



EMPLOYMENT TRIBUNALS

Claimant: Andrew Wells
Respondent: Balfour Beatty Group Employment Limited

AT A PRELIMINARY HEARING BY CVP

Heard at: Nottingham **On:** 19 August 2021

Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: In person
Respondent: Amy Smith, Counsel

JUDGMENT

1. The claim of disability discrimination is struck out.

REASONS

The Background to this Hearing

1. The Claimant had previously presented a claim to the Tribunal under case no 2602624/2020 on 3 July 2020. In that claim form he said that he wished to pursue claims of;

- Unfair dismissal.
- Age discrimination.
- Disability discrimination.
- Whistleblowing.

2. The Tribunal did not accept that any claim for disability discrimination because the Claimant having been given an opportunity on several occasions failed to provide

any details. When he finally requested to proceed with the claim of disability discrimination his application was refused by my colleague Employment Judge Ahmed.

3. The Claimant then made a second claim under the case no 2604122/2020 claiming;

- Disability discrimination.
- Holiday pay.
- Wages. This claim was accepted and consolidated with the earlier claim.

4. There is no dispute that the claims of holiday pay and wages should be allowed to proceed but the Respondents apply for the claim of disability discrimination to be struck out on the basis that it is an abuse of process.

The Hearing Today

5. The hearing today was conducted by CVP. The Claimant represented himself and he has represented himself throughout these proceedings. I take into account the fact that he is a litigant in person. The Respondents were represented by Amy Smith of Counsel. I had an agreed bundle of documents and Ms Smith had provided me with a skeleton argument. I heard submissions from both Ms Smith and Mr Wells.

The First Claim

6. The Claimant began early conciliation on 2 July 2020 and the certificate was issued on the same date (page1).

7. The Claimant then presented his ET1 on 7 July 2020 and this was numbered 2602624/2020 (page 40-51).

8. The Claimant had ticked the boxes at page 6 of form (page 45) indicating the type of claim he was making namely;

- Unfair dismissal.
- Age discrimination.
- Disability discrimination.

9. He also said that he was owed other payments but did not specify these. Nothing that was contained in the rest of the form including paragraph 8.2 which asked the Claimant to provide details of his claim referred to any claim of disability discrimination.

10. On 15 July 2020 the Tribunal wrote to the Claimant. It said that the claim form had referred to Employment Judge Heap who was considering rejecting it because it was not in a form that could be sensibly be responded to. The letter required the Claimant to provide further information in respect of the disability claim by 29 July 2020 otherwise it would be rejected (pages 28-9).

11. The Claimant responded on 27 July 2020. It can be seen at the letter at page 4 of the bundle that it does not refer to any claim of disability discrimination and there was no response to the questions raised by Employment Judge Heap.

12. On 30 July 2020 Employment Judge Ahmed rejected the disability discrimination claim (page 36). He said that only the claims of unfair dismissal, age discrimination and whistleblowing were accepted. He said that he had decided to reject the complaint of disability discrimination because the Claimant had not replied to paragraph 2 of the letter or given any further particulars. Attached to that letter was a document called; "Claim rejection. Your Questions Answered". This form is at pages 37-9. It was clearly rejected because the claim could not sensibly be responded to. The information sheet explained that if wished to disagree with the reason for the rejection he could ask for it to be reconsidered within 14 days. He could also appeal to the Employment Appeal Tribunal and the address of the Employment Appeal Tribunal was provided.

13. On 27 August 2020 the Respondent filed its ET3 (pages 52-66). They did not respond to the disability discrimination claim because there was no claim of disability discrimination accepted by the Tribunal.

14. A case management preliminary hearing was conducted by my colleague Employment Judge Brewer on 21 October 2020. The record of the hearing is at pages 70-7. Employment Judge Brewer noted that;

"The grounds of complaint were sparse, and the Employment Tribunal required the Claimant to set out the basis of the proposed claims. In the event he failed to provide any information for his complaint of disability discrimination, and he has not been allowed to proceed with that".

He went on to describe the issues which ultimately to be determined by the Tribunal in respect of his claims of unfair dismissal, whistleblowing and age discrimination.

15. On 23 October 2020 the Claimant sent an email to the Tribunal asking for his claim of disability discrimination to be "reinstated". This is at page 68. He did not provide any further details about his claim other than saying;

"It has only been confirmed recently that during the redundancy scoring process my Managers scored against me on absences where I had to take off work due to ongoing health issues that I had been suffering from for a few years.

I understand that I should have appealed this decision earlier, but with ongoing health issues and live events it wasn't possible".

16. The Respondents responded to this application on 2 November 2020 (page 67). They pointed out that if the application was in effect a reconsideration application that the application was out of time and that the Claimant had not explained why the original rejection was wrong or to provide any explanation of his disability for his claim.

17. On 4 November 2020 the Claimant responded further saying;

"I did request for disability discrimination to be reinstated on my claim, I was advised to reapply with the Tribunal, which I have done". (page 78).

18. Employment Judge Ahmed considered the application and wrote to the Claimant on 21 November 2020 (page 80).

19. He pointed out that it was inaccurate to describe it as a "*reinstatement application*" as a complaint of disability discrimination had never been accepted by the Tribunal. He pointed out to the Claimant that he had been asked for details about his claims and that he had failed to answer the questions regarding disability discrimination. He pointed out that even now the Claimant had failed to provide any information.

