EMPLOYMENT TRIBUNALS

Claimant: Dr Ban Al Jassani

Respondent: Mears Housing Management Ltd (sued as Mears Group Plc)

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (by video link) On: 14 May 2021

Before: Employment Judge R S Drake (sitting alone in public)

Appearances
For the Claimant: In person
For the Respondent: Mrs J Fry (Solicitor)

JUDGMENT ON PRELIMINARY ISSUES

1 The Claimant's application for leave to amend her Originating Application (by adding claims of alleged discrimination because of religion as defined by Sections 4, 10 and for the purposes of Section 13 of the Equality Act 2010 ("EqA")) is refused and is therefore dismissed.

2 The Claimant's claim of discrimination in any form as expressed in her ET1 is struck out under Rule 37 as it is found to have no reasonable prospect of success.

3 The title of the Respondent is amended so as to describe them as appears above – Mears Housing Management Ltd.

4 Further Case Management orders are necessary for the listing of the substantive hearing of the extant unfair dismissal claim and are recorded separately.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

Reasons

Introduction

1 Today's hearing was listed as a Preliminary Hearing to determine whether the Claimant should be permitted to amend her Originating Application, and to consider whether any further Case Management Orders are necessary in respect of a full hearing for which a date is set in the separate record. I also had before me an application to strike out the discrimination claim as expressed in the unamended ET1 under Rule 37 for not having a reasonable prospect of success even if amended in the manner sought and drafted by the Claimant. The only claim still extant is a claim of unfair dismissal. There exist and, as I understand it, are now completed a list of Orders promulgated by EJ Shore on 22 January 2021 but these related only to today's hearing. Therefore, I promulgated further Case Management Orders ("CMOs") regarding the unfair dismissal claim and listing of it for full hearing on the merits.

2 The issues in respect of the unfair dismissal claim in this case have already been identified and recorded in EJ Shore's CMOs dated 22 January 2021 referred to above.

Relevant background

3 Proceedings in this case were commenced on 27 August 2020. The Claimant brought claims of Unfair Dismissal and Direct Discrimination referring to the latter simply as by reason of "religion or belief" by ticking the box provided on page 6 of the ET1 Form – page 7 of the bundle before me today. The unfair dismissal claim was expressed in extenso in the annex to the form, but the discrimination claim was not and was completely unparticularised. No allegation of associative disability discrimination (in relation to the fact that the Claimant's son has special needs) is raised in the ET1 but was touched upon before EJ Shore who was exploring the claims with the Claimant in his discussion. It is not referenced in any way in the Claimant's Further Information set out in her PHR Agenda nor in response to the order made by EJ Shore at the PHR.

4 A Response ET3 was entered by the Respondents on 30 September 2020.

5 A PHR to address case management took place on 22 January 2021 before Employment Judge S Shore, who recorded inter alia: -

> Para 8 - "We had a discussion about the nature of the Claimant's claims and the types of claim that she was bringing to the Tribunal. She had presented claims of unfair dismissal and discrimination because of or related to religious belief in her application to the Tribunal (ET1). The unfair dismissal claim was adequately set out in the Claimant's claim form and appended document (that ran to 8 pages) and the Respondent's response (ET3)."

."

Para 9 – "In the Claimant's appended document, however, I could not see a description of events that could be characterised as discrimination because of or related to religious belief. I asked the Claimant some questions about the claim"

Para 10 – "She says she is a Muslim. The act that she complains of in her ET1 and appended document is the Respondent's decision to dismiss her on 11 May 2020. She says that she did not understand the concept of discrimination and had just presented the facts. She agreed that she had ticked the religious belief box on page 6 of the form because she believed she had been discriminated against, but did not know why. She had not been able to take advice on her claim before she made it and had problems because English is not her first language. She knew she had not been treated fairly"

Para 12 – "I went through the definition of disability contained in section 6 of the Equality Act 2010. There are six types of disability discrimination and four types of religious belief discrimination that can be claimed. I have set them out in Annex 1 to this order. The Claimant should look at her original claim form again and advise the Respondent and the Tribunal what discrimination claims she is making in the original claim."

