



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L Busby

**Respondent:** University Hospitals Birmingham NHS Foundation Trust

**Heard at:** Birmingham **On:** 28 January 2018

**Before:** Employment Judge Flood (sitting alone)

## Appearances

For the claimant: Mr A Rozycki (Counsel)

For the respondent: Miss R Owsu-Agyei (Counsel)

## RESERVED DECISION ON PRELIMINARY HEARING

1. The claimant's application for permission to amend her claim so as to add a complaint of harassment (section 26 Equality Act 2010 ("EQA")) as particularised in paragraphs 34-36 of the claimant's further and better particulars document served on the respondent on 14 September 2018 ("**the Further Particulars**") is granted.
2. The claimant's application for permission to amend her claim so as to add 5 new allegations to her existing complaint of failure to make reasonable adjustments (sections 20 & 21 EQA) set out at paragraphs 22 to 26 of the Further Particulars is declined.
3. The claimant's application for permission to amend her claim so as to add a complaint of discrimination arising from disability is granted in part in that the allegations of acts of less favourable treatment identified at paragraphs 41 & 42 of the Further Particulars is permitted to proceed (subject to the provision of additional particulars) but application to add the allegations set out at paragraphs 38, 39, 40, 43 and 44 of the Further Particulars is declined.

# REASONS

## Background

- (1) This preliminary hearing was called “**to determine whether the claimant’s application to amend her claim should be accepted or not**”.
- (2) The claimant made a number of allegations of disability discrimination under the EQA in a claim form submitted on 4 March 2018 (“**Claim Form**”). The Claim Form was presented when the claimant was not legally represented and sets out a narrative version of the events leading up to this claim. It made a number of complaints about how she was treated by the respondent, which are contained in a 6-page letter of complaint appended to the Claim Form (“**Grounds of Complaint**”). The respondent submitted its response on 26 April 2018.
- (3) At a preliminary hearing for the purposes of case management held on 7 June 2018 in front of Employment Judge Lloyd, the matter was listed for hearing and attempts made to clarify the basis on which the claims were made. It was initially identified that the claimant appeared to be making complaints relating to a breach of the duty to make reasonable adjustments (sections 20 and 21 EQA) but it was also contended by the claimant that complaints of direct discrimination because of disability (section 13 EQA); discrimination arising from disability (section 15 EQA) and indirect discrimination (section 19 EQA) were also being advanced. EJ Lloyd ordered that further particularisation of the claimant’s complaints “*more especially in respect of the claims under ss.15 and 19 EQA*” would be required. The Case Management Summary and Orders made by EJ Lloyd also set out further background.
- (4) The claimant provided her first attempt at further particulars of her claims on 28 June 2018 and also clarified that the section 19 EQA complaint was no longer being pursued. The respondent made another request for further and better particulars on 21 August 2018. The Further Particulars (which was prepared by counsel) was served on the respondent on 14 September 2018 and this is the document the claimant now seeks to rely on as setting out her pleaded case. As well as purporting to set out particulars of complaints under sections 13, 15, 20 & 21 EQA a complaint of harassment (section 26 EQA) was added.
- (5) The respondent served its amended response in respect of the section 13 and sections 20 & 21 allegations (in part) but objected to the Further Particulars on 6 November 2018. The objection was on the basis that numerous parts of the Further Particulars would, in the view of the respondent, require the claimant to apply to amend her claim. The claimant made an amendment application on 6 December 2018 and the respondent confirmed that it objected to this application on 18 December 2018.
- (6) The matter was listed for an Open Preliminary Hearing to determine whether the application to amend the claim should be accepted and this came before me.