20. He said;

"I have treated the application as an application for reconsideration of the rejection of a claim under Rule 13. Such an application needs to be made normally within 14 days of rejection. It is now long past the expiry of the time limit with no explanation for the delay. Furthermore, there was a preliminary hearing on 21 October 2020 when the issue could have been discussed but was not raised. This is not a case of the Claimant discovering new information as he would at least have known of the condition on which he would have been relying for a disability discrimination claim back in July.

It is not in the interests of justice to allow the application to be made out of time or to accept the complaint of disability discrimination. The Claimant's application of 23 October is therefore refused".

21. On 23 November 2020 the Claimant sent a further email taking issue with the application being refused (page 83). He asked again for the decision to be reconsidered stating that he did not feel Employment Judge Ahmed's email was accurate and explained that he had justified his delay, and that he had raised it with Employment Judge Brewer at the preliminary hearing. He referred to his response to the Respondent and attached his comments in red stating;

"I had only learned recently (when I received the redundancy appeal outcome on 16/10/2020) that the time I had off from work due to ongoing disabilities was used against me within redundancy scoring process".

22. He said that he believed that he had provided the information requested and that had been under immense stress, pressure and overwhelmed with everything that had happened. He pointed out that he had no legal assistance, nor did he have legal qualifications or training and he invited Employment Judge Ahmed to reconsider his decision and add the disability discrimination to the final hearing. There is no power though to reconsider a reconsideration decision.

23. The Claimant then contacted ACAS again on 23 October 2020 and filed his second claim under case no 2604122/2020 on 16 November 2020 again ticking the box for disability discrimination. Again, the particulars were brief, and he did not describe his disability but said that the Respondent had "*used (his) absences against*

(him)".

The Law

24. Rule 37(1) (a) of the Employment Rules of Procedure 2013 provides;

"At any stage of the proceeding, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds;

(a) That it is scandalous or vexatious or has not reasonable prospect of success".

25. The Tribunal also has the power to strike out claims on the basis they are an abuse to the process. Ms Smith referred me to a number of cases namely;

- ***Henderson v Henderson [1843] 3 HARE 100***
- ***Johnson v Gore Wood [2002] 2 AC 1***
- ***Parker v Northumbrian Water Ltd [2011] ICR 1172***
- ***Manson v Vooght [1999] BPIR 376***
- ***Agbenowossi-Koffi v Donvand Ltd (Trading as Gullivers Travel Associates) [2014] EWCA Civ 855***
- ***James v Public Health Wales NHS Trust EAT 0170/14***
- ***London Borough of Haringay v O'Brien UK EAT/004/16***
- ***Owolabi v Bondcare Ltd & others EAT 0624/12***

26. It is a well-established principle that there should be finality in litigation and as was said in the ***Johnson v Gore Wood*** case;

"A party should not be twice vexed in the same matter" or, "to avoid the suppression of subjecting a defendant unnecessarily to a successive action".

27. It involves a question of whether the claim should have been brought earlier and not just whether it could have been.

28. As Ms Smith describes there is a balance to be struck between the Claimant's right to bring a genuine and legitimate claim with a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed.

29. The case law makes clear that being faced with two claims when one would have been sufficient will often of itself constitute oppression.

My Conclusions

30. I am satisfied in this case that the Claimant has had ample opportunity to bring his disability discrimination claim in his first claim. Whilst he ticked the box, he did not provide any information about that claim.

31. He then had a further opportunity to explain his claim and have it accepted by the Tribunal when asked for further information by Employment Judge Heap. He failed to do so.

32. The Claimant then had a further opportunity to challenge the rejection of his claim of disability discrimination made by Employment Judge Ahmed. He again failed to do so in time in fact he was a further 3 months before he made his application into Employment Judge Ahmed to reconsider that rejection.

33. At a preliminary hearing before Employment Judge Brewer he failed to raise any issue in respect of the disability discrimination claim and only raised the matter again after that hearing.

34. I am satisfied that Employment Judge Ahmed was entirely correct in rejecting the reconsideration application. He was well out of time and even then, had not provided any reasonable details of his claim.

35. This is a case where his claims of unfair dismissal, age discrimination and whistleblowing are due to be heard in November and if I allowed the Claimant to proceed with his claim of disability discrimination I would need to adjourn that hearing so that he could provide details of the claim which he still has not provided. It is now of course almost 18 months since the Claimant was dismissed.

36. In all the circumstances of this case I am satisfied that it is appropriate to strike out the claim of disability discrimination and the other matters will proceed to a hearing.

CASE MANAGEMENT ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The hearing will be heard over **4 days by CVP on the 8,9,10 and 11 November 2021**. The hearing will commence each day at **10.00am** but on the first day of the hearing there will be **2 hours reading in time** so that the parties are not join the hearing **until 11.30am on the first day** so that the hearing can **start promptly at 12.00 noon**.
2. The Respondents will provide to the Claimant **by the 17 September 2021** a hard copy of the trial bundle which will be indexed and paginated.
3. The parties will exchange their witness statements **by 8 October 2021**.
4. The Respondents will provide to the Tribunal **3 hard copies** of the bundle and all the witness statements with an emailed version of the same **4 days before** the first day of the hearing.

CASE NO: 2602624/2020 (Lead case) & 2604122/2020

Employment Judge Hutchinson

Date: 31 August 2021

JUDGMENT SENT TO THE PARTIES ON

3 September 2021
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FOR THE TRIBUNAL OFFICE

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