Neutral Citation Number: [2022] EAT 184

Case No: EA-2020-000987-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 September 2022

Before :

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT

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Between :

MR A SHANKAR **Appellant**

v-

1) GENPACT (UK) LIMITED
2) GARTH JACKSON – SMITH
3) ASHISH WADHWA
4) MANOJ BAALEBAIL
5) DANIEL GOLDUP

Respondents

- -
- -

A Shankar the **Appellant** in person
The Respondents neither present nor represented

Hearing date: 6 September 2022

- -

JUDGMENT

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SUMMARY

Disability Discrimination & Jurisdictional / Time Points

The EJ rejected the Claimant's application to amend to plead indirect discrimination on three grounds**:** Firstly, that the amendment was only put in many months after the application. Secondly, the Claimant was legally represented by a distinguished law firm between 23 December 2019 and 10 February 2022, which gave plenty of time for the amendment to be put in. Thirdly, the respondents would be prejudiced by the amendment. The appeal was dismissed as there was no error of law identified in this Decision.

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JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. In this case Mr Shankar represents himself and he has put in a very helpful skeleton argument running to 17 pages. I gave him a 25 minute break during his oral presentation so that he could concentrate on the limited issues that are before me. The respondents to this appeal are not represented. In an email dated 1 August 2022 they indicated that they would not attend. Of course, I still have to find an error of law in the decision of EJ Glennie to allow this appeal.

2. The claim form was presented on 22 November 2019 and EJ Glennie accepted several amendments to it, but not indirect discrimination. The claimant brings claims of disability discrimination, section 15, and failure to make reasonable adjustments, direct race discrimination, harassment related to race, victimisation, public interest disclosure, detriment, automatic unfair dismissal, section 103A **Employment Rights Act**, breach of contract, unlawful deduction from wages and holiday pay. The claimant is sadly suffering from multiple medical conditions, as is clear.

3. The claim that is sought to be added by way of amendment is indirect discrimination, including (and I am summarising) requiring the claimant to work long and excessive hours in a pressurised work environment, requiring the claimant to work when he was suffering from disability related illness, assignment to a project which required the claimant to work in India but to follow India UK and Poland working hours, applying its standard appraisal criteria.

4. These factors are also raised under the heading section 64D, which was allowed under failure to make reasonable adjustments contrary to **Equality Act** section 21.

5. The decision of EJ Glennie, reached after a preliminary hearing held on 28 July 2020 by phone, sets out a series of general factors relating to the amendment, and I quote

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paragraphs 18 to 20 as follows, and the then goes on to specifics:

> **"18. With regard to the timing and manner of the applications, I make the following findings. On the one hand, as I have already observed, the case is at an early stage procedurally in the Respondents have not yet presented a response. Conversely, nearly eight months passed from the date when the claim form was presented and production of the latest version of the Grounds of Complaint. During that time the Claimant advanced 4 amended versions of the claim."**

6. I interpolate to say I think this is a very important feature.

> **"19. …Although the Claimant was unrepresented at the outset, he was able to formulate and amend an extensive pleading in November 2019. …The only amendment proposed with input from legal advice was that of January. I accept that the Claimant's health is likely to have made it more difficult for him to work on his claim, but again this evidently did not inhibit him from drafting an amending substantial Grounds of Complaint in November 2019 …**
>
> **20. It is also an unusual feature of the case that there have been 4 proposed amendments before the response has been presented."**

7. Then at paragraph 24.21 in relation to 64C specifically, he says:

> **"Although the amendment is put in terms of reliance on facts already pleaded, to support an additional cause of action, there is no apparent reason why this could not have been proposed at an earlier stage, in particular when the Claimant was legally represented in January, or in February. There would be hardship to the Respondents in allowing the scope of the claim to be expanded in this way, while any hardship to the claimant is mitigated by the fact that he remains able to present his case about these matters in the way he formulated it originally and (to the extent applicable) as allowed under paragraph 64B."**

8. So, the appeal was made against that and this came on the paper sift before HHJ Auerbach, who says in relation to this:

> **"The judge's points are fairly made. He properly took the view that the additional cause of action of indirect discrimination would materially add to what the respondents had to defend and that this was not a mere relabelling. Permission to present the application to amend is not the same as permission to amend."**

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9. This matter was then taken before HHJ Tucker who made an order staying the appeal, but giving permission on this one ground, many others having been withdrawn. She asked the employment judge to answer three questions: (a) whether he considered the fact that the request to amend to include a claim of indirect disability discrimination was included within the solicitor's correspondence on behalf of the claimant in January 2020; (b) whether he was aware that the claimant asserts those solicitors ceased to act for him by the time of the tribunal's response to that letter; and (c) if so, what the judge's reasons were for finding the permission to amend in respect of that claim would not be granted although no response has been lodged at the time the application to amend was raised and the claim relied on facts already pleaded.

