



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr R Steen

AND

Respondent

The Edward James
Foundation

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD In chambers **ON** 8 October 2020

EMPLOYMENT JUDGE GRAY

JUDGMENT ON APPLICATION TO AMEND

The Claimant's application to amend the originating application is granted in respect of adding complaints of direct disability discrimination (section 13 Equality Act 2010 "EQA") and harassment related to disability (section 26 EQA) in respect of the allegation of failing to give the Claimant access to a computer for recreational purposes and to access his wage slips and make holiday requests.

The Claimant's application to amend the originating application is refused in respect of adding a complaint of harassment related to disability (section 26 EQA) in respect of allegations as to the conduct towards him of Mr Graham between 19 June 2019 and 10 February 2020.

REASONS

1. The Claimant seeks leave to amend the claim which is currently before the Tribunal, and the Respondent opposes that application.
2. At the Case Management Preliminary Hearing on the 10 June 2020 before me, the Claimant confirmed he had applied to add complaints of direct discrimination and harassment to his claim by his email dated 8 June 2020.
3. That email said ... “I believe that the Respondent’s failure to put in place computers that I can use for recreational purposes is an act of direct disability discrimination, which I have added to the list of issues... I have added to the list of issues that my exclusion from the computers for recreational purposes is also an act of harassment, which makes me feel humiliated, undervalued and unwanted as an employee ... I have also included as acts of harassment the unwanted conduct of Mr Graham towards me, to the list of issues which I believe are acts of harassment.....I had hoped that the conduct towards me by Mr Graham and the Respondent generally would have improved after I raised by Tribunal complaint but the dates of the instances I have documented show that not to be the case.....I seek the Employment Judge’s consent for those issues to be included in my claim on the grounds that I made reference to Mr Graham in my statement of detriment sent to the Tribunal within the time limit and it would be in the interest of efficiency and justice.”.
4. By email dated 10 June 2020, the Respondent’s representative opposed the Claimant’s application to

amend stating “We oppose the Claimant's suggested expansion of the claim, for reasons which will be articulated at the Preliminary Hearing today at 2pm. Having received the Claimant's comments on the List of Issues and his further information, we have provided an updated List of Issues, as attached, and we also attach the authority of *Reuters v Cole* which will be referenced during the hearing today.”.

5. At the case management preliminary hearing I discussed the application with the parties. The Claimant confirmed that he had not received the documents attached to the Respondent's email in a size 16 font and had not had time to convert them or peruse them with his magnifying software/equipment before the hearing.
6. Noting this, I discussed with the Claimant how he framed his direct discrimination complaint. After that discussion (which is summarised in the case management summary from the hearing on the 10 June 2020), the Claimant confirmed that he was in the process of sorting legal advice and he requested time to consult his adviser about the complaints of direct and harassment to do with him not having access to the Respondent's computers for recreational purposes.
7. The amendment relating to a complaint of harassment about the alleged conduct of Mr Graham (paragraph 20 in the draft list of issues) was then considered. After discussion it was identified that further clarification would be needed as to the basis of this amendment and the complaints. The Claimant had attached a document titled “Acts by Mr Graham and cleaning complaints 12 June 2019 9 March 2020” to his amendment application email alongside the draft list of issues. However, it was

not clear which of those “complaints” he was relying on for this harassment complaint, which are already part of his original claim form and which are new and therefore would need explanation as to why he seeks to include them now.

8. The Claimant confirmed that he would be able to do this following the legal advice he is to receive and directions were therefore agreed to deal with the amendment application as follows:

a. the Claimant to confirm:

i. if he still seeks to make an amendment application to include complaints of direct discrimination and harassment about not having access to the Respondent’s computers for recreational purposes and if so on what basis; and/or

ii. if he still seeks to make an amendment application to include his harassment “complaints” about Mr Graham and if so which of those he says are already part of his original claim form (and where they are referred to in that claim form) and which are new and therefore he should also provide explanation as to why he seeks to include them now.

b. The Respondent was then to confirm its position in respect of the clarification provided by the Claimant as detailed in the paragraphs above.

c. The Parties were then to confirm to the Tribunal, how they propose the amendment application, if still

being made, is proportionately determined, i.e. based on the documents they have submitted only, or by a telephone or video or an in person preliminary hearing.

9. The parties have since confirmed that they want the amendment application determined on the papers they have submitted. These consist of a letter from the Claimants' now appointed legal representative dated 22 July 2020 and the reply from the Respondent's legal representative dated 18 August 2020.

10. The amendments sought are to add:

a. Complaints of direct disability discrimination (section 13 Equality Act 2010 "EQA") and harassment related to disability (section 26 EQA) in respect of the allegation of failing to give the Claimant access to a computer for recreational purposes and to access his wage slips and make holiday requests; and

b. A complaint of harassment related to disability (section 26 EQA) in respect of allegations as to the conduct towards the Claimant of Mr Graham between 19 June 2019 and 10 February 2020.

11. Having considered the written submissions of the parties the following appears to be commonly acknowledged:

12. The allegations as to failing to give the Claimant access to a computer for recreational purposes and to access his wage slips and make holiday requests are

part of the current claim, they were not though pleaded as being acts of direct discrimination and harassment.

