



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Mortimer

v

NPL Management Limited

Heard at: London South Employment Tribunal

On: 27 February 2019

Before: EJ Webster

Appearances

For the Claimant:

Ms Johns (Counsel)

For the Respondent:

Mr Henry (Solicitor)

PRELIMINARY HEARING JUDGMENT

1. By and ET1 dated 20 March 2018 the claimant brought a claim for disability discrimination. The respondent filed an ET3 and refuted the claims. On 14 September 2018 the claimant's solicitors made an application to amend the claim. On 24 September I heard a preliminary, case management hearing listed for one hour. At that hearing it was apparent that the application to amend was detailed and extensive and that there was not sufficient time for me to consider it properly. The respondent was also in a difficult position to respond to the application at that time as they required further information to properly understand the application and its basis. Both parties had asked each other for significant additional information which neither had had time to provide. The matter was therefore re-listed for today. The purpose of today was therefore to consider the claimant's application to amend the ET1.
2. There were several versions of the amended ET1. We agreed that I was to consider whether the version at pages 36-41 of the bundle could be submitted.
3. The original Grounds of Claim was primarily a chronological list of events ranging in date from 1.10.16 to 26.3.18. There was little if any narrative apart from the initial paragraph. None of the facts were 'labelled' as fitting under any particular legal claim.

4. The claimant was unrepresented at the time that he submitted the claim. Within 2 weeks of his previous solicitors being instructed (at the beginning of September 2018) they applied for the claim to be amended. The claimant recognizes, in his application, that he is adding new claims as well as arguing that he has re-labelled some claims and clarified others.
5. Ms Johns' Skeleton argument in support of the claimant's application (pgs 82-91) sets out where there are new claims, where there are amendments and where there are clarifications. Somewhat confusingly this skeleton also includes factual incidents that are not in the amended ET1. I have only considered the matters actually set out in the amended Grounds of Claim, not those only included in the skeleton. If something is not in the Grounds of Claim I have not considered it as part of the application.
6. The majority of the respondent's objections are set out in their letter at pages 69-71 of the bundle though this was elaborated on in some respects by Mr Henry during the hearing.

Background

7. The claimant remains employed by the respondent. He has been diagnosed with severe asthma. The respondent accepts that he is disabled for the purposes of the Equality Act 2010. The claimant states that his asthma has been exacerbated by people smoking in the vicinity of his work space and that despite him raising repeated concerns, insufficient steps have been taken to protect him from that smoke. He also alleges that he has been treated badly because of raising those concerns with his employer.
8. The respondent refutes these claims in their entirety.

The Law

9. The leading case on amending claims is Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore [1996] IRLR 661. It was held that when faced with an application to amend, a tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions." Relevant circumstances would include the nature of the amendment, the applicability of time limits and the timing and manner of the application. I have therefore considered all these matters with regard to each amendment sought by the claimant. This was restated by the Court of Appeal in Kuznetsov v Royal Bank of Scotland [2017] EWCA Civ 43, though the scope was widened so that a tribunal ought to take account of all the circumstances, to balance the injustice and hardship of allowing an amendment against the injustice and hardship of refusing it, and to approach the Selkent factors as neither a tick box list or an exhaustive list of factors.
10. I have also had regard to the Presidential guidance on case management. This states that where substantial amendments are sought they require regard to be had to all the circumstances. In particular, the tribunal will consider whether

making or not making the amendment will result in any injustice or hardship to a party. The guidance restates the test in Selkent.

11. The claimant's application approaches this application to amend based on some factual amendments and then deals with the types of claim. Unfortunately the factual list of events in the skeleton argument is confusing as some of these facts are not even referred to in the amended ET1 let alone the original ET1 and it is not clear what head of claim they are meant to support. I have therefore approached this matter by considering each head of claim and whether it can be pleaded in relation to all or any of the facts relied upon for that claim.

Background Information/Factual clarification (paragraphs 1-30 Amended Particulars of Claim)

12. The respondent did not object to the addition of paragraphs 1-30 of the Amended Particular of Claim (pages 36-41) insofar as they amount to background information and clarification of the facts set out in the original Grounds of Claim.

