



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104750/2017

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Held in Glasgow on 6 February 2019

Employment Judge Shona Maclean

10 **Miss E Sneddon**

Claimant
Represented by:
Mr W Templeton
Consultant

15 **East Dunbartonshire Council**

Respondents
Represented by:
Ms F Ross
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's application to amend is allowed to the extent that it is adding to rather than replacing the existing particulars of claim (section 8.2 of the claim form) but under deletion paragraphs 3, 4 and 5 and deletion of the sentence, "this requirement impacted on the claimant's depression by placing her under unneeded stress" in paragraph 11 of the proposed amendment.

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REASONS

Introduction

1. This preliminary hearing was arranged to determine an application by the claimant on 13 November 2018 for additional information to be added to the claim form. The respondent opposed the application; the respondent said that the claimant was seeking to amend the application and such an application should be refused.

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2. Mr Templeton represented the claimant who was present. Ms Ross represented the respondent. The respondent prepared productions to which I was referred.
3. The issue to be determined was whether to exercise my discretion to allow the proposed amendment and if so to what extent.
4. I found following facts to be established or agreed.

Findings in fact

5. The claimant, who was unrepresented sent the claim form to the Tribunal's office on 26 September 2017. In section 8.1 the claimant ticked that she was claiming discrimination on the grounds of disability. In section 8.2, the claimant referred to her condition, Cushings Syndrome which she stated is a progressive condition which affects her mobility. The claimant said that she had a disability in terms of the Equality Act 2010 (the EqA). The claimant narrates events that took place on her return to work following long term sick absence on 13 March 2017. The claimant maintains that she was treated differently than another colleague on the same grade in relation to a job evaluation process which had taken place during her absence and that the respondent had failed to make reasonable adjustments on her return to work. At section 9.2, the claimant concludes *"I believe I have been and continue to be discriminated against because of my disability. My employers have failed to make all of the reasonable adjustments which they ought to have done."*
6. The respondent sent a response in which it raised a preliminary issue of time bar in relation to matters before 4 May 2017. The respondent denied that the claimant had been subject to disability discrimination as alleged and if the claimant was disabled the respondent was unaware of the full nature, extent and impact of her condition. The respondent denied that the claimant had been subject to direct discrimination or that the respondent was under a duty to make reasonable adjustment or that it failed to do so. The respondent asserted that the claimant had failed to identify:

- a. the acts of direct discrimination or the basis upon which she alleged that the treatment about which she complained was because of her disability;
- b. what was the substantial disadvantage the claimant was put through compared to non-disabled employees;
- c. what provision, criterion or practice (PCP) the claimant relied upon for the purposes of her reasonable adjustment complaint; and
- d. what substantial disadvantage does the claimant say that she suffered because of the PCP.

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7. A preliminary hearing for case management purposes took place on 30 November 2017. It focused on the information that required to be exchanged in relation to determining whether the claimant had a disability in terms of the EqA.

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8. In March 2018, the case was sisted to permit the parties to discuss settlement. At the claimant's request, the sist was recalled in September 2018 and a preliminary hearing for case management took place on 25 October 2018 (the October PH).

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9. In note of the October PH, it was recorded that the claimant had presented a complaint alleging that she had been discriminated because of her disability when the respondent treated her less favourably and failed to make reasonable adjustments. Mr Templeton acknowledged there was a need for specification of the clam to be provided and he was directed to do so by 16 November 2018. The respondent had until 7 December 2018 to comment on the specification of the claim or provide specification of the response.

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10. On 17 November 2018, Mr Templeton referred to the note of the October PH and "enclosed a further note of particulars to stand as an amendment to the ET1 submitted by his client before she had the benefit of advice as agreed".

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11. On 6 December 2018, Ms Ross advised that the respondent objected to the proposed amendment because it seeks to introduce new facts, new claims and adding an additional disability.

5 12. At preliminary hearing for case management on 21 December 2018 (the December PH) the Employment Judge directed that this preliminary hearing be fixed to consider whether to allow the proposed amendment. In addition, it should be case management to deal with the arrangements for the final hearing when the issue of time bar would be considered.

10 **Submissions**

The Claimant

13. Mr Templeton explained that the claimant was unrepresented until the October PH. The claim form had been presented without the benefit of advice and the claimant had been allowed to provide further specification by amendment within 21 days which she did on 13 November 2018. The
15 respondent was given 21 days to reply. It did so on 6 December 2018 objecting on several grounds. There was no mention in that the claimant had not made an application to amend.

