EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109424/2021

Held on 10 January 2022

Employment Judge N M Hosie

Mr R Stubbs	**Claimant** **In Person**
First Aberdeen Limited	**Respondent** **Represented by** **Ms L Penny,** **Solicitor**

WRITTEN REASONS

On 12 January 2022, following a Preliminary Hearing on 10 January, I issued a Judgment in the following terms:-

" The Judgment of the Tribunal, for the reasons given orally at the Hearing, is that: -

1. the claimant's application to amend is refused;
2. the claimant was not a disabled person in terms of the Equality Act 2010;
3. the complaints of disability discrimination are dismissed;
4. the complaints of unfair dismissal and for unpaid holiday pay shall proceed to a Final Hearing on the merits. "

1. By e-mail on 24 January, the claimant requested written reasons for the Judgment. The following are the reasons, which contain reference to the Joint Bundle of Documents which was submitted at the Preliminary Hearing ("P").

Claimant's application to amend

2. By e-mail on 4 October 2021, the claimant applied to amend his claim form (P.120/121). In short, he sought to include the alleged disability of hearing loss and corresponding reasonable adjustments ("Adjustment 1"); and adjustment of the respondent's disciplinary procedure by waiting until he had returned to work to commence such a process ("Adjustment 2").

Respondent's submissions

3. The respondent's solicitor based her submissions on the guidance in ***Selkent Bus Co. Ltd v. Moore*** [1996] ICR 936. She maintained that the application to amend sought to introduce a *"new claim".* She submitted that the balance of prejudice/hardship favoured the respondent.

Claimant's submissions

4. The claimant referred to his suspension on 11 August 2020. He maintained that the respondent was aware that he was *"unhappy driving coaches*", but he did not want to raise a separate grievance. He also drew to my attention that it took some six months for the respondent to decide that he should be dismissed.

Discussion and Decision

5. In ***Cocking v. Sandhurst (Stationers) Ltd & Another*** [1974] ICR 650, to which I was referred by the respondent's solicitor, the NRIC, laid down a general procedure for Tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several subsequent cases and were re-stated in ***Selkent***. In that case, the EAT

emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to parties by granting or refusing the amendment.

6. In the relevant case law, there is also reference, with approval, to paragraph 311.03 in section P1 of Harvey on Industrial Relations & Employment Law:-

"***(b) Altering Existing Claims & Making New Claims [311.03]***

A distinction may be drawn between:

(i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;
(ii) amendments which add or substitute a new cause of action which is linked to, or arises out of the same facts, as the original claim; and
(iii) amendments which add or substitute a wholly or new cause of action is not connected to the original at all."

7. In her submissions, the respondent's solicitor addressed each of the factors identified in ***Selkent*** that may be relevant to an application to amend. However, I was mindful, with reference to the Judgment of HHJ Tayler in ***Vaughan v. Modality Partnership*** *UKEAT/0147/20/BA* at para. 16, that: *"**Selkent** factors should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment. Mummery J specifically stated that he was not providing a checklist at 843 F:* ***"What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively."***

8. That said, I was satisfied that, by and large, the submissions by the respondent's solicitor were well-founded.

9. I also remained mindful, when considering the application to amend, that the claimant was unrepresented. However, he informed me that he does have knowledge of Employment Tribunal proceedings as he had brought a previous Tribunal claim against the respondent and he is currently studying for a law degree.

10. I was also mindful of the Judgment of The Honourable Mr Justice Langstaff in ***Chandhok v. Tirkey*** UKEAT/0190/14 at para. 16 that: "*the claim as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. The respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.*"

Nature of the amendment

"Adjustment 1"

11. There is no reference in the claim form to the "claimant's hearing impairment", or to the possibility of the claimant doing coach work as a reasonable adjustment. It was clear that the claimant was seeking to introduce a new claim.

"Adjustment 2"

12. This was more difficult as there is reference in the claim form to the claimant's disciplinary procedure, but this appeared to be no more than background information. Albeit with some hesitation, I decided that this was, "*a new cause of action which is linked to, or arises out of the same facts, as the original claim.*"

Time limits

"Adjustment 1"

13. The claimant was suspended on 11 August 2020 and dismissed on 12 February 2021. His claim form was submitted on 11 May 2021.

14. The possibility of an application to amend was first mentioned by the claimant in his e-mail on 9 August 2021 (P.76/77); his application to amend was made by e-mail on 4 October 2021 (P.120/121). This aspect of his application to amend, therefore, is out of time as it was made more than three months after the date of the last act complained of, even allowing for the early conciliation extension (P.18),

"Adjustment 2"

15. Again, this was more difficult given my finding that although this was a new cause of action it was linked to the original claim. However, arguably it was also out of time.