6 Subsequently, the Claimant submitted on 18 February 2021 "Further Information" which largely restated the claims she had expressed in her response to a PHR Agenda dated 7 October 2020 amounting to an application to amend the claim. On that date she referred generically to "different types of discrimination I faced" but went no further in describing nor particularising them. The Respondents have replied thereto opposing the application and expressing an application to strike out of which the Claimant acknowledges she is aware.

The Claimant's application to amend the claim

7 The Claimant's application deals first with her already well-expressed unfair dismissal claim which needs no further comment here.

8 In the remainder of the application to amend, the Claimant refers only to a refusal by the Respondent on or by 23 January 2020 to accept the Claimant's request for flexible

working based upon her feeling (and that only without more in the way of evidence), that the reason for this was her religion (she is Muslim) when comparing herself with a successful request made by another employee (named simply Angela) whom she believes is not Muslim. She does not apparently seek to argue additionally or in the alternative that the refusal of the request for flexible working amounted to associative direct discrimination on grounds of her son's special needs notwithstanding the fact EJ Shore had explored that possibility at the PHR on 22 January 2021. This would be a new claim not foreshadowed or mentioned in any way in the ET1.

Relevant Law

9 In Chandhok v Tirkey [2015] ICR 527, the EAT said:

"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

10 In the case of Selkent Bus Company Ltd v Moore [1996] IRLR 661, which the EAT held that, when faced with an application to amend, a tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions." The EAT considered that the relevant circumstances would include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

11 In considering any application to amend, the Tribunal must have regard to the overriding objective set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to deal with cases fairly and justly. Any such consideration should include: -

a. Ensuring that the parties are on an equal footing.

b. Dealing with a case in ways which are proportionate to the complexity and importance of the issues.

c. Avoiding unnecessary formality and seeking flexibility in the proceedings.

d. Avoiding delay, so far as compatible with proper consideration of the issues.

e. Saving expense.

12 The 2018 Presidential Guidance on General Case Management further states: -

12.1 The Employment Tribunal can allow amendments, but it will generally only do so after careful consideration and taking into account the views of the other parties. (Para 1, Guidance note 1)

12.2 Generally speaking, minor amendments cause no difficulties. Sometimes the amendment is to give more detail. There may have been a typographical error, or a date may be incorrect. The Tribunal will normally grant leave to amend without further investigation in these circumstances.
(Para 2, Guidance note 1)

12.3 More substantial amendments can cause problems. Regard must be had to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. If necessary, leave to amend can be made conditional on the payment of costs by the claimant if the other party has been put to expense as a result of a defect in the claim form. (Para 3, Guidance note 1)

12.4 In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment. (Para 4, Guidance note 1)

12.5 Relevant factors would include: he amendment to be made…The Tribunal must decide whether the amendment applied for is a minor matter or a substantial alteration, describing a new complaint…Time limits…the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended…The timing and manner of the application…A party will need to show why the application was not made earlier and why it is being made at that time. (Para 5, Guidance note 1)

12.6 The Tribunal looks for a link between the facts described in the claim form and the proposed amendment. If there is no such link, the claimant will be bringing an entirely new cause of action.
-In this case, the Tribunal must consider whether the new claim is in time. -The Tribunal will take into account the tests for extending time limits: the "just and equitable" formula in discrimination claims; (Para 12, Guidance note 1)

13 I am to have regard for the provisions of Section 123(1) EqA which provides as follows: -

"Proceedings on a complaint (under section 120) may not be brought after the end of -

(a) the period of three 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."

