EMPLOYMENT TRIBUNALS

Claimant: Mr D Silberman

Respondent: Peninsula Business Services Limited

HELD AT: Manchester (by CVP) **ON:** 22 April 2021

BEFORE: Employment Judge Holbrook

REPRESENTATION:

Claimant: In person
Respondent: Mr M Alam, Solicitor

JUDGMENT having been sent to the parties on 26 April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. On 14 December 2020, the claimant in these proceedings, David Silberman, applied to amend the ET1 which he had presented to the Tribunal on 30 March 2020 to include claim(s) for disability discrimination pursuant to the Equality Act 2010.

2. I refused Mr Silberman's application at a preliminary hearing on 22 April 2021 (when I also refused reciprocal applications made by the parties to strike out each other's cases and for costs/preparation time orders). I had heard oral submissions in relation to these matters from Mr Silberman and from the respondent's solicitor, Mr Alam. In addition, I was referred to various documents in an agreed 168-page hearing bundle. The hearing was conducted remotely, using the CVP video hearings platform.

3. I gave judgment (with oral reasons) at the conclusion of the preliminary hearing and, on 23 April, Mr Silberman emailed the Tribunal to request that written reasons be provided as well. Unfortunately, it appears that this request initially went astray, and I have only recently been made aware of it. I therefore regret the resulting delay in the production of these written reasons.

FACTS

4. Mr Silberman presented a claim to the Tribunal on 30 March 2020, having contacted ACAS on 16 March and an early conciliation certificate having been issued on 27 March. The claim was initially identified by the Tribunal as a claim for breach of contract (wrongful dismissal) and unlawful deductions from wages. However, at a hearing on 16 November 2020, Employment Judge Ross granted an application (which had been made on 4 November) for Mr Silberman to amend his ET1 to include a claim that he was automatically unfairly dismissed on the grounds of exercising the right to be represented at a grievance and at a grievance appeal hearing. In fact, the Employment Judge held that Mr Silberman did not need permission to amend his claim in this way, as he was merely seeking to clarify a claim that had already been pleaded.

5. Employment Judge Ross went on to make case management orders at the hearing on 16 November with a view to the case being dealt with at a two-day final hearing in May 2021. In doing so, she discussed with the parties the legal issues arising from the above claims (and these were set out in an Annex to the judge's case management note). She also provided the following brief summary of the case:

> "The claimant was employed by the respondent from 15 July 2019 as an HR Documentation Consultant. The claimant presented a grievance which was heard on 3 January 2020. The grievance was not upheld. The claimant was given a grievance outcome letter on 14 January 2020. On 24 January 2020 the claimant resigned. The respondent accepted his resignation and agreed a period of eight weeks' notice, to end on 19 March 2020. Meanwhile the claimant appealed against his grievance outcome and a grievance appeal hearing was heard on 29 January 2020.
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> On 4 February 2021 the claimant was summarily dismissed. The letter of dismissal said that the claimant had been discussing the grievance matters with his colleagues and commenting on management/seniors in a derogatory manner. The reason for dismissal was given as, "Your disregard for adhering to management instructions and your refusal to carry out your duties as informed".
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> The claimant disputes the respondent's version of events. He says the reason he had been discussing the grievance matter with colleague(s) was because he was considering asking one of them to accompany him to grievance or appeal meeting. He says it would be unjust to prevent him mentioning the grievance to them at all as it would prevent him asking a colleague to accompany him."

6. There was no discussion at the 16 November hearing of the fact that Mr Silberman may have a disability or that he might wish to make a claim for disability discrimination. Nor was there any reference to this in the ET1.

7. Nevertheless, by letter dated 14 December 2020, Mr Silberman applied to amend his ET1 to make claims for direct and indirect disability discrimination; discrimination arising from disability; and for failure to comply with the statutory duty to make reasonable adjustments. Mr Silberman explained that he was seeking permission to amend his ET1 in this way following legal advice which he had received on 10 December.

