



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Master

**Respondent:** Springfields Fuels Limited

**Heard at:** Manchester

**On:** 10 September 2019

**Before:** Employment Judge Ainscough

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr A Moore, Solicitor

## JUDGMENT

- (a) The claimant has permission to amend his claim and rely on paragraph (xv) of the constructive dismissal issues.
- (b) Paragraph (xii) of the constructive dismissal issues is not an amendment but rather further detail of facts already pleaded and can be relied upon by the claimant.
- (c) Permission to amend is refused in respect of the constructive dismissal issues at paragraphs (ii), (x) – (xiii) and (xvi) – (xviii).
- (d) The claimant has permission to amend his claim and rely on paragraphs (ii) – (iv) of the race discrimination issues.
- (e) Permission to amend is refused in respect of the disability discrimination issue at paragraph (ii).
- (f) The claimant has permission to amend his claim and rely on paragraphs (i) – (iii) of the religion or belief discrimination issues.

# REASONS

1. The Preliminary Hearing was an application made by the respondent to:-
  - (a) Clarify the issues;
  - (b) Deal with any application to amend made by the claimant in his email of 23 April 2019;
  - (c) Deal with any time limit issue that may arise from the application to amend by the claimant; and
  - (d) To determine whether or not some or all of the claims should be struck out on the basis of no reasonable prospect of success and/or not being actively pursued.
2. At the outset of the hearing, I explained to the claimant the application that had been made by the respondent and that it would be necessary to go through the claim form and his email of 23 April 2019 to clarify the issues in each claim he sought to bring before the Employment Tribunal.

## 3. **Clarification of Issues**

### a. Constructive Unfair Dismissal Claim

The claimant contends that the following amount to a breach of contract for which he resigned on the 28 February 2018.

- (i) On 18 January 2018 the respondent drafted a letter to the claimant, which was not received until 20 February 2018, which did not accept that the grievance he had submitted was resolved;
- (ii) The claimant was not paid for overtime in accordance with the letter he received on 17 September 2009, until September 2010. The claimant was never paid for credit time.
- (iii) False allegations were made about the claimant's use of a fork lift truck in December 2017.
- (iv) In December 2017, Gail Beauchamp from Human Resources made a false allegation to occupational health about the claimant's control of a fork lift truck.

- (v) In December 2017, despite the occupational health doctor confirming that the claimant was fit to drive a fork lift truck, he was still banned from doing so by Gail Beauchamp.
- (vi) In February 2018 the claimant looked at the personnel directory on the email address book and noted his position was that of Labourer and not Team Worker.
- (vii) The respondent instigated disciplinary proceedings in regard to the fork lift truck incident by way of a letter dated 18 January 2018.
- (viii) In October 2015 the claimant's planning job was terminated.
- (ix) In October/November 2015 the claimant's flexible working stopped.
- (x) In December 2015 Gail Beauchamp terminated the claimant's flexible working for Friday prayers.
- (xi) On 18 March 2016, conveyed by way of letter of 11 April 2016, Andy Musgrove told the claimant that his flexible working application to attend Friday prayer had been unsuccessful.
- (xii) In 2014 Ian Grant made a false allegation in a performance management agreement, that the claimant had breached his employment contract and tried to dupe him into signing it.
- (xiii) The claimant was never paid sick pay at the pension rate once the full pay sick pay had run out despite enquiring with the Welfare Officer about this in July 2015.
- (xiv) Between May and July 2015, the claimant's union subscription was not deducted from his wages despite the claimant being paid wages during these months. The claimant had to reimburse the union himself in November 2015.
- (xv) The claimant was subject to a performance management agreement on 15 June 2017 in which Andy Musgrove and Sam Cotton removed six skills from the claimant's recorded skill set, which prohibited him from doing different jobs.
- (xvi) In 2017 a towing hitch fell on the claimant's foot injuring him.

- (xvii) In 2016 the claimant's left hand was injured by a hand-held angle grinder.
- (xviii) In the middle of 2017 a false allegation was made that the claimant had entered a contaminated area without wearing a dust mask.
- (xix) In late 2017 the claimant and an apprentice were exposed to Asbestos in the work place and the respondent did not provide them with protection nor did they investigate the incident.

b. Race Discrimination

- (i) In October 2015, Gail Beauchamp made a mimic of the claimant to Andy Musgrove when describing how he had been granted flexible working. The claimant contends that she would not have made this comment in regard to a white person and the same amounts to direct race discrimination and/or harassment.
- (ii) On various unspecified dates Steve Chippendale, a Welder, made derogatory comments about the claimant's health and ability to work which the claimant contends he did because of the claimant's ethnicity and would not have done so to a white person and the same amounts to direct race discrimination and/or harassment. Specifically, on 28 February 2018 Steve Chippendale ordered a cake which said "Good Fooking Riddance!" to celebrate the fact that the claimant was leaving work.
- (iii) There was a failure by Tim Berry, the Line Manager to deal with Steve Chippendale because he was friends and went cycling with him and the same amounts to direct race discrimination and/or harassment.
- (iv) In September 2017 Gary Preston told Steve Chippendale to stop being racist in the rest room and Steve Chippendale's behaviour amounts to direct race discrimination and/or harassment.

