - (5) Whether the listing is of sufficient length
 - (6) Any application for costs

2. The Tribunal had before it the original Claim Form, the Response, a Written Application to amend the Claim Form, a draft Claim Form reflecting the proposed amendments, and draft amended Grounds of Claim, a draft List of Issues, Submissions in writing prepared by the Respondent, a Costs Application on behalf of the Respondent and a Schedule of Costs.
3. The background to these proceedings, summarised briefly, is as follows.
4. The Claimant, Pawel Lemanowicz was employed as a Gym Instructor by the BBC Club Sport and Leisure Limited, a registered charity providing sports and leisure facilities to BBC staff, between June 2014 and the termination of his employment by reason of redundancy in the second week in February 2018.
5. The Claimant initiated the mandatory ACAS Early Conciliation process on 21 March 2018. ACAS issued a certificate on 21 April 2018 at the conclusion of an unsuccessful conciliation process and the Claimant presented a Claim Form to the Employment Tribunal on 21 May 2018 setting out the claims he wished to make and the grounds on which he made those claims.
6. The Respondent subsequently entered a Response on 13 July 2018 denying the claims and setting out the grounds on which it resisted them. A Notice of Hearing was issued by the Tribunal to the parties, incorporating Case Management Orders to ensure that the proceedings are trial-fit when the Final Hearing takes place and the hearing was listed for four days in January 2019.
7. On the 6 September 2018 a Preliminary Hearing before Employment Judge Tayler took place for Case Management purposes, resulting in Case Management Orders and the listing of this Preliminary Hearing to determine the six issues set out above.
8. The workplace-context of these claims is that when the Claimant joined the Respondent at a time when it operated gyms/sports facilities in three London locations; at the BBC's Media Centre in London W12, at its premises in London W1, and at a gym in Elstree which was not permanently staffed.
9. In April 2017, the landlord of the Media Centre served notice on the BBC to vacate the Media Centre during July 2017.
10. In June 2017 Josh Kerwin, the Gym Manager at the London W1 premises resigned and Marvin Francis, responsible for the Media Centre premises, assumed responsibility.
11. In July 2017 the Media Centre gym closed, as did the Elstree gym later that month.
12. Accordingly, from August 2017 onwards BBC personnel wishing to use the Respondent's sports and leisure facilities went to the Respondent's premises in London W1 where the instructors were Marvin Francis, manager, the Claimant and Sophie Langsford, who had been working as a peripatetic instructor.
13. The Respondent, considering itself to be over-resourced with gym instructors, conducted a redundancy selection process to determine whether to retain Pawel Lemanowicz or Sophie Langsford. At the conclusion of the process the Respondent selected Ms Langsford and terminated Mr Lemanowicz's employment, placing him immediately on garden leave until the expiry of his notice period, the employment relationship ending in the second week in February 2018.
14. The Claimant records in Section 11 of his Claim Form the appointment of a representative in respect of these proceedings. It transpires that the Claimant was assisted by his representative, a qualified city lawyer, in completing his Claim Form, that

the lawyer is also a personal friend, that the Claimant is being assisted on a pro bono basis (as is Counsel now instructed by or on behalf of the Claimant), but that the Claimant's representative does not practice in the field of employment law. Nevertheless, the Claim form is specific about the claims the Claimant is making against the Respondent and the grounds on which those claims are based.

15. The Claimant indicated in Section 8.1 of the Claim Form that he was making 6 claims:
 - (1) That he was unfairly dismissed
 - (2) That he was discriminated against on the grounds of his race
 - (3) That he was discriminated against on the grounds of his sex
 - (4) That he was discriminated against on the grounds of his sexual orientation
 - (5) That the Respondent owe him a statutory redundancy payment
 - (6) That there were outstanding payments owed to him by the Respondent
16. Section 8.2 of the Claim Form requires Claimants to set out the background and details of their claim in the space provided, and specifies that "*The details of your claim should include **the date(s) when the event(s), you are complaining about happened***". The highlighted section is in bold text on the Claim Form.
17. In just over half a page of text the Claimant complains, but with minimal reference to dates when the events happened, against Marvin Francis, his line manager, that during the last two years of his employment he was regularly bullied, humiliated and victimised, and on one occasion threatened, by Mr Francis and complains against Management in four respects namely that the redundancy was structured so that the only person who could be made redundant was the Claimant; and complains against Management that when he brought his complaints about Mr Francis' bullying, humiliating and victimising treatment of him to the attention of the Respondent it took no action about those grievances; that when he reported Mr Francis' threatening behaviour towards him on his last working day at the gym the Respondent took no action against Mr Francis, and finally that when "new employers" have approached the Respondent to seek confirmation of the Claimant's former employment with the Respondent, it has "refused to acknowledge [his] existence with them."
18. In relation to Mr Francis' treatment of him, the Claimant states that, as a regular feature of Mr Francis' treatment of him during those two years:
 - (1) Mr Francis would "*belittle me in front of staff and clients*"
 - (2) Mr Francis did "*not train me adequately*"
 - (3) Mr Francis would "*treat me as if I was stupid and had little intelligence*"
 - (4) Mr Francis would "*not talk to.....me.*"
 - (5) Mr Francis would "*not help me*"
 - (6) Mr Francis would "*actively show me up in front of others.*"
 - (7) Mr Francis would "*bully me about being Polish*"
19. The Claimant states in section 8.2 that:

"From the bullying and victimisation I was subjected to, it was apparent that this was motivated by my race and my sexual orientation. Mr Francis would regularly bully me about being Polish. His manner also changed when he discovered that I was gay."
20. The Claimant lists this treatment as the way in which asserts he was regularly bullied and victimised and further describes it in "humiliation" terms, both as Mr Francis intending to humiliate him in front of staff members and gym clients, and in terms of the Claimant feeling humiliated by such treatment.

