EMPLOYMENT TRIBUNALS

Claimant	Ms A Agore
Represented by	Mr U Alukpe (solicitor)
Respondents	HC-One Oval Limited
Represented by	Mr M Clayton (solicitor)
Before:	**Employment Judge Cheetham QC**

Preliminary Hearing held on 10 June 2021 at
London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. Upon withdrawal by the Claimant's solicitors in their letter of 26 May 2021, the claim for direct race discrimination is dismissed.

2. The application to amend the claim is allowed only to the extent of the claims for (i) discrimination arising from disability and (ii) a failure to make reasonable adjustments, as set out below. The remainder of that application is dismissed.

REASONS

1. This is a claim that was brought by the Claimant on 11 August 2020, arising from her employment as a Registered Nurse between 29 November 2019 and 23 April 2020.

2. On 13 April 2021, EJ Tsamados required the Claimant to provide further information about her complaints of race discrimination, disability discrimination, automatic unfair dismissal and detriment (health and safety).

The Claimant did so via her solicitors, but provided a completely new set of particulars.

3. In the covering letter, the solicitors stated that the Claimant was withdrawing her claim of direct race discrimination. During this hearing, Mr Alukpe wanted to reinstate that claim, but I was unwilling to allow that in the face of the unequivocal withdrawal and without advance notice. If that is the Claimant's wish, then she can make an application to reinstate that claim, but I have recorded the withdrawal in this judgment.

Application to amend

4. There was no dispute over the applicable legal principles and, in particular, the well-established guidance provided ***in Selkent Bus Co Ltd v Moore*** [1996] ICR 836. Mummery LJ referred to the relevant circumstances as including the nature of the amendment, the applicability of time limits and the timing and manner of the application.

5. It should be said at the outset that, despite Mr Agore's repeated attempts to persuade the Tribunal otherwise, the new particulars did require an application to amend the claim. He tried to suggest that EJ Tsamados had somehow allowed the Claimant to re-write her claim by ordering further particulars, but that is incorrect. A requirement to provide further particulars relates to the claim as pleaded; it is not an invitation to start again.

6. In its letter of 2 June 2021, the Respondent set out its objection to the application, making the point that the amended particulars of claim significantly expanded the claim, whilst at the same time lacked the necessary particulars. In that letter it also applied for a deposit order.

<u>Health and safety detriments and automatic unfair dismissal – Employment Rights Act 1996 ss. 44, 100</u>

7. The amended particulars of claim refer to a series of detriments and then dismissal. However, they fail to set out the basis for the claim, referring only to "health and safety activities". The Tribunal went through s.44 with Mr Alukpe, but he struggled to identify the relevant sub-section(s) and, in my view, what he was describing as set out in the amended particulars did not fall within s.44.

8. Beyond the reference in paragraph 8 to "*Automatic unfair dismissal; Detriments (Health and Safety)*", the ET1 contains no particulars. Therefore, as pleaded in the amended particulars, these are entirely new claims. Mr Alukpe relied upon the reference in paragraph 8 of the ET1 to suggest that this was just re-labelling, but that is incorrect. "Re-labelling" works the other way round, namely where the ET1 contains details of an allegation, but it has been given the wrong or no label. This frequently happens with litigants in person.

9. What we have here is a label, but no particulars at all in the ET1, but proper particulars in the amended particulars either. Therefore, in my view, the Claimant is not assisted by the inclusion of those words in the ET1, where her application to amend also fails to provide proper particulars.

10. The application to amend in respect of the health and safety claims under ss.44 and 100 of the 1996 Act is therefore not allowed. The Tribunal considered that the Respondent would be prejudiced by having to defend these new claims, which would require further particularisation in any event and which would also be significantly out of time.

11. The difficulty facing the Claimant over time (in other words, the fact that these new claims would be out of time) applies to each of the claims identified below as "new", although I have not repeated it each time. There was no attempt by the Claimant to address this limitation issue.

Direct discrimination – Equality Act 2010 s.13

12. The Claimant states that she is disabled by reason of her asthma, but that has not been admitted.

13. In summary, the complaint is that the Claimant was dismissed for not completing her training, whereas another employee was not dismissed.

14. However, what Mr Alukpe was describing at this hearing was not direct discrimination, but discrimination arising from disability (and see below). He was not saying that the Claimant was treated less favourably because of disability, irrespective of the reference in the amended particulars. In fact, that particular paragraph does not particularise direct discrimination either. It refers to the Claimant's employment being terminated because of her failure to complete e-learning.