c. Disability Discrimination

- (i) The claimant contends he suffers from a shoulder injury that occurred in 2015 when he fell and injured the tendons in his shoulder. The claimant had to wait two months for an operation, was in a sling for six weeks and was signed off from work for six months.

- (ii) The claimant also contends he suffers from a left-hand disability which was caused by the injury from the handheld angle grinder at work.
- (iii) The claimant contends that the respondent failed to make reasonable adjustments as recommended by the Occupational Health Unit that he be allowed to attend medical appointments for his shoulder injury and hand injury. The claimant contends that he was having medical appointments for his shoulder injury in 2015, 2016 and 2017.
- (iv) The claimant contends the respondent failed to make reasonable adjustments on 20 November 2015 by asking him to lift a 30kg barrel of oil despite medical advice saying that he should lift no more than 5kg.
- (v) The claimant contends that the respondent failed to make a reasonable adjustment of allowing him to carry on driving a fork lift truck. As a result the claimant had to do manual handling jobs which exacerbated his left-hand disability.

d. Religion or Belief

- (i) The claimant is Muslim and contends that stopping the flexible working that accommodated his attendance at Friday prayers in December 2015 was discrimination on the grounds of religion or belief.
- (ii) The claimant contends that refusing his application for flexible working for attendance at Friday prayer on 18 March 2016 and 11 April 2016 was discrimination on the grounds of his religion or belief.
- (iii) That on an unspecified date, Steve Chippendale stated that “we live in a Christian country who has given you permission to go and pray during working hours”. The claimant contends that this amounted to discrimination on the grounds of the claimant’s religion or belief.
- (iv) That a referral to prevent Anti-Terrorist Police post-employment amounts to religion or belief discrimination contrary to section 108 of the Equality Act 2010.

**Submissions**

Respondent’s submission

4. The respondent's representative contended that the majority of claims brought by the claimant were out of time. The early conciliation certificate was lodged on 8 May 2018 and therefore any act prior to 8 February 2018 was out of time.
5. The respondent is also concerned that it would be difficult for the claimant to bring the unfair constructive dismissal claim because he in fact elected for voluntary severance and was paid in accordance with that scheme.
6. On query from the Tribunal as to the last straw argument the respondent conceded that there may well be a position that the claimant could take in regard to last straw in which mutual trust and confidence could have been said to have been breached, but this would be evidentially difficult. The respondent noted that the same type of argument was not in the claim form and that the voluntary severance and possible affirmation of any breach would make it a legally difficult claim for the claimant to bring.
7. The respondent was not expecting the Tribunal to strike out on this point and noted that evidence would need to be heard by the Tribunal.
8. Instead, it was agreed that the Tribunal would deal with the amendment application.
9. The respondent submitted that the claimant's email of 23<sup>rd</sup> April went beyond answering the respondent's request for further and better particulars. The respondent had specifically requested further and better particulars of those acts pleaded in the claim form and anything not included in the claim form, was a new claim.
10. The respondent submitted that there were whole new facts that amounted to whole new claims that the respondent was now being asked to respond to. The respondent contends that the following amount to amendments to the claim:
  - Constructive Unfair Dismissal: claims (ii), (x), (xi), (xii), (xiii), (xv), (xvi), (xvii), (xviii).
  - Race Discrimination: claims (i), (ii) and (iii)
  - Disability Discrimination: Claims (ii)
  - Religion or Belief Discrimination: Claims (i), (ii) and (iii).
11. The respondent contends that there is a massive prejudice caused to it because these amendments are being considered some twelve months after the claim form was submitted and it is highly likely that any final hearing on these issues will be in another twelve months' time and it contends it would have difficulty in finding any witnesses who could remember what happened.

Claimant's Submission

12. It was the claimant's submission that he had rushed the claim form because he had a deadline. The claimant submitted that he had included everything he could remember at the time and the reason for that was because he was rushing.
13. The claimant contends that at the time he submitted the claim form he was suffering from stress.
14. When the Tribunal queried why it had taken him until April 2019 to provide the further and better particulars requested by the respondent in September 2018, the claimant contended that he was suffering from stress, he was a litigant in person and had not quite understood what he needed to do.

