Case No: 3334197/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss Jodi Hayward

Respondent: David Lloyd Leisure Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford **On:** 14 February 2020

Before: Employment Judge Alliott (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr McArdle, Solicitor

JUDGMENT

1. The claimant's application to amend her claim to bring claims of disability discrimination and victimisation is dismissed.

REASONS

Introduction

1. On 5 December 2019, the claimant sent an e-mail to the Employment Tribunal stating:

> "During all of the meetings I have had, I was advised that I do have a case to bring forward, and have also been advised to add victimisation and disability discrimination to my case, as such, I would like to add these claims to my case as advised, and would like to ask for a postponement of my case …."

2. On 6 December 2019, Mr McArdle on behalf of the respondent objected to such an application.

3. Consequently, Employment Judge Manley on 6 January 2020, directed as follows:

> "The application to amend the claimant's claim cannot be determined on the papers and will need a hearing if it is pursued. The hearing listed between 12 and 14 February 2020 is postponed. There will be a preliminary hearing on Friday 14 February 2020 for two hours to consider the claimant's application."

4. Thus it is that this application to amend comes before me today.

Procedurally where this case is

5. The claimant was employed by the respondent on 7 August 2017 as a club room assistant. She was dismissed for gross misconduct on 19 June 2018.

6. The claimant issued her claim form on 16 October 2018, shortly prior to the expiry of the three month primary limitation period (taking into account the period of early conciliation).

7. Therefore, this application to amend the claimant's claim comes approximately one year, one and half months' after the expiry of the time limit for the presentation of such a claim.

8. On 3 April 2019 Employment Judge Bloch QC held a closed preliminary hearing. At that hearing, the issues were identified as relating to allegations of sex discrimination and a breach of contract in relation to the grievance procedure. Case management orders were made and this case was set down for hearing between 12 and 15 February 2020 over four days.

9. The claimant has served a schedule of loss on 21 May 2019. I am told that the lists of documents were exchanged in early December 2019. However, agreement of a final hearing bundle and exchange of witness statements have not taken place.

The Law

10. I have a discretion as to whether or not to allow an amendment pursuant to rule 29 of the Employment Tribunal's Constitution and Rules of Procedure Regulations 2013.

11. I take into account the following extracts from the IDS Employment Law Handbook on Employment Tribunal Practice and Procedure at 8.16.

> "In Chapman and Others v Goonvean and Rostowrack China Clay Co Limited, 1973, ICR 50, NIRC, Sir John Donaldson stressed that, in the making use of their discretionary power to amend, tribunals should seek to do justice between the parties having regard to the circumstances of the case. Then in Cocking v Sandhurst (Stationers) Limited and another, 1974, ICR 650, NIRC, he laid down a general procedure for tribunals to follow when deciding whether to allow amendments to claim forms, involving changing the basis of the claim or adding or substituting respondents. The key principle was that in exercising their discretion, tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it."

12. At 8.18, Balance of hardship and injustice, the following is set out:

> "In determining whether to grant an application to amend, an Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors having regard to the interest of justice and to the relative hardship that would be caused to the parties by granting or refusing an amendment."

In Selkent, Mr Justice Mummery, explained that relevant factors would include:

- the nature of the amendment;
- the applicability of time limits;
- the timing and manner of the application.

13. At 8.19, the following is set out:

> "It is important to note that the balance of hardship and injustice test is a balancing exercise. Lady Smith noted in Trimble & Another v North Lanarkshire Council & Another, EATS0048/12, that 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 in context and that is why it is important to look at the whole surrounding circumstances. Moreover, it is important to ensure that amendments are not denied purely punitively or where no real prejudice will be done by their being granted ….."

14. At 8.27, New causes of action, the following is set out:

> "The observations of Mummery P in the Selkent case regarding the significance of the nature of the proposed amendment might be understood as an indication that the fact that an application introduces a new cause of action would, of itself, weight heavily against amendment."

Later, the following is set out:

> "Following the approach indicated by Abercrombie, tribunals should, when considering applications to amend that arguably raise new causes of action, focus 'not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry 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'."

The nature of the proposed amendments

15. The claimant seeks to introduce claims of disability discrimination and victimisation. Obviously enough, the claimant is representing herself and I make full allowance for the fact that she is a litigant in person and that Employment Tribunals are intended to be relatively informal venues for dealing with employment disputes. However, whilst she has made an application to amend to include these claims, I have nothing in writing from her as to how and on what basis she puts these proposed new claims.

16. Consequently, during the course of this hearing I have endeavoured to explore with the claimant how it is she puts these new claims. Over approximately one hour, I endeavoured to discover what it is she is actually complaining about.

17. As regards the disability discrimination claim, the claimant told me that her disability includes anxiety/depression and dyslexia. I was shown a school report from June 2010 that indicated that the claimant had slow reading and required an extra 25% time for exams and an A & E discharge report dated March 2019 (approximately nine months after her dismissal), indicating that she had had an admission due to, as she told me, a suicide attempt.

