EMPLOYMENT TRIBUNALS

Claimant: **Mr P McGrath**

Respondent: **Aldi Stores Ltd (Aldi Stores Ltd)**

Heard at: **Sheffield** **On: 20 November 2019**

Before: **Employment Judge Brain**

Representation

Claimant: Written representations
Respondent: Written representations

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that the claimant's application for permission to amend his claims is refused.

REASONS

1. On 5 September 2019 I conducted a case management hearing in this matter. The issues were identified. A minute of the hearing was sent to the parties on 1 October 2019.

2. On 19 September 2019 the claimant applied to amend his claim to include complaints of:

    2.1. Harassment arising from an incident of 30 January 2018 involving Shaun McCowliff of the respondent. He alleges that Mr McCowliff made comments about the claimant's caring responsibilities. The claimant has caring responsibilities for his mother who has dementia.

2.2. A claim of disability discrimination because of his association with his mother (whom the claimant says is a disabled person because of the dementia).

3. Employment Tribunals have a broad discretion to allow amendments at any stage of the proceedings, either on the Tribunal's own initiative or on application by a party. In determining whether to grant an application to amend a claim, an Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. In **Selkent Bus Co Limited v Moore** [1996] ICR 836, EAT the-then President of the Employment Appeal Tribunal, Mr Justice Mummery, gave guidance as to how Tribunals should approach applications for leave to amend. Relevant factors will include:

   3.1. *The nature of the amendment-* applications to amend range from (amongst other things) the addition or substitution of labels for facts already pleaded to and on the other hand the making of entirely new factual allegations that change the basis of the existing claim. The Tribunal has to decide whether the amendments constitute a substantial alteration pleading a new cause of action.

   3.2. *The applicability of time limits* – if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended.

   3.3. *The timing and manner of the application* – an application should not be refused solely because there has been a delay making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made.

4. The hardship and injustice test is a balancing exercise. It is inevitable that each party will point to there being a downside for them if the proposed amendment is allowed or not allowed. Thus, it will rarely be enough to look only at the downsides or prejudices themselves. These need to be put into context. The balance of prejudice is to be weighed in each case.

5. 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. This will be an important factor where the facts material to the new claim sought to be brought by way of amendment or are already in play in the extant claims.

6. The first key factor therefore is to identify the nature of the proposed amendment. It is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint as distinct from re-labelling an existing claim. If it is a purely re-labelling exercise then it does not matter whether the amendment is brought within the time frame for that particular claim or not.

7. The fact that an application seeks to introduce a new cause of action is a factor to be weighed, with the focus being upon the extent to which the new pleading is likely to involve substantial different areas of enquiry than the old. That said, just because an amendment would require the other party and the Tribunal to undertake new and substantial different lines of enquiry does not mean that the amendment should necessarily be refused. That is a factor to be weighed in the balance.

8. The second factor identified in **Selkent** as being relevant to the discretion whether to allow an amendment is that of time limits. If a new complaint is sought to be added, it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions. In **Galilee v Commissioner of Police of the Metropolis** (UK EAT/207/16) it was held that the doctrine of *"relation back",* whereby a new cause of action introduced by amendment took effect from the time the original proceedings were commenced, thereby defeating a limitation point that the other party might otherwise have had, should not be applied to amendments to Employment Tribunal claims. Accordingly, amendments to pleadings in the Employment Tribunal which introduce new claims or causes of action take effect for the purposes of limitation at the time permission was given to amend. It was thus necessary for the claimant to show a *prima facie* case that the primary time limit was satisfied or that there were grounds for extending time at the amendment application stage.

9. The question of whether a new cause of action contained in an application to amend would, if it were an independent claim, be time barred falls to be determined by reference to the date when the application to amend is made and not by reference to the date at which the original claim form was presented. That said, if a claim is out of time and the Tribunal considers that time should not be extended under the appropriate test the Tribunal nonetheless retains discretion to allow amendment in any event. Whether a fresh claim would be in time or out of time is simply one of the factors in the exercise of the discretion. In other words, the fact that the relevant time limit for presenting the notional new claim has expired will not prevent the Tribunal exercising its discretion to allow the amendment although it will be an important factor on the side of the scales against allowing it. Had the amendment incorporating a new claim been a freestanding claim, that it would have been out of time is not an absolute bar to allowing it. The greater the difference between the factual and legal issues raised by the amended claim in comparison to the original the less likely the out of time amendment will be permitted.