In assessing whether it is just and equitable to extend time for a discrimination complaint, the Tribunal is entitled to consider anything that it deems to be relevant (Hutchinson v Westward Television Ltd [1977] IRLR 69). The Tribunal's discretion is as wide as that of the Civil Courts under section 33 of the Limitation Act 1980 (British Coal Corporation v Keeble [1997] IRLR 336 and DPP v Marshall [1998] IRLR 494)

14 The case law (of which I was already aware) and to which I directed the parties included the following: -

14.1 Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379 from which I note that the time limit for issue of proceedings "… is a jurisdictional and not a procedural issue … "which means that if a case is out of time and time is not extendable, the Tribunal simply has no power or jurisdiction to hear the claim;

14.2 Palmer & Saunders v Southend BC [1984] IRLR 119 from which I note inter alia that I am to consider the substantial cause (if shown) of the Claimant's failure to issue within the Primary Period, whether there was any impediment preventing issuing in time, whether or not the Claimant was aware of her right to issue a claim, whether the Respondent has done anything to mislead or impede the Claimant issuing her claim, whether the Claimant had access to advice, and lastly whether delay was in any way attributable to that advice.

14.3 Robertson v Bexley Community Centre [2003] IRLR 434 from which I note that application of S123(b) involves the exercise of a discretion which is an exception rather than the rule; this point is augmented by the EAT's decision in Simms v Transco [2001] All ER 245 which is authority for the proposition that whilst the fact a fair trial is impossible will most likely preclude extension of time, it does not follow that merely because a fair trial is still possible time should be extended – each case is fact specific;

14.4 Afolabi v Southwark BC [2003] ICR 800 from which I note that it is my duty to ensure no significant circumstance is left out of my consideration when considering whether to exercise my discretion or not and also that if I fail to take account of prejudice to a Respondent of allowing a claim to proceed out of time, I will be in error.

15 Under Section 33(3) Limitation Act 1980, Courts (and Tribunals) are required to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including as paraphrased by me:

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 claimant acted once they knew of the possibility of taking action.

e. The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

16 However, there is no legal obligation on the tribunal to go through the list above, providing that no significant factor is left out (see Afolabi [2003] IRLR 220). The emphasis should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing (DPP v Marshall [1998] IRLR 494).

17 I must also have regard for Rule 37(1)(a) of the Rules which provide that: -

"add any stage of the proceedings either on its own initiative or on the application of a party a tribunal may strike out all or part of a claim in response on any of the following grounds - that it is scandalous or vexatious or has no reasonable prospect of success "

I recognise that paragraph (2) provides as follows: -

"a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations either in writing or if requested by the party at a hearing"

The Respondent's response and application to strike out

18 The Respondent opposes the application to amend the claim to include these new elements.

19 There is no claim for direct associative disability discrimination, nor of religious harassment or victimisation in the ET1 claim. I note this submission is correct.

20 In that context, the Respondent submits that the amendments sought by the Claimant are not "minor amendments" as set out in Paragraph 2 of the 2018 Presidential Guidance referred to above. Rather, they are "substantial amendments" as set out in Paragraph 3 of that Guidance. I agree and so find accordingly.

21 The Respondent argues that the Tribunal must consider whether the new complaints are out of time and, if so, whether the time limit should be extended. The Claimant will

therefore need to show why the application was not made earlier and why it is being made at this time. If it is out of time, given that these are discrimination complaints, the Tribunal needs to consider whether it is just and equitable to extend time. Then, following Selkent, the Tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with both the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions" and the overriding objective. With this approach in mind:

The Respondent's replies to these questions

22 Are the new complaints out of time? It appears that all the discrimination complaints relate to events which took place no later than 23 January 2020. As such, they are substantially out of time today and as at the date the amendment was first sought, and were already out of time when the ET1 was first filed.

23 Why was the application to amend not made earlier? The application was, in effect, first made 22 October 2020 in preparation for the 22 January 2021 PHR, just over half a year after the claim was first brought.

24 The Claimant offers the following explanations: -

23.1 She is unrepresented, but though she had taken advice from lawyers (whom she did not retain) from the CAB and from ACAS, she was unaware that she could claim discrimination when filing her ET1;

23.2 She was fearful of potential dismissal or other adverse reaction were she to have complained of discrimination immediately after refusal of her flexible working request on 23 January 2020;

23.3 She was very distressed and emotional about the situation as she cares for a son with special needs. However, I noted that she did not adduce any medical evidence to support this.