16. With his knowledge of Employment Tribunal proceedings and access to the internet, the claimant was not, or at least should not have been, ignorant of time limits and it was clear that he was well able to articulate his claims.

17. While I do not believe that the cogency of any evidence is likely to be adversely affected by the delay, I was mindful of the relevant case law, that the burden is on the claimant and that the exercise of discretion to extend the time limit is the exception and not the rule (***Bexley Community Centre (t/a Leisure Link) v. Robertson*** [2003] EWCA Civ576) to which I was referred by the respondent's solicitor).

18. There was no apparent impediment to the claimant submitting his application in time and, had I been required to extend the time limit, I would not have done so as I do not consider, in all the circumstances, it would be "*just and equitable*" to do so. However, for the purposes of consideration of an application to amend, time-bar is not determinative. As Mummery LJ said in ***Selkent***, it is but a factor to be considered, in the round, albeit an important one.

Timing and manner of the application/prejudice and hardship

19. As I mentioned above, there was no apparent impediment to the claimant submitting his application to amend in time. No new facts had come to light; the claimant was well able to articulate his claim; he was familiar with Employment Tribunal proceedings.

20. The respondent's solicitor made submissions with regard to the merits of the claim, were I to allow the amendment, but I was reluctant to have any regard to this in the absence of hearing evidence, particularly as the case law makes it clear that discrimination claims are "fact-sensitive".

21. As far as the relative prejudice and hardship was concerned, the claimant's employment ended almost a year ago and if I were to allow the amendment there would be further delay in bringing the case to a Final Hearing as further and better particulars of the discrimination claim would be required and the respondent's solicitor would require to respond by way of amendment of the response form. Further, the introduction of a "new" disability claim would require further investigation by the respondent and additional evidence at the Final Hearing which would take time and add to the expense.

22. In my view, the prejudice/hardship for the claimant were I to refuse the application to amend would be minimal as he will still be able to pursue his other claims. However, the prejudice/hardship to the respondent will be

significant as there will be further delay and expense which the respondent will be unlikely to recover from the claimant, even if they successfully defend the claim.

23. I was of the view, therefore, that the balance of prejudice/hardship favoured the respondent.

24. I decided, therefore, in all the circumstances, to refuse the application to amend in respect of Adjustment 1.

25. So far as Adjustment 2 was concerned, with some hesitation, I decided that it should be allowed as there was some basis for the amendment in the claim form : by way of background information the claimant had set out the alleged disadvantage in his application in respect of his *"work-related stress*".

26. In my view, these decisions are consistent not only with the guidance in the case law, but also with the "overriding objective" in the Tribunal Rules of Procedure.

Disability status

27. I heard evidence from the claimant in relation to his assertion that his *"stress, anxiety and depression*" amounted to a disability in terms of s.6 of the Equality Act 2010. This was disputed by the respondent.

28. Mr Stubbs was signed off work because of *"anxiety with depression",* according to his fit notes (P.216/217). He had been signed off previously for about four weeks and returned in early October 2019. He said that he was signed off again on 18 August 2020 and never returned to work after that. The fit notes also state that he was signed off, *"as a result of stress at work with now ongoing unresolved issues with previous employer".* At the time of

the hearing he was still in receipt of fit notes. However, he advised that he had started studying for a law degree at the Open University in September 2021.

29. I had no reason to doubt his evidence that he spends most of his time at home; he sleeps a great deal; he does supermarket shopping once a week; he watches TV; he is able to cook; he reads a great deal in connection with his University studies; he does not socialise. He is in receipt of Universal Credit for which he is required to submit fit notes.

30. In the course of cross-examination, the respondent's solicitor referred him to the following:-

- The medical report from his G.P. dated 3 August 2021 (P.238). The claimant confirmed that having been signed off work for four weeks he was able to return in September 2019.
- An Occupational Health Report dated 25 September 2019 (P.218-220). The claimant confirmed that an, *"employment matter in 2019 had increased his anxiety".*
- An Occupational Health Report dated 14 October 2019 (P.221-222). The claimant confirmed that he was "*not diagnosed with a mental health condition*". He also advised that he had not attended any of his *"psychological support sessions".*
- An Occupational Health Report dated 10 September (P.224-226). The claimant accepted that, *"work-place related problems"* had triggered his low mood. He also accepted that the OH Advisor had expressed the opinion that the 2010 Act was unlikely to apply in his case (P.225). However, he pointed out that this is, *"ultimately a legal decision and not a medical decision".*
- An Occupational Health Report dated 10 December 2020 (P.227-230) which also expressed the opinion that the 2010 Act was unlikely to apply (P.228). That report also contained the following (P.229): "*Mr Stubbs*

described a number of work-related concerns and it may be helpful to explore these on his return to determine how best they may be resolved. Given that Mr Stubbs has not been diagnosed with a mental health condition, in my opinion, his prognosis is favourable especially if his work-related stressors are managed."

31. In his evidence, the claimant also referred to his averments in his claim about his disability (P.16).

Discussion and Decision

32. It was for Mr Stubbs to establish that he had a disability at the relevant time. Not just disabled in the general sense, but disabled within the meaning of s.6(1) of the 2010 Act which is in the following terms:-

"***6. Disability***

(1) A person (P) has a disability if –
(a) P has a physical or mental impairment, and
(b) The impairment has a substantial and low-term adverse effect on P's ability to carry out normal day-to-day activities."

33. When considering the circumstances relating to Mr Stubbs, I had regard not only to the statutory definition and also to Schedule 1 which amplifies the definition, but also the "Guidance on Matters to be taken into Account when Determination Questions relating to the Definition of Disability 2011"; and the "EHRC Code of Practice on Employment (2015)". I was also greatly assisted by the observations of the EAT and the principles laid down in ***Goodwin v. Patent Office*** [1999] ICR 302, to which I was referred by the respondent's solicitor.

34. The first requirement of the definition is a physical or mental impairment. This is dealt with at paras. 10-15 of the Guidance.

35. It was clear from the evidence that Mr Stubbs suffered from *"stress at work"* and *"anxiety and depression".*

36. At first, I was inclined to the view this inevitably meant that he had a mental impairment. However, I have now had the opportunity of reading the EAT Judgment in ***J v. DLA Piper*** [2010] ICR 1052 and in particular para. 42, to which I was also referred. It was clear that the claimant's illness was triggered by the way he felt he was being treated by his employer. In my view, this was not the sort of mental condition which was described in ***J*** as *"clinical depression",* but rather, as the EAT put it, *"simply a reaction to adverse circumstances which in this case were problems at work".*

37. Although the distinction is a narrow one, I was mindful not only that the claimant's illness had been triggered by the way he perceived he was being treated by his employer, but also, after an absence of some weeks in October 2019, he had returned to work for several months before being signed off again in August 2020, triggered apparently by his suspension.

38. I was also mindful that Mr Stubbs had indicated in his claim form that he did not consider that he had a disability and that he accepted, in evidence, that his disability claim was something of an "afterthought". Further, although the determination of disability is a legal decision, in none of the OH Reports which the respondent obtained was the opinion expressed that the claimant was a disabled person, quite the contrary in fact.

39. Accordingly, and albeit with some hesitation, I arrived at the view that the claimant did not have a mental impairment which enjoyed protection under the 2010 Act.

40. However, for the sake of completeness, I wish to record that even if I am wrong in deciding that Mr Stubbs did not have a mental impairment covered by the 2010 Act, I would still have decided that he was not a disabled person.

41. The reason for this is that, on the basis of the evidence I heard, I was not persuaded that any mental impairment had a substantial effect on his normal day-to-day activities.

42. Although Mr Stubbs was confined to his home for lengthy periods, I was mindful that this was during the Covid Pandemic lockdown. He was still able to function normally, wash, read, cook, watch TV, do shopping and the like.

43. However, the focus is on the things that a person cannot do. I heard scant evidence about that.

44. In arriving at this view, I was mindful that substantial is defined in the Guidance as nothing more than minor or trivial.

45. Had I been required to do so, therefore, I would have found that any mental impairment did not have a substantial effect on his ability to carry out normal day-to-day activities.

46. So far as the issue of how long an impairment is likely to last is concerned, this should be determined at the date of the discriminatory act. As I mentioned, the claimant returned to work in October 2019 and worked, apparently without any difficulty, until August 2020. It did not appear to me that his first absence could be aggregated with the second.

47. As his illness was triggered by the way he perceived he was being treated by his employer, his employment ended in February 2021 and the Guidance stresses that anything that occurred after the date of the discriminatory act will not be relevant, I was not persuaded either that his alleged impairment was “long-term”.

48. For all these reasons, therefore, I arrived at the view that the claimant was not a disabled person as defined by the 2010 Act.

49. It follows, therefore, that his disability claim should be dismissed. However, his unfair dismissal claim and for unpaid holiday pay will now proceed to a Final Hearing. I am bound to say that the more I heard about this case, the more I was persuaded that this is what the claimant's case is all about. It is a case where the main issue is one of fairness and not discrimination.

Employment Judge **N Hosie**

Date of Judgement **9 February 2022**

Date sent to parties **9 February 2022**