



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No. 4110799/2019

Held at Dundee on 29 November 2019

10

Employment Judge A Kemp

Mr A Pullar

**Claimant
In person**

15

British Telecommunications PLC

**Respondent
Represented by
Mr P Livingstone
Barrister**

20

25

JUDGMENT

30

1. The claimant's application to amend the Claim Form to include a claim of discrimination under sections 20 and 21 of the Equality Act 2010 is allowed.

35

2. The respondent shall have a period of 14 days from the date of this Judgment to provide further and better particulars of its defence to that claim.

3. A hearing shall be fixed for case management of the claim so made, and the remaining claim in relation to holiday pay.

REASONS

Introduction

- 5 1. This case called for a Preliminary Hearing on case management. It had originally been fixed as a Final Hearing, but that was later amended by Notice of 30 October 2019. That followed an email from the claimant dated 28 October 2019 when he attached a document with further information on his claim.

10

Pleadings

- 15 2. The claimant made an initial Claim which in section 8.1 under the heading "Type and details of claim" only ticked the box for holiday pay. He did not tick the box for discrimination, or that under that heading for disability. The claim was managed by the Tribunal staff on the basis that it was a claim for holiday pay.

- 20 3. The claimant also however on the following page of the form under the initial printed words "Please set out the background and details of your claim in the space below" made reference to his having suffered two heart attacks in October 2017, that he was deemed unfit for work by his GP, and that in September 2018 he had "submitted a Reasonable Adjustments request" to a "lack of duty of care" towards him, and that he had requested reasonable adjustments. He then set out comments on matters after he returned to work including on access to a quiet room if he felt unwell, and that a first aider had left the respondent 2-3 months beforehand. He acts for himself, and sustained a

- 30 4. Whilst no admission is made, he is likely from the information before me to be a disabled person under the Equality Act 2010.

5. In the Response Form the respondent denied the claim, and denied that there was discrimination “if and to the extent that the claimant is pursuing” such a claim. It states “In particular, it is denied that BT failed to make reasonable adjustments.....”

5

Amendment

6. In the document emailed to the Tribunal on 28 October 2019 the claimant made further reference to the claims he made, which included a reference to the failure to take reasonable adjustments and a reference to the “Disability Act 2010”. He clarified that that was intended to mean the Equality Act 2010. He set out the steps he considered ought to have been taken, but did not identify other aspects required for the claim under sections 20 and 21 of that Act, particularly the provision, criterion or practice founded on.

10

15

7. The respondent argued that the email constituted an application to amend, that it was one that sought to add a new claim to that which had been made, that it was out of time, that there was prejudice to the respondent by that being late, although it was accepted that the prejudice was limited, and that under the principles established in the case of Selkent, referred to below, the application ought not to be granted.

20

8. The claimant was given an opportunity to reply, and in the course of that (with Mr Livingstone’s express consent) there was a discussion as to what PCPs were founded on, and what steps were said to have been reasonable. The claimant also clarified that he was a disabled person and that that was the protected characteristic he founded on, and that he did not seek to make a claim of unfair dismissal.

25

9. The PCPs so identified were –

30

- (i) A workplace which did not maintain a consistent ambient temperature

- (ii) The practice of not putting an external sign on or near the door of the toilets that they were being cleaned
- (iii) The absence of a first aider always available to respond to any incident.

5 10. The claimant argued that he suffered a substantial disadvantage by the PCPs as someone who had had a heart attack, and who previously had suffered incidents at work when the temperature was not controlled. He also required to use the toilet quickly on occasion, and the lack of a sign caused him not to go to the nearest available toilet as quickly as he wished.

10

11. The claimant's last day of employment was 28 June 2019. Prior to that he had been suspended on allegations of gross misconduct, later upheld and for which no claim is made. The claimant returned to work on 29 March 2019 and accepted that by mid April 2019 he was aware of the decision not to provide the steps he had requested, and which he argues before the Tribunal were reasonable to have been taken to avoid the disadvantage referred to above, which were to maintain an ambient temperature including by locking windows, having the sign at or near the external aspect of the toilet door near his workplace, and having the first aider present. He said that he had carried out a test for that, no one replied, and it transpired that the first aider had left the respondent's employment some months earlier.

15

20

12. The claimant accepted that his claim was out of time. He had commenced early conciliation on 5 September 2019 and had presented the claim form on 12 September 2019. He wished to pursue the discrimination claim, and in effect asked me to exercise discretion to receive it.

25

Discussion

30 13. It was at the least unclear from the Claim Form that the claimant intended to pursue a claim for disability discrimination under the Equality Act 2010. His reference to his having sustained a heart attack was relevant to a claim for holiday pay if he was to argue for the carry forward of unused leave when

absent from work from illness. Such a claim can arise from three routes, either (i) the Working Time Regulations 1998 read in conformity with the Directive the regulations implement, (ii) an unlawful deduction from wages under Part II of the Employment Rights Act 1996, or (iii) breach of contract.

