EMPLOYMENT TRIBUNALS

Claimant: Mr I Shah

Respondent: Sky Retail Stores Limited

Heard at: **London South Employment Tribunal (by video)**

On: **26 January 2022**

Before: **Employment Judge Ferguson**

Representation
Claimant: In person
Respondent: Mr R Multani (legal executive)

JUDGMENT having been sent to the parties on ***11/10/22*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

BACKGROUND

1. The Claimant remains employed by the Respondent as a customer sales advisor.

2. By a claim form presented on 21 August 2020, following a period of early conciliation from 24 June to 24 July 2020, the Claimant brought complaints of discrimination on grounds of religion or belief and whistleblowing detriments. In the claim form the Claimant said "This discrimination and neglect has caused me a great deal of stress and anxiety and severely impacted on emotional wellbeing, to the point where I had to stop working… The neglect has continued during my sickness my first LTS call was on 01/05/20 but the sickness began on 21/09/18 which is about 7 and a half months."

3. Following a preliminary hearing on 20 April 2021 the Claimant provided further and better particulars of his claim on 24 May 2021.

4. At a further preliminary hearing before Employment Judge Smith on 4 March 2022 the Claimant indicated that he wished to pursue a complaint of disability discrimination. Employment Judge Smith determined that the original claim form did not include a complaint of disability discrimination. The reference to health was only as a consequence of the treatment the Claimant said he

received. The Claimant therefore required permission to amend. Employment Judge Smith ordered that the Claimant should send a written application to amend by 1 April 2022 and said "as a minimum" the application must specify a number of things, including identifying the disability, how long the Claimant had had the impairment, what the effects were on the Claimant's ability to undertake day to day activities, whether the Claimant received any medical treatment including medication and a description of the treatment complained of.

5. As to the whistleblowing detriments complaint, the list of issues set out by Employment Judge Smith identified that the Claimant relies on an alleged protected disclosure about a GDPR breach in March 2019. The Claimant says that he was subjected by his line manager, Mr Devathu, to the following detriments as a result of the protected disclosure:

   5.1. In March 2019, instructing the Claimant to return a uniform by the post office rather than by the Respondent's internal procedures;

   5.2. In approximately May 2019, failing to record a day's leave for the Claimant;

   5.3. On or about a date in May 2019, failing to provide a return to work document and/or conduct a return to work interview with the Claimant.

6. The list of issues identified a further alleged detriment relating to the conduct of the Claimant's grievance but the Claimant confirmed at today's hearing he does not pursue that allegation.

7. The question of whether the Tribunal has jurisdiction to consider the complaints in light of the applicable time limits was also identified as an issue.

8. Employment Judge Smith listed today's preliminary hearing to determine (1) the Claimant's application to amend his claim to include a complaint of disability discrimination and (2) whether all of part of the Claimant's case should be struck out, or whether a deposit order should be made, on the basis that it has no or little reasonable prospect of success.

9. On 11 March 2022 the Claimant submitted a one-page document entitled "Application to amend". It said:

> "Further to the Preliminary Hearing on 04/03/2022, I am writing to ask for a Permission To Amend claim form in order to change the category for my claim from Religious Discrimination to Other Type Of Complaint which I classify as mistreatment and victimisation. Also I would like to apply to include Disability Discrimination.
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> The reason for this is because I have been mistreated and believe there is a case to be heard, however I have submitted an incorrect category with Religious Discrimination. I am not legally trained and was advised to submit a claim on the grounds of Religious Discrimination by an union representative. However this would not be the correct category.
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> With regards to Disability Discrimination, I would like to include this to the case because I suffered from Stress and Anxiety due to the

complaints. This happened on 19/09/2019. I feel I was neglected and mistreated after this. An example of this is my complaint where the first welfare call was 7 months after I had been on leave due to work related stress and anxiety.

Also it relates to my treatment from the investigation manager David Holmes. During the investigation, it would be highly likely he knew I was suffering from long term work related stress. Despite this he used provocative and intimidating language during the grievance appeal meeting in January 2020."

10. At the start of the hearing the Claimant confirmed that, as indicated in his amendment application, he wished to withdraw the complaint of discrimination on grounds of religion or belief. It is therefore dismissed.