8. In his application for permission to amend, Mr Silberman stated that at all material times he has suffered from Crohn's disease, migraines and "an undiagnosed potential heart condition". He explained how he considers each of these impairments

has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities and he summarised his complaints against the respondent in the following way:

> "[A]t the beginning of my employment the requirement to log all bathroom breaks amounts to a provision, criterion or practice (PCP) which indirectly discriminated against me and persons with my disability and put me and persons with my disability at a substantial disadvantage because the nature of Crohn's disease primary symptom is frequent and urgent need to use the bathroom. This would mean that I would be using the bathroom considerably more than my co-workers who did not have Crohn's disease and would put me at a substantial and manifestly unfair disadvantage when the tracking of bathroom times was used for any reason. The Respondent will not be able to show that the PCP was a proportionate means of achieving a legitimate aim. The particular disadvantage I was placed at was I would be at an unfair disadvantage when the tracking of bathroom times was used for any material reason, when compared to employees who do not share my disability. Additionally, I suffered significant embarrassment at having my bathroom times monitored and had an underlying concern that this information may be used, particularly as the Respondent had never explained the reasons why this was tracked and what the information would be used for. The detriment I suffered as a consequence was significant embarrassment as I knew my bathroom times were being compared with my co-workers who did not share my disability and unfair treatment for using the bathroom more frequently than my co-workers. This is evidenced at page 115-116 of the bundle where it was stated "Upper management sent emails to all staff in error listing EVERY employee's length of toilet break in a day, with an instruction to speak to those employees who were deemed to go over the 'acceptable' length of time away from the phone". This is clear evidence that the tracked bathroom breaks were being used to take action against offending employees which I would clearly have been identified due to the nature of my disability.
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> I believe that the tracking of bathroom times and their use for speaking to offending employees who were identified as having spent too much time away from the phone put me at a substantial disadvantage at work compared to those not suffering from my disability because I would clearly be put at a manifest and unfair disadvantage when the same principles were applied to my employment."

9. At the hearing on 22 April 2021, Mr Silberman explained that it was not until 28 March 2020 that he had become aware that the respondent had been monitoring its employees' bathroom breaks. When asked why he had not sought to amend his ET1 before mid-December, he stated that he had experienced significant ill-health during the summer of 2020. Mr Silberman also stated that he had initially been unaware of the possibility that a claim for disability discrimination might arise from the facts of this case. He had commenced a law course in September 2020 and had asked one of his lecturers for advice about making a claim for unfair dismissal. He had not asked the lecturer about the possibility of making a discrimination claim, however, and had not realised that he could make such a claim until he consulted a solicitor on 10 December.

10. The respondent opposed Mr Silberman's application for permission to amend on the grounds that the claims for disability discrimination were out of time and, in any event, had no reasonable prospect of success and were vexatious.

DISCUSSION AND CONCLUSIONS

11. The Tribunal has a discretion to permit a claimant to amend their claim at any time following presentation of the ET1. Possible amendments range from minor corrections or additions to the introduction of entirely new claims. The key principle to be observed in the exercise of this discretion is that the Tribunal must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it. Relevant factors for the Tribunal to have regard to include the nature of the amendment, the applicability of any time limits and the timing and manner of the application. But this is neither an exhaustive list of relevant factors, nor a checklist to be ticked off: the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.

12. In terms of the nature of the proposed amendment which Mr Silberman seeks to make to his original ET1, it is plain that this involves the introduction of wholly new claim(s) – under the Equality Act 2010 – which are based on entirely different facts and circumstances from those which relate to Mr Silberman's existing claims. This is certainly not a re-labelling exercise, or a mere clarification of an existing claim. The ET1 did not mention any of the matters referred to by Mr Silberman in his application for permission to amend. Nor did it indicate the possibility of a claim for disability discrimination. Indeed, I note that Mr Silberman ticked the box at section 12.1 of the form to indicate that he does not have a disability.

13. As well as exploring the nature of the proposed amendment, it is necessary to consider the application of any relevant statutory time limits. Section 123 of the 2010 Act provides that a claim for disability discrimination must be presented to the Tribunal within the period of three months starting with the date of the act to which the complaint relates, or within such other period as the Tribunal thinks just and equitable.

