



EMPLOYMENT TRIBUNALS

Claimant: Miss L Horne

Respondent: ASDA Stores Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Leicester **On:** 17 October 2019

Before: Employment Judge Ayre (sitting alone)

Appearances

For the claimant: In person

For the respondent: Miss S Firth, Counsel

DECISION AT PRELIMINARY HEARING

1. The name of the respondent is changed to ASDA Stores Limited.
2. Emma Simes is not joined as a party to these proceedings.
3. The claimant's application to amend the claim is allowed, save in relation to the incident in 2016.

REASONS

Name of employer

4. The respondent submitted that the name of the respondent should be changed to ASDA Stores Limited as that is the company that employs the claimant. The claimant told me that her contract of employment states that ASDA Stores Limited is her employer, but that her place of work is ASDA IDC.
5. In light of the claimant's acceptance that ASDA Stores Limited is her employer, the name of the respondent is changed to ASDA Stores Limited.

Joining Emma Simes as a respondent to the proceedings

6. The claimant applied to join Emma Simes as a respondent to the proceedings. In the 'Scott Schedule' completed by the claimant following the last Preliminary Hearing, she only identified one incident involving Emma Simes, an incident that the claimant alleges took place on 29 May 2018 and in respect of which the claimant identifies two alleged discriminators, one of whom is Ms Simes.
7. Miss Firth told me that she was instructed to represent Ms Simes as well as the respondent, and that her instructions were to oppose the application to join Ms Simes as a party. She submitted that the only allegation made against Ms Sime was in relation to an incident on 29 May 2018 which was significantly out of time, the claim form having been presented on 23 November 2018. The details of that incident were, she submitted, vague, and the claimant would still be able to pursue that allegation against the respondent if Ms Simes were not joined as a party.
8. Guidance Note 1 of the Presidential Guidance – General Case Management (2018) contains guidance for employment tribunals considering amendments of claims and responses, including on the addition and removal of parties. Paragraph 17 states that: *"Asking to add a party is an application to amend the claim. The Tribunal will have to consider the type of amendment sought. The amendment may deal with a clerical error, add factual details to existing allegations, or add new labels to facts already set out in the claim. The amendment may, if allowed, make new factual allegations which change or add to an existing claim. The considerations set out above in relation to amendments generally apply to these applications."*
9. Paragraph 4 of the Guidance Note provides that *"In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all of 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."*
10. Relevant factors are set out in paragraph 5 of the Guidance Note and include: the nature of the amendment, time limits, and the timing and manner of the application.
11. Rule 34 of *Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013* ("the Rules") provides as follows:-

"The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings, and may remove any party wrongly included."
12. In reaching my decision on the application to add Ms Simes as a party to the proceedings I have taken account of the guidance in *Selkent Bus Co. Ltd v Moore* [1996] ICR 836. I have also balanced the interests of and relative

hardship to both parties in allowing or refusing the application, and considered the interests of justice.

13. The claim against Ms Simes is significantly out of time and no explanation has been provided by the claimant for not including her as a party earlier. I am conscious of the potential implications for Ms Simes of being joined as a party to the claim, and also of the fact that if Ms Simes is not joined, the claimant still has a live claim and potential remedy against the respondent, her employer. There only appear to be one, or at most 2 allegations against Ms Simes.
14. The interests of justice in my view favour not joining Ms Simes as a party, and my decision therefore is that she should not be joined, and the claim should proceed against the respondent only.

Application to amend

15. The respondent submitted that some of the allegations contained within the claimant's Scott Schedule were new allegations which required an application to amend the claim.
16. In particular, Miss Firth argued that the allegations contained within paragraphs 4.1, 4.6, 4.7, 4.8, 4.11 and 4.13 – 16 of the Draft List of Issues sent by the respondent's solicitors to the Tribunal on 15th October 2019 were new allegations.
17. These allegations are, in Miss Firth's submissions, more than merely a relabeling of existing claims but were new factual allegations which amount to new claims and which involve new alleged discriminators. The balance of hardship is, in her submission, greater against the respondent than the claimant if the new allegations are allowed in.
18. Having considered Miss Firth's submissions, the Presidential Guidance and the *Selkent* factors, I decided to allow the application to amend, save in relation to the allegation at paragraph 4.1 of the Draft List of Issue which relates to an incident in 2016 and which is significantly out of time.
19. It seems to me that the other amendments do not substantially change the claim – they are rather the addition of factual allegations to existing complaints of discrimination. The claimant is a litigant in person, and the amendments have been made at an early stage in the proceedings.
20. For the above reasons, it is my decision that all of the amendments should be allowed save that relating to the alleged incident on 13 January 2016.