21. There is nothing alleged by the Claimant within Section 8.2 that he was discriminated against on the grounds of his sex and, although the Claimant's Agenda Form completed for this Preliminary Hearing, in Box 2.1, Claim 4, refers to "Direct Discrimination on grounds of gender" the Claimant withdrew that claim during the course of the Preliminary Hearing.
22. Further, there is no claim of disability discrimination in Section 8.1, nor any narrative within Section 8.2 from the Claimant alleging any disability or discriminatory treatment suffered which was causally connected with a disability. In Section 12 of the Claim Form the Claimant answers the question "*Do you have a disability?*" with "No". The Claimant's Agenda Form completed for this Preliminary Hearing, in Box 2.1 makes no mention whatsoever of disability discrimination.
23. There is no reference in Section 8.2 of the Claim Form to explain the money claim for "Other Payments"

Claimant's Agenda Form for this Preliminary Hearing

24. Box 2.1 describes Claim 1 as "Constructive Unfair Dismissal". This is evidently wrong as the Claimant was actually dismissed by the Respondent, fairly or otherwise. There was nothing "constructive" about this dismissal. The Claimant was actually dismissed not constructively dismissed.
25. The fifth claim specified in Box 2.1 of the Claimant's Agenda document states "Direct Discrimination on the grounds of age". There has never been an age discrimination claim within these proceedings and Counsel for the Claimant confirmed that there was no intention to seek to introduce one.
26. There is no mention in the Box 2.1 of a sex discrimination claim, no doubt because, as Counsel has confirmed, that claim has been withdrawn by the Claimant and is hereby formally dismissed.
27. There is no mention in Box 2.1 of any disability discrimination claim, but Counsel seeks to amend the Claim form to add such a claim.
28. There is no mention in Box 2.1 of any money claim for "other payments". As referred to above, there was no mention of that claim in Section 8.2, within the Claim Form and no reference to it in the Claimant's Application to Amend the ET1.
29. Box 2.1 refers to a claim for a statutory redundancy payment but it is common ground that the Claimant received his statutory redundancy payment. That claim has been withdrawn by the Claimant and is hereby formally dismissed.

30. SUBMISSIONS

The Respondent had helpfully prepared submissions in writing and Counsel for the Claimant addressed the comprehensive Application to amend in submitting the case for its acceptance. Counsel both addressed the Tribunal in support of their cases being advanced on behalf of their respective clients.

31. THE LAW

The Employment Tribunal may grant amendments under its powers within Rules 29, 34 and 41 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 - Schedule 1.

It is important to identify whether an amendment application is in fact an application to amend the original claims or in fact, in essence, an application to add a new claim (with consequent possible issues arising such as time-bars), and if not a new claim, whether the circumstances

actually require no more than an Order for further and better particulars of the existing claims but otherwise, should an amendment be required, whether the proposed amendment is minor or major.

Determining an application to amend invariably requires a careful balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties, by granting or refusing the amendment sought.

Guidance on the correct approach to exercising judicial discretion is set out in the decision of the Employment Appeal Tribunal in Selkent Bus Co Ltd v Moore 1996 ICR 836 approved by the Court of Appeal in Ali v Office of National Statistics 2005 IRLR 201

Relevant factors for consideration would include the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

CONCLUSIONS

The Claimant's Application to Amend

32. The Tribunal bears in mind that the Claimant completed his Claim Form, choosing specifically from the menu of potential claims (selecting some and not others) and choosing not to set out in great detail the sequence of events and the facts and matters relied on by him in support of those claims, but rather (which can be acceptable to the Tribunal except for neglecting the requirements in Section 8.2 to catalogue the dates when the events happened) setting out the headline features of the treatment about which he complains, and therefore the basis on which he has selected the claims he wishes the Employment Tribunal to judge.

Disability Discrimination Claim

33. This proposed amendment would require the addition of a new claim of disability discrimination. The Claimant did not select disability discrimination on the Claim Form as one of his claims, did not make any reference whatsoever to disability in section 8.2 of the Claim Form, and in Section 12 informed the Tribunal that he did not have a disability.
34. The Tribunal concludes that, in selecting three separate protected characteristics but not "disability" and that in asserting that he was not disabled, the Claimant consciously concluded when completing his Claim Form, aided by his lawyer-representative, that he did not intend to make any claim relating to disability to the Tribunal. It is simply an afterthought and well after the time limit has expired. Balancing considerations of hardship and injustice the Tribunal is satisfied that the balance tips in favour of the Respondent. The Application to amend in this respect fails.