20 14. It was the respondent who asked for further specification. Mr Templeton did not accept that the claimant was adding new facts, making a new claim or adding an additional disability.

15. In relation to the disability, the claimant has always maintained that she had
25 Cushings Syndrome. Clinical depression is a side effect of that condition and not a new disability.

16. It had already been decided at the December PH that the time bar point would be reserved and addressed at a final hearing. It did not need to be addressed
30 at this stage and could be rolled up for the final hearing.

17. The original claim did not specify what type of disability the claimant was claiming. Her direct discrimination claim was in relation to the reduction in her

grade. The indirect discrimination claim was about the procedures that they followed and there was a failure to make reasonable adjustments. All the claims were flagged up in the original claim form and there are no new facts. I was therefore urged to allow the amendment.

5 *The Respondent*

18. Ms Ross said that technically there had been no formal application to amend. Furthermore, there had been no attempt by the claimant to address the factors which I had to consider in exercising my discretion (see *Selkent Bus Company Limited v Muir* [1996 ICR830]).

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19. I was referred to the previous preliminary hearing notes. There was no decision that the amendment had been previously granted or agreed. The reasons for the respondent's objection was set out in the email sent on 6 November 2018.

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20. Miss Ross said that the amendment is significant in that it seeks to introduce a new head of claim indirect discrimination. This was not foreshadowed in the claim form and is quite distinct from direct discrimination and a claim of failure to make reasonable adjustments as it involves a different line of enquiry (see *Reuters Limited v Cole* UKEAT [0258/17/BA] and *Office of National Statistics v Ali* [2004] AWCACIV 1363).

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21. Miss Ross also said that the claimant is seeking to introduce a new disability. There was no reference in claim form to clinical depression. The claim form and claimant's agenda for previous preliminary hearings for case management focused on her difficulties in relation to physical impairment and there was no reference to any mental impairment.

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22. The claim form also introduces new facts:

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- a. That the claimant suffers from clinical depression.
- b. That she was not consulted about the change to her grade.
- c. That she was denied a working space on the ground floor.
- d. She was not provided with PPE.

- e. She was not provided with a designated disabled parking bay.
- f. That she was disadvantaged by a chair without an arm.
- g. That she requested an auxiliary aid, a wheeled briefcase.
- h. That her workstation was not secure and so she had required to carry her laptop and files on a daily basis.
- i. That she was told that she should purchase a briefcase herself at her own cost.

23. Where there is a new head of claim it is essential for me to consider when deciding whether to allow the amendment whether or not it has been presented out of time. The indirect discrimination claim relates to an email sent on 3 April 2017. Accordingly, the claim would have been out of time when the claim was originally presented and was certainly out of time when the amendment application was made in November 2018. No arguments have been advanced why it would be just and equitable to extend the time for presenting the claim. I was referred to *Selkent* (above); *Amey Services Limited & another v Aldridge & others* UKEATS/0007/16JW, paragraph 22; *Galilee v Commissioner of Police for the Metropolis* ICR634 paragraph 67 to 68 and letters from Employment Tribunals (Scotland).

24. I was asked to consider the balance of injustice and hardship. One of the respondent's witnesses has already retired. The respondent is aware of the information set out in the claim form, but the witnesses will require to be asked about various other allegations which have only now been brought to light. The new claim of indirect discrimination is inadequately specified. The claim form could proceed with existing claims. I was invited to refuse the application.

Deliberations

25. From the submissions, there appeared to be no issue that under rule 29 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) I had broad discretion to allow an amendment at any stage of the proceedings. However, such discretion must be exercised in accordance with the overriding objective of dealing with cases

justly and fairly under rule 2. I should also have regard to the guidance from the EAT in *Selkent* (above).

5 26. This claim came before the Tribunal in September 2017. A final hearing is to be arranged but has not yet been fixed.

10 27. I considered that in exercising my discretion, I had to have regard to all the circumstances of the case, any injustice or hardship which would result from the amendment or the refusal to make it. This involves 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. The factors include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

15 28. For the avoidance of doubt, I considered that at the October PH, the claimant was directed by the Employment Judge to provide “specification of the claim”. This was against the background of the respondent requesting the details at paragraph 6 above. The claimant was not directed to amend claim. I agreed with Miss Ross that when Mr Templeton intimated the document headed
20 “particulars of claim to stand as an amendment to ET1”, he was seeking to substitute this document presumably for section 8.2 of the claim form although this was not entirely clear. While Mr Templeton may not have considered that this document was an amendment to the claim form and therefore did not make an application to amend the claim form, this is an effect of what
25 has happened given the respondent’s objection and the direction made at the Employment Judge at the December PH. I was satisfied that the claimant had made an application to amend.