13. The Respondent acknowledges though, that as ongoing matters “the amendments would be in time. Consequently, the Respondent does not object to the addition of these claims in principle, however the Respondent submits that the amendments should be refused in the present case since they disclose no reasonable prospects of success.”.
14. The allegations as to the conduct towards the Claimant of Mr Graham between 19 June 2019 and 10 February 2020, being acts of harassment related to disability, are not part of the current claim. As the Claimant’s representative acknowledges, there is no express reference to Mr Graham in the claim form. It is also the position that other individuals are expressly named by the Claimant in his claim form, but not Mr Graham.
15. The application to amend to include such complaints is first set out in the Claimant’s email dated 8 June 2020.
16. As to the specificity of the allegations about Mr Graham, the Claimant’s representative in its submissions refers directly to only one allegation about the conduct of Mr Graham towards the Claimant, being that on the 10 February 2020.... “Mr Graham and the Claimant were in a narrow corridor leading to the Respondent’s basement. Mr Graham was in front of the Claimant and had opened a side door into the corridor that leads down to the Respondent’s basement. Mr Graham became aware of the Claimant and had to close

the door to let the Claimant pass. Whilst doing that, Mr Graham frowned at the Claimant and shook his head. This made the Claimant feel uncomfortable and upset him.”.

The Law

17. The parties refer to the case authorities of ***Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT*** and ***Reuters Ltd v Cole UKEAT/0258/17/BA***.
18. The EAT held in ***Selkent Bus Company Ltd v Moore***: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors would include:
 19. The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and
 20. The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider

whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and

21. The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.
22. These factors are not exhaustive and there may be additional factors to consider, for example, the merits of the claim.

Judgment:

23. Applying these legal principles to the current application, I find as follows:
24. I do not accept that the complaints are relabelling as they do raise distinct causal and factual elements that were not obvious or identified at the first case management preliminary hearing in this matter on the 26 February 2020. At that hearing the claim form was considered and the complaints the Claimant was making and the issues they raised were identified.
25. It is accepted by the Respondent that the allegations as to failing to give the Claimant access to a computer for recreational purposes and to access his wage slips and make holiday requests are ongoing, so

no time limit issues are raised by adding these complaints now.

26. As to the merits of those complaints the Respondent asserts that those complaints are more naturally categorised as a complaint for failure to make reasonable adjustments. This may prove to be the case, however the basic ingredients for such complaints have been articulated by the Claimant's representatives and the Respondent does not assert it would be prejudiced in answering such complaints at the already listed hearing. Instead it seeks deposit orders for those complaints if they are permitted to proceed. Such an application cannot be determined as part of this decision as the Claimant has not had a right of reply to the Respondent's application for deposit orders. This will be required and is dealt with in the case management directions that accompany this decision.
27. Considering these findings, the timing and manner of the application to add complaints of direct and harassment about the allegations as to failing to give the Claimant access to a computer for recreational purposes and to access his wage slips and make holiday requests, do not require consideration.
28. However, a time limit issue does arise in respect of the allegations against Mr Graham, which were only applied to be added on 8 June 2020, almost 4 months after the last allegation against him.
29. So, considering the timing and manner of the application for the allegations as against Mr Graham to be added. From what has been asserted by the Claimant's legal representatives, what the Claimant

knew as at the 10 February 2020 remains the same as what he knows now, i.e. since then there has been no discovery of new facts or new information appearing from documents disclosed on discovery to only alert the Claimant now as to this type of complaint.

30. As noted above the first time the Claimant articulates that he wishes to amend his claim to include such complaints about Mr Graham is within his email dated 8 June 2020. This is almost 4 months after the 10 February 2020 allegation.
31. There have now been two case management preliminary hearings in this matter followed by submissions by his legal representative, but despite that the allegations asserted as being harassment related to the Claimant's disability by Mr Graham in my view lack the necessary ingredients to articulate such a complaint.
32. The allegations of harassment against Mr Graham specifically referred to in the submissions for this application to amend, as submitted by his legal representative, focus on matters on 10 February 2020, but do not provide any suggestion that the actions of Mr Graham on that day relate to the Claimant's disability.
33. So, even if it were just and equitable to extend time to allow this complaint to be added, as currently pleaded with the assistance of legal representation, in my view the necessary ingredients to make such a complaint with merit, do not seem to be there. By allowing such an unspecific complaint to be added now it will clearly lead to greater prejudice to the Respondent for the reasons it sets out in its letter dated 18 August 2020. In short requiring an amended Response, interviewing and

potentially calling Mr Graham as a witness, which could jeopardise the already listed and case managed final hearing, requiring adjournment, relisting for a longer hearing and further case management.

34. Therefore, I find that the Claimant's application to amend the originating application is granted in respect of adding complaints of direct disability discrimination (section 13 Equality Act 2010 "EQA") and harassment related to disability (section 26 EQA) in respect of the allegation of failing to give the Claimant access to a computer for recreational purposes and to access his wage slips and make holiday requests.
35. The Claimant's application to amend the originating application is refused in respect of adding a complaint of harassment related to disability (section 26 EQA) in respect of allegations as to the conduct towards him of Mr Graham between 19 June 2019 and 10 February 2020.

Employment Judge Gray
Dated 8 October 2020