- (7) At the outset of the hearing, I clarified with the parties that the claimant was making an application to amend her claim in respect of the following numbered paragraphs of the Further Particulars. (The respondent submitted that these potentially disclosed matters not specifically referred to in the Claim Form and needed to be the subject of an amendment application. The claimant took a different view on whether an amendment application was needed which I deal with in the conclusions below):
- (i) A complaint of alleged harassment contrary to section 26 EQA  
Paragraphs 34, 35 and 36 of the Further Particulars
  - (ii) The addition of 5 new allegations of failure to make reasonable adjustments under sections 20 & 21 EQA  
Paragraphs 22, 23, 24, 25 and 26 of the Further Particulars
  - (iii) A complaint of discrimination arising from disability contrary to s 15 EQA  
Paragraphs 37, 38, 39, 40, 41, 42, 43 & 44 of the Further Particulars

All other paragraphs in the Further Particulars which are not referred to above, were considered by the parties to correctly amount to the provision of further particulars of complaints already made and no amendment application was appropriate. I agreed with this formulation of the issues.

### Relevant Legal Framework

- (8) The general case management power in rule 29 of **First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (amended and reissued on 22 January 2018) (“**the Rules**”) together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments.
- (9) In the case of **Selkent Bus Co Limited v Moore [1996] ICR 836**, the Employment Appeal Tribunal gave useful guidance, namely:
- (4) *Whenever a 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.*
  - (5) *What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
    - (a) *The Nature of the Amendment*  
*Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of*

*other labels for facts already pleaded to on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*

*(b) The Applicability of Time Limits*

*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, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.*

*(c) The Timing and The Manner of the Application*

*An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision.”*

- (10) This position is also summarised in the Presidential Guidance issued under the provisions of **Rule 7** of the Rules which I have also considered.

**Submissions**

- (11) In support of the claimant’s applications, Mr Rozycki submitted that all the matters referred to the Further Particulars were simply that i.e. the provision of further particulars and did not in fact require an amendment application at all. He contends that the legal dimensions of the claim are now set out in the Further Particulars but they arise from the same facts that are set out in the Grounds of Complaint. He contends that the Further Particulars drafted by Counsel, simply puts the claimant on an equal footing as the respondent as she has now had the opportunity to have her complaints set out in a legal context
- (12) In respect of paragraph (7) (i) above, the harassment complaint, Mr Rozycki submitted that this was the only matter that could amount to an actual amendment of claim in the true sense. However the factual matters which constitute this complaint are set out on the second page of the Grounds of Complaint in the 7<sup>th</sup> and 8<sup>th</sup> paragraphs down, where the specific comments relied upon are set out by the claimant. Although it is not pleaded as a complaint of harassment as such, he contends the allegation is clearly set out here in factual terms.
- (13) In respect of (7) (ii) above, the reasonable adjustments complaint, he went through each of the new allegations of provisions, criteria or practices (“PCPs”) in the Further Particulars that the claimant alleges the respondent applied that put her at a substantial disadvantage in relation to

a relevant matter in comparison with persons who are not disabled at any relevant time. He contends that the substance of each factual allegation already appears in the Grounds of Complaint as follows:

