Case No. 3312213/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S. Lee	AND	Abellio London Ltd

HEARD AT: **Watford Tribunal** **ON:** 22 April 2022

(Hybrid – Claimant in person; Respondent by CVP)

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation:

For Claimant: Mr J. Wallace, Counsel

For Respondent: Ms T. Patala, Solicitor

RESERVED JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. The Claimant's application to amend his claim to include a complaint of wrongful dismissal is granted.
2. The Claimant's applications to amend his claim to include complaints of direct disability and sex discrimination, victimisation, failure to make reasonable adjustments, and discrimination arising from disability are refused.

REASONS

Background

1. The Claimant worked for the Respondent as a bus driver from October 2014 until his summary dismissal on 10 June 2020.
2. In a claim form presented on 6 October 2020, the Claimant brought a claim for unfair dismissal.
3. There was various correspondence between the Claimant and the Tribunal about his claim from December 2020. This had led to some confusion regarding when the application to amend had been made, however Mr Wallace confirmed that the relevant date is 16 March 2021.
4. The Claimant seeks to add claims of:
    4.1 Wrongful dismissal;
    4.2 Direct discrimination based on sex and disability;
    4.3 Victimisation;
    4.4 Failure to make reasonable adjustments; and
    4.5 Discrimination arising from disability.
5. The Claimant asserts that he was suffering from the following impairments:
    5.1 Stress
    5.2 Anxiety;
    5.3 Depression;
    5.4 Chronic Fatigue Syndrome/Fatigue

6. The Respondent opposes the amendment application, on the basis that:
    6.1 The Claimant could have included the details in his original claim
    6.2 The Claimant has had a considerable amount time to apply for any necessary amendment

6.3 The amendment is substantial, consisting of new causes of action and based on new factual allegations

6.4 Allowing the amendment would cause hardship to the Respondent, including increased costs and delays

7. Consequently, this Preliminary Hearing was listed to determine whether the claim can be amended to include any or all of the above. This was originally due to take place on 26 August 2021, but was postponed until this hearing.

Procedure, documents, and evidence heard

8. The Respondent had prepared a joint bundle of documents amounting to 163 pages – references to page numbers below are to this bundle.
9. Mr Wallace provided a skeleton argument and the Claimant's witness statement the morning of the hearing. The hearing started late so that I had the opportunity to read these documents. Essentially, the submissions were:

9.1 Per the sliding scale cateogrising amendments established in Selkent Bus Co Ltd v Moore [1996] IRLR 661, the amendments sought in this case fall into the middle category - *"relabelling amendments which add labels to facts already pleaded"* - rather than amounting to entirely new causes of action, because:

9.1.1. The factual basis for the additional claims at worst, varies little from the claims that he seeks to add. All detrimental treatment concerns the disciplinary process, which will be central to the unfair dismissal claim;

9.1.2 The Claimant had already asserted discrimination in the ET1 as he ticked the box at 9.1 requesting a recommendation if discrimination is claimed

9.2 The Claimant was a litigant in person until more recently, without the skills to properly quantify his claims.

9.3 The Claimant would suffer more hardship than the Respondent.

9.4 The facts are similar to the unfair dismissal claim.

10. The Claimant gave oral evidence, in addition to his witness statement. During this, he referred to three additional documents that were not in the bundle and I had not had sight of. Ms Patala provided these - the Claimant's appeal letter dated 16 June 2020 (Doc A), notes of appeal hearing on 26 August 2020 (Doc B), and the appeal outcome letter dated 14 October 2020 (Doc C) - and I considered them during a short adjournment.
11. Both representatives made oral submissions. Mr Wallace's submissions on behalf of the Claimant were based on his skeleton argument, and Ms Patala's submissions, expanded on the Respondent's grounds for opposition as set out above.
12. Due to the delays caused by late service of documents, the hearing ended at 1.20pm leaving insufficient time for deliberation and delivery of an oral judgment. Therefore, this judgment was reserved.

Findings of fact

13. On 6 February 2020, it was alleged that the Claimant committed gross misconduct by dangerous driving - going through a red light – and unsatisfactory driving standards – speeding and driving with one hand.
14. Satinder Uppal – Driver Manager – conducted a fact-finding interview on 11 February 2020. This concluded that there was a case to answer and a disciplinary hearing was scheduled for 20 February. This did not go ahead as the Claimant was off sick.
15. The Claimant was signed off sick by his GP from 21 February to 31 July 2020.
16. The Claimant was assisted in the disciplinary process by his union, from around April 2020. He was in communication with the union's General Secretary, Mr Stephen Morris, and then Mr Jim Black being allocated to represent him.
17. The disciplinary hearing eventually took place on 10 June 2020, in the Claimant's absence, after confusion about if/how he and Mr Black would attend. The Claimant

was dismissed. When he received the letter informing him of this, he forwarded it to his representative. The Claimant was advised to draft an appeal in his own words, which he submitted on 16 June 2020. The appeal letter (Doc A) did not contain any reference to the discrimination claims that are the subject of the amendment application.

