



# EMPLOYMENT TRIBUNALS

**Claimant:** “ X ”

**Respondent:** “ Y “  
**Preliminary Hearing by telephone on 1 June 2020**

**Before:** Employment Judge Pritchard

**Representation**

**Claimant:** In person  
**Respondent:** Ms N Motraghi, counsel

## JUDGMENT

- 1 The Claimant's application to amend her claim is allowed in part.
- 2 Paragraphs 13.1 and 13.2 of the document attached to Claimant's application dated 29 May 2020 shall stand as an amendment to her claim.

## REASONS

1. The Claimant claims disability discrimination and deductions from wages (outstanding expenses). The Respondent denies that the Claimant was a disabled person and/or that it had knowledge of it and resist the claims generally.
2. The Claimant's particulars of claim set out the factual background to her claim but do not state with any particularity the alleged discriminatory acts / omissions relied or the type of discrimination being alleged.
3. By email received at the Tribunal after business hours on the Friday of the week before the preliminary hearing, the Claimant applied to amend her claim. The application makes it clear that with regard to her disability discrimination claim she wishes to claim discrimination arising from disability under section 15 of the Equality Act 2010 and failure to make reasonable adjustments under section 20.
4. The Claimant spoke orally to her application at the preliminary hearing to which the Respondent objected.
5. In deciding whether to exercise its discretion to grant leave to amend, 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.

6. In Selkent Bus Co v Moore 1996 ICR 836, the Employment Appeal Tribunal provided guidance as the matters to be included in the Tribunal's consideration of an application to amend.

#### The nature of the amendment

7. The Claimant submits that her particulars of claim already include facts from which claims under sections 15 and 20 of the Equality Act 2010 can be identified.
8. The Respondent submits that the Claimant's particulars of claim identifies only the following allegations which might be related to the Claimant's alleged disability, namely that "*it is my belief that I was denied the opportunity to complete the capability plan and my employment was terminated as a result of having informed my supervisor that I was suffering with a chronic digestive disorder brought on by high stress and anxiety levels*". The Respondent submits that these allegations should be characterised as acts of direct discrimination and allowing the amendment would lead to an altered basis upon which the claim is being made and would alter the scope of enquiry necessary.
9. When considering applications to amend that arguably raise new causes of action, Tribunals should focus on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old pleading – the greater between the factual and legal issues raised by the new claim and the old, the less likely it is that the amendment will be allowed; see: Abercrombie v Aga Rangemaster Ltd 2013 IRLR 953 CA.
10. The Tribunal agrees with the Respondent's submission that there are no pleaded facts from which a reasonable adjustments claim can be identified.
11. With regard to the allegations relating to denial of the opportunity to complete her /capability probationary plan and dismissal, they can be identified in the Claimant's detail of claim. The Claimant has not expressly characterised this aspect of her claim as one of direct discrimination, nor at the preliminary hearing did she agree that they should be so characterised. In the Tribunal's view, the Claimant's amendment in this regard simply adds the legal label she wishes to attach, namely a claim under section 15 of the Equality Act 2010, to the facts pleaded.
12. The Claimant's application included a lengthy description of new factual matters but she told the Tribunal, in terms, that this was relevant background to which she would be referring in her witness statement.

#### The applicability of statutory time limits

13. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions. The Tribunal must consider time limits as at the date the application is made. Although the applicability of the relevant time limit is an important factor, the weight of authority suggests that it is not

determinative. Thus the fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment. This might be the case, for example, where the new claim being brought by way of amendment is so closely related to the claim already the subject of the claim form; see: British Newspaper Printing Corporation (North) Ltd v Kelly 1989 222 CA; Ali v Office of National Statistics 2005 IRLR 201 CA. Also see paragraph 10(1) of the Presidential Guidance on the General Case Management for England and Wales. In Ali v Office of National Statistics 2005 IRLR 201 the Court of Appeal concluded that it was impossible to think, and it would be difficult to conceive, of circumstances where the just and equitable test, as opposed to the balance of injustice and hardship test, would lead to a different result.

14. Where the amendment is simply changing the basis of, or re-labelling the existing claim, it does not matter whether the amendment was brought within the time limit. See for example: London Borough of Hammersmith and Fulham v Jesuthasan 1998 ICR 640 CA.
15. In the Tribunal's view, the question of time limit does not fall for consideration in respect of the Claimant's allegations now labelled as claims under section 15 of the Equality Act 2010.
16. As for the amendment sought to include a claim of reasonable adjustments, it is noted that the Claimant contacted ACAS on 12 September 2019, ACAS issuing an early conciliation certificate on 12 January 2020. The Claimant presented her claim to the Tribunal on 11 February 2020, the last day open to her to present her claim within the primary time limit insofar as it relates to her dismissal. The application to amend is now being made on 1 June 2020. As the Tribunal has concluded above, the amendment seeks to introduce a new claim significantly out of time.
17. The Claimant told the Tribunal that she suffered a panic attack on the day she was dismissed, was suffering from poor mental health when she presented her ET1 claim and that she consulted her doctor in October 2019. For about the last eight weeks the Claimant says she has been recovering from the Covid 19 virus. However, she has provided no medical evidence to support her application and made no submissions as to how long her poor health impacted on her ability to seek an amendment to her claim. The Respondent makes the point that the Claimant is a qualified solicitor having worked for the Respondent as an employment lawyer and would be aware of the relevant time limits.

#### The timing and manner of the application

18. Although the Tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it, it is relevant to consider why the application was not made earlier. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly where the new facts alleged must have been within the knowledge of the Claimant at the time the claim was presented. The Tribunal repeats its observations made in the paragraph above.

#### Balance of prejudice

19. Proceedings are at a preliminary stage. Allowing the Claimant to amend/label her allegations relating to not being permitted to complete her probation/capability plan and dismissal is unlikely to lead significant extra costs incurred by the Respondent.
20. On the other hand, it is highly likely that allowing the section 20 reasonable adjustment claim to proceed would lead to extra costs being incurred, the scope of enquiry widened. Further, the Respondent would be deprived of a limitation defence.
21. In the Tribunal's view, the balance of prejudice falls in the Claimant's favour with regard to her application to amend the claim / label those aspects of her claim as falling under section 15 of the Equality Act 2010. Accordingly, paragraphs 13.1 and 13.1 of the Claimant's application shall stand as an amendment to her claim.
22. With regard to the application to include a claim of reasonable adjustments, the balance of prejudice falls in the Respondent's favour and the application to amend in this regard is refused.

Note

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date: 1 June 2020