18. Whilst I am obviously making no decisions on substantive issues, I observe that at this stage, the medical evidence of disability is relatively light.

19. As regards the allegation of disability discrimination, I have endeavoured to understand how it is that the claimant would seek to put her case. Whether it be enquiring as to the alleged less favourable or unfavourable treatment, or the something arising in consequence of the disability, I was at a loss to understand how that was put in the context of the Equality Act 2010. It is quite clear to me that the claimant has considerable complaint as to the way management treated her whilst she worked for the respondent. However, that is a far cry from establishing or setting out a case that she had been treated in that way on the grounds of her disability. In essence, the claimant was telling me that she felt that the way that she was treated during the course of the investigation and disciplinary process did not take account of her particular difficulties, in particular, giving her breaks during the course of those meetings. However, I am at a loss to see how that can even begin to be less favourable treatment and/or unfavourable treatment given that others were treated apparently in broadly the same way and the claimant was acknowledging during those meetings that she had supplied coffee to other members of staff without making the relevant charge. As regards indirect discrimination or a failure to make reasonable adjustments, again, the claimant was in considerable difficulties in formulating what PCP would be relied upon or indeed, what reasonable adjustments she would be contending for.

20. In the circumstances, I have taken into account that the claimant's proposed amendment on the issue of disability discrimination is currently extremely vague and lacking in particularity and, having explored it with the claimant, appears to me to be somewhat tenuous.

21. Turning to the victimisation claim, I explored with the claimant what protected act she was seeking to rely upon. In essence, she told me a long litany of allegations of complaints regarding her treatment by management, the hallmark of which was that none of it seemed to be attributed to any protected characteristic under the Equality Act 2010.

22. Again, I take into account in the exercise of my discretion that the victimisation claim is unparticularised and appears weak.

23. In any event, the nature of the amendment is not a relabelling exercise but the introduction of two new substantive causes of action. It is quite clear to me that if allowed, these new claims would introduce very substantial new factual and legal issues into the claim. There would have to be investigation as to the

claimant's medical past and whether she was disabled within the meaning of the Equality Act 2010, and further allegations of a factual nature into the way that she alleges that she was treated by management.

The applicability of time limits

24. As set out above, the application to amend is approximately one year and one and a half months after the expiry of the primary limitation period. The claimant essentially explains the delay by the fact that she says she was in receipt of incorrect legal advice as to whether or not she could bring these claims.

25. I begin by observing that on the claim form at question 12, the claimant has indicated that she does not have a disability although I take into account that that question can be read in the context of adjustments at the Employment Tribunal. However, the tick box exercise relating to discrimination clearly sets out a range of options and the claimant was well able to fill in the form herself to include a claim for sex discrimination.

26. The claimant sought to urge upon me that during the course of the grievance procedure and her appeal against dismissal, she raised orally issues relating to victimisation and disability in the sense that the respondent was said to be well aware of those matters. If that is truly the case, then in my judgment, those potential claims would have been at the forefront of the claimant's mind when filling in the claim form herself.

27. In any event, the claimant told me that she went to the Hillingdon Law Centre prior to lodging her complaint and had had certain advice at that stage.

28. Further, following the preliminary hearing on 3 April 2019, when Employment Judge Bloch QC advised her to take legal advice, the claimant told me she went again to the Hillingdon Law Centre. There, she says, she was given wrong advice not to bring further claims by no less than two individuals. She states that it was only when she went to Brunel University and spoke to someone there that the suggestion was made that these further matters should be introduced into her claim.

29. In my judgment, taking due allowance to the fact that the claimant is a litigant in person, the claimant has undoubtedly had access to legal advice prior to submitting her claim form. Further, during the course of 2019, she had access to legal advice. The nature of that advice is not for me to comment upon. In my judgment, the claimant had ample opportunity to formulate her claims, especially if, as she said to me during the grievance and appeal process, they were at the forefront of her mind.

30. Were I determining an application to extend time for the presentation of these claims on a just and equitable basis, I would exercise my discretion against the claimant. In my judgment, she has had ample opportunity to make this amendment application sooner and that the effluxion of time will have prejudiced the respondent significantly.

31. This claim is already somewhat old and the hearing date for the 12 to 15 February has now been postponed. De facto this case will have to be relisted in one years' time. I am told that one key management witness has left the respondent's employment. Whilst obviously witnesses can be traced, the fact of the matter is that new factual allegations will have to be dealt with by the respondent some years after the events which we are dealing with. Any delay is the enemy of justice in terms of fading memories, and consequently, I consider that the respondent would be genuinely prejudiced were these amendments to be allowed.

The timing and manner of the application

32. The application has been made at the eleventh hour, prior to the substantive hearing of the action, and has resulted in a postponement of the hearing.

33. Taking into account all the factors that I have to in the exercise of my discretion, I have concluded that it would not be in the interests of justice to allow these amendments and consequently I refuse the application.

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Employment Judge Alliott

Date:…27 February 20……

Sent to the parties on:

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For the Tribunal:

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