



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr D Love

v

**Respondent**

Gate Gourmet (London) Limited

**Heard at:** Bury St Edmunds (by CVP)

**On:** 27 August 2020

**Before:** Employment Judge M Warren

**Appearances**

**For the Claimant:** In person.

**For the Respondent:** Mr O Holloway (Counsel).

**COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

## JUDGMENT

1. The claimant's claims for race discrimination, holiday pay and wages are dismissed upon having been withdrawn.
2. The claimant's claim of unfair dismissal is dismissed for want of jurisdiction.
3. The claimant's claim in breach of contract is struck out on the grounds that it has no reasonable prospects of success.
4. The claimant has leave to amend his claim to include a complaint of failure to make reasonable adjustments. His complaint of disability discrimination is not struck out.

## REASONS

### Background

1. Mr Love's employment with the respondent as a, "General Assistant" commenced on 10 September 2018. There is an issue as to whether his employment was terminated at all and if so, when. Early conciliation was between 26 August and 10 October 2019. These proceedings were issued by a claim form filed on 29 November 2019 and they are resisted.
2. In the ET1, Mr Love ticked boxes to indicate that he was bringing claims of unfair dismissal, race discrimination, disability discrimination, breach of contract, for unpaid wages and for unpaid holiday pay. He also ticked the box at 10.1 on page 9 of the ET1 which asks the claimant whether, if his claims include a claim that he was making a protected disclosure, he wanted a copy of the claim form sent to a relevant regulator.
3. Upon filing the ET3, the respondent applied by email dated 13 January 2020 for the claimant's claims to be struck out or in the alternative, a deposit order made. That application was re-iterated in an email dated 18 March 2020.
4. Today's hearing was originally a closed preliminary hearing to deal with procedural matters. It was converted to an open preliminary hearing in order to consider the respondent's applications at the direction of Employment Judge Anstis.

### The Claimant's Case

5. Mr Love filed appended to his ET1, a typed document which begins with the heading, "The Problem at Gate Gourmet" which runs to 28 paragraphs. That document together with narratives contained within the claim form at 8.1, 9.2 and 15 represent a source from which one determines Mr Love's pleaded case. In other words, the case he puts before the Tribunal. Whilst these documents make many references to the Equality Act 2010, to harassment, breach of trust and confidence, discrimination, stress and depression, it is not possible to discern precisely what Mr Love's claims are in legal terms, by placing appropriate labels on the various matters that he complains of.
6. The respondent applies for the claims to be struck out on the basis that as, "pleaded" it does not have any reasonable prospects of success. However, given that we are dealing with a litigant in person, the first step must be to identify what the case is, what the issues are, before one can decide what its prospects of success are. That must be the next step, if one is to comply with the overriding objective.
7. I discussed with Mr Love the detail of his case and worked with him to identify the legal basis upon which it might be put.

***Unfair Dismissal***

8. Mr Love confirmed that he had not been dismissed by the respondent and that he had never written to or otherwise informed the respondent that he resigned.
9. It was suggested that Mr Love may have resigned in a letter written on his behalf in September 2019, which raised a grievance about the way he was being treated, in which reference was made to the conduct he was complaining of amounting to constructive dismissal and that he felt that he could not return to work, (he was away from work certified as unfit to work at the time). However, Mr Love acknowledged that this letter of grievance did not expressly state that he resigned his employment. Thereafter, he continued to receive sick pay and send into the respondent his fit notes.
10. Mr Love's statutory sick pay came to an end in January 2020. In February 2020 he received a letter from the respondent in which they wrote that Mr Love had not replied to their correspondence, written after the issue of the claim, stating that they had not understood him to have resigned his employment. Payments of statutory sick pay having come to an end, the respondent wrote that they were now treating his employment as ended. Arrangements were made to make a payment of one month's pay in lieu of notice. He was told that any accrued holiday pay would be paid.
11. On this basis, Mr Love's employment with the respondent did not end until February 2020 and he was still employed by the respondent as at 29 November 2019, when he filed his claim form.
12. I discussed with Mr Love why he had ticked the box at 10.1 of the ET1. He was not sure, but he confirmed that he was not claiming that he was treated badly or dismissed because he had whistleblown.
13. On the basis of the foregoing, the Tribunal has no jurisdiction to consider the claim for unfair dismissal for two reasons:
  - 13.1 Mr Love did not have the required two years' service to bring a claim of unfair dismissal, see s.108(1) of the Employment Rights Act 1996 (ERA). None of the various grounds for claiming automatic unfair dismissal, for which 2 years' service is not required, apply.
  - 13.2 As at 29 November 2019 when the claim was issued, Mr Love was still employed. Employment needs to be terminated one way or the other, either by dismissal or resignation, before one can claim that one has been unfairly dismissed, (see s.94, s.95 and s.96 of the ERA).
14. It follows that the claim of unfair dismissal must be dismissed as the Tribunal does not have jurisdiction to consider it.

