Case Number 2301946/2020A

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Adebimpe Ogunlaja

and

Respondent: Arriva Rail London Ltd

HELD AT London South ON 25 February 2021

EMPLOYMENT JUDGE PHILLIPS

Appearances:

For Claimant: Mr Steven Gittins, of Counsel

For Respondent: Ms Mosley-Ford, Paralegal

JUDGMENT

The Claimant's application to amend her ET1/Claim Form to add new claims of disability discrimination is allowed. Accordingly, she is entitled to bring additional claims of (1) a failure to make reasonable adjustments, (s.20 Equality Act 2010), discrimination arising from disability (s.15 Equality Act 2010), and direct disability discrimination (s 13 Equality Act 2010).
The Claimant is permitted to bring a claim of direct race discrimination.
The Claimant's application to amend her ET1/Claim Form to add a new claim of unlawful deduction from wages (holiday pay) is refused.

REASONS

1. The Respondent is in the business of providing train services throughout Greater London. Until her resignation on 13 January 2020, the Claimant, who is of Black African descent, had been employed by the Respondent since 19 October 2009 as a Senior Customer Service Resource Controller at the Respondent's New Cross, S E London depot.

2. The Claimant in her ET1 Claim brings claims of (1) constructive unfair dismissal (s 95(1)(c) ERA 1996, (2) direct race discrimination (s.13 Equality Act 2010); and (3) victimisation (since withdrawn). The Respondent denies all the claims.

The Respondent says, in its ET3 Response, that the Claimant resigned voluntarily without notice.

Brief procedural history

3. On 24th August 2020, by email, the Claimant, though new appointed solicitors, wrote to the Tribunal and the Respondent and

    1) withdrew her victimisation claim;
    2) provided further details of her pleaded claims;
    3) applied to amend her claim to add new claims of (1) disability discrimination, consisting of claims of a failure to make reasonable adjustments, (s.20 Equality Act 2010), discrimination arising (s.15 Equality Act 2010), and direct discrimination (s 13 Equality Act 2010), and (2) unlawful deduction from wages (holiday pay).

4. The Respondent objected to the Claimant's application to amend (by email on 25th August 2020). The Respondent also asserted that the particularisation of the race discrimination claim as a direct race discrimination claim is in effect also a new claim. The Respondent objects to that as well.

5. On 28 September 2020, the Tribunal extended this hearing from one to three hours to allow time to determine the amendment application as well as make provisions for case management thereafter.

Relevant law

6. The authorities with regard to amendments are set out in a number of cases including *Cocking v Sandhurst* [1974] ICR 650, *British Newspaper Printing Corporation (North) Ltd v Kelly* [1989] IRLR 222, *Selkent Bus Co v Moore* [1996] IRLR 661, *Housing Corporation v Bryant* [1999] ICR 123, *Harvey v Port of Tilbury (London) Ltd* [1999] ICR 1030, *Ali v Office of National Statistic*s [2005] IRLR 201, *Abercrombie v Aga Rangemaster plc* [2013] EWCA 1148. It was most recently considered by the EAT in *Vaughan v Modality Partnership* [2021] IRLR 97.

7. The EAT in *Selkent*, to which I was specifically referred, stated a number of general principles, which it said were applicable to the amendment of tribunal claims: namely that whenever the discretion to grant an amendment is invoked, a tribunal should take into account, "all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it". In terms of what the relevant circumstances might be, the EAT said it was 'impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant": (a) the nature of the amendment"; (b) the applicability of time limits; and (c) the timing and manner of the application.

8. There are no time limits laid down in the Rules for the making of amendments, so in practice amendments may be made at any time – before, at, even after the hearing of the case.