5

14. On the other hand, he did make reference to both his application for reasonable adjustments to the respondent, and that in certain respects the respondent had not, he claimed, implemented what was sought. Those facts are not relevant to any claim about holiday pay, I consider, on a fair reading of them. They are relevant to a claim for not having made reasonable adjustments under sections 20 and 21 of the 2010 Act.

10

15. I consider that the document attached to the email of 28 October 2019 does seek to add detail to initial pleading, and is an application to amend the Claim Form. The claimant does not have a right to do so. It is a matter that the respondent can, and does, object to, and whether or not to allow the amendment is a matter for the exercise of discretion.

15

16. The nature of that exercise was discussed in the case of **Selkent Bus Company v Moore [1996] ICR 836**, which was approved by the Court of Appeal in **Ali v Office for National Statistics [2005] IRLR 201**. All of the circumstances must be considered. There are three particular issues that require consideration.

20

17. Firstly the nature of the amendment. Here the claimant did not make explicit that he was pursuing a claim of discrimination on the ground of disability, as he did not tick the boxes for that, but did refer to an extent to issues of reasonable adjustment in his Claim Form.

25

18. Secondly, the applicability of time limits is a further factor. Here, the time limit to pursue any new claim made by the proposed amendment has expired. Whether or not this is a new claim is a matter considered further below. If it is, Early Conciliation ought to have been commenced in about mid July, and

30

was commenced in fact about 6-7 weeks late. Against an initial period of three months, that is a reasonably lengthy delay, but not an inordinate one.

5 19. Thirdly the timing and manner of the amendment is to be considered. The application was made just under two weeks after the Response Form was submitted on 15 October 2019. That is a delay that is not unduly long.

10 20. There are other factors to take into account. The claimant is acting for himself. Whilst any delay involves prejudice, the degree of prejudice here is, as was very appropriately conceded by Mr Livingstone, limited. Matters are still at a fairly early stage.

15 21. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new causes of action

20 " ... to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry 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."

25 22. In order to determine whether the amendment amounts to a wholly new claim, as opposed to a change of label, it is necessary to examine the case as set out in the original application to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of
30 victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment 'was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time'.

23. It is also necessary to consider matters in the context of Rule 2 and the overriding objective, and Rule 29 which gives the Tribunal a wide discretion.

5 24. In the present case, I consider the fact that there was at least some pleading with regard to the claimant having sustained two heart attacks, and his reference to reasonable adjustments, which was irrelevant to an issue of holiday pay, such that there has been an expansion of what was pled on the facts rather than something entirely new, which was sufficient to lead to
10 comment in the Response Form about a discrimination claim, tips the balance in favour of allowing the amendment. I take into account also that the application to amend is not unduly late, the degree of prejudice is limited, and that had this been a new Claim Form it would, I consider, have been just and equitable to allow it to be received if it is late under the primary time limit.

15 25. I would also record that the claimant was asked what claims he made under the 2010 Act, and the only one that he articulated before me was that under sections 20 and 21. It is those sections to which I consider his amendment is directed, and which I allow to proceed. He was not able to comment on claims
20 which may or may not arise under other provisions, particularly sections 13, 15 and 19. If he wishes to seek to pursue such claims that will require a separate amendment, with details of the statutory provisions founded on and an argument as to why that should be allowed, but that is likely to face more difficult contrary arguments, including the lack of anything within the Claim
25 Form which would naturally be said to infer such claims, and the claimant is not therefore encouraged to do so. The comment is added for the avoidance of doubt.

Conclusion

30

26. I therefore allow the amendment that is sought by the document attached to the email dated 28 October 2019. It is clearly appropriate for the respondent

to be allowed to respond to that, and I have so provided in the Judgment above.

27. There was separately a discussion in relation to the claim for holiday pay. I
5 understand from the respondent that it has in fact already carried forward
what it considers to be the entitlements for annual leave that arise under the
Working Time Directive, being 4 weeks per annum and not the additional 1.6
weeks per annum under UK law, and that issue was recently the subject of a
10 decision of the Court of Justice of the European Union which confirmed that
EU law did not require a states additional annual leave to be similarly carried
forward. The parties are, I understand, to consider matters further and
exchange information. The claimant may wish to consider what is the legal
basis of his claim, being one or all of the three routes set out above.

15 28. I consider that it will be appropriate to hold a further Preliminary Hearing on
case management to address the position after the respondent has amended
its own pleadings to respond to the amendment, and to consider the
remaining claim in relation to holiday pay however that is characterised,
20 assuming that it is still maintained. A listing letter shall be sent to the parties
to seek to identify a date for that in the period January to March 2020, but
hopefully in the early part of that period.

25

30

35 **Employment Judge:**
Date of Judgment:
Date sent to parties:

Alexander Kemp
04 December 2019
05 December 2019