EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr S Hembrough	AND	Magpie Metal & Waste Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VHS **ON** 21 October 2021

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant: **Mr D Leach (Counsel)**
For the Respondent: **Mr M Curtis (Counsel)**

JUDGMENT ON APPLICATION TO AMEND AND JUST AND EQUITABLE EXTENSION

The Claimant's application to amend the originating application is granted.

It is just and equitable to extend time in respect of the Claimant's disability discrimination complaints.

JUDGMENT having been delivered orally on the 21 October 2021 and written reasons then being requested at the hearing, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the Claimant sought leave to amend the claim which is currently before the Tribunal, and the Respondent opposed that application.

2. For reference at this hearing I was provided with the following:

a. An 80-page pdf bundle of documents with separate index;

b. A witness statement from the Claimant;

c. An amended draft case management agenda; and

d. Written submission from Claimant's Counsel with a pdf bundle of case authorities.

3. I heard evidence from the Claimant, and I also heard factual and legal submissions from Counsel on behalf of the respective parties.

4. The general background and procedural history of the claim as it stands before the determination of this application is as follows:

a. The Claimant resigns from his employment on the 21 December 2020.

b. The ACAS period runs from 21 December 2020 to 21 December 2020.

c. A claim is presented on the 22 December 2020, alleging unfair constructive dismissal.

d. The response is presented on the 24 April 2021.

e. The Claimant's solicitors go on record on the 9 August 2021 and apply for leave to amend the claim (page 34)

f. As noted in the written submissions of Claimant's Counsel … "Following objections from the Respondent dated 17.8.21 [37], directions were given by EJ Christensen dated 1.9.21 [39]. Unfortunately, separate correspondence from EJ Bax dated 2.9.21 appears to have overlapped with those directions [40]. The ensuing confusion is explained in an email from the Claimant's solicitors, dated 9.9.21 [68].".

g. Full details of the application to amend are submitted on the 6 September 2021.

h. This matter had been listed for final hearing on the 21 and 22 October 2021 to determine the complaint of unfair constructive dismissal.

i. By letter 8 October 2021 from the Tribunal that hearing was converted to this preliminary hearing to determine the Claimant's application to amend.

5. It was accepted by the parties that the application to add complaints of disability discrimination was to add a new claim that was out of time, this meant time limit jurisdictional issues arose. The parties confirmed that they wanted the question of whether it was just and equitable to extend time in respect of the Claimant's disability discrimination complaints determined at this hearing also.

6. The Claimant's application to amend is summarised as follows:

    a. The Claimant has made an application to amend his claim to include claims of disability discrimination, and allegations of disability discrimination within his constructive unfair dismissal claim, harassment, failure to make reasonable adjustments and breaches of various implied terms detailed in in the Claimant's further and better particulars of claim (page 35, 43 and 57).

    b. The Respondent strongly objects to the Claimant's application to amend his claim (page 37 and page 66).

    c. Further, about a draft list of issues prepared in this claim the Respondent's position is that the allegations set out at paragraphs 2 d-h (as highlighted in red of that draft) cannot be inferred from the original claim and the Claimant has not been granted permission to add claims of discrimination including as allegations under his constructive unfair dismissal claim or otherwise.

    d. The Claimant confirmed that those amendments flow from the primary amendment to add the claims of disability discrimination, so in that sense they are reliant on that amendment.

