



EMPLOYMENT TRIBUNALS

Claimant: Mr K Rimmer

First Respondent: Adecco (UK) Ltd

Second Respondent: Bentley Motors Limited

PRELIMINARY HEARING

Heard at: Stoke (Hanley) Employment Tribunal (in public)

On: 18 October 2019 and 21 November 2019

Before: Employment Judge Mark Butler (sitting alone)

Appearances

For the claimant: Mr D Flood (counsel)

For the first respondent: Mr R Hayes (counsel)

For the second respondent: Miss V Brown (counsel)

RESERVED JUDGMENT

1. The claim form submitted on 11 October 2018, Case Number 1304603/2018, was brought out of time, and it is not just and equitable to extend time. The claim against Bentley Motors Ltd is therefore rejected.
2. The application to amend the first claim form, brought on 22 March 2019, has been granted.

REASONS

3. This claimant has submitted two claim forms. The first of which was submitted on 08 June 2018, and was brought against the first respondent, Adecco (UK) Ltd. There was no mention of any other respondents. A second claim form was submitted on 11 October 2018, with the same cause of action but with further details, albeit in relation to similar matters, but this time the claimant named both Adecco (UK) Ltd and Bentley Motors Ltd as the respondents. Subsequently, there has been an application to amend the claim form(s), with this application to amend having been made on 22 March 2019.
4. This case was initially considered before Employment Judge Gaskell in a closed Preliminary Hearing on 22 March 2019. Employment Judge Gaskell listed the case for an Open Preliminary Hearing, with a time estimate of 1 day, to consider and determine the following:
 - (a) The claimant's application to amend the claim.
 - (b) Whether or not the second claim (Case Number 1304603/2018) was presented in time. And, if it was not, whether the tribunal has jurisdiction to consider it.
5. And it is these two matters that were the focus of this hearing.
6. This hearing was listed to take place on 18 October 2019. The hearing took longer than expected and went part heard. The second day of the hearing took place on 21 November 2019.
7. Evidence was heard from Mr Rimmer himself. And from Ms Anila Shahban of Adecco (UK) Ltd for the first respondent, and from Ms Christine Holloway of Bentley Motors Ltd for the second respondent. I was further assisted by a bundle of documents that ran to 383 pages.

Issues

8. The following were issues that I needed to consider in relation to the matters I was determining:

When was the last prima facie discriminatory act by Bentley Motors Ltd?

Was the claim form submitted on 11 October 2018, which included Bentley Motors Ltd for the first time, in time?

If the final act was in time, was this prima facie, a part of a continuous act of discrimination?

If the final act or any of the acts were out of time, would it be just and equitable to extend time?

Should the amendment brought on 22 March 2019 be allowed?

Law

9. I was helpfully taken to the relevant chapters in *Harvey on Industrial Relations on Employment Law* by Mr Flood. Namely the chapter on amendments and the just and equitable extension of time. I do not repeat this here but have taken account of the commentary that these chapters provide.
10. I was also taken to relevant case law. This included *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96, *Gallop v Newport City Council* [2014] IRLR 211, *Donelien v Liberata UK Ltd* [2018] IRLR 535.
11. There are several areas of consideration in this case. And these are all considered under relevant sub-headings below.

Duty to make reasonable adjustments

12. Section 20 Equality Act 2010 Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

...

13. Section 21 Equality Act 2010 Failure to comply with duty

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Obligations of a principal

14. Miss Brown helpfully took me to paragraph 6 of Schedule 8 to the equality Act 2010:

6(1) This paragraph applies where A is a principal.

Relevant matter	Description of disabled person
Contract work that A may make available.	A person who is, or has notified A that the person may be, an applicant to do the work.
Contract work that A makes available.	A person who is supplied to do the work.

(2) A is not required to do anything that a disabled person's employer is required to do by virtue of paragraph 5.

Continuing Act

15. When considering the matter of a continuing act, amongst other sources, I was taken to paragraphs 21 and 22 of *South Western Ambulance Service NHS Foundation Trust v King*, Appeal No. UKEAT/0056/19/OO, where Mr Justice Choudhury (President) states:

21. *Hendricks demonstrates that there are several ways in which conduct might be said to be conduct extending over a period (or, as it is sometimes called, a “continuing act”). One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment. Another example given in paragraph 48 of Hendricks is where separate acts of discrimination are linked to one another and are evidence of a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected and isolated acts. In both these examples, the continuing act arises because of the link or connection between otherwise separate acts of discrimination.*

22. *If the time issue is raised at a preliminary stage, the Claimant merely needs to establish a prima facie case that there is such a continuing act. That was the situation in Hendricks. However, as Mummery LJ makes clear at paragraph 49 of the judgment, once the Tribunal has made full findings of fact at a substantive hearing, the conclusion may be that there was no continuing act at all.*