**The Law**

15. In the case of **Selkent Bus Company Limited -v- Moore 1996 ICR 836**, the Employment Appeal Tribunal endorsed the key principle that when exercising its discretion in an amendment application, Tribunals must have regard to all the circumstances and in particular, any injustice or hardship which would result from the amendment or refusal to make it.
16. In that case, Mr Justice Mummery outlined that a Tribunal will need to consider: -
  - (i) The nature of the amendment: is it minor or substantial;
  - (ii) The applicability of time limits – if a new claim is proposed by way of amendment, whether the new course of action is in time or whether time limits should be extended;
  - (iii) The timing and manner of the application.
17. Guidance Note one of the Presidential Guidance on general case management, at paragraph 12 states “if the claimant seeks to bring a new claim, the Tribunal must consider whether the new claim is in time”.
18. However, at paragraph 11.2 Tribunals are reminded that even if no new facts are pleaded, the Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
19. Before any time limit issues are considered, it is incumbent on the Tribunal to consider the nature of the proposed amendment.
20. In the case of **Abercrombie and Others -v- Aqa Range Master Limited 2013 IRLR 953** the Court of Appeal determined that when considering a new allegation amendment, Tribunals should focus on:

**“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”.

## Discussion and Conclusion

### Constructive Unfair Dismissal

21. The application to amend to include claim (ii), that the claimant was not paid overtime from 17 September 2009 to September 2010 was not pleaded in the claim form. It amounts to a new allegation.
22. Whilst the claimant appears to contend that the series of breaches of the contract led to his eventual resignation in February 2018, I struggle to see how this failure some nine years earlier could be part of such a series. When balancing the hardship of injustice and hardship caused by not including this claim, I note that the claimant was in receipt of his overtime payment, albeit twelve months after the event. It is unlikely that the respondent would have the ability to obtain witness evidence given the duration of time and for this reason, this part of the application to amend is refused.
23. The application to amend to include claims (x) and (xi) in regard to the removal of flexible working to attend Friday prayer and the refusal of the flexible working application for Friday prayer are not included within the claim form. Whilst there is a complaint of removal of flexible working, that flexible working was provided for another reason and not Friday prayer. I take the view that this would amount to a new allegation.
24. The removal of Friday prayer flexible working occurred in December 2015 and the application was refused in March/April 2016. The respondent will have difficulty in obtaining any substantial evidence, either in witness or documentary form in regard to acts which took place over three years ago and it will thus be difficult for the respondent to fairly respond to this claim. I have weighed the injustice and hardship to the claimant in not allowing this amendment to his claim with that of the respondent, and on balance I am of the view that the respondent faces a greater hardship due to the unavailability of evidence. For this reason, I refuse the claimant's application to amend the claim in this way.
25. The application to amend the claim to include claim (xii), the 2014 allegation that the claimant was forced to sign a performance management agreement which stated he had breached the employment contract, is included within the claim form. This is not an application to amend but rather further details and will remain within the claim.
26. The application to amend the claim to include claim (xiii), a complaint that the respondent failed to pay the claimant sick pay at the pension rate, is not within the claim form. There is no general complaint in this regard and this amounts to a new allegation.



27. The claimant contends that this took place in the Summer of 2015. The respondent makes the point that it would have difficulty obtaining any substantive evidence, either witness or documentary, to properly respond to this point. I have weighed the injustice and hardship to the claimant in not allowing this amendment to his claim with that of the respondent, and on balance I am of the view that the respondent faces a greater hardship due to the unavailability of evidence. For this reason, I refuse the claimant's application to amend the claim in this way.
28. The application to amend to include claim (xv), that the claimant was subject to a performance management agreement on 15 June 2017 does not appear in the claim form. However, the claimant does make complaints in the claim form of similar management meetings in regard to his medical appointments.
29. Whilst this is a new allegation, when balancing the injustice and hardship caused to the parties, it would appear that the respondent will have to provide evidence in regard to its dealings with the claimant in late 2017, of which this was one such meeting. The claimant will be subject to more prejudice if I were to deny this amendment, than there would be to the respondent in having to obtain evidence for an additional meeting. For this reason, I will allow this amendment.
30. The application to amend to include claims (xvi) and (xvii) to deal with the injuries the claimant suffered in the workplace in 2016 and 2017 respectively are new allegations and are not included in the claim form.
31. Both new allegations will require the respondent to obtain detailed evidence about the incidents themselves and the aftermath and how the respondent dealt with the same. Balancing the injustice and hardship caused to the parties, these incidents date back some years and the respondent contends that it will have difficulty in obtaining the relevant evidence to properly respond to this part of the claim. For that reason, the application to amend the claim on these two grounds is refused.
32. During the Preliminary Hearing the claimant was unable to particularise the application to amend to include claim (xviii), that a false allegation had been made that he had entered a contaminated area without a dust mask.
33. This is a new allegation that is not included in the claim form and given the generality of the amendment, the injustice and hardship caused to the respondent in trying to respond to such a general claim, will be great. It is for this reason that I refuse this amendment.
34. The Tribunal concludes that the respondent should respond to the claims detailed at points (i), (iii), (iv), (v), (vi), (vii), (viii), (ix), (xii), (xiv), (xv) and (xix) of the constructive unfair dismissal claim.
35. It was conceded by the claimant during the Preliminary Hearing that the complaint in regard to the referral to the Anti-Terror Police occurred after his

resignation and therefore would not form any part of a breach of contract about which he could resign.