18. The Claimant undertook his own research into the Tribunal process, and also received advice from Mr Morris regarding the deadline and need to involve ACAS.
19. The claim for victimisation relates to Marta Leszcynska dealing with the Claimant's dismissal – he says that he had requested that someone else handled it because he had raised a grievance about her in 2018.
20. The appeal hearing took place on 26 August 2020 – the Claimant attended with his union representative Jim Black. Aside from reference to a request that Marta not deal with the disciplinary because of the previous grievance, the notes of the hearing (Doc B) do not contain any reference to the discrimination claims that are the subject of the amendment application. The Claimant gave evidence that the appeal notes are not thorough – he had not raised any issues with the accuracy of the notes previously.
21. The Claimant made a claim to the Tribunal on 6 October 2020. He completed the ET1 himself, but got some help from Mr Morris who checked it and corrected some grammar before submission. The Claimant could not recall who ticked box 9.1, and he gave evidence that at the point he completed it, he could not point to any specific discrimination, but felt that being dismissed in his absence was discriminatory.
22. The appeal outcome was sent to the Claimant on 14 October 2020 (Doc C) – the decision to dismiss him was upheld – along with the notes from the appeal hearing. In relation to Marta's involvement in the process, the Respondent relied on the grievance allegations being two years old and that the Claimant was able to appeal the original decision.
23. The Claimant forwarded the appeal outcome letter to his union that day, and believes that Mr Morris responded the next day.

24. The Claimant relies on the appeal outcome being received after his claim was submitted as reason that he did not include the discrimination claims from the outset. He says that he realised he had been discriminated against during the between 14 October 2020 and December 2020.
25. The Claimant wrote to the Tribunal regarding on 31 December 2020, regarding having further and better particulars to provide [28A]. He believed this was his application to amend.
26. On 6 January 2021, the Claimant wrote again. The Tribunal responded on 28 February 2021 advising him to provide the Respondent with any further and better particulars, and to confirm if he was applying to make an amendment [36].
27. The Claimant drafted his application to amend between 28 February and 16 March 2021. He received some help from Mr Morris in relation to the structure, but drafted it himself.
28. Although the Claimant advised the Tribunal and Respondent on 10 March 2021 that he had already applied to amend [37], this is not accurate.
29. On 16 March 2021, the Claimant made an application to amend his claims [43 – 49] to include the complaints set out at paragraph 4 above.
30. On 26 march 2021, the Respondent opposed the application [50-51].
31. On 11 June 2021, Employment Judge Quill directed that there would be a preliminary hearing for case management purposes, and to consider the Claimant's amendments [52]. The Claimant was directed to provide further information about what he said his disability was, and about his complaints of allegations, by 28 July 2021. He was also specifically told to provide information about why he did not make these claims in the claim made on 6 October 2020 [54].
32. The Claimant responded on 24 June 2021 [56 – 60], asserting that he had made his application to amend his claim on 31 December 2020, not 16 March 2021, and responding to EJ Quill's points. In relation to the reason the original claim did not include the discrimination complaints, he says that he only identified and linked incidents after receiving the appeal outcome on 14 October 2020 [60]. He did not provide an explanation for the delay after that date.

33. A telephone preliminary hearing for case management took place on 5 July 2021. The Claimant completed an agenda for this [63 - 67] where he repeated his wish to amend his claim. The Claimant's union representative, Stephen Morris, was on the call with the Claimant.
34. The Claimant responded to EJ Quill's June correspondence in more detail on 28 July 2021. In addition to what he said previously, he states that the Respondent's grounds of resistance – received by him on 11 December 2020 - "contain a number of extraordinary revelations relating to my claim amendments", but provides no further details [83].

Relevant law

35. The correct approach to adopt when considering an application to amend was recently considered and outlined by His Honour Judge Tayler in the EAT in the case of **Vaughan v Modality Partnership Limited (2020) UK EAT 0147/20**. Within that case the following messages were communicated, the first being that the Tribunal has a broad discretion when considering applications to amend.
36. The key test for considering amendments has its origin in the decision of **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650** at 657BC:

> *"In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."*

37. In **Selkent Bus Co Limited v Moore (1996) ICR 836** at 843D it was said:

> *"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."*

38. In **Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07** (6 June 2007), Underhill P concluded that on a correct reading of Selkent the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.
39. The list that Mummery J gave in Selkent as examples of factors that may be relevant to an application to amend ("the 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.
40. The factors identified in Selkent should be used to identify matters that pertain to the vital issues on the balance of hardship and injustice.
41. In **Abercrombie v Aga Rangemaster Limited (2014) ICR 209** Underhill LJ stated this important consideration, at paragraph 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 inquiry 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."*

42. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise and one needs to start by considering what the real practical consequences of allowing or refusing the amendment are. 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.