10. It is very unfortunate that EJ Glennie did not in fact respond to those questions. Instead, he wrote (page 171) on 5 July saying that his provisional view is that he should allow the amendment to include a complaint of indirect discrimination and that this would be consistent with his decision to allow the other amendments sought in January 2020. He then asked for the observations of the parties.

11. The respondent represented by Deloitte Legal, wrote on 7 July 2022 objecting and pointing out that:

> **"Whilst the Claimant's solicitors suggested that a claim of indirect discrimination may be brought, no such claim was in fact brought on 7 January 2020 nor in a revised Grounds of Complaint filed by the Claimant in February 2020. On 10 February 2020 EJ Glennie ordered the Claimant to file a new application to amend the claim no later than 24 February 2020 and to send in a single draft incorporating all amendments sought to date. The Grounds of Complaint as filed on 24 February 2020 in compliance with this order did not include a claim of indirect discrimination. This claim was introduced by way of further amendment in advance of the preliminary hearing on 28 July 2020."**

12. The matter then went back to EJ Glennie who wrote on 27 July saying that he had decided to review his decision:

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> **"At that stage it appeared to me I might have inadvertently made inconsistent decisions regarding paragraph 64B and 64C, and I expressed the provisional view in favour of allowing the amendment after all. With the assistance of the parties' written submissions, I am satisfied that I intended to make different decisions regarding the two paragraphs and there is a distinction to be drawn between them. In the circumstances, and having regard to the importance of finality in justice, I have concluded I should not revisit the order or seek to re-exercise the discretion which I exercised in making the order in the first instance."**

13. I have only jurisdiction to overturn the decision of EJ Glennie if I find an error of law. It is important to note that the letter from Irwin Mitchell in January did not include an indirect discrimination complaint. All it said was that "we wish to apply to plead claims of indirect disability discrimination", so that the reality is that the period to be looked at is from the entering of the original application, 22 November 2019, until 17 July 2020.

14. I take the relevant chronology from Mr Shankar's helpful skeleton argument. He says on 23 December he was able to get legal help from Irwin Mitchell. Louise Butt from that firm was on leave for two weeks from 24 December 2019. The tribunal granted an extension only until 7 January 2020 to send in his amended claims. Molly Patterson for Irwin Mitchell submitted the letter to provide a further extension of deadline to submit amended claim. Irwin Mitchell then requested the decision on the extension for the deadline to submit the claim. EJ Glennie responded to the request on 10 February, but this was (as he puts it) "the last working day for Irwin Mitchell's engagement with the claimant's employment tribunal matter."

15. On 10 February 2020, EJ Glennie directed the claimant to send to the tribunal any application to amend by 24 February. Considering the tribunal did not respond to the claimant's request for an extension, the claimant went ahead and submitted his amended claim on 24 February 2020. That included a request that he should be allowed to update his complaints after receiving legal guidance.

16. He did "obtain legal guidance from a counsel in July 2020". He described him as a senior

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counsel, and it was Anthony Korn of No.5 Chambers. Then on 28 July 2020, the claimant made the application, and he was represented by Mr Wright of counsel to amend at a preliminary hearing before EJ Glennie.

17. It falls to me to decide only whether there was an error of law. The tribunal directed itself by reference to the leading case of **Selkent Bus Company v Moore** [1996] ICR 836. I have also been referred in the claimant's skeleton argument to **Vaughan v Modality Partnership** UKEAT 0147/20/BA, which does not really go beyond the principles in **Selkent**.

18. It seems to me that there were grounds for the judge to decide as he did. They are really threefold. Firstly, that the amendment was only put in on 17 July, although it had been mentioned that an application would be made before then. Secondly, he was legally represented by a distinguished law firm between 23 December 2019 and 10 February 2022, which gave plenty of time for the amendment to be put in. Thirdly, the respondents would be prejudiced by the amendment. It seems to me that there is no error of law in that, nor is the conclusion perverse so that the decision should stand.

19. It follows that I dismiss this appeal. I should say that the claimant raised several other issues in his submissions which do not fall within my jurisdiction and I have not dealt with them in this judgment.

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