30 29. I then considered the nature of the proposed amendment. As indicated above, the proposed amendment seeks to replace background information and details of the claim as set out in section 8.2 of the claim form. I agreed with Miss Ross’ submission the proposed amendment seeks to add a new type of claim: indirect discrimination which is not foreshadowed in the claim form or indeed any subsequent agenda provided by the claimant.

30. It also states that the claimant has another disability: clinical depression and that is a disability within the meaning of section 6 of the EqA. Paragraphs 3, 4 and 11 of the proposed amendment refer to clinical depression. None of the references to clinical depression and its effect on the claimant's day to day activities were foreshadowed in the claim form. These new facts must have been known to the claimant at the time the claim form was presented.
31. Paragraph 6 of the proposed amendment provided in my view and additional information about how the claimant was notified of her downgrade and her understanding this was because of her disability. It also referred to an indirect discrimination claim which in my view is a new head of claim.
32. Paragraph 6, 7, 8, 9 and 10 of the proposed amendment provided additional information. However, there is also new facts about the claimant being denied working space on the ground floor and not receiving an update remote access and not being provided with PPE. Again, these new facts must have been known to the claimant at the time the claim form was presented as did the new fact about the provision of a disabled parking bay in paragraph 11.
33. Paragraph 12, 13, 14 and 15 provide additional information and new facts. The new facts are again information which was in the claimant's possession at the time she presented the claim form. Paragraph 16 provides additional information.
34. From the above, I consider that the amendment comprised of:
- a. expanding on facts contained in the claim form.
 - b. adding new facts, most of which were known when the claim form was presented.
 - c. raising a new cause of action (indirect discrimination and introducing a potentially new disability).
35. While I accepted that the amendment included new facts, I was not convinced that all of these new facts would require the Tribunal and parties to make new

lines of enquiry or that it would necessarily expand on the documentary and oral evidence. It seemed to me that some of the new facts would in any event be required to explain what adjustments might have been put in place.

5 36. My understanding from Mr Templeton was that the claimant was not suggesting that there was any mental impairment which amounted to a disability as explained in section 6 of the EqA. However, I felt that these new facts when included could result in different line of enquiries if allowed to proceed. I also felt that allowing an indirect discrimination claim at this stage especially as it lacked specification and would involve making new and different lines of enquiry and being potentially out of time would expand on the documentary and oral evidence.

15 37. Turning to the timing and manner of the application while it was made a year after the claim form was presented, it was initially made in response to additional information sought by the respondent and provided within the timescale directed in the October PH.

20 38. I note that the claimant was not initially legally represented. However, she had prepared a detailed claim form setting out facts and quite clearly indicating the type of claim that she was pursuing albeit without reference to any statutory authority.

25 39. I appreciated that the lateness of an application to amend is relevant but not an insuperable reason for refusing an amendment application. While there was a significant delay in making application, a final hearing has not as yet been fixed.

30 40. As indicated, I consider that there was an issue in relation to time bar in respect of the indirect discrimination claim. Mr Templeton suggested that such a claim was foreshadowed in the claim form but I did not accept that submission. There was little explanation for the delay other than the claimant not being represented.

41. There was no suggestion that the reason for the late amendment was due to ignorance of the facts themselves or delay in any response from the respondent. The claimant knew about the facts and they were within her knowledge at the time.

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42. I then turned to consider the interests of justice and the relevant hardship of granting and refusing the amendment. If the amendment is permitted in its entirety there will require to be the specification of the indirect discrimination claim and a potential enquiry as to the respondent's decision in relation to the claimant's clinical depression. This is likely to result in further case management and result in expense for the respondent.

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43. If the amendment is refused the claimant would be advancing the claim which she was advancing in the claim form but without the additional information.

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44. Looking at the whole surrounding circumstances and balancing hardship and injustice to both parties, I concluded that the proposed amendment should be allowed to a limited extent. The proposed amendment will be adding to rather than replacing the existing particulars of claim (section 8.2 of the claim form) but under deletion paragraphs 3, 4 and 5 and deletion of the sentence, "this requirement impacted on the claimant's depression by placing her under unneeded stress" in paragraph 11.

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Employment Judge: Shona MacLean
Date of Judgment: 13 February 2019
Date sent to parties: 14 February 2019