



EMPLOYMENT TRIBUNALS

Claimant: Mr B. Lokkason

Respondent: Superbowl UK Newport Ltd

HELD AT: Wrexham in chambers on **ON:** 9th October 2020
written submissions only

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Written submissions

Respondent: Written submissions

Decision

On Claimant's application to amend and on clarification of the claimant's claims

The decision of the Tribunal is:

1. The claimant's application to amend his claim to introduce new claims of public interest detriment and disability discrimination (in various forms) in respect of the provision of training in February 2019 and an internal recruitment exercise in April 2019 is refused (and see 2 below). By reference to the claimant's professionally prepared document entitled Further and Better Particulars of Claim sent to the tribunal on 4th September 2020 ("the F&BPs"), the disallowed amendments are those at paragraphs 7 (a) – (c), and 14 (a) – (b).
2. The F&BPs at paragraphs 16 – 18 in respect of the claim of discrimination arising from disability contain a patent typographical error; it is assumed that paragraph 18 was intended to re-iterate the allegations at paragraph 14 (a) – (j); the application to amend by adding allegations in relation to the internal recruitment exercise in April 2019 is refused (the re-iteration of the allegations at paragraph 14 (a) and (b)).
3. In so far as the F&BPs introduce new claims of public interest disclosure detriments post-dating April 2019, those amendments are accepted in the interests of justice; by reference to the F&BPs they are at paragraphs 7 (d) – r)

4. The claimant has provided clarification of his claims of direct disability discrimination (F&BPs paras 14 (c) - (j)), discrimination arising (F&BPs paras 16 -19), indirect discrimination (F&BPs at paras 20 -23), failure to make reasonable adjustments (F&BPs para 24 -28), and harassment related to disability (F&BPs paras 29 – 31). In so far as that particularisation adds factual details not specified in the claimant's ET1 Claim of 29th November 2019, such that it requires formal amendment, then in the interests of justice that amendment is granted.
5. The issue as to whether any of the claimant's allegations and claims are in or out of time, be they set out in either or both the ET1 or the F&BPs, will be determined at the final hearing.

REASONS

1. The Issues:

1.1. Procedural background:

- 1.1.1. The claimant presented a lengthy narrative discrimination claim attached to his ET1 Claim form while he was still employed by the respondent. The respondent responded as it could but the claim required clarification.
- 1.1.2. The claimant subsequently resigned. Within three months of his resignation, during the ongoing discrimination proceedings, he made allegations of constructive unfair dismissal on the basis of the respondent's alleged treatment of him because he had made protected disclosures. He was permitted to amend his claim in these circumstances to include claims of automatic unfair constructive dismissal, unauthorised deduction from wages and breach of contract. The claims still required clarification.
- 1.1.3. There have been repeated preliminary hearings in which attempts were made to obtain that clarification. The claimant has, in accordance with case management orders, attempted to provide clarification, first with a schedule (the pro forma of which was provided for him) which he completed but which was insufficiently clear, and then a professionally prepared document, the F&BPs, which closely followed a scheme suggested to him for a list of issues.

1.2. **Referral to an Employment Judge:** I have been asked to decide whether the F&BPs amount to particularisation of the current claims or are amendments, and if the latter then whether to allow amendment in the face of the respondent's opposition.

1.3. **Preparation:** I have studied the claim, the response, the claimant's schedules, the preliminary hearing minutes and Orders, the F&BPs and the respondent's opposition to it. I have considered the statutory provisions and

Rules. I have been accurately and appropriately addressed on authorities by the respondent and I have taken those precedents into account. This exercise has been long and complicated.

1.4. Howsoever I decided these matters, the respondent made it clear that it requires an opportunity to present and serve and amended Response. It has put the claimant on notice of an application for a Costs Order.

2. The Facts:

2.1. The situation during employment including as gleaned from the ET1 and ET3 – that is circumstances relevant to the claims known to both parties from the outset of litigation:

- 2.1.1. The respondent accepts that the claimant lives with autism and that this amounts to a disability. The respondent employed the claimant with actual knowledge of disability.
- 2.1.2. The claimant was unsuccessful in an internal recruitment exercise in May/June 2019, to which the respondent attributed a deterioration in the claimant's conduct;
- 2.1.3. The claimant says that he frequently raised issues over PPE;
- 2.1.4. The claimant had issues over the respondent's mobile phone policy;
- 2.1.5. Relations between the claimant and managerial colleagues became fraught, e.g. with Mr Scrivens. The claimant was taken to task including over an alleged complaint by a customer. He did not welcome this.
- 2.1.6. On 5th August 2019 the claimant was issued with a formal oral disciplinary warning;
- 2.1.7. Allegedly as a result of comments made by colleagues about the claimant, the respondent investigated him and he was required to attend a disciplinary hearing;
- 2.1.8. The claimant was referred to OH;
- 2.1.9. On 5th November 2019 the respondent issued a final written disciplinary warning for gross misconduct, rather than proceeding to dismissal;
- 2.1.10. On 7th November 2019 the claimant commenced a period of sickness absence; he did not return to work;
- 2.1.11. The claimant presented his claim of disability discrimination to the tribunal on 29th November 2019;

2.1.12. The claimant resigned on 8th December 2019, before the respondent presented its response (and it refers to the termination of employment in it).

