



EMPLOYMENT TRIBUNALS

Claimant: Leonardo Wolfe

Respondent: Taka Mayfair Ltd

Heard at: London Central Employment Tribunal **On:** 16th August 2023
by Cloud Video Platform

Before: Employment Judge Gidney

Appearances

For the Claimant: Mr Wolfe (in person)

For the Respondent: Mr Stephens (Counsel)

AMENDMENT APPLICATION JUDGMENT WITH FULL REASONS

The Judgment of the Tribunal is that:

1. The Claimant's application to amend his Particulars of Claim, to include claims of:

1.1. indirect disability discrimination; and,

1.2. breach of the right to be accompanied to a disciplinary hearing,

is refused.

REASONS

Background to the Amendment Application

1. The Claimant was employed by the Respondent as Head Sommelier / Manager, from 21st December 2022 until 21st January 2023, accruing one month's service. He notified ACAS of a dispute with the Respondent on 25th January 2023 and obtained his Early Conciliation certificate on 2nd February 2023. By a Claim Form presented on the same day, 2nd of February 2023 [44]¹, the Claimant presented claims of:
 - 1.1 Unfair dismissal;
 - 1.2 Disability discrimination;
 - 1.3 Failure to pay notice pay.

2. At a Case Management Hearing before Employment Judge Plowright on 18th May 2023 [83] the Claimant's notice pay claim was dismissed upon withdrawal by the Claimant, upon the Claimant's confirmation that he had been paid his notice pay. The Judge then ordered the Claimant to pay a deposit of £5.00 for each of his claims of (i) unfair dismissal, (ii) direct disability discrimination and (iii) harassment related to disability.

3. On 12th June 2023 the Claimant made one single payment of £5.00 as a deposit payment. In his application to amend his claim dated 20th May 2023 [3], the Claimant confirmed that the £5.00 deposit was to be paid in respect of his claim of disability related harassment. He confirmed that again to me today.

4. Accordingly the Claimant's claim of (i) automatic unfair dismissal / ordinary unfair dismissal and (ii) direct disability discrimination are dismissed on the grounds of the Claimant's non-payment of a deposit. This was confirmed by way of separate Judgment issued at that time.

¹ All numbers in brackets refer to pages within the Agreed Preliminary Hearing Bundle.

The Amendment Application.

5. On 20th May 2023 [2] the Claimant made an application to amend the Claim Form that he had presented on 2nd February 2023 by the addition of two new claims:

- 5.1 Indirect Disability Discrimination s19 **Equality Act 2010** ('EqA');
- 5.2 Breach of the Right to be Accompanied at a disciplinary / grievance meeting (s10 **Employment Relations Act 1999**).

6. The Claimant made his application with candour and honesty, for which he is to be commended.

The Applicable Law

7. The applicable law in considering applications to amend a Claim Form are as follows:

- 7.1 Where an amendment is required, the leading case is **Selkent Bus Company Ltd v Moore** [1996] IRLR 661, in which it was held that when considering an amendment, the following are relevant factors: (i) the nature of amendment, (ii) the applicability of time limits, and (iii) the timing and manner of the application.
- 7.2 The EAT confirmed in **Vaughan v Modality Partnership** [2021] ICR 535 that having considered the relevant factors (which are not limited to those identified in **Selkent**) Tribunals must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it and make our decision accordingly. This requires consideration of '*the real practical consequences of allowing or refusing the amendment. 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' (para 21).

- 7.3 HHJ Taylor went on (in para 22): *'Refusal of an amendment will self-evidently 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. 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.'*
- 7.4 Another factor that can be considered is the merits of a claim. However, where there is a factual dispute between the parties, a Tribunal taking the merits into account must guard itself against the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored. This can be achieved, for the purposes of considering the amendment application, by taking the applicant's evidence at its highest.
- 7.5 What is required is a focus on the substance of the amendment and the extent to which it gives rise to, on the one hand, minor or technical amendments at the low end of the spectrum, or a wholly new allegation raising altogether new matters not previously raised at the other end of the spectrum: **Abercrombie & Ors v AGA Rangemaster Ltd** [2013] ICR 213, CA.
- 7.6 The Tribunal must have regard to the timing and manner of the application. The Tribunal must have regard to the relevant time limits and, if the new claim is out of time, to consider whether the time should be extended under the appropriate statutory provision. In **Galilee v Commissioner of Police of the Metropolis** [2018] ICR 634, it was confirmed that the Tribunal is able to allow an application to amend

subject to the time limits issue being resolved at the final hearing, albeit it is not obliged to do this.

- 7.7 Different types of discrimination claim (for example direct or indirect discrimination) are different claims and amendments to plead new discrimination claims are likely to be refused on the grounds that they seek to introduce entirely new claims: **Ali v Office of National Statistics** [2005] IRLR 201 and **Harvey v Port of Tilbury (London) Ltd** [1999] IRLR 693, EAT.
- 7.8 A cause of action is a set of facts that give rise to a legal remedy. The focus needs to be upon the facts that are alleged. If an amendment is in effect no more than or little more than applying a different legal label to the same set of facts, it is not a fresh cause of action; it is identifying rather a different way of looking at precisely the same facts for the convenience of the court and to enable justice to be done: **Redhead v London Borough of Hounslow** [2011] UKEAT/0409/11.
8. I shall take each of the Claimant's proposed amendments in turn.