Failure to make reasonable adjustments (paragraphs 32 – 35 Amended Grounds of Claim)

13. The respondent accepts that the claimant brought a claim for failure to make reasonable adjustments in his original ET1 and does not object to head of claim being brought.
14. The claimant confirmed at the original preliminary hearing in front of me on 24 September 2018 that the physical location of the new smoking shelter was not the basis for a claim. He clarified then and has clarified again today that the location of the new smoking shelter is not the basis for his claim. He states that it is the respondent's failure to ensure that people use the new smoking shelter that causes him difficulties because, he says, people still gather on the site of the old smoking shelter to smoke and do not use the new smoking shelter and/or are not confined to using the new shelter. Therefore it was agreed that the inclusion of the words "and new" at paragraph 32 was misleading and this would be deleted.
15. Ms Johns confirmed that inclusion of the date of 23 March 2018 at paragraph 33(a) was background information only and therefore the respondent did not object to this amendment.
16. The respondent objected to the inclusion of paragraphs 33(b) and (c) stating that these detriments were wholly unconnected to the claimant's other complaints. They occurred after the date of lodging the first claim for and are now out of time and were on 14 September when the claimant submitted his application to amend.
17. I accept that the factual incidents relied upon are out of time and were at the point at which the amendment was sought. However the claimant was moved from his original lab and continues to have to work from a different workplace and therefore arguably this is a continuing state of affairs albeit one that stems from a decision in March 2018. I make no finding as to whether these

detriments are in time or not but I find that it is arguable that they are part of a series of events and this does influence my consideration of whether to allow the amendment. Further the nature of the amendment is such that although it adds potential detriments, a claim for reasonable adjustments was clearly evident from the facts outlined in the original ET1. The basis for the new detriments remains the same – the fact that people were and are (according to the claimant) smoking in the vicinity of the claimant's work area. I think the respondent will be subjected to little detriment in having to respond to these additional claims whilst the injustice to the claimant of not being able to pursue them could be significant. Therefore, on balance, I allow these additional paragraphs and claims.

Indirect discrimination (paragraphs 36-38)

18. The respondent does not appear to object to the fact that this heading of claim was evident from the original ET1. However I have considered whether this is a claim relying on the facts already provided in the original ET1 that has simply been given a legal framework. The claimant confirmed at the hearing that the additional information at paragraph 37 of the amended grounds of claim is provided as factual information only and not a new claim.
19. I conclude that the inclusion of an indirect discrimination claim as pleaded at paragraphs 36 and 37 is a relabeling exercise only and the facts (namely that people continue to be allowed to smoke on site and the respondent has failed to take action to prevent people smoking in the wrong places and this practice has placed the claimant at a disadvantage because of his health) is not a new claim and therefore this amendment is allowed as it brings clarity to the claims being brought.

Discrimination arising from disability (paragraphs 39-40)

20. The basis for this claim is outlined at paragraphs 39 and 40 of the amended grounds of claim.
21. The facts relied upon by the claimant for the purposes of this claim are that, because of the exacerbation of his asthma he has been moved from his original workplace to another laboratory. He states that this is detrimental because it has resulted in his workload and expertise being decreased.
22. This is an additional issue that post dates the submission of the original grounds of claim. It is also an additional 'head' of claim.
23. As above, I find that the claimant working in an alternative workspace is capable of being an ongoing act or series of acts as it was continuing at the date of this hearing. Therefore it is possible that this claim is in time as the claimant remains placed in a different laboratory.
24. The case law clearly indicates that where new claims are brought after a claim form has been issued, it is acceptable for a tribunal to allow an amendment to the existing claim and not expect the claimant to submit a new claim. However I have also considered the potential prejudice to the respondent of accepting this new claim both in the sense of the factual basis and the 'head' of claim. I find that the issue arises out of the same factual situation. It does not, in my view,

significantly expand the evidence that the respondent needs to produce and I do not believe it will subject the respondent to an injustice relative to the injustice for the claimant if he could not bring this part of his claim which he could not have submitted at the date of his original ET1. I therefore allow this part of the amendment.

Harassment (paragraphs 41-43)

25. The claimant relies upon two acts as being acts of harassment:

- (i) An intranet notice being published about the movement of the first smoking shelter on 31 May 2017; and
- (ii) A conversation in a stairwell between him and a colleague around May 2017.

The intranet notice is referred to in the original grounds of claim. The conversation in the stairwell is not.

26. The respondent states that this heading of claim was not pleaded and could not be gleaned from the facts of the original ET1. They also object to the conversation in the stairwell being added on the basis that it could have been included in the original ET1 as it predates the submission of the original ET1 and it is now out of time and would have been out of time in September when the claimant made the application to amend.

27. I accept the inclusion of a claim for harassment on the basis that the fact of the publication of the harassment notice was included in the original ET1. Whilst the claimant does not use the word harassment, it is clear that he feels he has been badly treated by his employer and he alludes to the notice being inappropriate and harmful because he said “H and S decision unfortunate and health of certain individuals behind reason.” This wording is capable of being read as indicating that he felt badly treated by the wording of the statement – something which could amount to harassment. I therefore find that this is a relabeling of the existing claim and allow the addition of this head of claim based on this incident.