2.2. In essence the respondent has been aware of issues with the claimant, and says it has been having issues with him, from at latest May 2019. The claimant has complained at length in his ET1 of the respondent's treatment of him throughout that time although he initially concentrated on events from September 2019, following the oral warning, as being catalysts for his not being able to return to work in November 2019 when he was signed off as sick.

2.3. Employment Judge Beard allowed the claimant to amend his claim to, amongst other things, include automatic ("whistle blowing") constructive unfair dismissal on 21st February 2020, within 3 months of termination of employment.

3. Considerations:

3.1. The claimant's claim has always needed clarification. He was a litigant in person. He has explained the difficulties he has had in expressing his claims clearly because of his disability. He says he was unsure of what was required and how he should express himself. These claims are technically difficult and the respondent is represented by a sophisticated professional firm of solicitors, experienced in and adept at the practice of employment law and litigation.

3.2. The claimant's claim has however consistently talked around and about the background I have outlined above (2.1) and with which the respondent has always been familiar. The claimant did not spell it all out in specific allegations aligning with the wording of relevant sections of the Equality Act 2010, and he has taken considerable time and a few attempts to get there. We now have the F&BPs.

3.3. A claim of constructive dismissal requires a claimant to prove that he/she resigned by reason of the employer's conduct. A claimant must prove a fundamental breach of contract, and often this is an allegation of breach of the implied term of trust and confidence. For the automatic unfair dismissal claim to run, as it is argued as a constructive not an actual dismissal, the claimant must prove that the respondent's conduct was related to his "whistle blowing". This takes us to claims of detriment. In requiring the claimant to provide details of his claim regarding dismissal, the claimant has provided details of alleged detriments that amount to conduct justifying his resignation. I consider that this is a consequence of the allowed amendment in respect of automatic constructive dismissal claim. He has effectively relabelled what was initially, pre-resignation, a claim of disability discrimination to an alternative claim of public interest detriment.

3.4. The claimant has written at some length about his issues with the respondent. It has commented on issues with the claimant in its initial ET3. The nature and scope of these issues or concerns is discernible from the

initial pleadings. For our purposes those matters had to be distilled to the language of the Equality Act 2010 and the Employment Rights Act 1996. To an extent they now have been in the F&BPs.

3.5. Ms Walker, who drafted the F&BPs is to be thanked at least for putting some shape on the claimant's claim. She has re-labelled some claims. She has clarified others, giving background and specifics. She has used the language of the relevant legislation. I have found that she also extended the scope of the claims to pre-date matters ever raised by the claimant in all his writings to the tribunal (in respect of earlier internal recruitment and training); to that extent I have disallowed those claims.

3.6. All in all, I was generally able to recognise the specificity in the F&BPs in the vagueness of the ET1. Ms Walker has provided further and better particulars.

3.7. All that said, I note and understand the respondent's wish to challenge whether some claims are in or out of time, whether some events can be relied on for the dismissal claim, at the final hearing. I consider it within the overriding objective of the tribunal for the respondent to have the opportunity to "review, respond fully to and cross examine the claimant" on these matters. I also note the costs warning, which was foreseeable and which may be pursued at the conclusion of this litigation.

4. Application of law to facts:

4.1. The respondent ought to be in a position to investigate internally, and to marshal evidence, to address allegations in relation to its policies, their implementation, complaints it says it received about the claimant, its disciplinary procedures and outcomes, its internal recruitment procedures and its managers' views of and dealings with the claimant over matters as diverse as PPE to interpersonal relations. Most of those matters are probably documented.

4.2. The claimant has always expressed a sense of grievance about how he feels he was treated in respect of all those matters. He may have a meritorious claim; he may not. It would be harsh on him if he was deprived of the opportunity to make his claim for want of legal sophistication. After several attempts the claims have been made clear. The respondent can defend them. It can argue time points and the effect of delay on reliance on events in support of the dismissal claim.

4.3. The balance of prejudice would weigh heavily against the claimant if his amendments were not allowed and if the particularisation of claims was not accepted as such. I have identified the claims that may proceed and those that may not.

4.4. The respondent may now present an amended response. Subject to that I would request that the respondent drafts a proposed list of issues, the questions that the tribunal needs to answer to reach a judgment, for discussion and approval at a further preliminary hearing. A preparatory

timetable will be discussed and agreed at that hearing. The parties should also attempt to agree a joint agenda and timetable.

ORDERS

By no later than **28 days** after this Decision is sent to the parties:

- 1 The respondent shall present and file an amended response;
- 2 The parties shall notify the tribunal of any dates in the period December 2020 – March 2021 when they could not attend a 2-hour case management preliminary hearing;
- 3 The parties shall confirm whether they can participate in such a hearing remotely by video on the CVP platform or whether they require, in the interests of justice, an in-person hearing at a hearing centre.

Employment Judge T.V. Ryan

Date: 09.10.20

JUDGMENT SENT TO THE PARTIES ON 13 October 2020

FOR THE TRIBUNAL OFFICE