



**EMPLOYMENT TRIBUNALS
BETWEEN**

Claimant

Mr M Standere

Respondent

AND London Central Bus Company Limited

OPEN PRELIMINARY HEARING

HELD BY CVP

ON 4 February 2021

EMPLOYMENT JUDGE TRUSCOTT QC

Appearances

For the Claimant: in person

For the Respondent: Mr R Bailey of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claimant is permitted to amend his claim to add a claim of disability discrimination and harassment.
2. The amended claim of disability discrimination and harassment is dismissed on the grounds that the claimant has not established that he was disabled on account of work related stress and anxiety/stress/depression at the relevant time in accordance with section 6(1) of the Equality Act.

REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.
2. The case was listed for an open preliminary hearing by CVP because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic.

Preliminary

3. At a preliminary hearing on 11 August 2020, this Open Preliminary Hearing was listed to address the following issues:
- a. Whether the claimant is disabled in terms of the Equality Act
 - b. Whether the claimant is amending his claim by his further particulars
 - c. Whether he is permitted to do so
 - d. Whether any part of the amendment is time barred
 - e. Whether it is just and equitable to allow that part of the claim to continue.

4. The claimant represented himself and confirmed his disability impact statement [72-74] was his evidence. The claimant was asked at the hearing if he had a partner and if she had been asked to corroborate his evidence but he said she had refused to do so. The respondent was represented by Mr R Bailey, barrister who cross examined the claimant and made submissions to the Tribunal. There was a bundle of documents to which reference will be made where necessary.

Chronology of events

5. The claimant was employed as a bus driver from 15 December 2014 [4, 40] until his dismissal on 16 August 2019 with pay in lieu of notice [4, 40] for reasons of capability following an absence from work since 6 June 2019, during which period the claimant was signed off work with work related stress and anxiety [64-65]. He was not disabled before then.

6. There was an incident on 3 June 2019 leading to the claimant's absence from work. The incident involved a dispute between the claimant and another bus driver, Michael Commodore ["MC"], in which MC threw a plastic water bottle which struck the claimant. The claimant said he threatened to kill him. The claimant made a complaint and the respondent investigated the matter and brought disciplinary proceedings against MC as a result of which MC was given a final written warning and moved to another bus garage. The claimant did not co-operate in that disciplinary process.

7. The claimant had rest days on 4 and 5 June 2019 and was absent sick thereafter. The respondent sought to manage the claimant's absence from work but the claimant did not co-operate. He provided medical certificates which referred to work related stress and anxiety, the second of which said "Mr Standere reports feeling increasingly anxious, does not feel safe to back (sic) to work at present." The claimant was warned that sick leave could not be extended indefinitely and he was dismissed on grounds of incapacity after he had been absent for some 10 weeks.

8. ACAS was notified on 14 November 2019 and the certificate issued on 14 December 2019.

9. The claimant presented an ET1 claim form on 13 January 2020 claiming unfair dismissal, unspecified discrimination and various money claims [6]. He did not tick the box for alleging discrimination or specify any type of discrimination but identified a discrimination claim in the box for other types of claim [6]. By Grounds of Resistance dated 21 February 2020 [33-48] the respondent denied all the claims and asserted that the discrimination claim was "entirely unclear".

10. By order dated 30 April 2020 [49], Employment Judge Martin required the claimant to particularise his discrimination claim by 21 May 2020 and additional information was provided on that date [52-55]. That information narrates that the claimant alleges he was disabled and that is the basis for his discrimination claim. The precise acts of discrimination alleged lack clarity but appear to include allegations of direct discrimination and harassment. The allegations appear to be directed against his co-employee, Michael Commodore and his managers, Brian Goodge and Graham Johnson.

11. The disability relied upon appears to be “stress and anxiety”.

12. This Tribunal ordered that there be an Open Preliminary Hearing and made consequential directions [66-68]. Albeit late, the claimant has provided an impact statement but no other medical evidence.

13. He attended his GP on 31 December 2020, but not in the interval between that date and July 2019.

Relevant Legal Framework

Disability

14. Section 6(1) of the Equality Act defines a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Each component of the definition is subject to further elucidation within the Act.

15. Consideration of mental impairment takes place in **Morgan v. Staffordshire University** [2002] IRLR 190, **J v. DLA Piper UK LLP** [2010] IRLR 936 and particularly **Igweike v. TSB Bank plc** [2020] IRLR 267 which provides an invaluable analysis of this area of the law particularly at paragraphs 36-53

Time limits and extension

Just and equitable extension

16. The Equality Act permits the Tribunal to grant an extension of time ‘if, in all the circumstances of the case, it considers that it is just and equitable to do so’. They entitle the [employment] tribunal to take into account anything which it judges to be relevant’: **Hutchison v. Westward Television Ltd** [1977] ICR 279, EAT. Notwithstanding the breadth of the discretion, it has been held that ‘the time limits are exercised strictly in employment cases’, and that there is no presumption that a tribunal should exercise its discretion to extend time on the ‘just and equitable’ ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, ‘the exercise of discretion is the exception rather than the rule’ (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ).

Amending the claim

17. Adding a disability discrimination claim to an unfair dismissal claim is an amendment: **Harvey v. Port of Tilbury (London) Ltd** [1999] IRLR 693. Similarly, if one tries to add a sex discrimination claim **Foxtons Ltd v. Ruwiel** UKEAT/0056/08 or to add a claim of indirect discrimination to a claim of direct discrimination **Ali v. Office for National Statistics** [2005] IRLR 201.

18. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 NIRC. There is a distinction which requires to be drawn between:

(i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, i.e. re-labelling.

(ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim. As Harvey notes at paragraph 312.01 in relation to this type of amendment: "So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded.

(iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

19. In essence, **Selkent** said that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, [including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]" before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it." This approach was approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201.

20. There is also Presidential Guidance.

21. In **Galilee v. Commissioner of Police of the Metropolis** [2018] ICR 634, the Employment Appeal Tribunal examined the authorities on the effect of granting an amendment on the time limits for claims.

22. When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence. Although the allegations in the original claim and in the amendment were not identical, Rimer LJ, giving the only reasoned judgment of the Court, held that 'the thrust of the complaints in both is essentially the same'. The fact that the whistleblowing claim would require an investigation of the various component ingredients of such a case did not mean that 'wholly different evidence' would have to

be adduced. **Evershed v. New Star Asset Management Holdings Ltd** [2010] EWCA Civ 870 at para 50.

Discussion and decision

Time issues and amendment

23. The claim relating to the alleged unfair dismissal on 16 August 2019 is within time. The earliest date of any matters particularised as a complaint is 3 June 2019.

24. The ET1 claim form makes reference to an attached document. At paragraph 6a of the attachment it reads: "they have persistently focused their efforts on subjecting me to bullying, harassment and threatening behaviour while I was on sick leave with 'work related stress'. At paragraph 8, it reads:

I have suffered discrimination from the Respondent because:

- a. a. I was denied the right to a safe working environment.
- b. b. I was victimised for exercising my Health and Safety rights.

25. At paragraph 14 of the attached schedule of loss he says:

The Respondent through poor management and misuse of power harassed, bullied and subjected the Claimant to discrimination when he had suffered a 'workplace injury' as defined in the document 'Preventing Workplace Harassment and Violence' published by The Health and Safety Executive (HSE).

26. The claim is described as one of disability discrimination and harassment in the claimant's response to EJ Martin's order [52-55] on 21 May 2020. Paragraph 1 The Claimant asserts that the Respondent dismissed him from his employment because of his disability:

Para 1.4: On top of the above, on 07 June 2019, the Claimant raised formal complaints as to how the Respondent was dealing with the assault and threat upon him and the matter of his personal safety and life but the Respondent failed to investigate and/or deal with the raised formal complaint/grievance. This was followed by 3 other complaints/ grievances including one against Mr Brian Goodge which was submitted to the Respondent's general manager Mr Graham Johnson on 11 July 2019. However, complaints/grievance were all ignored, instead the Respondent turned to harassing the Claimant in the way and manner particularised in the Claimant's Statement signed on 13 January 2020.

Para 1.5: Despite the Claimant providing evidence, the Respondent (a) failed to identify and/or take action when the Claimant was suffering from stress; (b) treated him less well and put him at a disadvantage for reasons that relate to his disability.

27. In paragraph 2, he sets out certain actions by Mr Goodger and Mr G Johnson which he says constitute harassment:

Without dealing with all complaints/grievances raised by the Claimant (last one being on 06 August 2019) and knowing very well that the Claimant was on doctor's certified sick leave, the Respondent through their employees continuously harassed the Claimant because of his disability from 03 June 2019 until his unfair dismissal on 16 August 2019.

28. Any claim relating to a matter prior to 15 August 2019 might be out of time even if it had been included within the claim form at the time of presentation subject to any allegation forming part of a series or any just and equitable extension.

29. The Tribunal considered whether the acts of the respondent which the claimant complained of might constitute a series of acts culminating in his dismissal entitling him to claim in respect all of them in his ET1. The claimant appears to claim disability discrimination and harassment in relation to the period of employment after the incident on 3 June 2019 when at some stage the absence management policy was applied to him. These acts albeit by two different people while operating the absence policy might constitute a series of actions culminating in dismissal.

30. In relation to just and equitable extension, the claimant relied on his state of health as the reason for the delays but without more, this does not provide a basis to extend the time for making the claim.

31. The Tribunal considered the proposed amendment and took into account that the claimant was a party litigant and took all the other considerations in **Selkent** into account, decided that, as it comes into category II of **Selkent**, the amendment should be allowed. If the case had proceeded, further case management would have been required to identify the precise statutory provisions being relied upon.

Disability

32. The Tribunal considered the disability discrimination claim. The Tribunal did not accept the evidence of the claimant nor his submission that he was disabled in terms of the Equality Act. The Tribunal considered that it was more likely that he had an adverse reaction to events on 3 June 2019 which did not constitute a disability.

33. The relevant time to consider disability would appear to be the date of dismissal on 16 August 2019 although the matters of complaint (which may or may not be allegations of discriminatory acts) date back to 3 June 2019.

34. The only medical evidence is contained in the two fitness to work notes dated 11 June 2019 [64] and 10 July 2019 [65] both of which refer to “work related stress and anxiety”. The Tribunal did not accept that these fit notes alone were sufficient to establish that he had a mental impairment the effect of which was substantial. In order for it to have done so, there would have had to be supporting evidence possibly from a medical practitioner.

35. It is a necessary ingredient that the impairment has lasted or is likely to last 12 months or longer. Likely is to be interpreted as meaning “a good chance”. That must be the objective assessment at the date of the alleged discriminatory acts relied upon. The fact that the absence is described as work related indicates that it is likely that it will cease upon the resolution of the workplace stress or the ending of the employment of the claimant. The earliest date of the commencement of the impairment seems to be 3 June 2019. Without very much more, the Tribunal was unable to find that there was a good chance it would continue until June 2020 when objectively assessed in June, July or August 2019.

36. The Tribunal decided to dismiss the amended claim of discrimination and harassment so far as it is based on disability.

EMPLOYMENT JUDGE TRUSCOTT QC

Date 8 February 2021