#### Race Discrimination

36. The Tribunal takes the view that the only claim of race discrimination included within the claim form was that on 28 February 2018 when the claimant was presented with a cake with the phrase "Good Fooking Riddance!" which was his last day. This cake was bought by Stephen Chippendale who the claimant says was also responsible for numerous comments over the years which, the claimant contends, were as a result of his race.
37. The amendment sought by the claimant to include claim (i), that Gail Beauchamp mimicked him, is not included in the claim form and occurred in October 2015. This is a new allegation and is out of time. As this incident occurred almost four years ago it will be difficult for the respondent to obtain evidence to properly respond to this claim. This incident is unconnected to the other complaints of race discrimination and does not appear to form part of a series of acts. Balancing the injustice and hardship that will be caused to the respondent and the difficulty it will have in responding to the claim, permission is refused to amend the claim in this way.
38. There is an application to amend the claim to include claims (ii), (iii) and (iv) to include comments made by Stephen Chippendale, the management's failure to deal with those comments and the challenge made in September 2017 by a colleague. The cake allegation is within time. If, as it appears, the claimant is contending that the cake allegation is the last of a series of acts, the issue of whether any such amendments are in time, must be determined by a full Tribunal having heard all the evidence.
39. The Tribunal notes the hardship that would be caused to the respondent having to respond to unspecified dates when Steve Chippendale allegedly made such comments. However, the Tribunal takes the view that the respondent would have been aware of the complaints made by the claimant in 2017 when he submitted his grievance and should be able to respond to this part of the claim. It is for this reason that the Tribunal allows those amendments to be made.

#### Disability Discrimination

40. The amendment application in this regard relates to the lifting of a 30kg oil drum on 20 November 2015. This is not pleaded in the claim form and is a new allegation.
41. This incident took place almost four years ago. This reasonable adjustment does not relate to either the pleaded reasonable adjustments about the attendance at medical appointments or the failure to allow the claimant to carry on driving a fork lift truck. The Tribunal has considered the injustice and hardship to the parties and concludes that there would be greater

injustice and hardship to the respondent having to respond to this claim given the duration of time and the isolated nature of this claim and the disconnect with the other type of disability discrimination claim that has been pleaded. For this reason, the Tribunal refuses this application to amend.

42. Therefore, the respondent will respond to the claims (i) and (iii) of the disability discrimination part of the claim.

#### Religion or Belief

43. The first three claims are not included within the claim form and are new allegations. The first two new claims occurred at the end of 2015 and the beginning of 2016. The claimant is unable to give a day when Stephen Chippendale made reference to a Christian country. The claim for post employment discrimination following the referral to PREVENT is contained within the claim form.
44. If, as it appears, the claimant is contending that the PREVENT allegation is the last of a series of acts, the issue of whether any such amendments are in time, must be determined by a full Tribunal having heard all the evidence and therefore permission is given to amend the claim to include all three new allegations.

#### **Strike Out Application Rule 37**

45. Whilst the respondent made an application to strike out all or some of the claims following any clarification of the issues by the claimant at this Preliminary Hearing, the respondent did not detail that application further. It was agreed that the Tribunal would deal with the amendment application and provide its judgment before the respondent took stock of the claims it faced.

#### **Case Management Orders**

46. The respondent is granted permission to amend the response and must do so by no later than 18<sup>th</sup> October 2019.
47. It was agreed with the parties that there would need to be a further Preliminary Hearing to case manage the remaining case to a full hearing. That Preliminary Hearing for case management purposes will take place on **30 October 2019**.
48. If the respondent takes the view on having considered the remaining claims, that it would like to refresh its application to strike out any or all of the claim under Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, it should write to the Tribunal within 14 days of this judgment being sent to the parties and apply to convert the Case Management Hearing into a Preliminary Hearing for the purposes of that application.

49. In addition, if the 30 October 2019 is an inconvenient date of either party, they should write to the Tribunal within seven days of this judgment being sent to the parties with alternative dates of availability so the matter can be relisted.

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Employment Judge Ainscough

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Date 19<sup>th</sup> September 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
5 October 2019

FOR THE TRIBUNAL OFFICE