9. In *Vaughan*, the EAT reviewed the law and provided guidance on the correct approach to applications to amend. Judge Tayler pointed out that the key test in considering applications is the balance of injustice. And hardship to each party in either allowing or refusing the application. He stated that the *Selkent* factors are "examples" and "should not be taken as a checklist to be ticked off to determine the application but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment". Judge Tayler emphasised that these factors are not a checklist, and that the first consideration might be to start by considering the "real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of the success of the claim or defence; if permitted what will be the practical problems in responding".

10. Principles relating to applications to amend are also set out in the Presidential Guidance (2018) Guidance Note 1. These are derived from *Selkent* and *Abercrombie*.

Claimant's submissions in support of her application

11. Mr Gittins referred me to the document attached to the Claimant's ET1, headed **"**History leading to constructive dismissal". He said this contained a number of references throughout to the Claimant's diagnosis with Type 2 Diabetes and matters arising therefrom:

> 22nd March 2019 — the Claimant refers to her diagnosis of Type 2 Diabetes and the fact that it was "life changing". She said she informed my manager immediately, as she was at work when the doctor called, and to let him know that she was going to be placed on medication; and that "This was so that reasonable adjustment could be made to my working condition". She continued that her manager didn't notify occupational health but agreed that she could leave the office if the effect of the medication became too severe, provided the person left in charge was capable to carry on with the shift.
> 21st June 2019 — one of the charges on which she was suspended from work was leaving work without permission, (which I was informed related in part to the Claimant taking time out of the office because of her diabetes).
> 30th September 2019 — following the disciplinary hearing, the Claimant was referred to Occupational Health "so as to establish what reasonable adjustment could be made in relation to my fledgling health condition".
> 7th October 2019 — the Claimant attended Occupational Health, where her health related issues were discussed;
> 12th November 2019 — the Claimant had a telephone consultation with Occupational Health in relation to how to manage her health condition

26th November2019 — the Claimant had a meeting where "we were supposed to discuss my return to work and how to manage my health condition …"

12. While the box for disability discrimination was not ticked, there were, as set out above, numerous references to her disability in the attached particulars. Further, Mr Gittins said, the Grounds of Response, recognised this, as paragraph 43 stated, "Further, in the ET1 the Claimant makes reference to a "life changing condition" and "reasonable adjustment". The Respondent notes that disability discrimination is not pleaded, but in any case, disability discrimination and race discrimination as alleged, or at all, are denied.

13. Mr Gittins made the following submissions, taking into account the matters set out in *Selkent*:

    1) Type of amendment. The amendments are wholly or largely the addition of labels for facts already described rather than the making of entirely new factual allegations which change the factual basis of the existing claims.
    2) Time limits; and timing and manner of application. Time limits are not determinative in the overall assessment. However, the following is relevant (1) the application is made at a relatively early stage of the proceedings, following acceptance of the Claim by the Employment Tribunal on 24th July 2020: (2) the application is made at this time following a change of solicitor and the instruction of the Claimant's Counsel, when it was identified that there were facts pleaded in the Grounds of Complaint by the Claimant that were capable of grounding complaints that were not fully pleaded and it would be in the interests of justice for there to be an assessment of whether those complaints were well-founded;
    3) Prejudice and balance of hardship. Mr Gittins submitted that the balance of hardship weighs in favour of the amendment being allowed because (1) the 'new' grounds of complaint sought to be added were directly pleaded or factually pleaded in the Grounds of Complaint, and the Respondent is already on notice that it needs to address those matters; (2) the points sought to be added and/or amended are the same acts or omissions that the Claimant relies on as cumulatively breaching the implied term of trust and confidence with regard to her constructive unfair dismissal claim, such that those events will have to be assessed and findings made in any event; (3) the Respondent has ample time to prepare to meet and respond to the fully particularised claims; (4) if the amendments are not permitted, the Claimant may be deprived of a remedy to a well-founded complaint.