- (i) Paragraph 22, a PCP of *“requiring the claimant to work on the reception area”* which it is alleged put the claimant at a substantial disadvantage in that *“she was exposed to an unreasonable level of danger and was left humiliated that she could not do her job properly”*, he says is referred to on the second page of the Grounds of Complaint 5<sup>th</sup> paragraph down where the claimant states *“During this meeting I discussed working late shifts with Paul Arrowsmith as I did not feel that working alone and at night was suitable or safe.”*
  - (ii) Paragraph 23, a PCP identified as *“the practice of hot desking”* which it is alleged put the claimant at a substantial disadvantage in that *“she was unable to set up the auxiliary aids, which she had to source herself, and was unable to become very familiar with one working environment”*, he says is referenced at the first page of the Grounds of Complaint 6<sup>th</sup> paragraph down onwards, where the Access to Work report is mentioned and it is alleged this report prohibited hot desking.
  - (iii) Paragraph 24, the PCP identified as *“failing to inform members of staff about the claimant’s disability”* which it is alleged put the claimant at a substantial disadvantage in that *“she was exposed to an unreasonable level of danger and was left humiliated that she could not do her job properly”*, he says is mentioned at the second page of the Grounds of Complaint 3<sup>rd</sup> paragraph down onwards, when the meeting involving senior members of the management team held in December 2017 is referred to.
  - (iv) Paragraph 25, the PCP identified as *“the practice of not automatically referring disabled employees to Access to Work for an assessment or doing so in an expedient manner”* which it is alleged put the claimant at a substantial disadvantage in that *“the deadline was missed, and she had to begin her application again which resulted in delay in the Claimant getting the support she required”*, he also says is mentioned at the first page of the Grounds of Complaint, 6<sup>th</sup> paragraph down onwards, when Access to Work is dealt with.
  - (v) Paragraph 26 the PCP identified as *“the practice of not reading Occupational Health reports”* it is alleged put the claimant at a substantial disadvantage compared with non disabled colleagues in that *“the recommendations in the reports were not implemented in an efficient manner or at all”*, he says arises on second page of the Grounds of Complaint, 3<sup>rd</sup> paragraph down onwards, again with reference the meeting involving senior members of the management team held in December 2017.
- (14) In respect of (7) (iii) above, Mr Rozycki submitted that this complaint of discrimination arising from disability was not a new claim or cause of action and that there were many aspects in the Grounds of Complaint from which such a claim could be extrapolated. He refers to the second page of the Claim Form 5<sup>th</sup> paragraph down which starts *“During this meeting...”*

where he submits contains the factual circumstances which support the discrimination arising from disability claim are contained.

- (15) In terms of the Selkent factors, he submits that the nature of the claim was essentially the same but the Further Particulars expressed it in a more legalistic fashion. Accordingly he says time limits are not relevant as the time limits latch on to the matters already described in the Grounds of Complaint. He points out that in any event the claimant would argue that the Tribunal should exercise its discretion to extend time on just and equitable grounds and would have a good argument on this given that she was unrepresented when she first submitted her Claim Form. In terms of the timing and manner of the application, he submits that the claimant proceeded on the basis that as EJ Lloyd had ordered further particulars, there was no need for an amendment application. The application to amend it is said was put in as a precaution, and in a timely fashion once the issue had been raised by the respondent.
- (16) As to the balancing act required to determine whether it was in the interests of justice to allow an amendment, then Mr Rozycki argued that the balance favoured the claimant, as not granting her application leaves her in a position whereby complaints fall away and cannot be advanced. He submitted that the respondent was not in any way prejudiced by any of the amendments sought, as they will no doubt be granted permission to deal with this by way of an amended response.
- (17) The respondents objected to the applications made. Regarding (7) (i) above, the harassment complaint, Miss Owsu-Agyei stated that the amendments sought here were not simply a re-labelling of complaints already made. The factual allegations here are the same as the direct disability discrimination complaint but that this is a new formulation of this complaint which has never been made before.
- (18) As to (7) (ii) above, and looking at the nature of the amendment sought for each of the new allegations of PCPs in the Further Particulars that the claimant alleges were applied:
- (i) As to paragraph 22, she submits that the PCP identified about requiring the claimant to work in the reception area is entirely new and it is beyond a stretch of terminology to suggest it is mentioned in second page of the Grounds of Complaint 5<sup>th</sup> paragraph down where the claimant states *“During this meeting I discussed working late shifts with Paul Arrowsmith as I did not feel that working alone and at night was suitable or safe.”*
  - (ii) As to the PCP relating to requiring hot desking (paragraph 23), she submits that this is not mentioned anywhere in the Grounds of Complaint. This, she says, is a new factual allegation of a practice not raised before.
  - (iii) Dealing with paragraph 24, the PCP regarding failing to inform other staff about the claimant’s disability, and the reference to the second page of the Grounds of Complaint 3<sup>rd</sup> paragraph down onwards, describing a meeting held in December 2017, she submits that examples described by the claimant here about her problems reading specimens and near misses in the laboratory are nothing to do with a failure to inform staff – it is

too much of a stretch Miss Owsu-Agyei submits to suggest that a allegation regarding the alleged practice is made here.

