



EMPLOYMENT TRIBUNALS

Claimant: Mr B King

Respondent: Thales DIS UK Ltd

Heard by Cloud Video

On: 2 August 2021

Before: Employment Judge Reed

Representation

Claimant: Mr Zahra, friend

Respondent: Mr R Hickford, solicitor

JUDGMENT

The judgment of the tribunal is that:

- 1 The name of the respondent is amended to that shown above
- 2 The claimant's claim form does not include a claim of disability discrimination
- 3 The claimant is not granted leave to amend to include such a claim
- 4 The claimant's remaining claim (of sex discrimination) is struck out as an abuse of process.

REASONS

1. In this case the claimant Mr King made a number of allegations against his former employer, which is correctly identified as Thales DIS UK Ltd.
2. This was a preliminary hearing to deal with a number of specific issues identified at a case management hearing on 25 March 2021.
3. I heard evidence from Mr King himself and my attention was directed to a number of documents. I reached the following findings of fact.
4. Mr King began working for the respondent in December 1999. In the course of his employment was clearly unhappy with the way he was being treated and in July

2017 and April 2018 he lodged grievances. He alleged that he was being discriminated against on the grounds of sex and disability. In particular he alleged that that treatment was being meted out to him by his manager, Mr Mercer.

5. Mr King was dismissed by the respondent in August 2018 and in November of that year he commenced tribunal proceedings. He only ticked the box in his claim form indicating that he was claiming unfair dismissal but in the narrative he alleged he had been bullied, harassed and discriminated against. He did not identify a “protected characteristic”. He did, however, give broad detail of the factual allegations of the bullying and harassment he was making.
6. The tribunal wrote to him on 19 November to ask him if he was claiming discrimination and if so, on what basis (ie whether sex, age, disability or other protected characteristic). On 22 November Mr King replied. He mentioned respects in which he considered he had been mistreated but again failed to identify the protected characteristic. He sent a further email on 28 November which again failed to clarify the point, whereupon by letter of 7 December the tribunal informed him that the claim was being treated as one of unfair dismissal only. The claim proceeded to hearing in June 2019 and was dismissed on the basis that it was presented out of time.
7. In July 2020, Mr King commenced further proceedings. In this second claim he ticked the box to indicate that he was claiming discrimination on the ground of sex. He referred in the narrative of that document to disability in various contexts but did not make any statement that could sensibly be interpreted as an allegation of disability discrimination. Again, the Tribunal sought further details from him and in due course he did indicate that he wished to make a claim of disability discrimination. He set out the detail in a “harassment log” provided in March 2021. Although that document is not easy to follow, it is tolerably clear that disability discrimination is being alleged.
8. It was against that background that Employment Judge Dawson at a preliminary hearing on 25 March 2021 identified a number of issues for me to address. The first was simply whether the second claim form (ie the one in this claim) actually made a claim of disability discrimination.
9. In the course of Mr Zahra’s submissions he repeatedly emphasised the fact that Mr King had learning difficulties, had problems dealing with documents and suffered from depression. I did not doubt that was the case and it might well have been that he was disabled on account of those conditions.
10. However, this first issue I was called upon to address did not involve the exercise of any discretion on my part but simply required me to construe the document itself. It either made a claim of disability discrimination or it did not.
11. As I have said above, the box indicating a claim of disability discrimination was not ticked. Although disability is referred to in the narrative itself, no reasonable reading of that document would alert a reader to the fact that a claim of disability discrimination was being made.
12. I took the view that the claim form did not contain an allegation of disability discrimination. Such a claim could therefore only go forward if I was prepared to grant leave to amend. Whether leave should be granted was the second matter to be addressed by me in accordance with the directions of Employment Judge Dawson.
13. In determining that question I was bound to look to Mr King for an explanation for his failure to make the claim clearly in the form. I was certainly entitled, on that subject, to consider his mental state.