11. The following matters relating to the application to amend were clarified during the hearing:

    11.1. The Claimant says that the disability was depression, although there appear to have been related symptoms of anxiety, as is common. He says this started in May 2019 but he tolerated it until September 2019 when he saw his GP and was signed off work. He was prescribed anti-depressants and referred to therapy. He was unable to perform day to day tasks such as grocery shopping and became withdrawn, unable to sleep properly and was suffering from anxiety attacks. He said that according to his GP, as at January 2020 there was no prospect of him recovering in the near future and the symptoms would have carried on for 12 months at least.

    11.2. The Claimant seeks to add two complaints:

        11.2.1. Disability-related harassment. He says that during the grievance appeal hearing in January 2020 David Holmes used provocative and intimidating language, knowing of the Claimant's mental health issues. The complaint was put as follows in the Claimant's further and better particulars document submitted on 24 May 2021:

> "In the meeting he had made me feel anxious and was intimidating. This is because as a neutral investigator, instead of encouraging me to come forward with the truth, David used phrases such as 'be careful of what you say', 'abuse is a strong word', 'be careful because this can backfire on you'. Also 'You are dancing around the question' instead of accepting my response to his question."

        The Claimant confirmed in today's hearing he believed this conduct had the purpose or effect of violating his dignity or creating a hostile, intimidating, etc environment for him.

        11.2.2. The second complaint is of disability-related discrimination under s.15 of the Equality Act 2010. The Claimant says that he was off sick from September 2019 and did not receive any welfare-related contact from his line manager, Ram, until 1 May 2020. He says this "neglect"

was unfavourable treatment because he was off sick, and his sickness absence arose in consequence of his disability.

THE LAW

12. As confirmed by the Employment Appeal Tribunal in Vaughan v Modality Partnership [2021] ICR 535, the Tribunal has a broad discretion in determining applications to amend. The key test is that set out in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650:

> "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."

13. In applying that test, the Selkent[1] factors may be relevant, namely the nature of the amendment, the applicability of time limits and the timing and manner of the application. Other factors may also be relevant, depending on the circumstances of the case.

14. As to the applicability of time limits, in Abercrombie and others v Aga Rangemaster Ltd [2014] ICR 209 Underhill LJ, with whom the rest of the Court agreed, said:

> "…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 the old, the less likely it is that it will be permitted. It is thus well recognized that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted.
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> …
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> Mummery LJ says in his guidance in Selkent Bus Co Ltd v Moore [1996] ICR 836 that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a relabeling case – justice does not require the same approach."

15. Section 48 of the Employment Rights Act 1996 provides that an employment tribunal cannot consider a complaint of detriment because of a protected disclosure unless it is presented:

[1] [1996] ICR836

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

16. Ignorance or mistaken belief as to rights or time limits will not render it "not reasonably practicable" to bring a claim in time unless that ignorance or mistaken belief is itself reasonable. It will not be reasonable if it arises from the fault of the employee in not making inquiries that he or she should have made, or from the fault of the employee's solicitors or other professional advisers in not giving all the information which they reasonably should have done (Wall's Meat Co Ltd v Khan 1979 ICR 52). Trade union officials are considered skilled advisers in this context, so an action of a union adviser would be treated as attributed to the employee (Times Newspapers Ltd v O'Regan 1977 IRLR 101).

17. Pursuant to Rule 37 of the Employment Tribunals Rules of Procedure a tribunal may strike out all or part of a claim or response on the ground that "it is scandalous or vexatious or has no reasonable prospect of success."

CONCLUSIONS

Application to amend

18. I will deal with the appeal hearing allegation first. This allegation was not mentioned at all in the claim form, but was set out in the further and better particulars provided on 24 May 2021, albeit without specifying the type of disability discrimination alleged. The Claimant mentioned in that document being off work for stress and anxiety. Although depression is a different diagnosis it is common knowledge that there is often overlap between stress/depression/anxiety and I accept that the substance of the Claimant's complaint was set out on 24 May 2021.

19. By that stage, however, it was 16 months after the alleged harassment. The Claimant has not given any satisfactory explanation for the failure to mention this complaint in his claim form. It would be for him to show that it is just and equitable to extend the time limit and he has not done so. The fact that the complaint is out of time is not necessarily determinative, but in this case I consider it is a powerful factor. The Claimant says in his further and better particulars that the comments he complains of were not contained in the meeting minutes. The Tribunal would therefore need to determine this issue on the basis of the recollection of those present at the meeting. I am told that David Holmes left the Respondent's employment in January 2021. It may well be difficult, therefore, for the Respondent to defend the claim. In all the circumstances I consider the balance of injustice and hardship weighs against allowing the amendment.