- (iv) On paragraph 25, and the allegation that the respondent had a PCP of not automatically referring disabled employees for an Access to Work assessment, the complaint in the Grounds of Complaint she submits is actually about the delays in referring this claimant to the Access to Work Scheme. Nowhere is it suggested that there should even be a process of automatically referring employees. The claimant's complaint is about delays to the process and the subsequent missing of the 21-day deadline.
  - (v) As to paragraph 26 and the claimant's suggestion that the PCP of failing to read OH reports is referenced at the second page of the Grounds of Complaint, 3<sup>rd</sup> paragraph down onwards, again with reference the meeting involving senior members of the management team held in December 2017, this is challenged. Miss Owsu-Agyei states that there is no allegation here all suggesting that either Paul Arrowsmith or anyone at the respondent did not read the OH report. This is a new factual allegation entirely she submits.
- (19) Accordingly her first submission here is that contrary to what the claimant suggests, these are all new allegations which do require an amendment application. She challenged whether allegations in paragraphs 24 and 26 could even be PCPs at all referring me to the case of **The Carphone Warehouse v Martin [UKEAT/0371/12 [2013] EqLR 481]**. It is submitted that a lack of competence in carrying something out cannot of itself be a practice. She says allegation 24 and 26 fall squarely into this, as they are allegations of failures to carry something out in the claimant's particular situation rather than a practice in itself.
- (20) In terms of Amendment (7) (iii) above, the complaint of discrimination arising from disability, of the seven allegations of unfavourable treatment, the respondent submits that none should be permitted. Regarding paragraph 38, this seems to be an allegation that the claimant made a request not to work in the Containment Level 3 laboratories. The respondent submits that it is hard to see how this can be unfavourable treatment by the respondent at all. The action complained of is the claimant's request.
- (21) Miss Owsu-Agyei reminded me that the disability being relied upon by the claimant was her ophthalmological condition - a visual impairment. There are references in the Claim Form to stress and anxiety but these are not being relied upon as a disability for the purposes of this Claim. The allegations at paragraphs 39 and 40, are statements about something arising which she says is not in consequence of her ophthalmological condition. It is the stress and anxiety leading to the claimant's breakdown, which causes the time off work referred to at paragraph 39 and the need for a return to work interview mentioned at 40. On this point, Mr Rozycki countered that the decision of Simler J in **Pnaiser v NHS England [2016] IRLR 170** reminded us that the 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. He suggests that

the claimant's eye condition was very much bound up with her stress and anxiety and subsequent breakdown and therefore there is a sufficient connection.

- (22) In relation to allegations at paragraphs 43 & 44, the respondent submits that the something arising identified is logically incapable of meeting the test under s 15 EQA. The complaint appears to be in each of these allegations that the respondent (or Paul Arrowsmith) did not do things quickly enough, namely failing to notify payroll quickly of a change in role. Neither of these matters can in any way be said to be arising from the claimant's disability it is argued. Therefore it is submitted that such allegations have no prospect of success at all.
- (23) Finally Miss Owsu-Agyei submits that the further particulars provided at paragraph 42, are incomplete and in order for the respondent to address this, they would need to know what is being alleged as regards complaining and impatience of members of staff including names, dates etc.
- (24) Miss Owsu-Agyei referred to the second of the **Selkent** principles, namely the effect of any applicable time limits and submitted that all new allegations were now significantly out of time (some up to a year and 8 months out of time). In terms of the timing and manner of the application to amend, she stated that the application was made over 9 months after the claim was issued and raised new facts which will require significant time to respond to. The application was not made in a timeous manner but was made only in December 2018 despite the fact that an amendment application may be required being raised by the respondents solicitors on 6 November 2018. The claim has now mushroomed it is submitted. More generally on the relative injustice and hardship point, she pointed out that the respondent will now be put to additional cost of terms of time and expenses and there may be further disclosure and witness evidence required. This was unlikely to be achievable given that the matter was due to be heard for final hearing in March 2019. All of these matters it is submitted should have been raised at the earlier hearing and it is now unfair and unjust to the respondent for the claimant to be permitted to add to or remodel her claim