14. One particular problem for him, however, was that the broad factual allegations giving rise to the claims of disability discrimination he was now seeking to take forward were actually raised in the first claim. He told me that he only intended to claim unfair dismissal in that first claim but that was not what a natural reading of that document would lead one to conclude. Nor was it consistent with his replies to correspondence from the tribunal. I was satisfied that it was indeed his intention to claim discrimination in that first claim but since he claimed otherwise to me, he could not provide an explanation for his failure to reply satisfactorily to the correspondence from the tribunal.
15. This was not a matter of the “capability” of Mr King but rather his credibility. Contrary to his evidence I concluded that he did intend to claim discrimination in the first claim. He might have claimed that his mental state prevented him properly articulating such claims but since he denied any intention to do so anyhow, that was not an argument open to him.
16. I reminded myself that in the narrative in the second claim he expressly pointed out that he was two years out of time in making the claim. (As a side issue, he seemed to be suggesting in the course of his evidence that the claim was not out of time at all, on this basis that he was obliged to wait until the respondent’s internal processes had been exhausted before he brought the claim. He also said that they failed to hold a meeting he was expecting them to hold and that meant that the limitation period did not expire until literally years after the actions of which he complained. That did not stand up to any sort of scrutiny. If he was expecting further steps to be taken by the respondent, they would have to be taken very shortly after his dismissal at the very latest. If he thought that he was being mistreated by the failure to hold a meeting, that failure occurred at least a year if not eighteen months before the claim was presented)
17. In short, he was considerably late in making these claims and given the contents of his claim form it was clear he was well aware of that. He had already been offered the chance to progress them in the first claim but, for reasons that he could not give me (having denied an intention to make such claims there) had failed to avail himself of that opportunity.
18. Mr King took legal advice. He engaged solicitors who assisted him from January 2019 at the latest until the determination of his first claim in June of that year. It seemed highly unlikely that the actual wording within his claim form would not have been discussed with them. He said no such discussions took place but again that seemed to me to be literally incredible.
19. To some extent there was an overlap between this issue and the question of whether it would be an abuse of process for the claimant to pursue a claim of disability discrimination in the second proceedings (see below). Even if the claimant had expressly made such a claim in the second set of proceedings, for the reasons set out below I would have dismissed it. It would hardly make sense to permit an amendment to make a claim that in any event would not be going forward.
20. Certainly, the balance of prejudice favoured Mr King. If I were to deny him leave to amend he would be driven from the seat of justice. The respondent would have to deal with claims somewhat later than they would otherwise but there was no evidence that that would cause them any particular problem.
21. On balance, however, and in the light of all these considerations, I was not inclined to exercise my discretion to allow the claimant to amend his claim form to add a claim of disability discrimination.

22. The next issue I was called upon to address was whether the claim actually made in the second claim form – sex discrimination - should be permitted to go forward. It was suggested on the part of the respondent that issue estoppel applied in the light of the dismissal of the first claim such that Mr King was prevented from making the second claim. I did not accept that could be the case. The first claim was of unfair dismissal only. Issue estoppel did not apply where the claim in the second form was different.
23. Alternatively, it was suggested that the second claim was an abuse of process, on the authority of *Henderson v Henderson*. Where a claimant commences proceedings, the expectation is that he will not “leave out” any claims he has and bring them in later proceedings. It is not acceptable that he should commence further proceedings at a later stage in respect of claims that he could have made in the first set of proceedings. Mr King presented his first claim in November 2018 and he did refer there to the matters giving rise to the discrimination claims that he now wished to take forward. For reasons I have mentioned already, they did not go forward to a hearing at that particular time.
24. Again, determination of this question involved the exercise of a discretion. I could therefore consider Mr King’s mental state.
25. Again, however, a problem was presented by the wording that he used in the first claim. He effectively recounted there the matters relevant to the discrimination claim (whether sex or disability) he wished to take forward albeit that the claim was treated as only one of unfair dismissal. Clearly, those matters could have been progressed at that stage. The reason they were not was that Mr King failed to provide a proper reply to the letter from the tribunal. He did not suggest to me that it was his mental state that prevented him from doing to. Rather, he asserted that he all along intended to claim unfair dismissal only there. As I have mentioned, I did not accept that evidence.
26. In short, Mr King raised these matters in the first claim but his actions were such that he did not have the opportunity to take them to trial. He obviously could have progressed the relevant matters in his first claim had he dealt properly with the enquiries from the tribunal. In those circumstances I was driven to conclude that it was indeed an abuse of process for him to attempt to take them forward in a later claim. It followed that the remaining claim – of sex discrimination – fell to be dismissed.

Employment Judge Reed

Date: 24 August 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
29 September 2021 By Mr J McCormick

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