14. Mr Gittins reminded the Tribunal of the dicta of Underhill LJ in *Abercrombie*:

"48. Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise

new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: 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. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted …"

Respondent's submissions

15. Ms Mosley-Ford for the Respondent objected to the application. She referred to the Respondent's email of 25 August 2020, which set out details of the grounds on which the Respondent objected to the application. This pointed out that the Tribunal is obliged to consider the length and reason for the delay, the extent to which the Respondent co-operated with any requests for information, the promptness with which the Claimant acted once they knew the possibility of taking action and the steps taken by the Claimant to seek professional advice once they knew the possibility of taking action.

16. Taking into account the matters contained in the 25 August email, the following points were made on behalf of the Respondent:
    1) that the Claimant had the benefit of legal representation when the claim was filed, and that the firm, according to their website, said they were "… specialist … employment. … litigation solicitors based in London." While the Claimant states these matters should have been known to the Respondent, they were clearly known to the Claimant and her legal advisors. Th Respondent is being put at a disadvantage because of the shortcomings of the Claimant's previous legal representative and argues, respectfully, that the more appropriate course of action may lie elsewhere.
    2) The Claimant was suspended from 21 June and then off sick, so there are serious time issues that she will have to overcome.
    3) There is no mention in her grievance email of 25 August 2020 of any concerns about disability.
    4) Some of the refences to Occupational Health in her ET1 are to do with stress not with her diabetes.
    5) The Claimant resigned on 13 January 2020, and her ET1 was received by the Tribunal on 14 May 2020. This application was made on 24 August 2020, after the ET3 was due to be submitted and more than seven months after the last act which could be relied upon.
    6) The ET1 clearly set out the heads of claim at 8.1 as unfair dismissal and race discrimination. Disability discrimination was not pleaded.
    7) The claims sought to be added are significant and are more than an amendment or clarification. They are in effect new claims. These amendments are much more significant than mere relabelling. They

render some of the ET3 as submitted irrelevant and also deficient, which will require amendment. The Respondent has already filed its response to the claim and is concerned that its previous submission may prejudice proceedings.

8) To permit this claim at this late stage would not be dealing with the case fairly and justly.
9) There is a clear mechanism and timetable to lodge claims and the Claimant had access to legal advice within those time scales.
10) Further, elements of the pleaded claim are already clearly out of time and the Respondent is concerned to see the victimisation claim replaced with a direct race discrimination, a complaint which is different in nature and order from that originally lodged.
11) There was no mention of holiday pay at all in the previous claim. Even if this new claim is allowed, it is time barred.

17. In summary, the Respondent submitted that permitting the Claimant multiple and long-delayed scope to fundamentally change her complaints is neither just nor equitable, where all matters were known to her and her representative. As noted in *Bexley Community Centre (t/a Leisure Link) v. Robertson* [2003] EWCA Civ 576, time extensions should be the exception, not the norm, and the burden of equity and justifiability fall to the Claimant. The Respondent submits that the application does not satisfy the circumstances for an exception to be made and requested the Tribunal to deny the application in its entirety and / or in the alternative, to find the claims for direct race discrimination, disability discrimination and holiday pay out of time.

Discussion and conclusion

18. There is nothing in the Tribunal Rules of Procedure dealing specifically with amendments. They fall within the general case management powers of the Tribunal.

Disability discrimination claims

19. Taking the starting point suggested in *Vaughan*, and looking at the exercise of balancing the injustice or hardship of allowing or refusing the amendment, in my judgment, the real practical consequences of allowing or refusing the amendments here fall in favour of allowing them. It is still, despite the passage of time since the ET1 was submitted, relatively early days in procedural terms. It is correct that the ET3 has been served, and amendments may be needed if the amendments to the ET1 are allowed, but that is not uncommon in Tribunal cases, where further particulars may be supplied, for example. It does mean more work, but it should not in my assessment create enormous practical difficulties for the Respondent. Further, no disclosure has yet taken place and nor have witness statements been exchanged. All of that is still to come. The unfair dismissal claim covers much the same factual ground, all the background

facts have been pleaded and indeed the Respondent to some extent anticipated these amendments at paragraph 43 of its Response.