***Race Discrimination***

15. Mr Love explained that his complaint of race discrimination related to a remark made to him by his line manager, one Katarzyna Amanda, criticising him for allegedly not carrying out her instructions, "Do you understand English?". Mr Love felt that was a racist remark. He confirmed to me that he is white British. I suggested to him that making such a remark to a person who is white and British, whilst offensive, is not treating them less favourably because of their race. It would be different of course, if the victim of such a remark was of a different ethnic or national origin, or for whom English was not their first language. The remark is undoubtedly offensive in that it mocks or casts aspersions on Mr Love's intellect or powers of comprehension, it is not a remark made to him because of his race. Mr Love acknowledged that to be so and withdrew his claim of race discrimination.
16. For the avoidance of doubt, if Mr Love had not withdrawn his claim of race discrimination, I would have struck it out as having no reasonable prospects of success.

***Disability discrimination***

17. The disability relied upon is depression. Mr Love told me that he had first been identified by his doctors as suffering from depression in 2007 and that he has suffered a number of episodes ever since. He says that he was ill three times whilst working for the respondent and each time, the reason for his absence was given as depression. He explained that he had been treated badly by Ms Amanda as set out in his claim form and the document attached. Because of his illness and vulnerability, he was unable to cope, became ill and was therefore absent from work. A more senior manager called Bhags Kanth accompanied by a Human Resources advisor Sara Dickenson at a meeting on 1 March 2019, gave assurances to Mr Love that if he returned to work, he would not have to work with Ms Amanda again. He complains that the respondent did not honour that assurance so that after a period of time, he was required again to work with Ms Amanda, who again subjected him to an inappropriate management style which caused him once again, to become ill and absent from work. This was on 8 July 2019.
18. It seemed to me that as described, this might be categorised as a complaint of either failure to make reasonable adjustments or discrimination arising from disability. I discuss this further below, when considering the application to amend.

***Breach of Contract***

19. Mr Love explained that he had used the expression, “breach of contract” in his narrative because the respondent was in breach of its health and safety obligations to provide a safe system of work and in breach of the implied term to maintain mutual trust and confidence. These were breaches of contract relied upon to support a claim of constructive unfair dismissal, which cannot proceed, for reasons explained above. To be clear, it may well have been that they would have successfully supported such a claim, had Mr Love accumulated two years’ service and had he clearly resigned his employment in response to such breach, before issuing his claim for unfair dismissal.
20. The breach of contract claim is therefore a reference to the struck out constructive unfair dismissal complaint. It is not a free-standing complaint of breach of contract arising or outstanding on termination of employment as required by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

***Holiday Pay***

21. Mr Love was not clear, he acknowledged, why he had ticked the box to claim holiday pay. He confirmed he had not carried out any calculation nor suggested that he had not been paid the holiday pay he should have received, whether for actual or for accrued holiday. He acknowledged that he had received a payment of accrued holiday with his final payment in February 2020 and had no reason to think that the amount that he received was not correct. Mr Love withdrew the holiday pay claim.

***Unpaid Wages***

22. Once again, Mr Love was not sure why he had ticked the box to claim for unpaid wages and said that he did not intend to advance such a claim. He withdrew his wages claim.

***Application to amend***

23. Upon my identifying potential claims for failure to make reasonable adjustments or disability related discrimination, Mr Holloway objected that these claims could not be discerned from the pleaded claim. He acknowledged that a claim for reasonable adjustments could be identified from what I had been told today, but he was unable to see how one might describe the claim as one of disability related discrimination.
24. Upon my explaining to Mr Love his options, he applied for leave to amend his claim to include claims for reasonable adjustments and for disability related discrimination as identified above.