## **Conclusions**

- (25) I will deal firstly with (7) (i) above, the harassment complaint. I have decided to allow this amendment because it is clear that this falls squarely within the category of re-labelling complaints already raised (albeit in the alternative) and further particularising such complaints. The allegations of these comments being made to the claimant clearly appear in the Grounds of Complaint in the final two paragraphs of the second page. The gist of the comments alleged to have been made are set out here and paragraphs 34, 35 and 36 merely provide further particulars of these allegations identifying who is said to have made the comments and the dates they are said to have been made.
- (26) There may be some issues of time in respect of these complaints made but this will be dealt with at the final hearing of the claimant's claim. No



new limitation issues arise as the complaints constituting the alleged acts of harassment had already been made in the Claim Form.

- (27) The respondents are accordingly not significantly prejudiced with regard to the addition of this harassment complaint as it had already addressed the allegation and will presumably need to call evidence with respect to the direct discrimination point. Having conducted a careful balancing exercise, and having regard to all the circumstances of the case, including the nature of the amendments sought and delay on the part of the claimant in making this application I allow the claimant to amend to amend her claim in the manner sought.
- (28) As to (7) (ii) above, the 5 new allegations of PCPs in the Further Particulars, I also considered the factors identified by **Selkent** before addressing the balance of prejudice and hardship. I preferred the submissions of the respondent in this regard and I set out the analysis on each of these points below:

Nature of the amendment

- (29) The amendments requested are much more substantial. It was not the addition of factual details to an existing allegation, or a re-labelling exercise. It sought to bring into the reasonable adjustments complaint allegations which were not referred to at all or at best only in passing in the Grounds of Complaint.. This was more in the nature of “*entirely new factual allegations which change the basis of the existing claim*” as identified in the **Selkent** case. There was no reference in the Grounds of Complaint to working in the reception area, hot desking, not informing colleagues about disability, a policy of referring to Access to Work or even not reading Occupational Health reports. There is mention of the Access to Work process and alleged failures of the respondent in carrying this out but these do not appear to allege that any PCP as described was applied to the claimant at any time.

Applicability of time limits

- (30) The complaints and allegations requested are in the same position as regards time as the existing allegations. It must be at least arguable that these were instances of an act extending over a period on an ongoing basis. The issue of whether there has been a continuing act will need to be considered more generally as part of the final hearing of the claimant’s claim and at this point issues of whether it is just and equitable to extend time (if applicable) will be considered more broadly. Therefore whether the amendment requested was out of time was a factor that was broadly neutral. It did not tip the balance one way or the other.

Timing and manner of the application

- (31) The application to amend was made in December 2018. The claimant was not represented when she submitted her Claim in March 2018 but did have the assistance of counsel at the first preliminary hearing in June 2018. Further Particulars were ordered to be provided by 28 June 2018 and an attempt was made to do this on this date by the claimant’s solicitors. Therefore it appears that she has been legally represented

since at least June 2018. The claimant sought to change the basis upon which her complaints were made in September 2018 and an application to amend was only made in December 2018. The Grounds of complaint are very detailed and do set out at length the nub of what the claimant complains of. I struggle to see why these new points only arose in September and why an application to amend (even if precautionary as the claimant submits) was not made until 3 months later in December 2018.

