EMPLOYMENT TRIBUNALS

Claimant: Mr P Ditton

Respondent: Maritime Transport Limited

Heard at: Manchester **On:** 16 January 2020

Before: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: Mr A Lewis, Solicitor
Respondent: Mr M Wakelin, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's application to amend the claim to include a complaint of direct discrimination under section 13 of the Equality Act 2010 in the form set out in the proposed amended grounds of complaint sent to the tribunal on 4 July 2019 is granted.

2. The claimant is not permitted to rely upon a complaint under section 15 of the Equality Act 2010.

REASONS

1. By a claim form presented to the Tribunal on 12 June 2019 Mr Ditton brought complaints of unfair dismissal, unpaid notice pay and unauthorised deductions from wages in respect of his employment which ended with his dismissal on 26 April 2019. The respondent defended the claim.

2. The claimant applied to amend his claim within the primary limitation period to include contentions that he was also discriminated against on the grounds of perceived disability, either as direct discrimination or as discrimination because of something arising in consequence of the disability.

3. The respondent resisted that application.

4. The parties had put before me a number of authorities including **Selkent Bus Co Ltd v Moore [1996] ICR 836** in relation to the amendment, and the decision of the Court of Appeal in **Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061**, on appeal from the Employment Appeal Tribunal, a case involving perceived discrimination. I also bore in mind the Presidential Guidance on Case Management in respect of such applications.

5. At the outset of this hearing I dealt with the application to amend. I put to Mr Lewis that because of the wording of section 15 of the Employment Act 2010 a claim of perceived discrimination, which was what was being argued, could not be pursued on the grounds of something arising in consequence of perceived disability. Mr Lewis immediately accepted that, and indeed that was part of Mr Wakelin's argument.

6. The claim of direct discrimination is put in this way. The respondent in dismissing the claimant, who in his lorry veered from the normal path and had an accident by crashing with the central reservation of the A14, had found that the claimant had either been inattentive or had fallen asleep at the wheel.

7. The claimant's case before the dismissing officer had been that, as sometimes but rarely occurred with him and other members of his family, he had what can best be described as a short sneezing fit: 6 or 7 consequential sneezes or thereabouts resulting in his eyes being closed. He said that was how the accident occurred.

8. The respondent's case, whether it was put this way by the dismissing officer first or second for these purposes does not matter, was to this effect: "Even if you were not asleep (which we think you were), you had a medical condition of which you should have notified us. A medical condition which affected your driving should have been reported to us and the DVLA and you might have been found not fit to drive".

9. Effectively, in either case the respondent alleged gross misconduct based on gross negligence, in either not having informed the employer of the condition or having been inattentive/asleep at the wheel.

10. In either event, the respondent's case is that amounts to gross negligence and justified the dismissal.

11. There are arguments about the way in which the dismissal outcome was formulated but for the purposes of an amendment they are not relevant.

12. The claimant's case is that there are procedural problems, if the respondent went down the medical condition route because they did not investigate it. It is also going to be his case that the real reason why he was dismissed, because it was the first thing out of the dismissing officer's mouth, was that he had a medical condition which he should have notified to the employer. Therefore, he will say there was a perception by them that he was disabled and they dismissed him because of that perception.

13. Not so, says Mr Wakelin. If this was a discrimination claim at all, it was because of something arising in consequence of the perceived disability, if such there was.

14. While I think that that argument has merit, I am not persuaded of is that the claimant has no reasonable prospects of success of establishing direct discrimination.

15. The evidence, says Mr Lewis, looked at in one way, can show that it was the perceived disability that was in the mind of Mr Witter in deciding to dismiss and that was arguably the reason for his dismissal, and that would therefore be less favourable treatment than a person who was not perceived to have a disability. Therefore the burden will pass he says, if that link is established, which it could be. That would put the burden of proof on the employer to show that the reason for dismissal was in no sense whatsoever because of the perceived disability.

16. I bear those things in mind. I consider that there is, other than having to face this additional complaint no prejudice to the employer if I allow the amendment. It was suggested by Mr Wakelin, and this was the high watermark of his argument, that the hearing might take slightly longer if the amendment were allowed. I am doubtful that there is any force in that.

17. I form the view, notwithstanding the argument of Mr Wakelin, that it is just and proper to allow the amendment in relation to the section 13 claim only.

18. There is no other factor discernible from the case of **Selkent** which would deter against it. It is a new cause of action. I recognise that.

19. However it is a case which Mr Wakelin's client would have faced if, instead of applying to amend Mr Lewis had issued a fresh ET1. It would have been, all are agreed, in time.

20. Mr Wakelin suggested that not raising it at the outset but by way of amendment was an abuse of process. I am absolutely satisfied that it is not. It might give rise at best to some application in a small way for the costs of having to present a further ET3. A tribunal would not have rejected it as a claim simply on the grounds that it had not been presented in the same claim form.

21. I asked Mr Lewis to explain why it was not raised at first and he said he was not aware of the decision in **Coffey** until such time as the Court of Appeal handed down its decision rather than that of the EAT. As, I think it was, Underhill LJ who presided in the Court of Appeal in the case of Coffey, said in another context, litigation is not a game, mistakes are made. We are all as solicitors and barristers and judges meant to know the law immediately it comes into effect, but that is a counsel of perfection for all of us.

22. I am persuaded that there is no good reason to refuse the application to amend. Therefore, I allow the amendment.

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Employment Judge Tom Ryan

Date: 23 January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 February 2020

FOR THE TRIBUNAL OFFICE