28. However I do not allow the inclusion of the conversation on the staircase as part of the claim. The claimant states that he did not know he could write on more than one page for the ET1 grounds of claim hence limiting the number of incidents in his list. Whilst I have no reason not to believe him, I find that this assumption by him was not well-founded given the clear indication later in the form that additional information could be submitted in section 8.1 of the form.

29. Further I believe that this claim would have been out of time even at the date on which the original ET1 was submitted as it is not capable of being anything other than a one-off incident and occurred approximately 9 months before the submission of the original claim. I have considered whether it would be just and equitable to extend time but I do not believe it is. The claimant had the opportunity to include this incident in the original claim but did not do so. I therefore find that it is not in the interests of justice to allow this claim to be added. The claim is highly unlikely not in time, it does not significantly disadvantage the claimant not to allow the addition of this one off incident given the remainder of his claims. The respondent on the other hand would have to seek the attendance and evidence of another witness and given the time frame

involved, that witness may have little or no memory of such an event. Therefore weighing up the relative hardship to the parties and taking into account the strength and timing of this claim, I do not allow this part of the application to amend.

Victimisation (paragraph 44)

30. This claim is an entirely new head of claim. The claimant relies upon submission of his grievance on 17 March 2017 (before he submitted his ET1) as being a protected act. The less favourable treatment he relies upon is being relocated to a different lab which occurred after he submitted the original claim. Therefore the facts relied upon for this claim are either included in the original claim or post date it and therefore could not have been set out in the original claim.
31. I allow this amendment. Although the move to a different lab could technically be out of time as a one off incident, I refer to my considerations at paragraphs 16 and 21-23 above and restate them in reference to this part of the application.
32. I do not consider that this addition subjects the respondent to any significant prejudice or injustice as they are already answering claims arising out of the same facts and therefore will not need to produce any additional evidence to answer this claim. Conversely were the claimant not be able to pursue this claim it could amount to a significant hardship to him.

Whistleblowing detriment (paragraphs 45-47)

33. The claimant relies upon a disclosure on 11 May 2017 as being the qualifying disclosure. He drew his line manager's attention to that disclosure on 3 August 2017. He then relies upon the incidents set out at paragraph 47 as being the detriments he suffered as a result of the respondent becoming aware of his disclosure on 11 May 2017. In the original ET1 he ticked the whistleblowing claim box.
34. At this hearing he withdrew the amendment at paragraph 47a as the incidents relied upon predate the 3 August 2017 when his manager became aware of his disclosure. This paragraph should therefore be deleted.
35. The two subsequent detriments relied upon post-date the submission of the original ET1 and are, in summary, being sidelined from his area of expertise with his work being given to Mr Cooper and being moved to a different lab.
36. The original disclosure on 11 May 2017 is referred to in the original grounds of claim. The subsequent meeting with his manager on 3 August 2017 is not. I disagree with the respondent's submission that this claim has no factual nexus to any other facts relied upon in the claim. It is clear throughout that the claimant considers he has been treated badly because he has raised concerns about the effect of others smoking at his workplace.
37. Again, I refer to my reasoning as set out at paragraphs 16 and 21-23 above. I have considered the case of Baker v Commissioner of Police of the Metropolis UKEAT/0201/09 and note that just ticking the box of whistleblowing does not in itself satisfy the conditions of outlining a recognizable complaint of

whistleblowing detriment. I accept that this could therefore be a new head of claim and applied that standard of reasoning to the consideration of whether this amendment ought to be allowed.

38. The disclosure to HSE is set out in the original grounds of claim and the detriments now relied upon post date the submission of the ET1. Therefore the claimant could not have set them out in the original claim. Whether they are out of time is matter for the tribunal that hears this claim but they potentially form part of an ongoing series of events and are therefore potentially in time.
39. To refuse this amendment would cause the claimant significant hardship. Given the other additions already allowed above, this matter raises no new matters of evidence for the respondent as they are the basis for other claims above and therefore does not place them at a significant disadvantage. I therefore allow this amendment.

Conclusion

40. Whilst I accept that the allowed grounds of claim are now more extensive than the original list of incidents, the majority of the amendments add clarity and information to the list of incidents set out in the first Grounds of claim. The essential basis for all the claims remains the same – namely that the claimant believes the respondent has not dealt with his complaints about cigarette smoke properly or fairly. None of the amendments allowed deviate from these central facts. The additional clarity and labelling of the claims enables the respondent to properly respond and will allow the tribunal to better understand the basis for the parties' cases. Where new claims or facts have been allowed I have undertaken a careful consideration of the balance of hardship and the relevance, reason, justice and fairness of each amendment.
41. Orders were made at the hearing with the agreement of the parties and these are set out in a separate document.

Employment Judge Webster

31 March 2019