Amendment

16. Where a claimant seeks to amend their claim form (ET1) the tribunal has a discretion whether to allow or refuse the amendment.
17. Under its general powers to regulate its own proceedings and specific case management powers the tribunal can consider an application to amend a claim at any stage of the proceedings (Presidential Guidance March 2014).
18. The party's representatives made submissions to me in relation to the tests to be applied in relation to consideration of applications to amend.
19. All referred me to the case of **Selkent Bus Company Ltd v Moore [1996] ICR 836**, and I was also myself mindful of the direction provided by the case of **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650**, as well as the sections of the Presidential Guidance on Case Management dealing with applications to amend.
20. The guidance provided by **Selkent**, in particular, was that the key principle when considering the exercise of the discretion to allow an amendment is to have regard to all the circumstances, and in particular any injustice or hardship which would result from the amendment or refusal to amend.
21. In **Selkent**, the Employment Appeal tribunal set out a non-exhaustive list of relevant factors which are to be taken into account in considering the 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 the granting or refusing of the amendment. These were; the nature of the amendment, the applicability of time limits, and the timing and manner of the application:

“(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is

one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, 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 eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. 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: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.”

22. The Presidential Guidance reaffirms the **Cocking** and **Selkent** guidance, noting that relevant factors include the three matters outlined in **Selkent**, and also noting that tribunals draw a distinction between amendments which seek to add or substitute a new claim arising out of the same facts as the original claim, and those which add a new claim entirely unconnected with the original claim.
23. With regard to time limits, the Presidential Guidance notes that the fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment, and also that it will not always be just to allow an amendment even where no new facts are pleaded. In particular, the Guidance notes that where there is no link between the facts described in the claim form and the proposed amendment, the tribunal must consider whether the new claim is in time and will take into account the tests for extending time limits. In this case, those were; the just and equitable formula in relation to the victimisation claim and the expanded detrimental treatment claim, and the not reasonably practicable formula in relation to the failure to pay unpaid holiday and wrongful dismissal.

Time Limits and the Just and Equitable Extension of time

24. s.123 ... proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

25. Mr Flood relied on the chapter in *Harvey on Industrial Relations on Employment Law*, referred to above. I was not taken to any other specific authorities on this matter. However, this chapter included a non-exhaustive list of factors which may be useful to consider in assessing individual cases, which is found at paragraph 833 of that chapter. However, this included, the prejudice caused to the respondent for allowing, the impact on remedy, the length of time by which the application is out of time, medical condition of the claimant and the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

26. Further, the case of *Hunwicks v Royal Mail* [2007] All ER 68, is referred to in that paragraph. Where it is stated that whichever factor is relevant to be taken into account, must have been responsible for causing the time limit to be missed.

Findings of Fact

27. I make the following findings of fact, on the balance of probability based on all the matters I have seen, heard and read. In doing so, I do not repeat all the evidence, even where it is disputed, but confine my findings to those necessary to determine the issues in this case:

a. The claimant became an employee of Adecco (UK) Ltd on 15 September 2015. The contract of employment between the claimant and Adecco (UK) Ltd is at page 100 of the bundle. This was signed by the claimant on 15 September 2015.

b. Pay is provided for in the contract and can be read at p.102B of the bundle. This refers to two distinct pay calculations. The first is for number

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of hours worked. The second is for situations where no work is being done, but when the claimant is ready and available to work.

- c. The claimant's contract provided for Payment Between Assignments ('PBA'), which was paid when an assignment with Bentley Motors Ltd had come to an end. The claimant was paid PBA from 23 March 2018 until July 2019. PBA was paid at a lesser rate than when on assignment. There is a clear difference between being on assignment, and the situation when on PBA. When on PBA the claimant no longer needs to submit sick notes to Adecco (UK) Ltd but will need to meet with Adecco (UK) Ltd to discuss assignments. This was accepted as being accurate by the claimant under cross examination.
- d. PBA is only paid under the contract when an assignment has come to an end. And this will be for a period of four weeks.
- e. Payment of PBA still referred to Bentley Motors Ltd. However, this was an administrative system, and was referring to the cost centre. This is not an indication of who the payer was.
- f. The claimant was assigned to work for Bentley Motors Ltd, as Principal, from 15 September 2015. At no point during his employment with Adecco (UK) Ltd has the claimant been assigned to work for any other of Adecco's clients.
- g. Assignment is defined under the contract between Bentley Motors Limited and Adecco (UK) Limited. This can be found at p.262 of the bundle. This was defined as meaning 'any period during which the Agency Worker provides their Staff Services to Bentley'.
- h. The claimant last worked for Bentley Motors Ltd on 17 September 2017. From this date, he was signed off sick from work. His SP1 form explained that he was suffering from "severe back and shoulder pain". The claimant stopped providing any services to Bentley Motors Ltd from this date onwards.
- i. At no point from the 17 September 2017 was the claimant subjected to any of Bentley Motors Ltd's PCP's, as he simply never returned to work there. This was accepted by the claimant under cross examination.
- j. Bentley Motors Ltd operated a policy whereby if an individual was on long-term sick, which was defined as being off work for over two weeks, then they would be taken off assignment by management, and the position would be filled by somebody else. There was no scope to bump a person from a role they were filling. That person would then await to be redeployed. Whilst awaiting redeployment, if on a PBA contract, they