20. There will be in my judgment be few practical problems in responding. On the other hand, if the amendment is refused, it may deny the Claimant a potentially successful cause of action. Given the factual matters that are already pleaded and the fact that reliance will be placed upon them in terms of the constructive unfair dismissal claim, adding the three new disability discrimination claims to an unfair dismissal claim with similar facts, is unlikely to require wholly different or new or additional evidence. It is unlikely to make the case longer.

21. Looking additionally at the factors suggested in *Selkent*, while this cannot in my judgment be said to a mere 're-labelling', nor is it such an extreme case as to be said to be entirely new, nonetheless it is still an alteration which is pleading a new cause of action. The factual details are already set out, and there is already an existing race discrimination claim, which will bring with it similar legal issues for consideration. If there are continuing acts, such as for example a failure to make reasonable adjustments, then matters which appear to be out of time may not be. The Respondent has already flagged possible jurisdictional issues with the Claimant's case and the acts relied upon, and this is therefore already be a matter which the Tribunal hearing the full merits hearing will need to explore and determine. Explanation has been provided for the timing of the amendments. An application should not be refused solely because there has been a delay in making it. As I have said, in this case the delay is relatively small.

22. Having considered as set out above, all the circumstances, and bearing in mind that the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment, I have decided to allow the Claimant's application to amend with regard to the three heads of disability discrimination, because, on balance, I see relatively little injustice to the Respondent and the potential of much large injustice if the potential claims do not go forward for consideration by the Tribunal that hears the case.

The direct race discrimination claim

23. There is disagreement between the parties as to whether this is a new claim, or requires an amendment application. Mr Gittins says not, it is merely particularising a pleaded claim. The Respondent disagrees.

24. In my judgment, the ET1 does contain the barest of refences to a race discrimination claim. The race discrimination box in the ET1 has been ticked and victimisation is said to be "another" type of claim that is being pursued. So there is an inference that two types of race claim are being pursed. The additional particulars contain the barest of detail about a possible race claim. Nonetheless, it is not possible to entirely dismiss such a claim as having not

been made. It is crying out for further particulars, which have now been supplied. I would concur with Mr Gittins that no amend application is needed.

25. Nonetheless, for the avoidance of doubt, I have also considered it under the general principles set out above for applications to amend. In my judgment, the same considerations with regard to where the balance of prejudice in this matter lies, as set out above in regard to the disability discrimination claim, apply here, but with the additional factor that the race discrimination box in the ET1 has been ticked. It is noted that the ET3 does not plead to a direct race discrimination claim, only to a victimisation claim, which has now been withdrawn. In the matters now set out by the Claimant as particularising the "existing claims", the acts of less favourable treatment relied upon, such as the suspension, the disciplinary hearing, the further investigation and the Claimant's resignation, are all matters which are already pleaded in regard to the unfair dismissal claim. It is a claim which has been made but one lacking particularisation, but which is relying on facts already set out and relied upon. Again, on balance, I see relatively little injustice to the Respondent and the potential of much larger injustice if the direct race discrimination claim does not go forward for consideration by the Tribunal that hears the case.

The claim for unlawful deduction of wages

26. This is in my judgment in a very different category to the discrimination claims. There are no factual references to this, nor has any box been ticked to suggest the possibility of such a claim. No schedule of loss has been presented which mentions such a claim. It is completely new. It will undoubtedly require a considerable amount of additional documentation and new evidence to be disclosed beyond the existing claim. However, the same consideration on delay apply as already discussed above. On balance, I see much more practical unfairness and potential injustice to the Respondent if this claim is allowed to proceed. It takes the issues in an entirely new direction. Having weighed the balance here, I do not allow the claim for unlawful deduction of wages to go ahead.

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Employment Judge Phillips
Date: 25 February 2021