



EMPLOYMENT TRIBUNALS

At an Open Preliminary Hearing

Claimant: Mrs N Hulait

Respondent: Leicestershire Partnership NHS Trust

Heard at: Midlands (East) Region by Cloud Video Platform

On: 15 June 2023

Before: Employment Judge M Butler (sitting alone)

Representation

Claimant: Ms T Jones, Counsel

Respondent: Mr J Heard, Counsel

RESERVED JUDGMENT

The Claimant's application to amend the claim is granted in part and refused in part as set out in the Judgment below.

RESERVED REASONS

Background

1. The Claimant presented her Claim Form to the Tribunal on 13 July 2022 bringing claims of disability discrimination and arrears of pay. There was a preliminary hearing for case management purposes before me on 7 November 2022 at which I ordered that there be a further preliminary hearing to determine whether the Claimant was disabled by virtue of a number of conditions in addition to type 1 diabetes, which had already been conceded as a disability by the Respondent. That preliminary hearing took place on 30 March 2023, by which time the Respondent had conceded that the Claimant was also disabled by virtue by asthma, anxiety and depression, ADHD and bronchiectasis but not by reason of emotionally unstable personality disorder. Judgment was given accordingly.
2. Prior to the preliminary hearing, on 21 February 2023 the Claimant applied to amend her claim which it was proposed to hear at the preliminary hearing on 30 March. Unfortunately, the format of the application to amend did not include amended particulars of claim which had been highlighted in some way so as to make it clear precisely which amendments were being made. I ordered that a further amended claim be submitted so that the amendments

were readily discernible and listed the application to be heard at this Hearing.

3. It is fair to say that the consideration of the amended particulars of claim was particularly complicated. I am grateful to Mr Heard for attempting to set out those claims which have actually been amended, added to or withdrawn. His analysis was not challenged by Ms Jones, and I rely on it.

The Law

4. In determining the Claimant's application to amend, I have had regard to the Judgment in ***Selkent Bus Co Ltd v Moore [1996] IRLR*** and in particular consider:
 - (i) all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
 - (ii) whether the nature of the amendment reveals the addition of factual details to existing allegations and is essentially a relabelling exercise or whether the amendments amount to entirely new factual allegations.
 - (iii) whether time limits should be taken into consideration; and
 - (iv) the timing and manner of the application.
5. I have also considered the Presidential Guidance on General Case Management which distinguishes between adding or substituting a new claim arising out of the same facts as in the original claim and amendments which add an entirely new claim.
6. Many authorities have been cited during this application. I note here those which I have considered to be of particular relevance in determining the application:
 - (i) ***The Housing Corporation v Bryant [1998] ICR 123***: There must be some linkage demonstrated in the original pleading between the claim and the facts pleaded to avoid falling foul of a conclusion that the amendment constitutes a new claim.
 - (ii) ***Ali v Office of National Statistics [2005] IRLR201***: Considering an application to amend involves the overriding test of the balance of justice and hardship; a claim brought under one piece of legislation does not cover every possible head of claim under that legislation; and a claim of direct discrimination does not include circumstances giving rise to an indirect discrimination claim.
 - (iii) ***Reuters Ltd v Cole [UKEAT/0258/17]***: An application to add Sections 13 and 19 EqA to claims under Sections 15 and 21 involved more stringent tests and was not a mere relabelling exercise.
 - (iv) ***Vaughan v Modality Partnership [UKEAT/0147/20]***: In deciding an application to amend, the factors as set out in ***Selkent*** should be taken into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment.

- (v) ***Kuznetsov v The Royal Bank of Scotland [2017] EWCA Civ 43***: The factors identified in ***Selkent***, as well as all of the circumstances relating to the application to amend, must be considered in balancing the injustice and hardship.
- (vi) ***New Star Asset Management Holdings Ltd v Evershed [2010] EWCA Civ 870***: Amendments will be allowed if they do not raise any materially new factual allegations.

Submissions

7. Both Counsel presented written submissions. Mr Heard supplemented his written submissions with oral submissions and Ms Jones responded with her own brief oral submissions. I do not rehearse here those detailed submissions but confirm that I considered them fully in reaching my decision.

Discussion and Conclusions

8. Dealing with so many substantial amendments is not an easy or straightforward exercise. However, it is the Claimant's right to seek to amend her claim and the Respondent's right to oppose those amendments. I do take into consideration the fact that the Claimant has throughout this litigation been represented by solicitors. Some of the amendments should have been anticipated by the Respondent and they have largely done so. The application to amend was made somewhat late in the day, bearing in mind the date the original claim was presented. Some of them, notably the amendments to the indirect discrimination claim, would require yet more particularisation in order to be adequately responded to. Other amendments are opposed by the Respondent because they do not rely on the same originally pleaded facts. In the main, I agree with the Respondent but not in every case.
9. The Claimant submitted her original claim and the Respondent responded to it. The response was comprehensive insofar as the pleaded facts were particularised and linked to the claims in such a way as to permit a detailed response. There are now so many allegations which will inevitably mean that the Respondent will be put to additional expenditure in terms of time and cost in being able to properly reply to those amendments which are granted. I say at this point that the balance of hardship and injustice in allowing the amendments will rest firmly with the Respondent. There are two reasons for this. Firstly, it is inevitable that further instructions will need to be sought from witnesses and, secondly, in refusing the application to amend, the Claimant will still have a substantive claim against the Respondent. Accordingly, there will be far less hardship and injustice to the Claimant in refusing the application.
10. Of the factors which I must consider in determining this application, the nature of the amendment figures quite highly. Many of the claims pleaded in the amended application could and should have been pleaded originally. Further, the application to amend could have been made much sooner and in the conventional form which, in respect of the format of the application, would have obviated the need for this further hearing.
11. The amendments are so far ranging that it would be disproportionate in terms of time to consider all of the circumstances and the relevant factors in relation