10. The relevant limitation period for the claims that the claimant wishes to add by way of amendment is that to be found in section 123 of the 2010 Act. This section provides a limitation period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. Broadly speaking, the just and equitable test requires consideration of all of the circumstances of the case including anything which the Tribunal judges to be relevant. This requires taking into account all of the circumstances in the balance of injustice and hardship. If it would be just and equitable to extend time were the matter to be raised by way of a fresh claim then that would be a strong although not necessarily determinative factor in favour of granting permission. If it would not be just and equitable to extend time then that would be a powerful, but again not determinative factor against extending time. In other words, the test as to whether to grant an extension of time under section 123 of the 2010 Act (where a fresh claim has been presented) is a helpful guide but not determinative when applying the balance of injustice and hardship test upon an amendment application. The Tribunal when dealing with an amendment application is not simply dealing with a matter that may be out of time but rather with an application to introduce in to proceedings already underway a new cause of action. Therefore, the just and equitable test when considering whether to extend time upon a fresh claim involves the exercise of discretion but not an identical discretion to the one in play upon an amendment application.

11. The third factor identified in **Selkent** concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant. The overriding objective to be found at Rule 2 of schedule 1 to the *Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013* requires amongst other things that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these aims. The later the application is made the greater the risk of the balance of hardship being in favour of rejecting the amendment. That said, an application to amend should not be refused solely because there has been a delay in making it. The Tribunal will need to consider why the application was made at the stage at which it was, whether if the amendment is allowed delay will ensue and where the delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

12. Additional factors for the Tribunal to consider include the merits of the claim. It is not of course the Tribunal's function on an amendment application to decide upon the merits of the claim. However, a proposed claim may be obviously hopeless. That said, unless there is material to demonstrate the hopelessness of the case then it should otherwise be assumed that the case is arguable.

13. Applying these principles to the claimant's application I refuse both of his amendment applications.

14. The claimant requires permission to amend the claim as the first amendment application referred to in paragraph 2.1 is not extant in the claim form. This is not a matter of re-labelling an existing or extant claim. This harassment claim, if presented as a fresh claim, would be significantly out of time. It appears to be a one-off act of alleged harassment (the claimant's case otherwise being about a failure to make reasonable adjustments) and not part of a continuing course of conduct. The claimant's explanation for raising it now is that he had not realized the legal definition of harassment until this was discussed at the case management hearing. I agree with the respondent's solicitor that this is an inadequate explanation. I acknowledge that sources of legal help are limited but there is much in the respondent's point that there is a wealth of information on-line and the availability of information from ACAS. There is no adequate explanation from the claimant as to why the harassment allegation could not have been included within the claim form as presented on 14 June 2019. In his claim form he makes reference to a number of dates upon which relevant matters took place. It is not clear why the episode of 30 January 2018 was omitted.

15. I was not told by the respondent that the cogency of the evidence about the incident of 30 January 2018 has been affected by the delay. Mr McCowliff will have to attend to give evidence in any event about other matters in which he was involved.

16. The harassment claim appears to be weak. While I accept the claimant's point that Mr McCowliff's comment was unwanted and could reasonably be considered to create a hostile work environment for him, it appears not to be the case that the remark related to the claimant's disability. The comment was directed at the claimant's caring responsibilities and not the claimant's disability.

17. When balancing the prejudice between the parties therefore, I take into account that the respondent is not prejudiced by any impact upon the cogency of the evidence. Against that I must balance that the claimant is seeking to pursue a claim that would be out of time if presented as a fresh claim in circumstances where there is no adequate explanation for the failure to present the claim in time and what amounts

to a new claim appears to be weak as the causal link with the claimant's disability is absent (even on the claimant's own account).

18. Weighing all of these factors persuades me that the balance of prejudice favours the respondent.

19. Similar factors persuade me that the application to amend to include the associative disability claim referred to in paragraph 2.2 should also be refused. In addition to the same points about the inadequacy of the explanation for delay, to allow this would entail a significant new line of enquiry as to the claimant's mother's status as a disabled person. This goes far beyond a re-labelling exercise and involves a substantially different area of enquiry than does the existing claim.

20. Further, it is not clear how it is said that the respondent has treated the claimant less favourably than others because of his association with his mother. The claimant does not seek to explain this and says that the failure to make reasonable adjustments exacerbated his mental health condition (which has been brought on or exacerbated by the stress of the caring responsibilities). That is in reality an allegation of a consequence of the failure to make reasonable adjustments which, should the claimant succeed, may be reflected in any remedy awarded by the Tribunal. It is not an allegation of direct discrimination because of association with his mother.

21. The balance of prejudice therefore favours the respondent. The claim is significantly out of time with no adequate explanation for delay, it entails (if allowed) a wholesale new train of enquiry and appears to be misconceived anyway as the claimant's complaint is not one of less favourable treatment because of his association with his mother but rather the failure of the respondent to make reasonable adjustments for his disability (brought on or exacerbated by the impact upon the claimant's mental health of those responsibilities).

22. Nothing said here should be understood by the claimant as preventing him from giving evidence about what he alleges happened on 30 January 2018 or the impact upon him of his caring responsibilities. This will be important evidence in relation to the claimant's claim.

Employment Judge Brain

Date 25 November 2019