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would receive PBA pay whilst the search for alternative employment took place. PBA is defined in Schedule 6 of the service contract, and can be read at p.382 of the bundle.

- k. Once on long-term sick the claimant was taken off Bentley's headcount. There was no obligation on Bentley Motors Ltd to take the claimant back when he returned from being ill.
- l. When the claimant became ill, and was unable to work, this was provided for under the contract between him and Adecco (UK) Ltd. The claimant had to inform Adecco (UK) Ltd of periods of absence, and he would be paid sick pay accordingly. This is in clause 7 of the claimant's contract of employment, in at p.102B of the Bundle.
- m. The claimant received sick pay from Adecco (UK) Ltd from 17 September 2017 to 23 March 2018.
- n. On 7 December 2017, the claimant wrote a letter to Anila Shahban, requesting that Adecco/Bentley make reasonable adjustments. This can be found at pp139 and 140 of the Bundle.
- o. On 22 December 2017 the claimant raised a grievance. This was again sent to Anila Shahban of Adecco (UK) Ltd. This letter again refers to Adecco/Bentley. This letter can be found at pp146-148 of the Bundle.
- p. On 13 February 2018, the claimant was in receipt of a sick note that stated that he was fit to work with amended duties.
- q. The claimant was represented by a Trade Union representative during the ACAS conciliation period in relation to the first claim form, from 27 March 2018.
- r. At some point close to the 27 March 2018, and at the latest by the end of May 2018, the claimant instructed a solicitor from Slater and Gordon. They drafted his claim form on his behalf. This was submitted on 08 June 2018.
- s. The claimant only ever intended to bringing a claim against Adecco (UK) Ltd. Under cross examination, the claimant explained that he thought it was right to just bring the claim against Adecco (UK) Ltd, and that is why it was only Adecco (UK) Ltd named on the first claim form.
- t. The claimant at no point became an employee of Bentley Motors Ltd. The claimant understood that this was the case, and that it was possible that he could be assigned to other clients of Adecco (UK) Ltd. The claimant accepted that he could be assigned to other clients during

cross-examination. He also explained that he had discussed roles with other clients, including with ATOS. The claimant understood himself to be an agency worker.

- u. Under cross examination the claimant stated that he could not have known of the duty ending in June, and that is the only reason why he should be allowed to amend his claim.

Conclusions on status of claim form naming Bentley as respondent (case number 13034603/18)

28. The pleaded case of the claimant is not that he was an applicant to do their work, nor that he had notified Bentley Motors Ltd that he may be an applicant to do work. Nor has it been pleaded that the duty in relation to the claimant arose for Bentley Motors Ltd because Adecco (UK) Ltd were not required to do it. This is not pleaded in any of the relevant documents. In relation to Bentley Motors Ltd, it is only pleaded in relation to contract work that Bentley Motors Ltd makes available as a principal, with the claimant being supplied to do the work. The date on which the claimant's assignment with Bentley Motors Ltd came to an end is therefore important, as this is the last date on which the alleged PCP could have been applied to him.
29. The claimant's last date of work for Bentley Motors Ltd was 17 September 2017. He never returned to work for Bentley Motors Ltd at any point after this. And at this point of going off work with illness, the financial obligations passed to Adecco (UK) Ltd in the form of sick pay obligations. The last date on which there could be a prima facie act of discrimination by Bentley Motors Ltd is, in my judgment, the last date on which they could apply the PCP of needing to be flexible to the claimant. This date was the last date of the claimant's assignment at Bentley Motors Ltd, that being 17 September 2017. There are no further specific acts pleaded in relation to Bentley Motors Ltd.
30. In the alternative, if I am wrong on this matter, the assignment was ended when the claimant started to receive PBA, on 23 March 2018. However, this alternative position does not change my analysis below in the whole. The only impact that would have on that explained below is that the claim would be out of time by a shorter period, but still circa 3-4 months.
31. ACAS early conciliation in relation to the claim against Bentley Motors Ltd was commenced on 31 August 2018 and concluded on 14 September 2018. With this claim submitted on 11 October 2018. This claim was therefore brought out of time. ACAS conciliation would have needed to be commenced in relation to this claim by 16 December 2017, that being 3 months less one day after the last pleaded act of discrimination by Bentley Motors Ltd, with the claim form then submitted during the one-month extension afforded at the end of

attempted ACAS conciliation. This claim is therefore some 9-10 months out of time.

