**EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No 4107168/2019

Held in Edinburgh on 14 November 2019

Employment Judge: I. Atack

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| Archibald Park | Claimant<br>In Person: |
| Aramark Defence Services Ltd | Respondents<br>Represented by:<br>Ms E Wood<br>Solicitor |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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

**Reasons**

## Introduction

1. This preliminary hearing was arranged to determine an application by the claimant on 2 September 2019, under rule 29 schedule 1 of the Employment

Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules), to amend his claim. The respondent opposed the application.

2. The claimant represented himself and the respondent was represented by Miss Wood. Both parties relied upon their submissions which are summarised below.

3. I explained the purpose of this preliminary hearing to the claimant.

4. From the pleadings and submissions made I found the following material facts to be admitted.

**Material Facts**

5. The claimant presented a claim to the Employment Tribunal on 2 July 2019 in which he complained the respondent had dismissed him unfairly. In that claim form he had also ticked the boxes at paragraph 8.1 of the ET 1 to indicate he was making a claim of disability discrimination and for holiday pay.

6. A preliminary hearing took place on 14 August 2019 for the purpose of case management. Following that hearing the claimant was ordered to produce by 4 September further and better particulars of the claim which he sought to advance in relation to discrimination and also to answer seven questions which were set out in the note issued following the preliminary hearing, dated 14 August 2019.

7. On 2 September 2019 the claimant sent an email to the Employment Tribunal. In that email the claimant confirmed he wished to make a claim of direct discrimination on the grounds of disability under section 13 of the Equality Act 2010, a claim for failure to make reasonable adjustments under section 20 and a claim for harassment under section 26.

8. This preliminary hearing was arranged to consider the amendment proposed by the claimant in his email of 2 September.

9. The respondent had confirmed at the preliminary hearing held on 14 August that they accepted the claimant is and was at the material time a disabled person within the meaning of section 6 of the Equality Act 2019.

**Submissions**

Claimant

10. Mr. Park stated he did not know the system and it had not been until the previous hearing that he was made aware of what he should be looking at. The proposed amendment showed the way in which he was treated in the final weeks of his employment and on the day he was leaving. His claim for direct discrimination was, he said, in relation to a failure by the respondent in not having enough staff to carry out the contract on which they were engaged. He believed he would be treated differently if he had not been disabled.

11. With regards to the claim for reasonable adjustments his position was that he had previously had a computer and printer but because of the demise of another contractor those had been taken away from him and that it had taken the respondent six months to obtain a laptop for him. He stated he did not ever receive a printer before he was made redundant. It was his position that the respondent should have produced the printer earlier as he had emailed his line manager about his frustrations at being unable to carry out his work.

12. With regard to the claim for harassment he submitted that this was set out in the email of 2 September and related to the way in which he was treated by his line manager.

13. Mr. Park also submitted that he suffered from post traumatic stress disorder and that he had taken six months after the termination of his employment to find another job. He described himself as having been depressed and suffering from anxiety and submitted that was the reason for his having not done things correctly with regard to his claims and in the right timescale.

Respondent

14. For the respondent Miss Wood submitted that these were entirely new claims unrelated to those set out in the ET1. She submitted that no new facts had come to light since the claimant's dismissal that he did not know about at the time of his dismissal and she could not understand why these allegations were not in the original claim. The claimant had been away from work for some time before he submitted the original claim and it was not clear to her why the claims which were the subject of the proposed amendment were not raised at the time of the original claim.

15. It was her position that these new claims were out of time and should be rejected for that reason.

16. She submitted that the claimant had not shown there was any reason for extending the time limit and the application should not be allowed.

**Decision**

17. Both parties accepted that the claimant's email of 2 September contained the further and better particulars which he now wished to be accepted as an amendment to his case.

18. Under Rule 29 the Employment Tribunal has a broad discretion to allow an amendment at any stage of the proceedings. However, such discretion must be exercised in accordance with the overriding objective of dealing with cases justly and fairly under Rule 2.

19. In exercising its discretion the Employment Tribunal requires to have regarded to all the circumstances of the case, including in particular any injustice or hardship which would result from the amendment or the refusal to make it. This involves a careful balancing exercise of all relevant factors and having regard to the interest of justice. Relevant factors include the nature of the amendment, the applicability of time limits and the timing and manner of the application – ***Selkent Bus Co v Moore [1996] IRLR 661***.