Balance of prejudice

- (32) Putting these factors together I concluded that the balance of prejudice and hardship favoured refusing the amendment. My main concern was that allowing 7 (ii) would simply be giving the claimant another “bite of the cherry” enabling her to try and raise completely new factual allegations. If these matters were of concern to the claimant, my view is that these would have been described from the outset (as she sets out in detail many other allegations). They were not specifically raised, and it is only when counsel has sight that there is an attempt to stretch the allegations to cover other matters.
- (33) This complaint was raised substantially after the primary limitation period and so the respondents would be prejudiced in addressing these new factual complaints as to do so would require additional investigation. The claimant has numerous other disability discrimination complaints in play. She has had ample opportunity to set out what her claim actually is and make any applications to amend at a much earlier stage in the case. The relative prejudice to the claimant if the application is not granted would be relatively small whereas the disadvantage to the respondents if it were and the effect on the proceedings could be significant. For the above reasons, I refused this particular amendment.
- (34) As to (7) (iii) above, the complaint of discrimination arising from disability, of the seven allegations of unfavourable treatment requested, I preferred the submissions of the respondent on all but two of these, namely in relation to paragraphs 41 and 42. Applying the **Selkent** principles:

Nature of the amendment

- (35) The allegation at paragraph 41 of the Further Particulars that the respondent failed to conduct the redeployment process in an expedient and efficient manner is referred to in detail at page 3 of the Grounds of Complaint. The analysis set out at paragraph 41 is the attempt to legally formulate this factual allegation by way of a section 15 EQA complaint. Therefore this is a relabeling of an existing allegation of which the respondent is aware.
- (36) Similarly the allegation at paragraph 42 of the Further Particulars, namely that as a result of the claimant’s disability she could not read the small handwriting and barcodes on samples and because of this she was subject to the unfavourable treatment of the complaining and impatience of other members of staff, is also more in the nature of providing further particulars of an allegation already made. The claimant makes reference to this on the second page of her Grounds of Complaint, paragraph 5 onwards. Therefore this does seem to sit within the category of re-

labelling complaints already raised and further particularising how such complaints were made. I would add in response to a point raised by the respondent that further details of what incidents of complaints and impatience of other members of staff are relied upon, including names and dates does need to be provided. However the substance of the allegation does appear to have been made at the outset.

- (37) The nature of the amendments sought at paragraphs 38, 39, 40, 43 and 44 of the Further Particulars is different. The facts that are referred to do arise as allegations in the Grounds of Complaint in all cases. However the way that they are formulated in the Further Particulars is completely different and fundamentally changes the nature of what is complained about. These allegations of failures of good practice made by the claimant specify what the claimant says was not done and what she alleges should have been done. This is very different to suggesting that this was unfavourable treatment because of something arising from her disability. The factual allegations made in the Grounds of Complaint do not support such an interpretation. Paragraphs 39 and 40, for example, relate to a period of absence caused by her stress and anxiety and subsequent breakdown which the claimant has confirmed very clearly is not relied upon.
- (38) As to the applicability of time limits and the timing and manner of the application, then the same considerations as I have set out at paragraphs 30 and 31 above apply so I will not repeat these here.

Balance of prejudice

- (39) Putting these factors together I concluded that the balance of prejudice and hardship favoured the claimant in respect to paragraphs 41 & 42 (hence I have allowed the amendment). However the balance of prejudice favours the respondent in respect of paragraphs 38, 39, 40, 43 and 44. I have also considered and note the submissions of Miss Owsu-Agyei at paragraphs 20 to 22 above that some of the allegations made did not seem to contain the constituent elements of a complaint of discrimination arising from disability even if all the allegations were found to correct (see paragraphs 20 & 22). It was not in the interests of justice to permit such amendments to proceed and involve the respondents in time and expense in preparing its response to legal formulations that appeared to have no logical basis. Therefore on balance I have decided to decline this part of the claimant's application to amend.

**Employment Judge Flood**

**06<sup>th</sup> February 2019**