7. Claimant's Counsel confirmed that the specific complaints of disability discrimination that the Claimant seeks to add are as follows:

    a. The Claimant asserts that he is disabled by reason of a back injury that restricted him from doing manual work.

    b. The Claimant complains of discrimination arising from disability (Equality Act 2010 section 15), in that the Respondent treated him unfavourably by, as set out in paragraph 36 of the amended grounds of claim …. "The Claimant raised the difficulties he was experiencing with Kevin on multiple occasions and was either told that it needs to be done regardless or "that old chestnut again".". The Claimant says this was throughout his employment. The Claimant's case is that due to his disability (the back injury) he cannot do manual work; he raised his difficulties with Kevin and then received the comments. The comments made are also pleaded as being harassment related to disability (Equality Act 2010 section 26).

    c. The Claimant also complains of a failure to comply with the duty to make reasonable adjustments (Equality Act 2010 sections 20 and 21), in that he asserts that the Respondent applies a PCP of requiring the Claimant to perform the role of handyman, despite it not being his job, which put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it caused him difficulty and pain. The Claimant asserts that a reasonable adjustment would be for him to not to be asked to carry out handyman work.

The Facts

8. The findings of fact relevant to the application and the just and equitable question are that:

    a. The Claimant resigns from his employment with the Respondent on the 21 December 2020.

    b. The Claimant says he did not fully understand the complexity to the matter and sought to begin the claim on his own. He was aware that he had a claim for constructive dismissal after speaking with a friend who has a law degree. The Claimant says his friend advised him of his right to bring a claim and assisted with his letter of resignation and, as confirmed in cross examination, also told him about contacting ACAS.

    c. The Claimant contacted ACAS on 21 December 2020 and then lodged his claim with the Employment Tribunal on 22 December 2020.

    d. It is when the Claimant speaks with his friend again about the issues he was facing and the fact that he had started a claim against the Respondent, that she advised him to obtain legal advice, which he then did on that day by speaking to his now instructed solicitors, the date being confirmed in cross examination as the 2 August 2021.

    e. The Claimant's evidence is that after instructing his solicitors to continue the claim on his behalf, it became apparent to him that he had not fully appreciated that he had been a victim of the various breaches of contract which contributed to his constructive dismissal or the fact that he is deemed disabled under the Equality Act and that he had suffered disability discrimination.

    f. The Claimant understands that the claim for disability discrimination is out of time so seeks an extension on the basis that he did not understand the legalities involved when acting as a litigant in person.

    g. The Claimant's solicitors go on record on the 9 August 2021 and apply for leave to amend the claim. Full details of the application to amend are submitted on the 6 September 2021.

    h. The Claimant confirmed in cross examination that the matters he now complains about as disability discrimination continued into the last week of his employment and were constant throughout his time there.

    i. When asked in cross examination about his reason for resigning in the original claim form he confirmed that it was the assault and his safety. He agreed that the way he was spoken to by Kevin, with that old chestnut comment, did not cause him to resign.

9. From these facts I accept the evidence of the Claimant that he did not understand he had complaints of disability discrimination against the Respondent until he was advised of this by his current solicitors.

The Law

10. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of ***Chapman v Simon [1994] IRLR 124***). If a case is not before the Tribunal, it needs to be amended to be added.

11. In ***Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC*** Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in ***Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT***.

12. The EAT held in ***Selkent***: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:

    a. ***The nature of the proposed amendment*** - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and

    b. ***The applicability of time limits*** - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and

    c. ***The timing and manner of the application*** - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

13. I have also considered the recent EAT decision of Judge James Tayler in ***Vaughan (appellant) v Modality Partnership (respondent) UKEAT/0147/20/BA***. That finds … "A practical approach should underlie the fundamental exercise of balancing the hardship and injustice of allowing as against refusing the amendment. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.".

14. In this case it is not in dispute that the nature of the amendment being applied for is the adding of a new claim or cause of action related to disability. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in ***Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA*** that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus "not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted". It is not in dispute here that the allegations made (both constructive dismissal and disability discrimination) are all against the same person at the Respondent.

15. On the applicability of time limits and the "doctrine of relation back", the doctrine of relation back does not apply to Employment Tribunal proceedings, see ***Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN***. The judgments in both ***Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207*** and ***Abercrombie*** emphasised that the discretion to permit amendment was not constrained necessarily by limitation. This though is a matter that I have been asked to determine in this application, whether it is just and equitable for me to exercise my discretion to extend time in respect of the disability discrimination complaints.

