EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4106356/2017

Heard in Glasgow on 17 May 2018

Employment Judge: lain F Atack

Mr Samuel Casement	**Claimant** **Represented by:-** **Mr E Wilson** **Student Advisor**
The Royal Bank of Scotland Plc	**Respondents** **Represented by:-** **Mr B Campbell - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

One: That the claimant's application to amend should be allowed under deletion of paragraph 25d, relating to a proposed claim of a failure to make reasonable adjustments under Sections 20 and 21 of the Equality Act 2018.

Two: That the respondent's application to amend is allowed, by consent.

REASONS

Introduction

1. This Preliminary Hearing was arranged to determine an application made by the claimant on 11 April 2018, under rule 29, schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) to amend his claim. The respondent opposed the application.

2. Mr Wilson of the University of Strathclyde Law clinic represented the claimant. Mr Campbell represented the respondent.

3. The original claim, ET1, was presented by the claimant on 17 November 2017. In that form he indicated at paragraph 8.1 that he was claiming unfair dismissal, discrimination on grounds of disability, notice pay and "other payments'*.

4. It was agreed between the parties that the claimant had been dismissed by the respondent with effect from 12 July 2017.

5. The respondent does not accept that the claimant is disabled. In their response they denied the claims of unfair dismissal and discrimination. They stated they understood the claimant's claims comprised direct discrimination under Section 13 of the Equality Act 2010 and discrimination arising from disability contrary to section 15 of that Act.

6. A Preliminary Hearing was held on 9 March 2018 at which the claimant was instructed to provide further information of the claims he intended to present to the Tribunal.

7. On 27 April the respondent applied to amend their response to the ET1 as originally presented.

8. On 11 May the claimant applied for leave to amend his claim.

9. This Preliminary Hearing was arranged to deal with the proposed amendments.

10. Mr Wilson confirmed that he had no objections to the respondent's proposed amendments as set out in the attachment to their letter of 27 April.

11. Mr Campbell for the respondent advised that he was only objecting to paragraphs 25c and d of the claimant's proposed amendment as attached to their representative's letter to the Employment Tribunal of 11 May. He did not object to the other proposed amendments. The paragraphs to which he was objecting were the amendments relating to proposed claims of indirect discrimination under section 19 of the Equality Act 2010 and a claim of failure to make reasonable adjustments under sections 20 and 21 of that Act.

12. No evidence was led and each party's representatives made submissions, which are briefly set out below.

Submissions

Claimant

13. For the claimant Mr Wilson submitted that the original claim had been submitted by a solicitor who was representing the claimant at that time. The claimant could not afford to continue utilising the services of that solicitor and in about January 2018 contacted the University of Strathclyde Law Clinic. He had a meeting with the clinic on 19 February and gave a detailed account to them. At the Preliminary Hearing held on 9 March the claimant had intimated an intention to amend the ET 1 and this was submitted formally on 11 May.

14. It was Mr Wilson's position that the claims referred to in the proposed amendment arose fmm the same facts and-circumstancesas set eut-in the ET 1. Allowing the amendment would not prejudice the respondent as matters were still at an early stage.

15. He submitted that the relevant provision, criterion or practice for a claim of indirect discrimination was set out at paragraph 7 of the paper apart to the original ET 1 and that therefore the amendment proposed in relation to a claim of indirect discrimination was not a new head of claim but simply the expansion of one already referred to.

16. So far as the claim of a failure to make reasonable adjustments was concerned, Mr Wilson submitted that this claim was alluded to in the ET 1 even if not mentioned separately. In his submission both adjustment should be allowed and he submitted this would not prejudice the respondent as it would have little effect upon their ability to defend the claim.

Respondent

17. For the respondent, Mr Campbell submitted that the application to amend sought to introduce a complaint of failure to make reasonable adjustments and also that it sought to add a complaint of indirect discrimination, notwithstanding the claimant's position that that latter complaint was part of the original claim. He did not object to the other proposed amendments confining his objections to paragraphs 25c and 25d of the proposed amendment.

18. He referred to the case of **Selkent Bus Co v Moore [1996] ICR 836** at pages 843-4.

19. It was his position that claims of indirect discrimination and of a failure to make reasonable adjustments could not be read into the original particulars of claim.

20. He submitted that this would not merely be a re-labelling exercise and referred to the case of **Reuters Limited v Cole [2018] UKEAT/0258/17/BA** and in particular to paragraph 27. It was the respondent's position that the amendment would introduce new and different factual areas and analyses, tests and legal questions. These matters would be likely to increase the evidence and legal tests which the tribunal would have to consider in

determining the claimant's claims. The volume and nature of medical evidence would also be likely to change. It would also be likely to increase the time needed to hear the claims.

21. He submitted that the claims were out of time as the allegations of fact relating to the proposed new cases date between January and at the latest July 2017.

22. The new claims could have been made sooner than they were. Many of the issues included were initially raised by the claimant by way of a grievance in March 2017, the outcome of which was issued on 7 June 2017. The claimant had been represented by solicitors when the claim form was submitted and it was Mr Campbell's position that it was unrealistic to conclude that the claimant's solicitors would not have contemplated all of the main types of disability related discrimination claims possible under the Act. The claimant was able to give a full account to his current advisers in February this year and there was no good reason why he could not have done the same in November last year.

23. Further, no satisfactory explanation had been provided as to why the complaints now being sought to be added were not made at the same time as those in the original claim form.

24. Mr Campbell also submitted that the application to amend should have been made earlier. The claimant would be aware from the respondent's response to the first Preliminary Hearing agenda document, at paragraphs R2.3 and R2.5, that the respondents did not accept there were claims of failure to make reasonable adjustments or of indirect discrimination. The claimant had instructed his current advisers on 19 February and the letter sending the application for leave to amend specifically stated that the claimant gave full details of his case to the advisers on that date. The matter was also discussed at the Case Management Preliminary Hearing on 9 March but no application to amend was made until 11 May.

25. Mr Campbell submitted there was no presumption that an amendment application should be granted. In this case the period of delay had been considerable. Some or all of the new matters alleged occurred over a year ago and the claim was presented almost exactly six months before the amendment application. In the context of the three-month time limit that was significant.

26. The proposed claims were out of time and the claimant would have to rely on the exercise of the tribunal's just and equitable power for them to be heard on their merits. He submitted the tribunal should not exercise that power.

Decision

27. The Tribunal has, under rule 29 of the Rules, a broad discretion to allow amendment at any stage of the proceedings. However, such discretion must be exercised in accordance with the overriding objective of dealing with cases justly and fairly under Rule 2. The tribunal also requires to have regard to the guidance of the EAT in Selkent (above).

28. In exercising any discretion, the tribunal has to have regard to all the circumstances of the case, in particular any injustice or hardship which would result from the amendment or the refusal to make it. This involves a careful balancing exercise of all the relevant facts, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment i.e. whether it is minor or substantial, the applicability of time limits and the timing and manner of the application.

29. In this case there were two applications to consider; namely the application under paragraph 25c relating to the proposed claim of indirect discrimination contrary to section 19 of the Equality Act 2010 and under paragraph 25d relating to the proposed claim of a failure to make reasonable adjustments under sections 20 and 21 of that Act.

30. Dealing firstly with the claim under section 19, the claimant's position was that such a claim was always part of the original claim. If that was correct then the application to amend such a claim would simply be a re-labelling exercise. In the case of **Selkent,** Mummery J distinguished **"the addition or substitution of other labels for facts already pleaded" from "the making of entirely new factual allegations which change the basis of the existing claim ".**

31. The basis of Mr Wilson's argument was that paragraph 7 of the paper apart to the ET 1 stated **"During the claimants phased return, the respondent sought to change the claimants working shift pattern. This change had an adverse effect on his work/life balance, an impact on his childcare arrangements, as well as his health.*'**

32. He also said that there was in any event a degree of crossover between a Section 16 and a Section 19 claim and the comparator would be the same in any event.

33. In the case of Cole to which Mr Campbell referred, Soole J reviewed the authorities and stated **"[First] I do not accept that the authorities establish that a mere relabelling exercise extends beyond a new claim based on facts which are already pleaded.''**

34. I had to consider if this proposed amendment was an entirely new factual allegation or if it was simply the addition of a new label for facts already pleaded.

35. The ET 1 at paragraph 16 of the paper apart does refer to Section 19 of the following way: **- "Had he not suffered with this mental health issue, the claimant would not been dismissed, contrary to the Equality Act 2010 s 15(1) and/or direct discrimination because of disability, contrary to the Equality Act 2010,** STOfl)". tn my optnton trie reference in Wat context o Section 19 is simply a mistake. The words in the sentence refer to **"direct discrimination because of disability"** which is the language of Section 16.

I therefore did not consider anything can be drawn from wording of that part of the ET1.

36. In the case of **Abercrombie and others v Aga Rangemaster Ltd. [2014] ICR 209** Underhill LJ stated

"48. Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to 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 thus well-recognised that in cases where the effect of a proposed amendment is simply to put a different label on facts which are already pleaded permission will normally be granted...."

37. In this case I considered that paragraph 7 of the paper apart is in a different position from paragraph 16 and in my opinion is capable of founding the basis of a claim of indirect discrimination the facts pled in paragraph 7 are limited but I considered that they could be read as referring to a claim of indirect discrimination albeit one which would have to be amplified. I did not consider that this was a new complaint and that it was correctly described by the claimant's representative as a re-labelling exercise.

38. Having decided that this proposed amendment was a re- labelling of an existing claim rather than the addition of a new claim there is no need to consider the question of timings as the nature of the original claim remains intact and all that is sought to be done is to change the grounds upon which the claim is based. Taking all factors into account, I did not consider that the respondent would be materially prejudiced by allowing this amendment. I considered that the refusal of the application to amend in respect of this matter would result in greater prejudice to the claimant than would result to the respondent if it was allowed. The pleadings may not be as full as they could

have been but I considered that they did foreshadow a claim of indirect discrimination.

39. Accordingly I will allow the proposed amendment contained in paragraph 25c of the application for amendment.

40. With regard to the other proposed amendment, namely that contained in paragraph 25d relating to a failure to make reasonable adjustments, I did not consider that this was a mere re-labelling exercise. The claimant's representatives in their letter applying for leave to amend specifically stated that in their view the proposed amendments gave rise to only one new head of claim: the failure to make reasonable adjustments.

41. This was not an amendment designed to alter the basis of an existing claim but to add a new cause of action.

42. In his submissions Mr Wilson stated that the claim for failure to make reasonable adjustments was alluded to in the ET1 . It was his position that paragraph 9 of the paper apart to the ET 1 was relevant. He accepted that the claim had not been mentioned separately but argued that it was alluded to in paragraph 9. The relevant averment states as follows: - **"The respondents had failed in their duty of care to the claimant."** That averment he suggested pointed to reasonable adjustments.

43. I was not persuaded that that bold averment was capable of the construction for which Mr Wilson was arguing. A claim for failure to make reasonable adjustments is a statutory claim set out in Sections 20 and 21 of the Equality Act. Merely to say that an employer has **'failed in their duty of care"** is not sufficient to indicate a claim is being made under a particular section of the Equality Act or indeed under that Act at all. There is nothing in the ET1, taken as a whole, to Indicate to tha respondent that a claim of a failure to make reasonable adjustments is being made. There is no hint of such a claim.

44. In my opinion this proposed amendment is seeking to introduce a new complaint and not simply to relabel an existing claim.

45. The new claim would appear of the face of it, to be out of time as it refers to matters which occurred when the claimant was still employed by the respondent. The original claim was lodged on 17 November 2017 but the proposed amendment was not presented until 11 May 2018. Whilst I was given an explanation that the claimant for cost reasons could not continue with his previous solicitor it was not explained satisfactorily how the claimant was able to have a meeting with those solicitors at which he gave them sufficient information to allow an ET 1 to be prepared and presented but at which he was not able to put forward all the information relating to his case.

46. The claimant consulted his current advisers on 19 February 2018 and according to their letter of 11 May was able to recount to them the full details of what happened to him from which they identified the claims he might have. However no amendment was sought at that stage and indeed although the claimant was instructed to supply detailed information following the preliminary hearing on 9th March he did not apply for leave to amend until 11 May.

47. The fact that the claim is out of time is only a factor, albeit an important and potentially decisive one in the exercise of the overall discretion whether or not to grant leave to amend. The other factors to consider are the relative injustice and hardship involved in refusing or granting an amendment. The claimant's position was that the facts and circumstances giving rise to a claim for failure to make reasonable adjustments related to very similar facts and circumstances to those already pled, namely what happened to him at work, how he felt badly treated by the line manager and how he was unsupported despite having a long-term condition. The respondent disagreed and argued that this claim would require new facts and new factual analysis. It was their position that this new claim would increase and alter the evidence and the legal tests which the tribunal would have to consider and also the nature of medical evidence would be likely to change. Mr Wilson submitted that the

same witnesses would be required but did not comment any further on the concerns expressed by Mr Campbell. I accepted from the information given to me, that if the amendment was to be allowed new facts and further evidence would be required. This was a new claim not foreshadowed in the ET 1.

48. I also had to consider that if the claim was out of time would it be just and equitable to allow it to be received at this stage. Mr Wilson did not specifically address me on the question of the just and equitable extension of time limits. The claim as now proposed in respect of an alleged failure to make reasonable adjustments is considerably out of time as the last alleged failure must have been whilst the claimant was still employed by the respondent and that employment ended in July 2017. I also took into account that the new advisers were aware of all aspects of the claimant's concerns by 19 February but that no application for leave to amend was made until 11 May. No satisfactory explanation was given for that further delay.

49. In considering this application I also had to take into account all the circumstances and the balance of injustice and hardship. I took into account that the claimant had received legal advice in November when the claim was first presented. There was no satisfactory explanation as to why the claimant could not have given a full account to his then solicitors as he did to his current advisers in February of this year. There was no explanation as to why if the claimant was able to explain the position to his new representative in February he could not have told his previous solicitors in November. The claimant was able to have a meeting with his solicitors and whilst he may well not have been able to afford to continue using their services I was not persuaded that cost alone prevented him from giving full details of all grounds of his complaint to those solicitors. There was no apparent difficulty in explaining all the circumstances to his new advisers in February.

50. In all the circumstances I did not consider It Io be just and equitable to exercise my discretion to extend the time limit.

51. Having considered all the matters I am of the opinion that the amendment insofar as it relates to the claim of a failure to make reasonable adjustments be refused. The remainder of the proposed amendment will be allowed.

52. The respondent will be permitted until 27 June 2018 to respondent to the amendment to the extent to which it has been allowed. The case should then be listed for a further Case Management Preliminary Hearing to make arrangements for the merits hearing.

Employment Judge: I Atack
Date of Judgment: 11 June 2018
Entered in register: 13 June 2018
and copied to parties