



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Z Alison

v

Asda Stores

Ltd

Heard at: Watford

On: 8 October 2020

Before: Employment Judge Daniels (sitting alone)

Appearances:

For the Claimant: In person

For the Respondent: Mr F Mortin (Solicitor Advocate)

JUDGMENT having been sent to the parties on 5 November 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, on 15 November 2020, the following reasons are provided:

REASONS

Introduction

1. The claim for breach of contract was dismissed upon withdrawal by the claimant at the Preliminary Hearing. The claimant's application to amend her claim to include a claim for disability discrimination and/or for age discrimination was deemed not well founded and was dismissed in its entirety. No other claims being pursued, these proceedings were then at an end. A request was made by the claimant for reasons dated 15 November 2020.

The facts

2. The claimant started employment with the respondent as a retail assistant on 7 of April 2017. The claimant filed a grievance about her treatment in employment. She contends that she resigned in response to her grievance and grievance appeal outcomes. The grievance appeal outcome was received on 14 September 2018 with her resignation following on 16 September 2018, the last day of employment being 23 of September 2018.
3. On 21 November 2019 the claimant brought a claim in the employment tribunal. Her claim was for breach of contract only. The claimant's ET1 included the following allegations:

- 3.1 in July 2017, being persuaded to become a bakery colleague by Reece Burton;
 - 3.2 on 23 August 2017, being told to go into the freezer by Sharaz Butt (Mr Butt);
 - 3.2 on 2 September 2017, Ryan Lacey conducting a meeting in an administrative office which was not suitably private;
 - 3.3 on 29 October 2017, being bullied and harassed by Muna Ale, Mr Butt and Judy Barker. Specific details are not referred to in the ET1 but there is reference to a grievance letter dated 20 December 2017. (The claimant later expanded on this through voluntary further information to allege Judy Barker "moved her locker next to the claimant's and try and befriend the claimant between 11 November 2017 and 22 November 2017)
 - 3.4 Mr Butt bullying the claimant by insulting her and criticising her;
 - 3.5 discriminatory remarks (what those remarks were have not been pleaded);
 - 3.6 on 22 November 2017, discovering that her occupational health report had been shared with respondent;
 - 3.7 on 27 November 2017, being threatened with an absence review by Lee Randall, the General Store Manager and
 - 3.8 on 18 December 2017, a colleague hand delivering a letter from the respondent to the claimant, (the colleague did not make contact with claimant first).
4. On 12 July 2019, the Employment Tribunal issued a Notice of Claim to the respondent.
 5. On 9 August 2019, the respondent submitted its Response. The respondent denied the claims and also requested further information from claimant.
 6. On 16 September 2019, the claimant applied to strike out the respondent's Response. The ET rejected the application.
 7. On 22 October 2019, the claimant voluntarily provided further information as requested by the respondent. However, these letters largely requested further information from the respondent rather than clarifying the scope of her claim.
 8. On 1 December 2019, the ET confirmed that the only claim pursued by the claimant was one of breach of contract. The ET ordered the claimant to produce a schedule of the sums claimed. As the claimant failed to provide this, the ET requested she do so again.
 9. The claimant later submitted a Schedule of Loss dated 23 January 2020. This included some further details of her claims and referred to discrimination as well as breach of contract, but the discrimination claim was not particularised and no application to amend her claim was not brought.
 10. The claimant applied to postpone the Preliminary Hearing listed for 29 April 2020. The respondent did not object and the hearing was vacated. On 23 May 2020, the ET re-listed the Preliminary Hearing.

11. On 5 June 2020, the claimant again wrote to the ET setting out her position in respect of the respondent's Response.
12. On 15 September 2020, the claimant applied to amend her claim to include a complaint of age and/or disability discrimination. The respondent objects to the application.

Relevant legal provisions

Time limits

13. In determining the issue of time bar, regarding discrimination claims, the tribunal must apply section 123(1) EQA 2010:

"123 Time Limits Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable."