16. About the timing and manner of the application, this concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. However, an application to amend should not be refused solely because there

has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales.

17. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in ***Ladbrokes Racing Ltd v Traynor EATS 0067/06***, the Tribunal will need to consider:

    a. why the application is made at the stage at which it is made, and why it was not made earlier;

    b. whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and

    c. whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

18. It may also be appropriate to consider whether the claim, as amended, has reasonable prospects of success. However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are. It was observed by the EAT in ***Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12*** that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.

19. In respect of time limits, section 120 of the Equality Act 2010 (EqA) confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

20. I have considered the principles from the cases of ***British Coal v Keeble [1997] IRLR 336 EAT***; ***Robertson v Bexley Community Service [2003] IRLR 434 CA***; and ***London Borough of Southwark v Afolabi [2003] IRLR 220 CA***.

21. I note the factors from section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:

    a. The length of and the reasons for the delay.
    b. The extent to which the cogency of the evidence is likely to be affected by the delay.
    c. The extent to which the parties co-operated with any request for information.

d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
e. The steps taken by the claimant to obtain appropriate professional advice.

22. I note that the Court of Appeal in the ***Afolabi*** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

23. It is also clear from the comments of Auld LJ in ***Robertson*** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard … "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

24. My attention was also drawn to the Tribunal having the widest possible discretion as to the factors that it takes into account, but factors that will almost always be relevant are, the length of and reason for the delay, and whether the delay has caused the Respondent any prejudice, ***ABMU Local Health Board v Morgan [2018] ICR 1194 (CA)*****.** Further, that a very significant factor will be whether the delay has affected the ability of the Tribunal to conduct a fair trial of the issues, ***DPP v Marshall [1998] IRLR 494 (EAT)*****.**

The Decision

25. Applying these legal principles to the current application, I find as follows:

26. The amendment is to add a new claim / cause of action related to disability, making complaints of discrimination arising, a failure in the duty to make reasonable adjustments and harassment as well as an assertion that the contract was fundamentally breached by these now asserted breaches of the Equality Act 2010.

27. The discrimination complaints are out of time, so as requested by the parties I have gone on to determine the question of whether it is just and equitable to exercise discretion to extend time.

28. Before determining that I have considered matters concerning the timing and manner of application:

a. why the application is made at the stage at which it is made, and why it was not made earlier - ***the Claimant's evidence is he did not know he had complaints of disability discrimination until he was advised by his instructed Solicitor. There is no evidential basis to not accept this. The application is made promptly by the Solicitors and I accept that the course of its clarification is influenced by what the Tribunal requested, rather than any default on the part of the Claimant***.

b. whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them - ***the two day final hearing was postponed for this application, we already therefore have delay built into this process. There will be an increase in the final hearing length and new grounds of resistance will be required and evidence needed. This potentially increases costs, although I accept the commonality of the person accused works to mitigate that***.

c. whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier – ***the Respondent makes no positive case that this would be so***.

29. In respect of the merits of the new complaints I cannot at this stage, when the evidence presented was not for example focusing on the arguments around what might amount to a fundamental breach of contract, conclude that this is an utterly hopeless case.

30. Factoring all of this as well as matters relevant to time limits and whether it is just and equitable to extend time, and in particular the two factors which are almost always relevant when considering the exercise of any discretion whether to extend time, the length of, and reasons for, the delay and whether the delay has prejudiced the Respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh), I determine that it is just and equitable to exercise my discretion to allow time to be extended.

31. The prejudice of not allowing the amendment or extending time in my view would appear to be far greater for the Claimant, losing entirely his right of complaint about the discrimination he alleges, versus the prejudice to the Respondent in allowing the amendment and extending time.

Employment Judge Gray
Dated 22 October 2021

Judgment sent to parties: 5 November 2021

FOR THE TRIBUNAL OFFICE