15. Therefore, this amendment is not allowed. It has not been properly particularised and nor does it reflect what I am told is the Claimant's actual complaint. It was not referenced in the original claim and would prejudice the Respondent if it were allowed.

Discrimination arising from disability – Equality Act 2010 s.15

16. Mr Clayton accepted that there was a pleaded claim under s.15. The "something arising" was the Claimant's dismissal.

17. The ET1 did not refer explicitly to s.15 or "discrimination arising from disability", but it does refer in terms to the Claimant being dismissed and that this was something to do with her disability. The amendment is allowed, because it is relabelling what was already pleaded (albeit a little differently) in the ET1.

Indirect discrimination – Equality Act 2010 s.19

18. The provision, criterion or practice is the requirement that staff should complete e-learning, including in order to complete their probation successfully. However, Mr Alukpe was unable to assist with the disadvantage that created and, in particular, why it put people who shared the Claimant's protected characteristic at a particular disadvantage.

19. Nor was he able to respond to the fairly obvious justification argument, namely that staff needed to complete e-learning in order to be able to carry out their work.

20. The application to amend to allow a claim for indirect discrimination is not allowed, because it has not been properly particularised, was not referenced in the original claim and would prejudice the Respondent if it were allowed.

Failure to make reasonable adjustments – Equality Act 2010 s.20

21. Mr Clayton accepted that there was a pleaded claim, which could be read as the Claimant requiring more time to complete the e-learning.

22. The amended particulars of claim list at paragraph 9 what are said to be the adjustments, but only the first of the 10 sub-paragraphs is actually an adjustment, the remainder being various alleged failures by the Respondent (such as a failure to carry out a workplace assessment). In respect of these, there was no attempt to identify the provision, criterion or practice that put the Claimant at a substantial disadvantage.

23. The Claimant is now professionally represented, so I therefore approached these amended particulars as setting out what the Claimant now alleged and under what headings. It was not the Tribunal's role to suggest how the alleged failures might be characterised as different forms of discriminatory conduct, but - as pleaded - these failures did not amount to failures to make reasonable adjustments.

24. Therefore the amendment is allowed to the extent of the failure to make a reasonable adjustment by giving the Claimant more time to complete the e-learning.

Harassment – Equality Act 2010 s.26

25. The amended particulars of claim allege harassment related to both disability and race, but singularly fail to provide particularised allegations that would amount to harassment. To take an example, it is insufficient to allege:

    The Respondent and its management falsely alleged that the Claimant's probationary period was due for extensions prior to the expiry of the initial six-month probation period, thereby, setting up the Claimant for a dismissal;

26. This allegation does not say when this happened, who exactly said what and to whom or how this amounted to conduct coming within s.26.

27. The application to amend to allow a claim for harassment is not allowed, because it has not been properly particularised, was not referenced in the original claim and would prejudice the Respondent if it was allowed.

Wrongful dismissal

28. The claim is that the Respondent was not entitled to dismiss the Claimant on contractual notice, which is what happened. In the amended particulars of claim, it is dressed up as a claim for unfair dismissal, which the Claimant cannot bring, as she has insufficient continuity of service.

29. If, as was accepted, there was a contractual power to dismiss on notice and that is what happened and the notice was given (and paid), then this claim cannot succeed. Mr Alukpe was arguing that the Claimant should have been allowed to finish her probation, but also accepted there was no contractual basis for that.

30. The application to amend to allow a claim for harassment is not allowed, because it has no prospect of success, has not been properly particularised, and would prejudice the Respondent if it was allowed.

Unauthorised deductions

31. The claim is for the differential between the statutory sick pay that the Claimant received and the full pay she would have received had she not been absent through sickness. All Mr Alukpe could say was, "*she should have been paid full pay when she was off sick*". However, beyond asserting that was her entitlement, the Claimant has not identified any contractual basis for this claim, given that her employer was contractually entitled to pay her statutory sick pay.

32. The application to amend to allow a claim for harassment is not allowed, because it has no prospect of success, has not been properly particularised, and would prejudice the Respondent if it was allowed.

What remains

33. The outcome is therefore that the Claimant has two complaints that can go forward, as follows:

    (i) Discrimination arising from disability (s.15), the unfavourable treatment being the termination of the Claimant's contract.

    (ii) A failure to make reasonable adjustments, the adjustment being that the Claimant should have been provided with more time to complete her e-learning.

34. I do not believe they are properly pleaded even now, but I am reluctant to ask the Claimant to particularise them as I am not confident that this would be done properly and within those limits.

Deposit Order

35. The Deposit Order is set out separately to this Judgment.

36. The case management orders are also set out separately

Employment Judge S Cheetham QC
Dated 7 July 2021