25. Mr Holloway objected. He said that these claims cannot be deduced from the pleaded facts. He acknowledged that there were a couple of references to depression, but there were no references to the constituent parts of reasonable adjustment. He made the point that these claims would be substantially out of time and no reasons were offered as to why they are not in time. He said that the claimant had plainly been getting some assistance and has demonstrated a capacity to research, given the references to authorities and legislation in the pleaded claim. He said that the prejudice to the respondent were I to grant the application would be that it would now have to plead to a claim relating to events which occurred 10 months ago, in November 2019.

### The Law

26. When considering an application to amend, one must have regard to the guidance of Mummery J, (as he then was) in the case of Selkent Bus v Moore [1996] ICR 836. In exercising discretion, a Tribunal should take into account all the relevant circumstances and should balance the relative injustice and hardship of allowing or refusing the amendment.
27. Non-exhaustive examples of what might be relevant circumstances given by Mummery J included:
- 27.1 The nature of the amendment, whether it is a minor error, a new fact, a new allegation or a new claim;
- 27.2 The applicability of time limits and if the claim is out of time, whether time should be extended, and
- 27.3 The timing and manner of the application and in particular, why an application had not been made sooner.
28. On the question of time limits, section 123(1) of the Equality Act 2010 requires that a claim shall be brought before the end of the period of three months beginning with the date of the act to which the complaint relates or such further period as the Tribunal thinks just and equitable. Conduct extended over a period of time is treated as having been done at the end of that period, (section 123(3)).
29. On the just and equitable test, the EAT in the case of Cohan v Derby Law Centre [2004] IRLR 685 said that a Tribunal should have regard to the Limitation Act checklist as modified in the case of British Coal Corporation v Keeble [1997] IRLR 336 which includes that:
- 29.1 One should have regard to the relative prejudice to each of the parties;

- 29.2 One should also have regard to all of the circumstances of the case which includes:
- 29.2.1 The length and reason for delay;
  - 29.2.2 The extent that cogency of evidence is likely to be affected;
  - 29.2.3 The cooperation of the Respondent in the provision of information requested, if relevant;
  - 29.2.4 The promptness with which the Claimant had acted once he knew of facts giving rise to the cause of action, and
  - 29.2.5 Steps taken by the Claimant to obtain advice once he knew of the possibility of taking action.
30. Selkent was revisited by Underhill LJ in the Court of Appeal in Abercrombie v Aga Rangemaster Ltd [2014] ICR 209 and the guidance of Mummery J approved. Commenting on the now often referred to distinction between label substitution on pleaded facts as compared to substantial alterations pleading new causes of action, Underhill LJ said that it was clear that Mummery J was not suggesting so formalistic an approach that the fact that an amendment pleading a new cause of action, weighed heavily against allowing an amendment. These are just factors likely to be relevant in striking the balance of injustice and hardship. He said that the focus should be not so much on, “formal classification” but more on the extent to which the amendment is likely to involve different lines of enquiry, *“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”*. See paragraphs 47 and 48.
31. Underhill LJ also explains in Abercrombie that just because the amendment relates to allegations that are out of time, that does not mean we should automatically disallow it. It is still in our discretion to amend.
32. Whilst tribunals dealing with an amendment application have to consider whether the proposed amendment contains allegations that are out of time, we do not have to actually decide the time point. We can, if appropriate, grant the amendment subject to any limitation points the respondent may wish to raise at the final hearing. An example of when this might be appropriate, is when the subject of the amendment is an allegation that may be part of a continuing act of discrimination, determination of which is fact sensitive and better decided upon after hearing all the evidence at the final hearing, (see Galilee v Commissioner of Police of the Metropolis UKEAT/207/16 and Reuters Limited v Cole UKEAT/0258/17).

33. In exercising my discretion, I must have regard to the Overriding Objective and must seek to balance the relative prejudice to the parties. Rule 2 sets out the Overriding Objective as follows:

*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

*A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

### **Discussion and Conclusions**

34. I do not agree that a failure to make reasonable adjustments claim cannot be discerned from the pleaded case. It occurred to me that such a claim may be advanced upon reading the pleaded claim for the first time. Mr Love clearly pleaded that he was treated badly or inappropriately by Ms Amanda and that he therefore became seriously ill with depression, (paragraphs 5-7). He states at paragraph 10 that he had a meeting with Bhags Kanth on 1 March 2019 and was assured that if he returned to work he would not have to work with Ms Amanda again. At paragraph 11 he says that Mr Kanth went back on that assurance. He goes on to recite what he perceives as Ms Amanda's mistreatment of him. It is clear that Mr Love then became ill again as he states at paragraph 17, "if Mr Bhags Kanth had kept his word, he would still have been at work". All the constituent parts of a reasonable adjustments claim are there, all that is missing is the label.
35. I acknowledged that during a short adjournment, I was unable to formulate a claim of disability related discrimination on these facts.



