



# THE EMPLOYMENT TRIBUNAL

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**BETWEEN**

**Claimant**

**and**

**Respondent**

**Mr S Gallagher**

**Public Health England**

**Held at London South**

**On 6 February 2019**

**BEFORE: Employment Judge Moore**

**MEMBERS: Ms P O'Toole  
Ms B Levertton**

## **Representation**

**For the Claimant: In Person**

**For the Respondent: Mr R Moretto, Counsel**

## **JUDGMENT**

The unanimous Judgment of the Employment Tribunal is:-

### **Claimant's applications:**

1. The Claimant's application to amend his claim is refused.
2. The Claimant's application to strike out the response and/or that the Respondent should pay a deposit as a condition of continuing to advance their response is also refused.

### **Respondent's applications:**

3. The Respondent's application to strike out the Claimant's claim is refused.

4. The Respondent's application for a deposit order is granted and the Claimant is ordered to pay a deposit of £350 as a condition of continuing these proceedings, a separate deposit order will be sent to the Claimant.
5. The Respondent's applications for redaction of sections of the Claimant's witness statements referring to ACAS discussions is granted. The Claimant is ordered to remove references to ACAS communications from his witness statement. The Claimant is also ordered to remove the documents from the bundle which reference the ACAS communications.

## **REASONS**

### **Claimant's application to amend claim**

1. The Claimant made an application to amend his claim on 29 September 2018. The amendments sought were as follows:

#### **New Claims**

- a) Detriment for having made a protected disclosure.
  - b) Discrimination on the grounds of disability (by association), race, religion and sexual orientation.
  - c) Indirect sex discrimination based on a comparison with shared parental leave/pay and maternity leave / pay.
  - d) Breach of contract.
2. The nature of these amendments sought therefore were entirely new claims, rather than relabelling or providing further and better particulars

#### **Expansion of existing claims**

3. There were two claims referred to in the amended claim that were arguably contained in the original claim, namely victimisation and personal injury. The amendments sought significantly expanded on the matters that were referred to in the ET1.
4. In considering the application to amend we had regard to the principles in **Selkent Bus Company Ltd v Moore** 1996 ICR 836, EAT. As set out above the nature of the amendments were either entirely new claims or new factual

allegations that changed the basis of the victimisation and personal injury claims.

Time limits

5. All of the new claims are brought significantly out of time as at the date of the application to amend. In respect of the discrimination claims we considered the Claimant's explanations as to why they had not been brought sooner when considering whether it would be just and equitable to extend time under S123 (1) (b) EQA 2010. In respect of the breach of contract claim and the detriment claim related to a protected disclosure we considered whether it was reasonably practicable to have presented the claim in time.
6. Many of the amendments sought relied on events that predated the claim with some going back to 2014. The explanation from the Claimant as to why they had not been included on his original claim form was as follows. Firstly, that the Claimant was a lay person and that he had not realised that he needed to particularise all of his claims to the extent that was necessary, furthermore that the Claimant had a gradual realisation or perception that he says he had been subjected to discriminatory acts.
7. The Claimant submitted that he had found there was insufficient room on the online ET1 form to go into all of the detail and that in submitting the claim online he had been limited to 200 words. We considered the Claimant's claim form. Section 8 of the ET1 claim form is headed "Type and details of claim". Underneath are a number of boxes that can be ticked to indicate the type of claim that is being made where the different types of discrimination (age, race etc) are clearly set out. The Claimant left the boxes blank apart from the box ticked for sex discrimination. Furthermore, the section at 8.2 was blank; this page asks for background and details of the claim, as was section 15 which is a whole page where additional information can be provided. We do not accept that there was insufficient room on the form to have prevented providing further detail of all the claims.

8. The Claimant explained that when he received notice of the case management hearing in June 2018, the enclosed case management agenda had a section asking if there was an application to amend the claim and he thought from this that he could do so at the case management hearing.
9. The Claimant told the Tribunal that he had some legal advice since issuing the claim and he had evidently done some research as he cited the Equality Act in his grievance which predated the claim. We concluded that the Claimant was sufficiently aware of potential legal claims that could have been brought at the time of the original claim. The Claimant presented as well as a consideration of his written documents as articulate and intelligent.
10. We have considered the Claimant's explanations carefully and concluded that it would not be just and equitable to extend time and permit the amendment in respect of the discrimination claims. Further, we do not accept that it was not reasonably practicable to have submitted the breach of contract claim or detriment claim (protected disclosure) in time.
11. The prejudice to the Respondents in having to address entirely new and historic allegations contained in the amendments outweighs the prejudice the Claimant will suffer in not being able to pursue claims most of which are substantially out of time.

Timing and the manner of the amendment

12. Whilst the Claimant's explanation in respect of assuming from the case management agenda he could apply to amend his claim may be plausible, the manner of the amendments sought in any event have made it impossible to grant the amendments. On the whole the amendments lack any substantial particulars containing no details of the alleged perpetrators, dates times and facts that are said to have taken place. For example, in respect of the protected disclosure claim, the amendment did not set out what the protected disclosure was, to whom it was made and when.
13. On all of the amendments sought the Respondent could not have begun to have sensibly responded to the amendments. If amendments are sought it is

important that they are clear in the nature of what is being pleaded so that the balance of prejudice can be assessed for example by understanding what evidence the parties might need to adduce. This was not something that we were able to do on this occasion, other than to conclude that the lack of particulars again tipped the balance of prejudice towards the Respondent.

14. For these reasons the Claimant's application to amend his claim is refused.

#### Claimant's application to strike out the Response

15. This application was brought on two grounds, firstly that the response was vexatious and secondly it had no reasonable prospect of success. This application was without merit. The Respondent has shown that they have reasonable prospects of showing that the Claimant was not employed on like work to that of this comparator on the basis that the Claimant's job had been graded as an SEO grade, which is one grade lower than his comparators who are on a Grade 7 and the roles are unlikely to be the same or broadly similar. Even if the Claimant can show that he was employed on like work or work of equal value, the Respondent has a prospect of establishing a genuine material factor defence. One of the Claimant's comparators was male and the other was not even in post at the time of the comparison period. Therefore, the Claimant's application to strike out the response is refused.

#### Respondent's application to strike out the Claimant's claim

16. Discrimination claims should only be struck out in the most obvious and plain cases. The Claimant asserts he can explain why he has chosen valid comparators. There is a significant amount of evidence in dispute in this case, which requires examination at full hearing by the Employment Tribunal and we are not in a position to say, based on the submissions that we have heard today that the Claimant's case has no reasonable prospect of success. Having said that, we are persuaded that there are grounds to conclude that the Claimant's claim has little prospect of success and accordingly we have made a deposit order set at £350.

Respondent's application to redact sections of Claimant's witness statement and bundle documents

17. It is not in dispute that evidence relating to ACAS discussions have been included in the Claimant's witness statement and the bundle. These are inadmissible under Section 87 of the Employment Tribunal Act 1996 and we accordingly make an order that such references are redacted from the Claimant's witness statement and the documents removed from the Bundle in advance of the hearing that will now take place to consider the Claimant's remaining claims.

Remaining claims and case management

18. A closed telephone Preliminary Hearing will be listed after the time for the Claimant to pay the deposit has passed so as to clarify what claims remain and address any further orders that are required.

Employment Judge Moore  
Date: 1 March 2019