CASE MANAGEMENT SUMMARY

Final hearing

- (1) All issues in the case, including remedy, will be determined at a final hearing before an Employment Judge sitting with Members at the Employment Tribunals, **5a New Walk, Leicester, LE1 6TE**, on **Friday 30 October 2020, Monday 2nd November 2020, Tuesday 3rd November 2020, Wednesday 4th November 2020, Thursday 5th November 2020** and **Monday 9 November 2020**, starting at 10 am or as soon as possible afterwards. The first half day of the hearing will be for reading-in time for the Tribunal and for any preliminary matters to be dealt with. The parties and their representatives, but not necessarily any other witnesses, must attend by 9.30 am]on that day. The time estimate for the hearing is 6 days, based on the claimant's intention to give evidence and call possibly 1further witness and the respondent's to call8 witnesses, and on the following provisional timetable:
- (i) 4 hours for reading in and any preliminary matters;
 - (ii) maximum 3.5 days for oral and other evidence on liability;
 - (iii) a maximum total of 3 hours (half each) for submissions on liability;
 - (iv) approximately half a day for the Tribunal to determine the issues which it has to decide, reach its conclusions and prepare its reasons;
 - (v) 2 hours for the Tribunal to give judgment, with reasons if possible;
 - (vi) 4 hours for the Tribunal to deal with remedy, including hearing further evidence if appropriate, reaching conclusions and giving judgment, if the claimant succeeds in whole or part.
- (2) The claimant and the respondent **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The claim

- (3) The claimant is employed by the respondent [was employed by the respondent as a warehouse operative. She claims that during the course of her employment she has been subjected to disability discrimination. The respondent denies all of the claims.
- (4) The respondent admits that the claimant is disabled by reason of the following conditions:-
- (i) Hip dysplasia;
 - (ii) Femoroacetabular impingement;
 - (iii) Osteoarthritis in both hips; and
 - (iv) Hip labral tears in both hips.

Name of the respondent

The issues

- (5) The issues between the parties which potentially fall to be determined by the Tribunal are set out in the Draft List of Issues, with the exception of the

allegations at paragraphs 4.2 and 4.9 which, by agreement, are removed. In summary the issues are as follows:

Time limits / limitation issues

- (i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures and whether time should be extended on a "*just and equitable*" basis.
- (ii) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 29 August 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

EQA, section 13: direct discrimination because of disability

- (iii) Did the respondent subject the claimant to the treatment at paragraphs 4.3 to 4.8 and 4.10 to 4.16 of the Draft List of Issues?
- (iv) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators:-
 - a. John Harvey
 - b. Glyn Foster; and
 - c. Mark Shannon.
- (v) If so, was this because of the claimant's disabilities?

EQA, section 15: discrimination arising from disability

- (vi) Did the respondent treat the claimant unfavourably as set out at paragraph (iii) above?
- (vii) If so, was that treatment because of something arising in consequence of the claimant's disabilities?
- (viii) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aims:
 - a. Requiring its colleagues to attend their contractual role on a regular basis;

- b. Managing adjustments and roles that colleagues are medically fit to undertake so as to save cost and management time; and
- c. Allowing the respondent to plan its workforce and operational needs with certainty.

Reasonable adjustments: EQA, sections 20 & 21

- (ix) Did the respondent know and/ or could it reasonably have been expected to know the claimant was a disabled person?
- (x) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:
 - a. Requiring colleagues limited to AS duties to carry out all of the roles within AS if fit to do so
- (xi) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?
- (xii) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
- (xiii) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?
- (xiv) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

EQA, section 26: harassment related to disability.

- (xv) Did the respondent engage in the conduct identified at paragraph (iii) above?
- (xvi) If so was that conduct unwanted?
- (xvii) If so, did it relate to the protected characteristic of disability?
- (xviii) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

- (xix) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Other matters

- (6) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- (7) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise)...*". **If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written.**
- (8) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (9) *The following case management orders were uncontentious and largely made by consent.*

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Amendment

- 1.1 By consent, the respondent's name is amended to ASDA Stores Limited.

2. Judicial mediation

- 2.1 The parties are referred to the "*Judicial Mediation*" section of the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/. Both parties are interested in judicial mediation and the case file will be passed to the Regional Employment Judge for a decision as to whether to offer them judicial mediation. If they change their minds, they must inform each other and the tribunal of this as soon as possible.

3. Complaints and issues

- 3.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

4. Statement of remedy / schedule of loss

- 4.1 The claimant must provide to the respondent by **31st October 2019** a document – a “Schedule of Loss” – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant’s complaints and how the amounts have been calculated.

5. Documents

- 5.1 On or before **31 July 2020** the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.

6. Final hearing bundle

- 6.1 By **14 August 2020** the respondent shall send to the claimant a draft index to a bundle of documents to be used at the final hearing.
- 6.2 By **28 August 2020** the parties shall agree a bundle of documents for use at the final hearing. The respondent must paginate and index the documents, put them into one or more files (“bundle”), and provide the claimant with a ‘hard’ and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case and should only include the following documents:
- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;
 - documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

7. Witness statements

- 7.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **9 October 2020**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle; contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated.

8. Final hearing preparation

- 8.1 On the working day immediately before the first day of the final hearing (but not before that day), by 12 noon, the following parties must lodge the following with the Tribunal:
- 8.1.1 four copies of the bundle, by the respondent;
 - 8.1.2 four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question;
 - 8.1.3 three hard copies of the following, agreed if possible, by the respondent – a neutral chronology and a 'cast list'.

9. Other matters

- 9.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 9.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 9.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 9.4 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 9.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

- 9.6 Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Ayre

08 November 2019

Sent to the parties on:

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For the Tribunal:

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