20. In considering the proposed amendment the Employment Tribunal requires to consider the precise amendment which has been set out. The amendment should be set out in the same degree of detail as would be expected had it formed part of the original claim.

21. In the original claim the claimant has merely ticked box 8.1 to indicate that he is claiming disability discrimination but there is nothing in the ET1 itself which gives the respondent fair notice of that case. The claimant, in the email of 2 September, has confirmed that he wishes to make a claim of direct discrimination on the grounds of disability but there is nothing in that email which indicates how he alleges he was less favourably treated than the respondent treated or would treat others. There is nothing pled to allege that any less favourable treatment is because of disability. There is no mention of an actual or hypothetical competitor whom the claimant offers to prove would be treated differently.

22. The claimant also seeks to bring a case in respect of a failure to make reasonable adjustments under section 20 of the Equality Act but there is no mention in the ET1 of any such possible claim. Section 20 provides that the duty to make reasonable adjustments comprises three requirements. These are:-

    (a) a requirement where a provision criterion or practice 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 that disadvantage.

    (b) a requirement where a physical feature 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.

    (c) a requirement where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

23. There is no mention in the proposed amendment of any provision criterion or practice of the respondent which put or would have put the claimant at a substantial disadvantage in comparison with persons who were not disabled. There is reference to the claimant not having a laptop but there is no mention that the lack of a laptop put the claimant as a disabled person at a substantial disadvantage in comparison with those who are not disabled.

24. The third claim the claimant proposes to bring is one of harassment under section 26. Whilst the proposed amendment does refer to the claimant receiving emails which he perceived as being “aggressive” and “badgering” there is nothing to suggest that any alleged conduct by the respondent related to the protected characteristic of disability. There is also no specific allegation that any conduct was unwanted or that it had the purpose or effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

25. I accepted Miss Wood’s submission that these proposed amendments were in fact new claims. The proposed amendments were not simply designed to alter the basis of an existing claim but were seeking to set out entirely new heads of complaint. There was no mention at all in the ET1 of any possible claim of a failure to make reasonable adjustments or of harassment. The only reference to a claim of disability discrimination was in the ticking of the relevant box at paragraph 8.1. There was nothing in the original pleadings to indicate these claims. I therefore considered they should all be treated as an application to add new causes of action.

26. One of the factors the Employment Tribunal is entitled to consider is whether the cases as pled in the proposed amendment have any realistic prospect of success – ***Gillett v Bridge Hampshire Hospitals NHS Trust UKEAT/0132/12*** I

considered that the proposed new cases had little prospect of success for the reasons set out above.

27. I did not consider that what was being proposed gave the respondent fair notice of any claim of disability discrimination, or of a failure to make reasonable adjustments or of harassment. The amendment, as proposed in the email of 2 September, simply does not set out the basis of what the claimant offers to prove to substantiate the three individual new claims he is making.

28. I considered the question of hardship and injustice to both parties in either allowing or refusing the amendment. I accepted that the primary time limit for bringing the claims had expired. I considered, as stated above, the proposed amendments did not actually give fair notice of what each of these new claims was actually about and how the claimant claimed suffered as a disabled person. As a result it would not be in the interests of justice to allow the amendment as the respondent would suffer hardship in not knowing what was the case it had to meet in respect of each claim. The primary time limit for presenting these new claims in terms of section 123 of the Equality Act 2010 has expired. Had the claimant set out in detail the basis upon which he alleged that he had been discriminated as a disabled person, how any unwanted conduct was related to disability and how he been put at a substantial disadvantage by a provision criterion or practice of the respondent or their failure to provide an auxiliary aid I may have been minded to exercise discretion with regard to extending the time limit. That however is not relevant to this application which fails on the basis that it purports to be made on the basis of making new claims, but fails to specify any legal basis for those claims.

29. I concluded that this was an application to present three new claims. The basis of these cases was known to the claimant at the time of the termination of his employment. He was able to set out his claim for unfair dismissal and present his ET1 in time. His disability did not prevent that. He submitted that he only became aware of what was required of him at the preliminary hearing on 14 August. However, no satisfactory explanation was given as to why if he felt he had been unfairly dismissed and was able to complete the claim form in

respect of that complaint he could not in that same form have set out why he considered he had been subject to disability discrimination rather than merely ticking a box.

30. I concluded for the reasons set out above that the amendment should not be accepted. It is refused.

**Date of Judgment: 16 December 2019**

**Employment Judge: Iain Atack**

**Entered Into the Register: 20 December 2019**

**And Copied to Parties**