to every single one. Accordingly, I determine that the most reasonable way of giving my decision in respect of each of the amendments is to incorporate a schedule and append to this Judgment a copy of the amended particular of claim for easy reference. As can be seen, I have started with those amendments which the Respondent does not oppose, and which have therefore been granted without further consideration. The reference to paragraph numbers relates to paragraph numbers in the appended amended particulars of claim. Following on from those amendments which are not opposed are sections incorporating those amendments which were opposed and are refused and, finally, those which were opposed but are granted.

SCHEDULE

12. **Amendments granted without opposition**

Typographical/grammatical changes and the inclusion of words in the background narrative are granted in regard to the following paragraphs:
3, 3.2, 3.4, 3.5, 4, 7, 9, 12, 13,14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 39.9, 40, 41, 42, 43, 43.1, 43.2, 48.2, 49.1, 49.2, 52 and 77.1

13. **Amendments granted by consent**

Paragraphs 65.11 to 65.15
Paragraph 72
Paragraph 73
Paragraph 65
Paragraphs 26 to 29
Paragraphs 33 to 36
Paragraphs 72 and 73
Paragraph 75.21
Paragraph 75.26
Paragraph 78
Paragraphs 24 and 25

14. **Amendments opposed by the Respondent which are refused**

Paragraph 55:
The matters relied upon relate to the period before presentation of the claim, should have been included in the original claim and therefore constitute new claims.

Paragraph 56:
This relates to the period before presentation of the claim and since it was not originally pleaded is now a new claim.

Paragraph 57:
Since this refers to 6 October 2021, which is before the claim was originally presented, it is a new claim.

Paragraphs 58.1 to 58.3:
This relates to a period which seemingly overlaps the period before presentation of the original claim and after it. It is a new claim.

Paragraphs 59 and 60:

Whilst no dates have been pleaded, they seem to relate to the period before presentation of the original claim and are new claims.

Paragraph 65.2:

This is a new claim which could have been brought within the original claim.

Paragraphs 65.5 to 65.7, 65.9 to 65.10:

These allegations relate to a period before presentation of the original claim and are therefore new claims.

Paragraphs 67 to 67.1:

The factual basis for this claim was known to the Claimant before presentation of the claim which could have been pleaded at that point and is therefore a new claim.

Paragraph 68:

The facts now claimed are totally different to those originally claimed such as to make this a new claim.

Paragraphs 69.1 to 69.3:

These are new claims in that the original claim was silent on the PCPs and the Claimant would have known of what she now alleges prior to presenting her claim. It is therefore a new claim.

Paragraph 70:

In that this amendment now seeks to rely on facts not previously pleaded, it is a new claim.

Paragraph 71:

This is a new claim as per paragraph 70 above.

Paragraphs 75.22 to 75.25

These paragraphs are unclear, and it is not clear which periods of time the allegations relate to. They are therefore new claims.

Paragraph 76:

I agree with the Respondent that the Claimant is here seeking to add a further 11 reasonable adjustment claims which are not clear and relate to periods before presentation of the original claim. They are therefore new claims.

Paragraph 77.1:

This is a new claim because it was known to the Claimant before she presented her original claim.

15. **Amendments opposed by the Respondent but granted**

Paragraph 30:

I consider it to be clear that this largely relates to post presentation time periods.

Paragraph 31:

There is in my view sufficient reference to facts relied upon so as to constitute relabelling rather than new claims.

Paragraphs 32, 54 and 55:

This is a relabelling of the original claim with sufficient information in it for this to constitute relabelling.

Paragraph 58.4:

The allegations here clearly related to those made in the original complaint and are not new claims.

Paragraph 65.1

It is clear from the narrative in the original claim precisely what was being complained about such that this is not a new claim.

Paragraph 19 (arrears of pay)

I consider that it was perfectly clear what the arrears pay referred to, namely, being put on half pay. This would have been readily apparent to anyone with any experience of public sector claims, and it is not a new claim but a relabelling exercise.

16. Leaving the schedule at this point, I must address the issue relating to time limits and continuing acts. This is not a matter which should be considered at this stage but one which should be considered by a full panel at the final hearing. In my view, there is a reasonably arguable case, and I put it no higher than that, which should properly be determined at the final hearing.
17. As this Judgment has affected the timetable for the final hearing, I have separately made further Case Management Orders.

Employment Judge M Butler

Date: 6 July 2023

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