Indirect Discrimination

9. In respect of the application to amend the claim by adding a claim of indirect discrimination, the Claimant relied on a practise of the Respondent not to recruit staff who are receiving treatment for their mental health. His application to amend **[3]** stated:

'Mr Taji Maruyama, my manager and the co-owner of the Respondent's business, made repeated remarks that he would not have employed my predecessor, Mr Vitalijus Salagubus had he known that Mr Salagubus was allegedly receiving mental health treatment. ... By Mr Maruyama repeatedly stating that he would not have employed Mr Salagubus had he known about his treatment, it was made clear that this was in fact PCP which would be applied to anyone in my role as Manager and Head Sommelier, if not to all employees.'

10. Section 19 **EqA** states:

- 19(1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to the relevant protected characteristics of B's.*
- 19(2) *For the purposes of subsection 1, a provision, criterion or practice is discriminatory in relation to the relevant protected characteristic of B's if:*
 - 19(2)(a) *It applies or would apply to the persons with whom B does not share the characteristic,*
 - 19(2)(b) *It puts a would put persons with whom B shares the characteristic, at a particular disadvantage with compared with persons with whom B does not share it,*
 - 19(2)(c) *It puts, a would put B at that disadvantage, and,*
 - 19(2)(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

11. The provision, criterion or practice ('PCP') relied on in the amendment application is the practice of not recruiting staff who are receiving treatment for their mental health. This is certainly capable of amounting to a PCP for the purposes of s19 **EqA**, and it would be a practice that would put applicants for employment with the Respondent, who share the Claimant's characteristic of depression, at a particular disadvantage, thus satisfying s19(2)(b) **ERA**.

12. The difficulty, however, lies with the application of s19(2)(c) **ERA**. This requires the Claimant to establish that the PCP, as well as putting other applicants for employment who were receiving treatment for their mental health at a particular disadvantage, also put him at the same disadvantage. However, taking the Claimant's own evidence at its highest, he candidly accepts that he was recruited for the role. The Claimant also accepted in making the application to amend his Claim that the Respondent never knew that he suffered from depression during the entire period of his employment, including its termination. This means that the practice of not recruiting staff who are receiving treatment for their mental health did not put the Claimant at that particular disadvantage, or indeed any disadvantage. On his own case the Claimant cannot satisfy s19(2)(c) **EqA** and this claim, if allowed to proceed by way of amendment, would be doomed to fail.

13. In weighing up the balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it and in considering the real practical consequences of allowing or refusing the amendment, it strikes this Tribunal that there can be no injustice or hardship to an applicant in refusing an amendment application, if taking their evidence at its highest, it is bound to fail. Indeed, stopping such a claim at this stage will avoid the time and costs incurred by both parties in pursuing a claim that cannot possibly apply to the Claimant. Conversely, if it is allowed the Respondent will be put to additional costs and potentially a longer hearing if such a hearing is burdened with additional claims that cannot succeed.
14. In the circumstances, it is clear that it would not be appropriate to amend a Claim Form to include a claim that is misconceived, and for this reason, the application to include the indirect discrimination claim is refused. For completeness, the Tribunal's judgment on the other factors relevant when considering amendment applications is as follows:
15. Whilst the original Claim Form did present complaints of direct disability discrimination and harassment related to disability, a claim of indirect discrimination is an amendment of substance. It is not a minor or technical amendments at the low end of the spectrum. It is a wholly new allegation raising altogether new matters not previously raised. This point counts against allowing the amendment.
16. Having regard to the timing and manner of the application, the Tribunal notes that the original Claim Form was presented on 2nd February 2023 and the amendment application made on 20th May 2023, over three and a half months later. The Claimant raised the possibility of amending his claim at the first case management conference on 18th May 2023, and thereafter following the Tribunal's directions for making the application. In the circumstances the issue of the timing of the application would not have caused this Tribunal to refuse the application to amend. However, the relative speed in which it was made, whilst

the case was still in the early stages of case management, does not resolve or outweigh the issue of the merits of the application.

17. Finally, there is no reasonable basis for asserting that the amendment is no or little more than applying a different legal label to the same set of facts; it is a fresh cause of action with different considerations, liabilities and different defences. In his Claim Form [49-50] the Claimant, at section 8.1 of the ET1, ticked the box to claim that he had been discriminated against on the ground of his disability. In box 8.2 he particularised that claim in the following way:

'At the start of employment and throughout, Mr Maruyama made repeated references to my predecessor, Vitalijus Salagubus, allegedly receiving treatment for depression. ... Mr Maruyama's comments were extremely discriminatory towards him, implying that if he had known that he was receiving treatment, he would not have employed him.