36. Having regard to the guidance in Selkent, the British Coal limitation checklist, the balance of prejudice and the overriding objective, I have reflected upon the following:
- 36.1 The reasonable adjustment claim is a minor amendment, essentially placing a label on pleaded facts, albeit facts that have been clarified today.
  - 36.2 The event in question was on 8 July 2019 when Mr Kanth did not make the alleged reasonable adjustment of ensuring that Mr Love would not have to work with Ms Amanda. The period of limitation is three months, together with an extended period because of the early conciliation, would mean that this claim ought to have been brought in November 2019 and is therefore 9 months out of time.
  - 36.3 The reason for that delay is that Mr Love is a litigant in person with no understanding of how to correctly formulate a claim in legal terms. Whilst he appears to have had the benefit of some assistance, (somebody called Allison Napier described as a Statutory Advocate) that has clearly not been the advice of a legally trained professional advisor in the field of Employment Law.
  - 36.4 There was no suggestion that the respondent has failed to provide any information requested promptly.
  - 36.5 The claimant has acted promptly and in time in terms of setting out the facts upon which his claim is based. He also acted promptly on my drawing to his attention that if he wished to pursue a reasonable adjustments claim, he would need to make an application to amend.
  - 36.6 Mr Love has not taken professional legal advice.
  - 36.7 The parties are not on an equal footing, Mr Love is representing himself and the respondent have the benefit of employment specialist solicitors and counsel.
  - 36.8 It seems to me that allowing the amendment would be proportionate in regard to the complexity and importance of the issues.
  - 36.9 Allowing the amendment would avoid unnecessary formality and permit flexibility.
  - 36.10 Allowing the amendment would not cause any delay.
  - 36.11 Allowing the amendment will cause some expense in that the respondent will doubtless wish to amend its grounds of resistance.

- 36.12 In terms of balance of prejudice, if the amendment is allowed the respondent will lose the benefit of a limitation defence Parliament saw fit to put in place. However, that limitation defence was expressly subject to the possibility of time being extended where it is just and equitable to do so. Cogency of evidence may be affected given that these were events that were over a year ago, but the facts pleaded to were there to be seen when these proceedings were issued and ought by now to have been investigated. The prejudice to Mr Love if I do not allow the amendment is that his case will come to an end and he will lose the opportunity of seeking redress through the Tribunal for discrimination he says he has been subjected to. The balance of prejudice favours the claimant.
37. Having regard to these matters, I have decided that the application to amend should be allowed and that Mr Love's claim shall be identified as a complaint of failure to make reasonable adjustments, as formulated below under the heading "The Issues". It is just and equitable to extend time and the complaint is therefore in time.
38. As I am unable to formulate in appropriate legal terms, a complaint of disability related discrimination contrary to s.15 of the Equality Act 2010, the application in that respect is refused.

### **The Issues**

#### ***Disability***

39. Was the claimant a disabled person in accordance with the Equality Act 2010 at the relevant time because of depression?

#### ***Failure to make reasonable adjustments***

40. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?
41. A "PCP" is a provision, criterion or practice, (a way of doing things). Did the respondent have the PCP of requiring Mr Love to work with Ms Katarzyna Amanda?
42. If so, did such PCP put Mr Love at a substantial disadvantage in comparison with persons who are not disabled at any relevant time in that he was unable to cope with the inappropriate way he was treated by Ms Katarzyna Amanda?
43. If so, did the respondent know or could it reasonably have been expected to know that Mr Love was likely to be placed at any such disadvantage?

44. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? Mr Love identifies as a reasonable adjustment the making of arrangements so as to ensure that he was not required to work with Ms Katarzyna Amanda.
45. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

**Remedy**

46. If Mr Love's complaint succeeds questions will arise as to the remedy to which he is entitled which will involve an analysis of the financial losses he suffered as a consequence of the discrimination and what, if any, compensation for injury to feelings he should receive.

**Listing for hearing and Case Management Orders**

47. As this decision must be published on the internet, matters relating to case management will appear in a separate document.

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Employment Judge M Warren

Date: 14 September 2020

Sent to the parties on: ..1<sup>st</sup> Oct 2020..

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For the Tribunal Office