14. The key point being that a claim must be raised within 3 months of the date of the act complained of or, if outside this time period, then in such other period as the tribunal determines to be just and equitable depending on the facts and circumstances of the case.
15. For claims of discrimination, an allegation of direct discrimination, which is outside of the ordinary time limit of 3 months, is out of time unless the claimant can demonstrate that it includes acts extending over a period ending within the time limit pursuant to s.123 of the Equality Act 2010 (EQA) or it would be just and equitable to extend time.

Applications to amend

16. When considering an application to amend, the ET must take into account the overriding objective set out in Rule 2, of the ET Rules of Procedure namely to: ensure the parties are on equal footing; deal with cases in ways which are proportionate to the complexity and importance of the issues; avoid unnecessary formality and seeking flexibility in the proceedings; avoid delay; and save expense.
17. The case of **Cocking and Selkent Bus Company Ltd** noted that the Tribunal must act, when considering an application to amend as follows:

"In every case in which a tribunal is asked to amend a complaint by changing the basis of the claim... Tribunal should have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties."

The following criteria were deemed relevant to the determination of any such application:

the nature of the amendment – is it a minor or substantial alteration pleading a new cause of action; the applicability of time limits; the timing and manner of the application.

The ET must also consider the prejudice each party would suffer as a result of the decision to be made, having regard to all the circumstances of the case:

"It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to – (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information. (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action. (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action. "

(Robertson V Bexley Community Centre t/a Leisure Link [2003] EWCA Civ 576, British Coal Corporation V Keeble and others 1997 WL 1104672, EAT)

18. The ET must also consider the issue of time limits as per **Selkent Bus Co Ltd v Moore** [1996] I.C.R. 843 & 844:

"It is always for the party seeking to amend his claim to establish that it should in all the circumstances be accepted. In my view the required approach is of general application and is not restricted to circumstances in which the new claims sought to be inserted arose were open to the claimants at the time of the originating application. The accepted principle is that where time bar is an issue in a proposed amendment, it is considered as an integral part of the overall decision to grant or refuse the amendment... [22] A determination on the grant or refusal of an amendment is a single stage exercise. Once the tribunal allows the amendment the new claim is subject to the jurisdiction of the tribunal and a substantive decision will be made on the claims made within it."

This is supported by the Presidential Guidance, which states:

"If a new complaint or cause of action is intended by way of amendment, the tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended. Once the amendment has been allowed, and time taken into account, then that matter has been decided and can only be challenged on appeal

- 22 Upholding the decision of the EAT in **Robinson**, the Court of Appeal, in **Lambeth**, held there is no general principle that employees should always await the outcome of internal grievance procedures before embarking on litigation.

- 23 I also note **Ladbrokes Racing Ltd v Traynor** EATS 0067/06 in which the EAT identified guidance on how Tribunals should consider timing and the manner of the application as part of the balancing exercise. Namely:

"considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them."

Conclusions

Nature of the Amendments

- 24 The nature of the amendments sought were significant insofar as the claimant was seeking to include a new type of claim which carried with it potentially large ramifications in respect of both the potential financial exposure and damage to the respondent's reputation.
- 25 The claimant's reference to the grievance within her ET1 does not amount to a formal pleading nor do the documents she has subsequently provided.
- 26 The ET is well acquainted with cases where a mere relabeling takes place, and this is not one of those cases.