32. The next question is therefore whether it would be just and equitable to extend time to accept the claim against Bentley Motors Ltd, that being claim number 13034603/18. I have taken account the relevant factors in deciding on this matter. Amongst other factors, I have taken account of the following:

- a. the claimant had an awareness of the role that both Adecco (UK) Ltd and Bentley Motors Ltd had in organising his work. This is best shown when he raises a grievance on 22 December 2017.
- b. the claimant was represented by his trade union during the initial ACAS conciliation process, which commenced on 27 March 2018. He received advice by the Trade Union during this process. Despite being placed at Bentley Motors Ltd, the claimant made a decision, informed by Trade Union advice, that the claim would only be submitted against Adecco (UK) Ltd.
- c. The first claim form, which was submitted on 08 June 2018, was prepared on the claimant's behalf by an experienced and well respected law firm. He received advice by those he instructed. At this moment in time, the claimant did not issue a claim against Bentley Motors Ltd.
- d. There is no suggestion of lack of knowledge in relation to who the correct employer was, or of new information coming to light that made it obvious that Bentley Motors Ltd should have been included in the initial claim.
- e. The medical condition of the claimant and the impact that this may have had on the claimant's ability to bring a claim. Although I note that the first claim form, that against Adecco (UK) Ltd, was brought in time and the claimant's medical conditions did not prevent this claim from being submitted in time, and
- f. That this claim against Bentley Motors Ltd was brought at least 9 months out of time, and some 4 months after the initial claim form was submitted.

33. In these circumstances, it would not be just and equitable to extend time to bring this claim. The claim form that was submitted on 11 October 2018, that being claim number 13034603/18, is therefore rejected.

Conclusions on application to amend

34. I was helpfully assisted by the application to amend being accompanied by a document with tracked changes. This highlighted what amendments were being sought. Although this was a comparison between the second claim form,

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that submitted on 11 October 2018 and the amended version; there was no comparison provided between the amended claim form and the first claim form, which may have been useful. Amendments, as far as the tracked changes were concerned, were confined to paragraph 25 onwards.

35. Having considered the claim forms, the claimant does not seek to introduce a new cause of action.
36. The factual pleadings on the whole remain largely unchanged. There is some minor expansion of facts, but they are not expanding the claim into new areas of enquiry. The disability, the impact of the disability, the restrictions of the claimant and the PCP, remain constant across the different claim forms.
37. There is relabelling of the claim insofar as the claimant is seeking to plead a continuing act of discrimination, rather than one off acts. However, this was implicit in the original claim form in any event.
38. Amendment will not require Adecco to undertake significant new investigation to be undertaken. The prejudice on Adecco (UK) Ltd is relatively low.
39. Where there are new factual pleadings, at least when compared to the first claim form, these largely refer to matters that took place post-submitting of that claim form. And were contained in the second claim form, submitted on 11 October 2018, which was three months after the first claim form, submitted on 8 June 2018
40. I have taken into account that the application to amend was made some 9 months after the first claim form was submitted. However, there was the second claim form, submitted on 11 October 2018, where the majority of these amendments were first expressed.
41. I have considered the additional factual pleadings contained in the second claim form as having been submitted as an amendment as from the date of 11 October 2018, and then any further (minor) factual amendments from 22 March 2019. Pragmatically, that is what happened.
42. Risk of hardship is low to the first respondent, Adecco, given that the claimant already has a claim against Adecco for a failure to make reasonable adjustments and that the matters being complained of are well known to them and as such will not require significant additional investigation. There are no additional claims to meet.
43. The application to amend, taken into account the interests of justice and the relative hardship caused to the parties, falls in favour of allowing the first claim form to be amended to include the details contained in the second claim form and the amended claim form, as far as they are relevant to Adecco. However,

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this amendment is limited to a claim against Adecco, and not against Bentley Motors Ltd, given that I have rejected the claim against Bentley Motors Ltd as being out of time, and no extension being granted.

44. The case will now be listed for a Closed Preliminary Hearing to consider directions in this case.

Employment Judge **Mark Butler**

Date: 05/12/2019

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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