EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		
Mr S Wedlock	and	LHR Airports Limited

Public Preliminary hearing held at Reading on 8 November 2018

Representation
Claimant: In person
Respondent: Mr J French-Williams, counsel

Employment Judge Mr SG Vowles (sitting alone)

JUDGMENT

JUDGMENT having been sent to the parties on **20 November 2018** and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. This is a public preliminary hearing and the issues I have to determine are as follows:

    1.1 What claims are being pursued by the Claimant;

    1.2 Whether any of the claims have no reasonable prospect of success and should be struck out;

    1.3 Whether any of the claims had little reasonable prospect of success and should be made the subject of a deposit order of up to £1,000;

    1.4 Whether any case management orders are necessary for the future conduct of the proceedings.

2. I am also required to make a decision on the Claimant's application to amend his claim.

3. The Claimant presented an ET1 claim form to the Tribunal on 15 March

2017. He complained of wrongful dismissal or breach of contract and sought notice pay, unpaid salary, pay in lieu of holiday pay, and a company bonus. He did not claim unfair dismissal but in a schedule of loss dated 17 April 2017 he claimed a basic award, a compensatory award and compensation for loss of statutory rights.

4. On 13 April 2017, the Respondent presented a response and resisted all the claims and it also raised jurisdictional bars for claims under the Data Protection Act and for compensation for injury to feelings which it said were included in the claim form but which the Tribunal had no jurisdiction to deal with.

5. A preliminary hearing was held on 11 December 2017 which the Claimant did not attend. However, the Employment Judge on that occasion decided to proceed in his absence. Claims of unfair dismissal, holiday pay and salary were struck out leaving two claims, that is notice pay and a claim for a bonus payment.

6. The case management order also said this:

In his ET1, the Claimant did not tick the box indicating that he wished to bring a claim of discrimination on any ground. However, in the compensation or remedy section of the ET1, the Claimant indicated that he is seeking injury to feelings, middle band Vento guidelines left under Employment Tribunal's decision.

7. It also records that in his ET1 claim form, he referred to work-related stress and severe depression illness. The Judge also noted that the Claimant's Schedule of Loss included a reference to compensation for injury to feelings and referred to the Respondent's unlawful discriminatory acts. The case management order therefore contained an order as follows at paragraph 11.5:

The basis for a discrimination complaint by the Claimant is not at present clear and I have therefore made an order in paragraph 2 in the orders section below: (1) In respect pf any complaint which was included in the ET1 and/or claim statement, the Claimant must provide for information about this complaint; and (2) If the Claimant wishes to pursue any discrimination complaint which was not included in his ET1 or claim statement, he would need to make an application to amend his claim.

Application to Amend the Claim

8. On 1 March 2018, the Claimant produced a document which was six pages long headed '*ET1 discrimination claim'*. It was in narrative format so it was not clear what claims were being pursued in respect of what events but it referred to, amongst other events, hospital appointments, occupational health reports, a workplace risk assessment (or lack thereof), a breach of duty of care, a breach of the company's policies, the ACAS Code of Practice, bullying, a grievance, and a performance improvement plan.

9. Mention was made in that narrative document of direct discrimination, harassment, indirect discrimination and a failure to make reasonable adjustments. Also, it seems, a claim for automatically unfair dismissal for making a claim for breach of statutory rights. The Claimant's covering letter referred to amending his ET1 claim form in regard to the discrimination acts that were brought against him by the Respondent as listed in the case summary in the case management orders.

Evidence and Submissions

10. In his evidence before me today, the Claimant said that the contents of his ET1 claim form were true and correct as were the contents of paragraphs 1 to 16 in the two-page script attached to the claim form. He also confirmed that he had made an application to amend the claim on 1 March 2018. I asked him if he took the view that his ET1 claim form included a disability discrimination claim and he said "no". He said that he took legal advice before he made the claim from a "*senior barrister*" who told him not to mention his disability because he did not work long enough for the company. He said *"He told me not to tick the disability box. He said not a strong case for disability".*

11. He said that he had made his application to amend in response to the case management summary made on 11 December 2017. He confirmed that it was an application to amend the ET1 claim form to include a disability discrimination claim. He said that section 15 of his claim form did refer to his stress and depression and he said that his application to amend sets out more information about his claim. He said that he took legal advice from a solicitor before he made the application to amend who said that the barrister who had advised him before he made his original claim had misguided him and that he should make the application. I asked him why he did not make the application to amend before 1 March 2018 and he said *"I was not familiar with the process. I thought it would be dealt with later in the procedures and I only got limited legal advice"*. He said *"If I had been advised properly, I would have filled in the ET1 form correctly."*

12. Mr French-Williams on behalf of the Respondent objected to the application to amend. He produced a written skeleton argument and also made oral submissions. He referred to the claim form being presented on 15 March 2017 and the application to amend being presented almost a year later on 1 March 2018. He said that there were claims for disability discrimination and automatically unfair dismissal which were not in the ET1 claim form. He referred to the fact that the Claimant had accepted that he made no mention of disability discrimination in the claim form but he had had legal advice from a senior barrister beforehand. He said that it took 12 months for the Claimant to make the application to amend. So far as prejudice was concerned, there would be significant prejudice to the Respondent if the application was granted because the Claimant was dismissed over two years ago (18 October 2016) and the Respondent does not know whether the people involved were still employed. Medical evidence would be required because disability was not conceded.

