



EMPLOYMENT TRIBUNALS

Claimant: Mr D Hallworth

Respondent: Martin McColl Limited

Heard at: Manchester

On: 10 May 2021

Before: Employment Judge Sharkett

REPRESENTATION:

Claimant: Mrs K Spencer – family member of the claimant

Respondent: Ms K Howard Trainee Solicitor

JUDGMENT ON PRELIMINARY HEARING

- (a) The claimant has permission to amend his claim and rely on those allegations set out below
- (b) The additional allegations have already been pleaded in the ET1 and do not amount to new allegations.

REASONS

1. This was a Preliminary Hearing to consider the claimant's application to amend his claim to include the following allegations:
 - (a) That on 23 November 2018, on being informed that his grandmother had passed away, he was told by Sarah Oakes that he had to get back on his till and complete the 45 minutes remaining of his shift.

- (b) That in respect of attendance at the funeral of his grandmother which took place on 10 December 2018, Sarah Oakes refused him compassionate leave to attend the funeral and informed him that he would have to use a rostered day off to attend.
 - (c) That in respect of his rota for the day after the funeral of his grandmother, Sarah Oakes refused to change the claimant's shift that was rostered to start at 05.30am or to start later, in the knowledge that the claimant had to travel and stay overnight away from home in order to attend the funeral of his grandmother.
 - (d) That on 10th October 2018 and while attending the funeral and wake of his grandmother, Sarah Oakes made multiple attempts to contact the claimant on his mobile phone and sent text messages berating him and warning him that he would be in breach of his contract of employment if he did not attend work at 5.30 the next morning. The texts also made reference to threats of action to be taken against him on his return to work the next day.
 - (e) That on the claimant's return to work the following day, 11 December 2018, he was summoned without notice into the office by Sarah Oakes and Mark Nixon and berated.
2. It is the claimant's case that all the above allegations amount to acts of unlawful discrimination under s13 and s26 Equality Act 2010 on the protected characteristic of the claimant's sexual orientation and are also acts of victimisation under s27 Equality Act 2010

Background to the case

3. This is the third PH in this case, the previous ones having taken place on 5 February 2020 before Employment Judge Buzzard, and on 25 August 2020 before Regional Employment Judge Franey. Following the hearing of 5 February 2020, the claimant was required to provide further and better particulars of his claim by 5 March 2020. Further particulars had also been provided on 27 May 2019 but it remained unclear what the claimant's claims were. At the hearing of 25 August 2020 Employment Judge Franey relied on the further particulars of 5 March 2020 and identified the date of the last alleged act of unlawful discrimination. This raised the question of whether the claimant's claims had been brought within the prescribed time limit or whether time was in fact an issue to be determined in the claim. It was as a result of the observations made in that Hearing that the claimant now makes his application to amend his claim.

Submissions

4. For the claimant Mrs Spencer explained, that at the last hearing before Regional Employment Judge Franey she had come away baffled as to how the claimant's claims could potentially be out of time. She explained that

throughout the course of ACAS conciliation she had followed the requirements carefully and was at a loss to understand how an issue of time had arisen. Following the hearing she had spent time carefully going through all the documentation that had been produced to date in the case. She submits that during this exercise she realised that in an effort to do as she had been asked at the PH in February 2020, and particularise the claimant's claim succinctly, she had missed off allegations that had previously been contained in documents particularising the claim. Mrs Spencer submitted that these were all allegations that had previously been put to the respondent both in the letter of grievance (which the Tribunal notes was attached to the ET1 when it was submitted) and in the further particulars provided on 27 May 2019.

5. Ms Howard submits that the claimant had not sufficiently explained why the claimant had not made the application sooner than 2 October 2020 and that the delay would result in the respondent having difficulty contacting witnesses.

The Law

6. In the case of **Selkent Bus Company Limited -v- Moore 1996 ICR 836**, the Employment Appeal Tribunal endorsed the key principle that when exercising its discretion in an amendment application, Tribunals must have regard to all the circumstances and in particular, any injustice or hardship which would result from the amendment or refusal to make it.
7. In that case, Mr Justice Mummery outlined that a Tribunal will need to consider: -
 - (i) The nature of the amendment: is it minor or substantial;
 - (ii) The applicability of time limits – if a new claim is proposed by way of amendment, whether the new course of action is in time or whether time limits should be extended;
 - (iii) The timing and manner of the application.
8. Guidance Note one of the Presidential Guidance on general case management, at paragraph 12 states “if the claimant seeks to bring a new claim, the Tribunal must consider whether the new claim is in time”.
9. However, at paragraph 11.2 Tribunals are reminded that even if no new facts are pleaded, the Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
10. Before any time limit issues are considered, it is incumbent on the Tribunal to consider the nature of the proposed amendment.
11. In the case of **Abercrombie and Others -v- Aga Range Master Limited 2013 IRLR 953** the Court of Appeal determined that when considering a new allegation amendment, Tribunals should focus on:

“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”.

Discussion and Conclusion

12. Whilst this application has been treated as one of amendment, in reality it is the case that the allegations that the claimant now seeks to rely upon have already been pleaded in the claim but have somehow dropped off the further particulars in Mrs Spencer’s attempt to do as she was asked, and explain the claims more succinctly. The Tribunal has regard to the fact that Mrs Spencer has no legal training or previous experience of employment law or proceedings before an employment tribunal. The Tribunal has however, for the sake of completeness treated this application to amend as it would any other.

13 The bundle of documents before the Tribunal contains the ET1 in which there is reference to the claimant’s letter of grievance being attached as a means of giving information of what his claim is about. The letter of grievance that was submitted by the claimant to his employer and once again brought to its attention in the ET1 refers to all the allegations upon which the claimant now seeks to rely. There is a somewhat briefer reference in the further particulars of 27 May 2019 but reference is non the less there. The claimant through Mrs Spencer has provided a credible and understandable explanation of how this situation has arisen and why it took until 2 October 2020 for the application before the Tribunal today, to be made.

14 The Tribunal finds that these are not new claims, they are identification of facts already pleaded that are now given the correct legal label. The respondent has been aware of the claimant’s complaints about his treatment surrounding the death of his grandmother since before his employment with it terminated. It was reminded again of the complaints in the ET1. The respondent has already investigated those complaints as part of the grievance procedure and is therefore aware of the facts already provided by its potential witnesses. It is clear therefore that when considering the balance of hardship in allowing or refusing the application that it is the claimant who would suffer more prejudice in not being allowed to rely on allegations that he always intended should be included in his claim.

15 The claimant’s application succeeds and he is permitted to rely on the allegations set out above, in addition to those allegations identified at the PH of 25 August 2020.

Employment Judge Sharkett

Date 10 May 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 May 2021

FOR THE TRIBUNAL OFFICE