43. Refusal of an amendment will of course always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason.
44. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence.
45. Similarly, the prejudice to a Respondent will be that they have to respond to an additional claim that otherwise they would not have to meet. That will be the same for any amendment application so one has to look at prejudice over and above the base prejudice on both sides.
46. The Selkent factors are still relevant and they are:
    46.1 the nature of the amendment.
    46.2 the applicability of time limits.
    46.3 the timing and manner of the application.
47. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant.
48. The Selkent factors must also be considered in the context of the balance of justice. For example, a minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.
49. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.
50. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.
51. No one factor is likely to be decisive and the balance of justice is always key.

52. The prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.
53. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.

Conclusions

Wrongful dismissal claim

54. Having assessed the submissions and representations made by both parties, I am of the view that this application should be granted. There will be no injustice to the Respondent as a result of allowing this amendment.

55. This is clearly a case of relabelling. The only factual/evidential differences relate to whether the Claimant's alleged behaviour amounted to misconduct or gross misconduct.

56. The claim is amended to include a complaint of wrongful dismissal.

57. Insofar as any time point remains in issue in relation to this claim - in that the Claimant's employment was terminated in June 2020 and the amendment application was not made until 16 March 2021 - this will be determined at the Final Hearing.

Discrimination claims

58. Having assessed the submissions and representations made by both parties, I am of the view that this application should be refused because the Respondent will suffer a greater injustice and hardship in the amendment being allowed than the claimant will by it being refused. It is therefore in the interests of justice to dismiss this application and in accordance with the Overriding Objective under Regulation 2 of the Employment Tribunal Regulations 2013 to deal with cases fairly and justly.

59. In reaching this view I have carried out the balancing exercise in accordance with Selkent, and have taken account of the following factors in doing so.

60. I consider that the amendment is a new cause of action and not merely a relabelling of the claim. This is because although the claimant submits that his claim is for unfair dismissal while he had various health conditions, disability discrimination is a separate jurisdiction from unfair dismissal with its own applicable tests and different facts would require to be relied upon.

61. I do not accept the assertion that the Claimant had made a discrimination claim in his original form because he ticked box 9.1 on the ET1 in relation to remedy for discrimination. In response to my questions, the Claimant confirmed that this was not in his mind at the time of submitting the claim. He could not even recall whether he or the union representative had ticked that box.

62. The proposed amendments are not simply adding labels to facts already pleaded. Although in oral evidence the Claimant asserted that he had brought up discrimination as part of his appeal, this was not supported by the relevant documentation.

63. Aside from a reference towards the end of the appeal hearing on 26 August 2020 regarding Marta's involvement in the process, the Claimant had not raised anything that could be described as amounting to discrimination at any point in the disciplinary proceedings prior to dismissal. Even this was phrased as a complaint about the process, rather than the victimisation it is now categorised as. Whilst I have had regard to the appellant's ill-health and his status as a litigant in person, I am of the view that he had knowledge of all the material facts to plead a claim for discrimination at the time of his dismissal on 10 June 2020 and when presenting his unfair dismissal claim on 6 October 2020, and that his illness and lack of formal legal representation did not prevent him from lodging that claim.

64. As the amendments are new causes of action there is a time bar issue in that the Claimant's employment was terminated in June 2020 and the amendment application was not made until 16 March 2021. However, as I am refusing this application, the time bar issue will not require to be determined.

65. Notwithstanding that, the passage of time between the ET1 claim form being lodged on and the amendment application being made on is more than six months after the time limit for such an application and is a factor that weighs considerably against the

Claimant. Furthermore, it is not in dispute that the claimant sought advice from his union and also intimated his wish to make an application for amendment from December 2020.

66. Furthermore, as new causes of action, to allow the amendment would clearly delay these proceedings even further, as it still requires more specification from the claimant and there may be a need for additional witnesses that would lengthen the evidence and the Final Hearing which would incur further costs.

67. However, in refusing this application, the claimant is still entitled to pursue his unfair dismissal claim, and the alternative wrongful dismissal claim.

68. In all of these circumstances the applications to amend are refused.

Employment Judge K Douse

Dated: …19 July 2022……

Sent to the parties on: 21 July 2022

For the Tribunal Office