Decision

13. The tests I have to apply are set out in the following authorities: Selkent Bus Company Ltd v Moore [1996] ICR 836; Abercrombie v Argo Rangemaster Ltd [2014] ICR 209; and there is also guidance set out in the Employment Tribunals Presidential Guidance, the relevant part reads as follows:

In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.

14. It goes on to say that relevant factors would include firstly, the amendment to be made; secondly, time limits; and thirdly, the timing and manner of the application. It says that the Tribunal draws a distinction between amendments that seek to add or substitute a new claim arising out of the same facts as the original claim and those that add a new claim entirely unconnected with the original claim.

15. I am satisfied that the claims and the facts now the subject of the application to amend dated 1 March 2018 were not included in the ET1 claim form presented on 15 March 2017.

16. The Claimant accepts that they were not included. Indeed, he said that the barrister advising him advised him specifically not to include a claim for disability discrimination and he therefore did not do so. It is clear that he did mention stress and depression at part 15 of the form but did not, deliberately it seems, mention anything about a disability or about discrimination nor did he tick the box marked disability. He deliberately passed over that box and ticked a later box headed 'another type of claim' and directly below that he wrote *"Wrongful dismissal or breach of contract"*. There was nothing about being dismissed for requesting statutory rights.

17. I find that he now making an application to amend his claim by adding claims for disability discrimination and automatically unfair dismissal. These are entirely new claims and not a relabelling of facts already pleaded in the ET1 claim form.

18. The amendment sought is a substantial alteration to the claim. It is also significantly out of time. It is made one year after the ET1 claim form was presented and 17 months after the termination of the Claimant's employment. The Claimant had legal advice before presenting the ET1 claim form and if he had second thoughts about not presenting a claim for disability discrimination or automatically unfair dismissal, he could have sought alternative legal advice in a timely manner.

19. Indeed, he did seek legal advice before making the application to amend but waited a year before doing so. He has given no good reason for that delay. I took account in terms of time limits of the case of Robertson v Bexley Community Centre [2003] IRLR 434 where the Court of Appeal

said:

When Employment Tribunals consider exercising the discretion under what is now section 123 of the Equality Act 2010, there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse – a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

20. I also took account of the comments of the EAT made in the case of Chandhok v Tirkey [2015] which said that

The ET1 is not just something to set the ball rolling and an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the party chooses to add or subtract at some later date. It is required to set out the essential case.

21. I also took account of the decision in British Coal Corporation v Keeble [1997] IRLR 336 where the Employment Appeal Tribunal said that

A Tribunal is required to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case, in particular the length of and reason for the delay, the extent to which the cogency of evidence is likely to be affected by the delay, the extent to which the party sued has co-operated with any requests for information, the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

22. In this case, the delay has been considerable and it is clear that the cogency of evidence is likely to be adversely affected.

23. Finally, I took account of the Abercrombie case where the Court of Appeal said that in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old, the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted.

24. In my view, the prejudice to the Respondent if I grant the application to amend would be substantial. The Respondent would have to embark upon significant different areas of enquiry to deal with the new claims and as Mr French-Williams pointed out, it does not concede disability and so medical evidence would need to be obtained and all of that over two years after the Claimant was dismissed. The case would be unlikely to be heard until over three years after the dismissal. Mr French-Williams also pointed out that some of the Respondent's employees involved may no longer be employed and indeed even if they are, no doubt after that length of time, memories would have faded and documents may no longer be available.

25. However, if I refuse the application, the Claimant would be in no worse position than he was after having presented his original ET1 claim. Although some claims were struck out at the preliminary hearing which he failed to attend, he can still pursue his claims for notice pay and unpaid bonus, claims which were clearly and exclusively set out in the claim form on 15 March 2017.

26. For the above reasons, I find that the balance weighs in favour of the Respondent's objection to the application and that application to amend is refused. I shall now proceed to list the case to deal with the outstanding claims.

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Employment Judge Vowles

Dated 27 February 2019

Sent to the parties on

1 March 2019

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For the Tribunals office