Relevance of Time Limits

- 27 The key act the claimant refers to regarding age discrimination took place in July 2017 as per her ET1. The allegation was that she was pressured into accepting the role because of her age. This is the only allegation of age discrimination advanced. Time to present a complaint in connection with this began to run by no later than 19 August 2017. Accordingly, the claim should have been presented (subject to ACAS Conciliation) by no later than 18 November 2017. Even had age discrimination been pleaded to the Tribunal in the ET1, this claim would still have been out of time as the ET1 was filed on 21 November 2018.
- 28 The disability claim faces similar hurdles, indeed apparently larger ones as any such claim was not mentioned until much later.
- 29 Whilst Section 123(1)(b) of the EQA provides the Tribunal with discretion to allow the claim to be heard if it considers it just and equitable to do so, there do not appear to be any just and equitable grounds for extending the time limit here. As per the case of **Robertson** this should be the exception rather than the rule.
- 30 Whilst I did not determine the issue of time, it was clear to me that the claimant faced very serious time limit problems.
- 31 I will now comment on the other key factors that I need to take into account and my observations as to where these factors take the case.

The length of and reasons for the delay

- 32 The claimant issued her ET1 on 21 November 2018, over 15 months after the age discrimination act complained of. The claimant has failed to provide any good reason to me for the delay. The claimant waiting for the grievance process to conclude is not a good enough reason to allow the ET to extend time for such a long period. In any event, the delay went way beyond the end of that process.
- 33 On 23 January 2020, the ET confirmed that only a breach of contract claim was being pursued by the claimant. Despite sending further correspondence to the ET and the respondent on 13 April 2020 and 5 June 2020, the claimant did not advance a claim of age discrimination or correct the ET's view of her claim then. This suggests that any discrimination claim was only added as an afterthought and had little weight or merit.

Extent to which the cogency of the evidence is likely to be affected by the delay

- 34 The respondent's evidence will, by any related delay, be impacted on to a greater degree than the claimant's evidence. When the respondent was first notified of the claim in July 2019, the age discrimination claimant complains of matters that occurred roughly a year prior. Therefore, in defending these claims now, the respondent would be asking individuals to recall incidents which occurred some significant time ago and, to some of them, these incidents will have been part and parcel of daily life at a large retailer and not memorable. This would cause prejudice to the respondent.

The extent to which the party sued had cooperated with any requests for information

- 35 The respondent has in my view been willing to co-operate with the claimant and provided her with any information requested.

The promptness with which the applicant acted once he or she knew the facts giving rise to the cause of the action.

- 36 The claimant felt able to raise a grievance with the respondent on 20 December 2017. Her amendment application specifically refers to point 6 of the grievance concerning this age discrimination point. Yet, she did not clarify this was part of her claim until 15 September 2020. The claimant did not, in my view, act promptly in addressing the nature of her claim after the ET's correspondence which confirmed the claim was being considered as a claim for breach of contract only.

The steps taken by the applicant to obtain appropriate professional advice once he or she knew of the possibility of taking action

- 37 The claimant has been advised by the respondent to take legal advice and directed to free legal advice at the Citizens Advice Bureau. However, she still did not make her application until it was way out of time. She was also able to write other letters to the ET at the same time and made no mention of any alleged discrimination.

Further observations

- 38 Significant delay will be caused by the granting of this amendment application. The respondent will have to apply for leave to amend its Response to deal with the additional allegation and submits that if the ET does not determine the issue of time as part of the application (which it submits it should) then that issue should also be addressed as a preliminary issue. The respondent may also make a further application for strike out in respect of the amended claim and a further PH may be needed to determine both the jurisdictional point and the substantive merits of the claim.
- 39 Undoubtedly, the granting of the application will also require the respondent to come to a final hearing with additional witnesses and statements. For the respondent's primary witness on the discrimination point, his evidence may have been affected by the passage of time to a greater extent due to the additional waiting time and having not had to consider this type of allegation for a significant period of time.
- 40 The scope of the claim and ramifications on the respondent should the claim succeed are also widened if the application is granted.
- 41 Should the application be granted then the respondent would also be put to further costs in defending the claim.
- 42 As per the above, the claimant has known for some time that the ET and the respondent only considered a breach of contract claim to be advanced. The claimant failed to act until nearly 2 years after the issue of her ET1 to apply to include an age discrimination claim.
- 43 I noticed that there was no reference to disability discrimination in the ET1 or age discrimination and there was no tick in the box for discrimination or disability discrimination which of course would have been very easy for the claimant to do.
- 44 The claim included a significant number of issues being referenced in that claim, but with no mention of age or disability. Further, the claimant confirmed in the preliminary hearing that there really only two critical issues that were complained of and that the respondent's description of her complaints was much broader than she wished. Firstly, the way in which a return to work and in October 2017 and secondly the release of her personal private medical information which caused her great concern. Neither issue appear to have any stated or potential connection with her age or any disability.
- 45 I also find it striking that when the claimant voluntarily provided further information following a request by the respondent for further information on the 22 October 2019, there was no **reference to disability** or age discrimination in that document.
- 46 On 14 January 2020 the claimant did write to the tribunal copy to the respondent and amongst other things she stated in the letter that if it was not possible to pursue a claim for breach of contract, she was seeking permission to add a claim for discrimination. However, it is notable that she still didn't make reference to what kind of discrimination she was referring to and made no reference to disability or age in that letter. There was no apparent follow-up of the letter from the claimant.

