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EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr G Newton

AND

(1) Hays Specialist Recruitment Ltd
(2) Transport for London

Heard at: London Central

On: 8 February 2019

Before: Employment Judge Sharma

Representation

For the Claimant: Mr P. Ward, of Counsel

For the First Respondent: Ms A. Meredith, of Counsel

For the Second Respondent: Ms V. Brown, of Counsel

REASONS

These are my Reasons for denying the Claimant leave to amend his claims to include claims for race discrimination (under s 13 Equality Act 2010) and harassment (under s 26 Equality Act 2010).

1. In his claim form received by this Tribunal on 4 October 2018, the Claimant brought claims for unfair dismissal and breach of Regulation 5, Agency Workers Regulations 2010 in relation to the termination of a temporary assignment on 25th May 2018, effective on 1 June 2018 (the "Original Claim Form").

2. Both the First and the Second Respondent filed responses seeking the strike out of both these claims. The purpose of the Preliminary Hearing was to determine the applications made on behalf of the Respondents. At 1.06pm on 7

February 2019, the Claimant filed and served on the Respondents a draft amended particulars of claim (the "Amended Grounds").

3. At this Preliminary Hearing, the claims set out in the Original Claim Form were withdrawn and therefore dismissed.

4. Mr Ward for the Claimant made an application to amend the Original Claim Form by the presentation of the Amended Grounds, even though the original claims had been withdrawn.

5. In relation to the Amended Grounds, no notice of this had been provided to the Tribunal, although the Claimant stated that he had sent his Amended Grounds to the Tribunal, one day before this Preliminary Hearing namely on 7 February 2019. Unfortunately, these had not been received by this Tribunal.

6. The Amended Grounds related to race discrimination pursuant to s.9 and s.13 of the Equality Act 2010 and harassment for race and age under s.26 of the Equality Act 2010.

7. Whether I dealt with the amendments first or the withdrawal first the result was the same.

8. The application to amend was denied for the following reasons.

Entirely New Claims

9. Both Ms. Meredith for the First Respondent and Ms. Brown for the Second Respondent submitted that the Amended Grounds did not seek to amend the existing claims of unfair dismissal and compensation under the Agency Workers Regulations 2010. These sought to bring two entirely new claims based on new factual allegations. These were substituted claims. These entirely new claims were completely unconnected to the original claims. Totally new legal and evidential considerations would be necessary for these new claims. Based on the facts set out in the Original Claim Form, there was no discrimination or harassment which could be identified.

10. I accepted these submissions made on behalf of both Respondents.
11. In the decision of *Selkent Bus Co Ltd v Moore* (1996) ICR 836, Lord Justice Mummery distinguished “the addition or substitution of other labels for facts already pleaded from “the making of new factual allegations which change the basis of the existing claim”.
12. When I compared that which was in the Original Claim Form with that in the Amended Grounds, it was clear to me that the Claimant was making new factual allegations which changed in their entirety matters raised in the Original Claim Form. Fundamentally different causes of action were set out in the Original Claim Form and the Amended Grounds. There were no facts in common. This was not a relabeling exercise. In the Original Claim Form, there was no suggestion whatsoever of discrimination of any kind. The matters raised in the Amended Grounds would require substantially different areas of enquiry from those areas to be explored for the purposes of the Original Claim Form. As Ms. Brown submitted, which I accepted, the Amended Grounds would necessitate substantially different areas of enquiry but given the passage of time with a “decreased cogency of memory.”
13. Mr Ward accepted that this was a substantial amendment and an unusual race claim involving a white male person. Because of the unusual nature of this (as Mr. Ward put it), he submitted that the Claimant, as a litigant in person, did not know that he could bring a claim of this nature.
14. The Original Claim Form did not raise claims relating to discrimination. Item 9.1 of the Original Claim Form was ticked as were all the other boxes at Item 9.1. I sought submissions on this. Ms. Brown submitted that the Claimant was thinking about himself being discriminated as an agency worker and not because of race or age. I accepted this submission.

Claims raised in Amended Grounds: Outside Applicable Time Limits in s 123 (1) (a), Equality Act

15. The claims were significantly outside the time limits. The last act referred to in the Amended Grounds was on 25 May 2018. This was approximately eight months and two weeks ago. Thus, taking the last date when a complaint under the Equality Act could be made on the basis of 25 May 2018, this was 24 August 2018. The new claims would therefore be approximately five months and two weeks out of date.

Just and Equitable Consideration: Keeble Factors

16. It was not in my view just and equitable to extend time under s.123 (1) (b) Equality Act 2010. I made this decision by considering the guidelines set out in the case of *British Coal v Keeble* [1997] IRLR 336 which I refer to as the Keeble Factors.

17. **The Keeble Factor of prejudice to each party:** Mr. Ward submitted that the Claimant would lose his right to be heard. With respect, a greater prejudice will be suffered by the Respondents.