14. In the present case, the alleged act(s) of discrimination cannot postdate Mr Silberman's dismissal on 4 February 2020. The claim(s) for disability discrimination were thus already significantly out of time when Mr Silberman applied for permission to amend his ET1 on 14 December, and I do not think that it would have been just and equitable to extend time to permit such claim(s) to be presented on that date. I note that Mr Silberman was unaware of the facts which give rise to his proposed claim(s) until late March 2020, and also that he was unwell for much of the summer. However, I also note that, by September 2020, he had recovered sufficiently to embark upon a law course (and to discuss his employment tribunal claim with one of his lecturers). He was also able to correspond with the respondent about compliance with the Tribunal's case management orders. By mid-November, Mr Silberman was well enough to attend the hearing before Employment Judge Ross and to engage in a detailed discussion about the case. I therefore do not accept that Mr Silberman had been unable to seek advice from a solicitor about his case prior to 10 December or that the length of the delay in bringing the claim(s) before the Tribunal was reasonable. Moreover, given that Mr Silberman's work for the respondent had involved the drafting of employment contracts, policies and procedures, it is surprising that such advice was required for him to realise that there was the possibility of making a claim for disability discrimination.

15. Although the Tribunal has power to permit an amendment even where that amendment introduces a new claim which is out of time, it would not be appropriate to do so in this case. I consider that Mr Silberman could, and should, have raised the possibility of making a claim for disability discrimination sooner, and certainly by no later than the hearing before Employment Judge Ross on 16 November 2020.

16. The fact that the effect of the proposed amendment would be to introduce new claim(s), based on additional facts, is also relevant when considering the balance of injustice and hardship in allowing or refusing the application to amend. Allowing it would mean altering significantly the scope and nature of these proceedings. It would require the respondent to gather and present additional documentary and witness evidence, including evidence from witnesses who have not previously been alerted to the fact that they may need to give evidence in these proceedings. The events in question occurred many months ago now and the recollection of those witnesses may be impaired by the passage of time. In addition, there would probably be significant additional cost to the respondent in collating and disclosing the necessary additional evidence and in attending a significantly longer final hearing. I accept that refusing Mr Silberman permission to amend his ET1 will deprive him of the opportunity to pursue any claim for disability discrimination. However, taking all of the above matters into account, I consider that the balance of injustice and hardship favours refusing Mr Silberman's application to amend.

17. Turning to the parties' reciprocal applications to strike out each other's case, I note that, by letter dated 17 February 2021, the respondent applied for a strike out on the ground that Mr Silberman's claim is vexatious, and that his conduct during these proceedings has been scandalous, unreasonable and vexatious. As evidence of this, the respondent relied on the fact that Mr Silberman has twice applied for permission to amend, on the manner in which he did so, and on his alleged unreasonable conduct in relation to compliance with case management orders. A further ground for the application was added at the hearing on 22 April: that Mr Silberman's existing claims have no reasonable prospect of success. Mr Silberman responded by making a strike out application of his own on 22 February. The stated grounds for this were that the response to his claims itself has no reasonable prospect of success, that the respondent has repeatedly breached case management orders, and that the applications made to the Tribunal by the respondent were unreasonable.

18. It is clear that any assessment of the relative merits of the parties' cases will depend upon a careful consideration of the evidence about the events on which they rely. I have not heard that evidence, and the appropriate forum for it to be explored is at the final hearing of the claims. Mr Silberman's first application to amend his ET1 was successful – so he can hardly be criticised for making it – and whilst his second application has now been refused, that fact provides no justification for striking out his existing claims. As far as the parties' conduct generally is concerned, it is plain that their relationship has become increasingly strained during the course of these proceedings, and there has been particular disagreement between them about how and when witness statements should be exchanged. However, I have seen nothing to indicate that the conduct of either party has been so poor as to justify striking out their case.

19. The parties' grounds for seeking orders for costs against each other are essentially the same as above. However, I am not satisfied that either party has

established that the other has acted vexatiously, abusively, disruptively or otherwise unreasonably such as to justify the making of a costs order (in favour of the respondent) or a preparation time order (in favour of Mr Silberman) pursuant to rule 76 of the Tribunal's procedural rules.

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Employment Judge Holbrook

Date: 23 September 2021

REASONS SENT TO THE PARTIES ON

29 September 2021

FOR THE TRIBUNAL OFFICE