- 47 I also note no reference to mental health in the claimant's letter 14 January 2020 or anything to establish that she was a disabled person under the legislation. The essential issues she focused on were the return to work interview and to the release of medical information.
- 48 Thereafter she filed a schedule of loss on 23 January 2020 claiming breach of contract and did make some reference to breach of the Equality Act 2010 but no application to amend was included in that document which was simply a schedule of loss. Typically, if a party was seeking an application to amend they would not only set out the type of discrimination but also what type of that discrimination it was and how and to include a copy of the draft application which is sought. The application made here was a very long way away from a well and thoroughly presented application to amend.
- 49 On 15 September 2020 the claimant applied to make a claim for the first time to complain of age discrimination. She did not make an application to bring a claim for disability discrimination at that time and I was not aware of any good explanation for why that was the case.
- 50 The time to present a complaint in connection with this claim would normally have run out or began to run from 19 August 2017 and this claim submitted in November 2018 would be around one year out of time. The claimant did not argue that there was a continuing act in relation to age discrimination or the "just and equitable" exception would be available to her.
- 51 Even if the claim had been discrimination had been mentioned on the 21 November 2018 and it still would've been very substantially out of time. I considered whether it would be likely that the claim would show claims for age discrimination or disability discrimination would be in time. I have borne in mind the fact that the claimant had gone through an internal process for a period of time and it would ordinarily be sensible for a claimant to resolve matters internally. The claimant says that she sought advice from ACAS and Citizens Advice. However, the age discrimination case was a single act of discrimination which is likely to be substantially out of time. As regards the disability claim, that was also a claim which appear to be substantially out of time and unlikely to be permitted an extension out of time.
- 52 The claimant has said she wishes to pursue (any) breach of contract claim in the courts and she believes that she may be able to challenge some of the matters that concerned her by some form of alternative claim, under data protection laws in the courts. I made and make no comment on this: such claims are outside of my jurisdiction. Any decision on this issue was a matter entirely for her.
- 53 I also had very little information to suggest the claim for disability or age discrimination had anything other than very little or no prospect of success. Any claim for disability discrimination also had very little or no prospect of success it seemed to me. There was only passing, very late, reference to discrimination in those issues and nothing which pointed to disability discrimination or age discrimination or which might lead to the drawing of an inference in that respect.

- 54 The burden is on the claimant to show that they were very good reasons preventing her from filing in time. Here I can see no good reason for such a huge delay in the application being made.
- 55 After very careful thought and weighing all of the above factors there are overwhelming reasons why I cannot grant the application and I do not.
- 56 Having considered all of the facts the applications to amend to add age discrimination and disability discrimination are dismissed. This disposes of the matter and the proceedings are now at an end.

.....
Employment Judge Daniels

13 January 2021

Sent to the parties on:

25.01.2021

.....

For the Tribunal:

J Moossavi

.....