18. The Respondents would be put to significant cost because based upon the Original Claim Form, case management steps had taken place save for the exchange of witness statements and the production of the bundle. The list of documents had already been exchanged, copy documents had been exchanged, the list of issues had been prepared (which were now totally irrelevant) and the existing final hearing date would have to be vacated. In relation to the list of issues, Ms. Meredith submitted that the First Respondent had circulated these for agreement on 31 January 2019. The Claimant requested further time to respond but did not indicate at any time that he intended to issue the Amended Grounds. Ms. Meredith submitted that all these various stages, including the preparation of the list of issues had incurred the Respondents in time and money, which would have to be repeated. A new trial date would have to be listed but prior to that it would be necessary to have a further Preliminary Hearing. In fact.

19. In effect, the Respondents would have to start again.

20. This would include having to issue new Response Forms in the form of ET3s. These ET3s would have to deal with events which were alleged to have occurred over 8 months ago.

21. I accepted the submissions made by Ms Meredith. This application to amend was rejected because to allow it would be very prejudicial to the Respondents, requiring them to incur a considerable amount of costs and time. They would have to, in effect, start again. The work including Tribunal time and cost and therefore revenue from the public purse would have been totally wasted. It would, in my view, be contrary to the overriding objective to grant the Claimant's application to amend.

22. **The Keeble Factor relating to considering all the circumstances of the case:** As part of this factor, it was necessary to look at the cogency of the evidence. Six people from both the Respondents had been named in the Amended Grounds. Ms Meredith submitted that only one remained as a permanent employee of the Second Respondent and a second remained as an agency worker of the First Respondent, working for the Second Respondent. The other 4 named in the Amended Grounds were no longer with either the First Respondent or the Second Respondent.

23. It was my view that it would be prejudicial to the Respondents to have to locate these 4 people for the purposes of compiling witness statements. This would be costly. In terms of evidence gathering, Mr. Ward submitted that it was not long ago since the Claimant was working at the Second Respondent (namely, approximately twenty one month ago) so both the Respondents should still be able to locate relevant e-mails. I found it prejudicial to the Respondents when considering the amount of work they would have to do, including in relation to the gathering of evidence.

24. **The Keeble Factor relating to length and reason for the delay:** Mr. Ward submitted that after receiving the Tribunal letter dated 10 December 2018, the Claimant's daughter contacted Mr. Ward. It was only on 5 February 2019, however, that there was a meeting between Mr Ward and the Claimant which

culminated in the service of the Amended Grounds. They could not have met earlier, Mr. Ward explained, due to his busy diary.

25. I found that the Claimant had caused considerable delay in not issuing his Amended Grounds earlier and other than Mr. Ward's busy diary (which was not an acceptable reason for the delay), no adequate explanation for this had been provided.

26. **The Keeble Factor of steps taken to take legal advice:** The Claimant had access to legal assistance (whether through his daughter, who, although not professionally qualified in the law, had a law degree or through Mr. Ward). As Ms. Brown submitted (which I accepted) dealing with the complexities of the Agency Workers Regulations 2010 was a good indication of the Claimant's ability to deal with complex issues like discrimination. The Claimant was helped by his daughter who helped in the completion of the Original Claim Form. The Claimant's daughter was in turn supported by Mr Ward. Given therefore the availability of legal help, it was not just and equitable to extend time or indeed to allow this amendment at the eleventh hour.

27. **The Keeble Factor of promptness of the Claimant's actions:** Mr. Ward submitted that after 5 February 2019, the Claimant acted promptly by submitting the amendment on 7 February 2019. I find that the Claimant did not act promptly but rather, had acted all so last minute. Even the Tribunal did not get notice of the amendment until 2.05 pm on the day of the Preliminary Hearing. The Original Claim Form was submitted on 4th October 2018. The Claimant had his daughter's support who was in turn supported by Mr. Ward. The Amended Grounds could have been issued earlier.

28. It was not just and equitable to extend a time and this felt like an ambush for the Respondents. The First Respondent circulated a list of issues on 31 January 2019 but there was no mention to the First Respondent of the Claimant's Amended Grounds. All this cost the Respondents money. There was no explanation of the delay in the presentation of the Amended Grounds.

29. This was indeed not in line with the Presidential Guidance on General Case Management (2014). Paragraph 10 provides that in relation to an application for a Case Management Order:-

"Any such application should be made as early as possible."

30. For the aforementioned reasons, the Claimant's application to amend his Original Claim Form in line with the Amended Grounds was denied.

Cost Award Made Against the Claimant

25. Both representatives for the First Respondent and the Second Respondent made an application for costs against the Claimant under Rule 76 (1) (a) of the 2013 Regulations on the basis that the Claimant had acted unreasonably. Ms Meredith confirmed that the costs for the First Respondent were in the sum of £780. Although Ms. Brown had not full details on total costs incurred by the Second Respondent, she clarified that her brief fee was £1,000.

Because of the manner in which the Claimant had conducted himself, specifically by a way of issue of the Amended Grounds which bore absolutely no resemblance to the Original Claim Form, which had been served just a day before on the Respondents, I made an order for costs against the Claimant. This was done after I took evidence from the Claimant (on oath) in relation to his means. This was limited to a sum of £100 in favour of the First Respondent and £100 in favour of the Second Respondent. This is nominal considering the actual costs which the First and the Second Respondents incurred but given the circumstances of the case and the manner in which this case being conducted, it was right in my view that such an order be made.

Employment Judge Sharma

Dated: 18 February 2019

Judgment and Reasons sent to the parties on:

20 February 2019

For the Tribunal Office