... As a result I felt unable to discuss how he [Mr Maruyama] was making me feel for fear of losing my job. I also feel that after the second occasion of seeing me upset, in such a short period of time, he discriminated against me in dismissing me the next day'.

18. The first paragraph above is relied on by the Claimant as a claim of disability related harassment. Employment Judge Khan required a deposit be paid as a condition that this claim progressed, which the Claimant duly paid. The second paragraph raises a complaint of direct disability discrimination.
19. The reference to the view that Mr Marujama had of Mr Salagubus (that the Claimant says should be *implied* from what he was saying) does not raise or suggest an indirect discrimination claim. The Claimant asserted in his oral submissions that he ticked the 'disability discrimination' box at section 8.1 of his ET1 in the belief that he could then set out an indirect discrimination claim, however no such claim was set out or elaborated upon in section 8.2.
20. For all of the above stated reasons the application to add a claim of indirect disability discrimination is refused.

The Right to be Accompanied.

21. The Claimant's second amendment application is to amend his Claim Form to add a breach of the right to be accompanied claim, contrary to s10 **Employment Relations Act 1999**. The section states:
- 10(1) This section applies where a worker*
10(1)(a) Is required or invited by his employer to attend a disciplinary or grievance hearing, and,
10(1)(b) Reasonably requests to be accompanied at the hearing.
22. Thus there are two gateway requirements to be satisfied for the right statutory right to be accompanied to be engaged. The first is an invitation to a disciplinary or grievance hearing. The second is that the employee requests to be accompanied at the hearing.
23. In respect of the first qualifying requirement, the Respondent says the meeting was a performance review meeting and not a disciplinary or grievance meeting, such that s10 was not engaged. The Claimant disputes this, as the meeting resulted in his termination of employment. Whilst the resolution of this is a matter of evidence, I have approached this application taking the Claimant's case at its highest. This point alone would not have acted against allowing the amendment.
24. However the second qualifying requirement is that the Claimant asks to be accompanied to the meeting. With commendable honesty, the Claimant accepted that he made no such request. This means that the statutory right to be accompanied was not engaged. On his own case the Claimant cannot satisfy s10(1)(b) of the **Employment Relations Act 1999**.
25. In weighing up the balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it and in considering the real practical consequences of allowing or refusing the amendment, it strikes this Tribunal that there can be no injustice or hardship to an applicant in refusing an amendment application, if taking their evidence at its highest, it is bound to fail.

26. Indeed, stopping such a claim at this stage will avoid the time and costs incurred by both parties in pursuing a claim that cannot possibly succeed, given the Claimant's acceptance that he did not ask to be accompanied. Conversely, if it is allowed the Respondent will be put to additional costs and potentially a longer hearing if such a hearing is burdened with additional claims that cannot succeed.
27. This claim, if allowed to proceed by way of amendment, would be doomed to fail, and accordingly the application to amend the Claim Form to include it, is refused.

Conclusion.

28. In all of the circumstances, whether by withdrawal by the Claimant, non-payment of a Tribunal ordered deposit or this refusal of an application to amend, the Claimant's claim proceeds as a claim for harassment related to disability only, which shall be determined in accordance with the directions given at the Case Management Hearing conducted on 16th August 2023.
29. The summary of that claim, and the issues it raises, are as follows:
30. The Claimant commenced employment with the Respondent on 29th December 2022 in the role of Head Sommelier / Manager. He was dismissed on 21st January 2023, some three weeks later. The Respondent asserts that the reason related to the Claimant's performance.
31. It is the Claimant's claim to the Tribunal that on his first day, 29th December 2022, at a café away from the workplace Mr Maruyama told the Claimant that he would not have recruited Mr Salagubus had he known that he was receiving treatment for his mental health. The Claimant asserts that on two or possible three more occasions during the remainder of his three weeks of employment, Mr Maruyama repeated the same comment, always in a one to one situation.

32. The Claimant could not recall when or where the additional comments were made. The Claimant says that he found the comments to be offensive and capable of amounting to disability related harassment. The Respondent denies that the comments were made.
33. The Claimant notified ACAS of dispute with the Respondent on 25th January 2023 and obtained an Early Conciliation certificate on 2nd February 2023. He presented his Claim Form on the same day, the 2nd February 2023. The Claimant is making one complaint of harassment related to disability, contrary to s26 Equality Act 2010.
34. The issues the Tribunal will decide are set out below. Did the Respondent do the following things:
 - 34.1 On 29th December 2022, at a café away from the workplace, did Mr Maruyama tell the Claimant that he would not have recruited Mr Salagubus had he known that he was receiving treatment for his mental health.
 - 34.2 On two or possibly three more occasions during the remainder of his three weeks of employment, did Mr Maruyama repeat the same comment, always in a one to one situation?
 - 34.3 If so, was that unwanted conduct?
 - 34.4 Did it relate to disability?
 - 34.5 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
 - 34.6 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
 - 34.7 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Case Number: 2200850/2023

25th August 2023

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Employment Judge Gidney

Written Reasons prepared on 12th December 2023

Sent to the Parties on:
12/12/2023

For the Tribunal: