



EMPLOYMENT TRIBUNALS

Claimant: Mr N Whitrid

Respondent: Beaucare Medical Limited

RECORD of an OPEN PRELIMINARY HEARING

Heard at: Cambridge

On: 20 April 2022

Before: Employment Judge Bloom (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr Wallace, Counsel

JUDGMENT of Open Preliminary Hearing

- (1) The Respondent's Application to strike out the Claimant's claims is dismissed upon withdrawal of that Application by the Respondent.
- (2) The Claimant's Application to amend his claim to include claims of disability discrimination is granted.
- (3) The Claimant's claims of unlawful deductions of wages / holiday pay are dismissed upon withdrawal by the Claimant.

REASONS

- (4) On 17 June 2021, the Claimant brought a claim to the Employment Tribunal following the termination of his employment on the alleged grounds of gross misconduct, dated 13 May 2021. The claim makes it clear that the Claimant was pursuing in the claim submitted on line allegations of unfair dismissal and unlawful deduction of wages. At the commencement of the Preliminary Hearing, the Claimant confirmed to me that he no longer intended to pursue any

claim of unlawful deduction of wages and that claim as a result was dismissed upon withdrawal of the same by the Claimant.

- (5) He intends to continue to pursue the allegation of unfair dismissal.
- (6) The matter came before Employment Judge Brown on 20 January 2022. I have read Employment Judge Brown's Case Management Summary. He Ordered that an Open Preliminary Hearing should take place to determine an Application made by the Respondent that the Claimant's claim should be struck out on the basis that it was not possible to have a fair Hearing. The allegation surrounded a suggestion that the Claimant had made an unlawful threat of violence against one of the Respondent's witnesses. That allegation is strenuously denied by the Claimant. Mr Wallace on behalf of the Respondent, conceded that there were no witnesses available to be called at the Open Preliminary Hearing to give details of the alleged allegation. The Claimant would continue to deny the allegation. There was insufficient evidence that I could determine on the balance of probabilities that the Claimant had made the alleged threat. Having taken instructions on the point, Mr Wallace withdrew the Strike Out Application.
- (7) The other issue to be determined at the Open Preliminary Hearing as identified by Employment Judge Brown, was an Application by the Claimant to amend his claim to include claims of disability discrimination. That Application was opposed by the Respondent.
- (8) In determining this Application I have considered carefully all of the relevant Authorities. This includes detailed consideration of the Employment Appeal Tribunal's Judgment in the case of Selkent Bus Company Limited v Moore [1996] ICR836. I have reminded myself of the relevant factors to be determined in such an Application. Those factors are referred to in the Judgment of Mr Justice Mummery (as he then was) in the Selkent case. This includes consideration of the nature of the amendment, the applicability of time limits, and the timing on manner of such an Application. I have considered issues relating to the nature of the proposed amendment and the prejudice that may be suffered by either party depending on whether or not the Application was granted or refused. The Application by the Claimant is to include claims of disability discrimination. It is clear in my judgement that this is not a relabelling exercise. The claims submitted on line by the Claimant on 17 June 2021 were clearly identified as claims of unfair dismissal and unlawful deduction of wages. The Claimant had not completed box 8.1 of the ET1 claim form stating that he had intended to bring a disability discrimination claim.
- (9) In support of the Application I heard evidence on oath from the Claimant. The Claimant is a disabled person. This is conceded by the Respondent. He has suffered for a number of years from depression. He was not feeling well at the time he submitted the Application on 17 June 2021. He was on medication for depression. He had no financial resources to pay for any legal advice or legal representation. He submitted the claim himself. Although he had experience of submitting a previous ET1 relating to his dismissal from a previous employment in 2018, he had no experience of bringing discrimination claims. The 2018 claim is a whistle blowing claim.

(10) Having submitted the claim on line mid-morning on 17 June 2021, the Claimant took a break of a couple of hours. He went outside his home for that period. He returned home and decided to check the claim he had submitted to the Tribunal. He noted that it did not contain a claim of disability discrimination. He telephoned the Employment Tribunal office. I accept that he was told that there was no need for him to submit a fresh application for disability discrimination. He was told that if he emailed the Tribunal setting out the amendments, those amendment applications would be considered in due course.

(11) At 12.44 hrs on 17 June 2021, i.e. a couple of hours after presenting the claim, he submitted an email to the Tribunal service. This email stated,

"I've submitted this claim but I have noticed some errors when checking the download. I've contacted the Watford office and was instructed to email the correction. Thanks. They are as follows and you can amend thanks.

Section 12 regarding disability, please delete the 'no' box and please tick the 'yes' box. I suffer from depression and anxiety..."

(12) In my judgement the email timed at 12.44 hrs on 17 June 2021 was an Application by the Claimant to amend emailed to the Tribunal only two hours previously. The Claimant erroneously refers to paragraph 12 of the ET1 claim and not an Application to amend paragraph 8, namely, to include reference to a disability discrimination claim. That is an error, although in my judgement, not a fatal error. The email and the intention of the Claimant was to add to the claims of unfair dismissal and unlawful deductions from wages, claims of disability discrimination. The Claimant did not particularise the claims. I accept his evidence in this regard. He is not a lawyer and has no legal training. He had no access at the time to legal advice. He thought, having submitted the email, that in due course at a subsequent Case Management Hearing he would have the opportunity of specifying the nature of the discrimination claims. Indeed, that is what happened when the Telephone Preliminary Hearing took place before Employment Judge Brown in January 2022. He was Ordered to submit further information regarding those claims by 28 February 2022. He complied with that Order and submitted the particulars of his claims by email at 11.14 hrs on 28 February 2022. He specifies in the email the specific complaints of Victimisation, Harassment and an alleged failure by the Respondent to make reasonable adjustments. Specified individual paragraphs are contained under each pleading.

(13) Mr Wallace on behalf of the Respondent opposed the Application. He invited me to consider the timing of the Application to Amend. In my judgement, the Application to Amend was the Claimant's email timed at 12.44 hrs on 17 June 2021 and not later. I reject any submission or suggestion that the Application was only made when the further information of particulars of discrimination was submitted on 28 February 2022, or even at the date of this Open Preliminary Hearing. The wording of the claim first emailed to the Tribunal does make reference to grievances raised by the Claimant. He submitted two grievances

and in those grievances referred to his mental health and alleged treatment that he “suffered”. In numbered paragraph 24 of the Additional Information in the ET1 form, he refers to “*detrimental treatment*”. Again, I take note of the fact the Claimant is not a lawyer. In my judgement, he did have in mind at the time he submitted the original claim, bringing claims of disability discrimination in addition to claims of unfair dismissal and unlawful deductions of wages. Taking into account his disabilities and mental state at the time, I do not regard it as fatal to the Claimant’s Application that he did not until 28 February 2022 submit further particulars of the claims. The Application to Amend dated 17 June 2021 results in the amended claims of disability discrimination being presented within the statutory time period. It is the date of the Application to Amend that is relevant for such purposes.

- (14) The allegations around the disability discrimination issues have some overlap with the claim of unfair dismissal and although I accept they contained some new factual allegations, those allegations do not in my judgement cause any substantial difficulty to the Respondent in subsequently defending the same. There is no prejudice as a result, in my judgement, in granting the Application to Amend.
- (15) In determining all of these issues I take on board that it is a balancing exercise and that balance involves one of hardship and injustice to both parties depending on whether or not the Application is granted or refused. In my judgement, if the Application to Amend was refused a greater injustice is caused to the Claimant as opposed to any injustice caused to the Respondent if the Application is granted. All of the witnesses, bar one, to which the Claimant refers in support of his allegations of discrimination are still employed by the Respondent. The Respondent has a detailed file of all the various allegations which were referred to in the written grievances submitted by the Claimant. They therefore have the relevant persons available to defend the allegations and the supporting documentation.
- (16) I exercise, therefore, my discretion in allowing the Claimant’s Application to Amend his claims to include claims of disability discrimination. Those specific claims now need to be clarified.
- (17) Insofar as the claims of Victimisation are concerned, the following issues are identified:-

17.1 The Claimant made two protected acts, namely raising two written grievances on 11 January 2021 and 1 March 2021. The Respondent does not concede that the written grievances constitute protected acts. The Claimant relies on the following detriments:-

- (1) His previous use of a company van for personal use was removed by Ms H Mawrey after 1 March 2021;
- (2) The previous arrangement that he had flexible start times was changed to more rigid start times of each shift. This was following

an instruction by James Edmonson from the end of February 2021;

- (3) Part of his duties on Friday shifts were removed and given to another employee Mr John Collins. This was following an instruction from James Edmonson at the end of February 2021;
- (4) He was instructed by Rebecca Phillips on 11 February 2021 to pick up items which it was not his job to do;
- (5) He was told by Rebecca Phillips on 2 March 2021 to take that as a day's holiday when he was not able to undertake a particular task which had already been booked for someone else to complete;
- (6) On the instructions of James Edmonson with effect from the end of February 2021, his overtime was removed; and
- (7) On instructions of James Edmonson and a Heather Mawrey, from the end of February 2021 his work was monitored by Management.

(18) Insofar as the claims of Harassment are concerned, the following 14 individual allegations are made by the Claimant:-

- (1) Packaging for work sent to the Downham Market Depot was opened, damaged and with items missing. The Claimant alleges that John Collins was responsible;
- (2) The Claimant alleges John Collins ripped the lock off a toilet in order to blame the Claimant for that act;
- (3) A plug supplying power to an outside light at the back of the yard was cut off by John Collins;
- (4) John Collins left the Claimant's work untouched when the Claimant was on holiday and left rubbish everywhere;
- (5) On 30 December 2020, the Claimant was given excessive work to do even though his van was in for a service;
- (6) The Claimant was sent out with an over weight van on the instructions of James Edmonson on 21 October 2019, 27 March 2020, 25 June 2020 and 4 August 2020;
- (7) James Edmonson informed the Claimant that he (i.e. the Claimant) was ill and needed help on 21 April 2020. This comment was designed to distress the Claimant;
- (8) John Collins swapped around the order of deliveries knowing that it would distress and upset the Claimant;

- (9) John Collins parked his own van in the Claimant's own allocated space at the depot in order to distress him;
 - (10) On 2 March 2021, the Claimant was told to take a days allocated shift as a day's holiday in order to upset him;
 - (11) The Claimant was instructed by James Edmonson and Rebecca Phillips to pick up two heavy baths on 11 February 2021 in order to upset him;
 - (12) The Claimant was given strict commencement times of each shift rather than the previous arrangement of flexi commencement times;
 - (13) The permission granted to the Claimant to use the van for personal use was removed; and
 - (14) The Claimant's chair and shelves at the Downham Market Depot were removed by John Collins at the beginning of 2021.
- (19) Insofar as the allegations of failure to make reasonable adjustments are concerned, the following matters are relied upon:-
- (1) The provision, criterion or practice was the requirement of the Respondent that the Claimant should work alongside John Collins at the Downham Market Depot;
 - (2) The substantial disadvantage to the Claimant insofar as that requirement was concerned was to give Mr Collins the opportunity to "mess up" the Claimant's work, i.e. to hinder him and make work deliberately difficult and awkward for him; and
 - (3) The adjustments required by the Claimant was to instruct Mr Collins not to do the Claimant's work as a delivery driver and to allow the Claimant to continue with that duty.

Other Matters

- (20) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- (21) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise) ...*"
If, when writing to the Tribunal, the parties do not comply with this rule, the Tribunal may decide not to consider what they have written.

- (22) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (23) If the Tribunal determines that the Respondent has breached any of the Claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.
- (24) The following case management orders were uncontentious and effectively made by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Amended Response

The Respondent is granted leave to amend its Response on or before **18 May 2022**.

2. Schedule of Loss

The Claimant is to produce an updated Schedule of Loss by **27 July 2022**.

3. Documents

3.1 Both parties are to exchange lists of documents by **8 June 2022**.

3.2 Both parties are to provide copies of the documents to each other, by **22 June 2022**.

4. Final Hearing Bundle

The Respondent is to prepare four copies of the joint Bundle and a copy to be disclosed to the Claimant by **27 July 2022**.

5. Witness Statements

Witness statements are to be exchanged by **31 August 2022**.

6. Final Hearing

The case is to be allocated with a **5 day** time estimate and the Hearing to take place at the **Cambridge Employment Tribunal, Cambridge County Court, 197 East Road, Cambridge, CB1 1BA** on dates to be fixed.

7. Complaints and Issues

The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and / or incomplete in any important way.

8. Other Matters

- 8.1 The above orders were made and explained to the parties at the Preliminary Hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 8.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 8.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the Tribunal's permission except that no variation may be agreed where that might affect the Hearing date. The Tribunal must be told about any agreed variation before it comes into effect.
- 8.4 **Public access to employment Tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.
- 8.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 8.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and / or (d) awarding costs in accordance with rule 74-84.**

20 May 2022

Employment Judge

Sent to the parties on:24/5/2022

For the Tribunal: N Gotecha