20. As for the "neglect" allegation, all of the essential elements of this complaint were mentioned in the claim form, but the Claimant did not say that it amounted

to disability discrimination, rather the Claimant's ill health appeared to be relied upon as the consequence of the alleged discrimination on religious grounds.

21. I consider this is a clear example of "relabelling". The facts have been set out from the outset. It is also notable that after the further and better particulars the Respondent submitted an amended response which accepted that disability discrimination formed part of the claim. It simply requested further clarification.

22. The alleged "neglect" continued until the end of April 2020. Had this complaint been included in the claim form it would have been in time. The Respondent has known of the substance of it since the claim form was presented. I therefore do not accept the Respondent faces any significant prejudice in having to respond to this complaint.

23. I do accept that the timing and manner of the application are not ideal. In particular the Claimant did not comply with Employment Judge Smith's clear instructions about how to make the application to amend and what information to include. However I take account of the fact that he is not legally represented, and I do not consider the Respondent has been prejudiced to any significant extent because the complaint is now clear and is not expanded from the facts in the claim form. I will make orders today for the provision of a disability impact statement and medical evidence to be provided to the Respondent.

24. On this complaint therefore I conclude the balance of injustice and hardship falls in favour of allowing the amendment.

25. The amendment application is therefore allowed only to the extent of adding the "neglect" allegation as a complaint of discrimination arising from disability, as identified above.

<u>Whistleblowing detriments: strike-out/ deposit</u>

26. I must consider whether the whistleblowing detriments complaint identified by Employment Judge Smith has no or little reasonable prospect of success.

27. The Respondent submits that the complaints are out of time and the Claimant has no reasonable prospect of establishing that the Tribunal has jurisdiction to consider them.

28. It is important to note that the issue of jurisdiction was not listed as a preliminary issue for today, so the Claimant was not expected to produce evidence on the matter. I am considering only whether to strike out the claim or make a deposit orders, so I must take the Claimant's case at its highest.

29. The alleged detriments relate to the conduct of the Claimant's line manager Mr Devathu from March 2019 to May 2019. The ordinary time limit therefore expired, at the latest, in August 2019. The Claimant did not contact ACAS until 24 June 2020 and did not present his claim until 21 August 2020, a full year later. The Tribunal would only have jurisdiction, therefore, if the Claimant establishes that it was not reasonably practicable for him to bring his claim in time and it was brought within a further reasonable period.

30. The Claimant has never expressly asserted that it was not reasonably practicable for him to bring his claim or contact ACAS in time. He said today that his thinking at the time was that he would raise a grievance and wait for that to conclude. He was given the outcome of the appeal on 27 March 2020 and he contacted ACAS within 3 months of that date. He said that he took advice from a union representative in 2019 and tried to find out some information about Employment Tribunals online but it was confusing.

31. I note that the Claimant was at work during the period May to August 2019 and he submitted a lengthy grievance in July 2019. There was no impediment to him submitting a claim or contacting ACAS around that time. Even if he was unaware of the time limits, he had access to advice and there was nothing preventing him from finding out about them independently so any such ignorance was not reasonable. It is well established that waiting for an internal process to conclude does not in itself justify an extension of time under the "reasonably practicable" test (Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA). It is even less likely to justify an extension where, as here, it took eight months to conclude and the Claimant had access to advice during that period. Even if it was justified for the Claimant to await the internal process, there was no reason for him to wait a further three months after the appeal outcome before contacting ACAS. He said today that he was not well enough at that time to bring his claim. I note that in January 2020, however, he was still well enough to participate in the grievance appeal process. He would need very strong medical evidence to show that his depression suddenly deteriorated to the extent that it prevented him from contacting ACAS until June or bringing a claim until August 2020. Based on what the Claimant said today, the real reason for the delay appears to have been that he was proceeding on the basis that he had three months from the outcome of the grievance appeal to bring his claim. There is no real prospect of the Claimant establishing that that mistaken approach was reasonable.

32. The reasonably practicable test is a high threshold. In order to establish jurisdiction the Claimant would need to satisfy both limbs of the test, i.e. that it was not reasonably practicable to bring his claim within the ordinary time limit and that the claim was brought within a further reasonable period. For the reasons given above, I consider the Claimant has no reasonable prospect doing so. These complaints are therefore struck out.

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Employment Judge Ferguson
Date: 21 October 2022

Sent to the parties on
Date: 1 November 2022