25 Is it just and equitable to extend time? The Respondent asserts that it is not. The Claimant simply relies on the explanations for delay which are referred to above in paragraph 23. However, these are bare assertions not supported by any evidence of any kind such as medical reports attesting to her distress, or such evidence as statements from other employees to express support for the Claimant being justified in her fear of potential reaction to complaint.

The Respondent's response to the application to amend: Conclusion

26 The proposed new head of claim do not necessarily add extra value to the extant unfair dismissal claim.

27 It does not assist the Tribunal: it has prompted this hearing and the associated costs, and if leave to amend is granted will cause further unnecessary costs to be incurred as a revised Response is prepared.

28 The balance of prejudice (to the Respondent in having to prepare a case and gather evidence of what happened and why in January 2020 as set against the prejudice of the Claimant not being able to argue discrimination despite being able to argue unfair dismissal) favours the Respondent. They argue also that it is not just and equitable to extend time, and further that, for the reasons above, on a careful balancing exercise of all the relevant circumstances, it is not appropriate for the Tribunal to exercise its discretion to permit the amendment sought. The Respondent submits that to do so would be inconsistent with the requirements of relevance, reason, justice and fairness inherent in all judicial discretions, and contrary to the overriding objective in that it would be disproportionate to the complexity and importance of the issues, create delay and increase expense unnecessarily.

Conclusions

29 On application of the above-mentioned case law and statutory guidance, I prefer the Respondent's argument over those of the Claimant. I find as follows: -

28.1 The Claimant's ET1 is well drafted by a party who though unrepresented has demonstrated to me today considerable perspicacity generally, and yet the ET1 fails to make a clear statement of the alleged discrimination claimed now in the proposed amendment – I find that the amendment sought is substantial in the words referred to in Chandok and the Presidential Guidance referred to above; 28.2 I have applied the test and concluded that its and guidance described in Selkent and Rule 2 also referred to above and carried out a "careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of relevance, reason, justice and fairness inherent in all judicial discretions."

28.3 I have taken account of Section 33(1) Limitation Act and Section 123 EqA and I conclude that there is nothing in the evidence before me today to support the argument that it is just and equitable to extend time which would be necessary to validate a prima facie claim of discrimination and that there is nothing in the ET1 which sufficiently foreshadows anything so extensive as now appears in the proposed amendment;

28.4 I find there is no evidence (of the kind envisaged in Palmer & Saunders) sufficiently explaining the Claimant's delay in raising a complaint or claim of alleged discrimination of any form and nothing in the original ET1 which shows why religion was the basis of the reason for refusing an application for flexible working. It is not enough to say there exists a difference of religion between a complainant and a comparator, therefore that difference MUST be the reason for difference of treatment,

so the Claimant does not get to the point of establishing an argument that a prima facie case might exist such as to shift a burden of disproving such a case to the Respondent; therefore this putative claim has no prospect of success as it stands on the unamended ET1 for the purposes of Rule 37(1)(a);

28.5 The exercise of discretion to permit amendment is exceptional as referred to in Robertson and I find no basis for exercising it here;

28.6 by reason of the content of the Respondents response to the application to amend, I am satisfied that they put the Claimant on notice of their application to strike out her discrimination claim such as it was as existed under the original ET1; she had full opportunity to oppose it but made no argument to do so other than relying on her unsuccessful arguments for allowing her to amend her ET1.

30 In all the circumstances, I conclude that it is not appropriate to exercise my discretion to thus permit the amendment of the original claim as sought by the Claimant now and therefore her application in this respect fails and is dismissed.

31 Also, I find as reasoned above that even if the claim were to be amended, or otherwise, the discrimination claim has no reasonable prospect of success and should therefore be dismissed by strike out.

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Employment Judge R S Drake

Signed 14 May 2021

27 May 2021