Victimisation and Harassment

35. The Tribunal is conscious, in evaluating this proposed amendment, of the need to distinguish between clarification of an existing claims and adding claims of victimisation and harassment, that the Section 8.1 "claims-menu" listing the higher profile claims presented to the Employment Tribunal does not offer victimisation and harassment as tick-box options, and that the Claimant expressly refers to victimisation in Section 8.2 but does not use the word "harassment" (although he does refer to bullying and humiliation).
36. The Tribunal is satisfied that the Claimant is complaining, justifiably or not, in clear and explicit terms to the Employment Tribunal in his Claim Form of behaviour by line management which made his working environment intolerable for a period of two years, through the alleged treatment of him (those allegations including bullying, victimising and humiliating him), with the Claimant clearly attributing that conduct by line management to be due to his race, such race-related treatment being compounded by alleged homophobia after the point in time when Mr Francis learnt of the Claimant's sexual orientation.

37. That constitutes, in substance, a claim that the Respondent engaged in unwanted conduct related to the Claimant's race and sexual orientation which had the purpose or effect rendered unlawful by section 26 of the Equality Act 2010.
38. The Tribunal concludes that although the Claimant did not use the word "harassment" within Section 8.2, a claim of Harassment is nevertheless patently evident within the Claim Form and is to be determined by the Tribunal Panel at the Final Hearing.
39. However, ironically perhaps, although the Claimant in Section 8.2 does refer to "victimisation" of him by the Respondent the Tribunal concludes that what is being alleged is not conduct by the Respondent falling within section 27 of the Equality Act 2010 such that a section 27 claim would require the addition of a new claim to these proceedings. Looking at the substance of what the Claimant is asserting within Section 8.2 in its individual components, and as a whole rather than focusing on individual words, the Tribunal is satisfied that what the Claimant is alleging, justifiably or not, is a persistent pattern of bullying, oppressive, humiliating treatment by his line manager, rather than asserting that he, the Claimant, did something (or Mr Francis believed the Claimant had done something) which, in law amounted to a "protected act" and because of that action, or belief, Mr Francis subjected him subsequently to detrimental treatment.
40. After careful and considered balancing of the countervailing issues of injustice in denying the Claimant a claim of Victimisation and the hardship to the Respondent of granting the application, the balance tips in favour of the Respondent. The application to amend in this respect fails.

SUMMARY

41. The following claims will proceed to a Final Hearing to be determined by a full Panel:
 - (1) A claim of (conventional) unfair dismissal – S.94 Employment Rights Act 1996
 - (2) A claim of direct discrimination because of the protected characteristic of sexual orientation – S.13 Equality Act 2010.
 - (3) A claim of that the Respondent discriminated indirectly against the Claimant in relation to his race - S.19 Equality Act 2010
 - (4) A claim that the Respondent subjected the Claimant unlawfully to harassment – S.26 Equality Act 2010
42. Otherwise, the original claims in respect of sex discrimination and for payment of a statutory redundancy payment are dismissed, those claims having been withdrawn by the Claimant; applications by the Claimant to add claims of disability discrimination and victimisation fail, and although the Claimant refers to a claim of age discrimination within the Agenda document no such claim has ever been made, nor is there an Application before the Tribunal to consider amending the Claim Form by adding an age discrimination claim to these proceedings.

The Respondent's Costs Application

43. The Tribunal is not unsympathetic to the additional expense incurred by the Respondent in consequence of the shortcomings in the Grounds of Claim set out in the Claim form and the subsequent proceedings required to seek clarity regarding the number of claims, the specifics of each claim, and sufficient particulars upon which the Respondent could reasonably be expected to prepare for a Full Hearing.

44. Nevertheless, circumstances in which the Employment Tribunal may make a costs order are, as Counsel for both parties appreciate, strictly circumscribed by Rule 76. The Tribunal does not consider that the conduct of these proceedings by the Claimant, and those representing the Claimant, falls within Rule 76.

The Respondent's Strike-out and/or Deposit Order Applications.

45. The Respondent's applications in this respect are set out within the Skeleton Argument. The circumstances in which the Tribunal may strike out a claim (because, the Respondent contends they have "no reasonable prospect of success") or make a Deposit Order (because they have "little reasonable prospect of success") are in Rule 37 and Rule 39 respectively.

46. The Tribunal has given careful consideration to measuring the Claimant's Claims, as they now stand, against those tests. These claims are largely, if not entirely, fact sensitive and their prospects of success, zero or little or substantial, will depend upon the findings of fact reached by the Panel at the Final Hearing. The applications fail, but the Tribunal invites the Claimant to re-evaluate the claim of indirect race discrimination in terms of the provisions of Section 19 of the Equality Act 2010 and the context of the underlying factual matrix on which the Claimant has based his claims.

Employment Judge Hemmings

Date 17 January 2019

JUDGMENT AND REASONS SENT TO THE
PARTIES ON

29 January 2019

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FOR THE TRIBUNAL OFFICE