



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Williams

**Respondent:** ATS Euromaster Ltd

**Heard at:** Birmingham in public by CVP

**On:** 17 November 2023

**Before:** Employment Judge Wright

**Representation:**

Claimant: In person

Respondent: Ms Brown, solicitor, Shoosmiths

## JUDGMENT

1. The claimant's application to extend time to submit his claim for indirect disability discrimination and failure to make reasonable adjustments succeeds.
2. The claimant's application to re-label his claim to one of constructive unfair dismissal succeeds.
3. The claimant's application to re-label his claim to include a claim that he has suffered deterrents for asserting a statutory right succeeds.

**Issues**

4. This was a preliminary hearing to consider the claimant's application to amend his claim. The initial application was made on 12 October 2022.
5. The claimant confirmed this was an amendment to bring a claim for disability discrimination. The claimant's disability is type 1 diabetes and thus controlled by medication.
6. The claimant confirmed at the hearing on 17 November 2023 that his claim was for indirect discrimination and a failure to make reasonable adjustments and that his dismissal was discriminatory.

*Indirect Discrimination*

7. The provision, criteria or practice (PCP) relied upon was the practice of being required to regularly work through lunch breaks and to work long hours, putting the claimant and those who share his disability at a particular disadvantage compared to those that do not.
8. The claimant relies on a hypothetical comparator, that being someone with no material differences to the claimant who does not have type 1 diabetes.

*Failure to make reasonable adjustments*

9. Regarding the claim for failure to make reasonable adjustments, the adjustments sought were:
  - 9.1 Appropriate breaks, including lunch breaks to help regulate his diabetes (ongoing)
  - 9.2 Working regular hours, enabling him to take his overnight insulin medication at home with his evening meal as required to regulate his diabetes (ongoing)
  - 9.3 Not dismissing him (constructive dismissal)
10. The claimant also mentioned his resignation letter in his original ET1 form and in his application to amend. It was clarified that the claimant was seeking to re-label his claim to include that his dismissal was unfair (and discriminatory).
11. The claimant also mentioned in his ET1 form that he had suffered detrimental treatment for complaining about working through breaks. His application was therefore to re-label his claim to include a claim that he had suffered detriments for asserting a statutory right to a break, by being threatened by his manager with the loss of his role. The claimant also confirmed that when he (and others) had tried to raise the issue of not being given breaks, in response they were deliberately given extra work, exacerbating the situation.
12. The claimant confirmed that his claim is that he had been forced to resign because the respondent had continued to fail to make reasonable adjustment to his working hours to enable him to have breaks to manage his insulin levels and had continued to require him to work excessive hours late into the evening (above and beyond any requirement to work reasonable additional hours stipulated in his contract). This was unreasonable and meant that he was unable to take his overnight insulin at a regular time with his evening meal and thus effectively manage his diabetes.
13. It was clarified that the issues in respect of this hearing were therefore the claimant's application to amend his claim to include a claim for disability discrimination as set out above, that his dismissal was unfair and discriminatory and that he had suffered detriments for asserting a statutory right to a break.

**Law**

14. The Tribunal has a general discretion to allow applications to amend a claim.

15. In determining whether to allow the application to amend the claim, I have borne in mind 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, and the primary case authority of *Selkent Bus Company Ltd v Moore* [1996] ICR 836. Both the Presidential Guidance and the Selkent case direct that regard should be given to all the circumstances and, in particular, any injustice or hardship which would result from the amendment or the refusal to amend.

#### *Discrimination*

16. There is a time limit for claims of disability discrimination to be issued to the Employment Tribunal. In this case, the claimant is stating that conduct extended over a period and as such is to be treated as done at the end of the period. As the claimant is stating that the last act of discrimination was his dismissal, the time limit is 3 months less 1 day from the effective date of termination of 18 September 2021. This is extended in a variety of ways by the requirement to obtain an Early Conciliation Certificate from ACAS before filing a claim. The test for discrimination claims is whether it is 'just and equitable' to extend time to permit the claim to proceed (s.123 Equality Act 2010). I have made no findings as to whether the claimant's claims are to be considered a continuing act. If the respondent is arguing to the contrary, this will be an issue for the final hearing.
17. It is not disputed that the claimant's claims for disability discrimination are out of time. It was also common ground that his disability, type 1 diabetes, and a complaint of discrimination had not been mentioned in the ET1 form. An application to amend a claim can be made at any time in proceedings. The Tribunal has the discretion to extend time to bring a claim for discrimination on the grounds that it is 'just and equitable' to do so. This discretion is wide and exercised based on the specific circumstances of the case.

#### *Re-labelling*

18. Following preliminary discussions at the start of the hearing, the claimant's claims that he has suffered detriments and that his dismissal was an unfair dismissal are both being pursued on the grounds that they are an application to re-label his claim.
19. To be considered a 're-labelling' the claimant has to be amending something that is linked to the original claim or arises out of the original claim. The facts of the claim do not alter, but they are being given a new label.

#### **Evidence, submission and findings**

20. I was provided with a 70-page bundle, written submissions on behalf of the respondent, and, from the claimant a written witness statement from Ethan Barton and Reece Shackles and a document labelled Annex A regarding MOT log in times as evidence of working through breaks.

21. As the claimant had not produced a witness statement for the purposes of this hearing, it was agreed that his ET1 form and his application to amend his claim would stand as his witness statement and that he would be called to give oral evidence. The respondent's representative took a pragmatic approach that it was necessary to hear evidence from the claimant and so did not object to this approach.
22. The claimant's evidence was that his original resignation letter, mentioned in his ET1 form, was handwritten. It was handed to his manager, with the claimant informing his manager that 'you know the issues'. It set out all the issues regarding his manager making him work late and through breaks and that this was the reason for his resignation, these issues having been already documented by HR, as the claimant had had several meetings with HR about the fact that he is type 1 diabetic and needed regular breaks and to be leaving at regular times to take his overnight insulin with his evening meal. The claimant also, through the course of the hearing, provided a further document to the Tribunal, which was from his personnel file sent to him by the respondent. This was an email between Andrew Jackson and Nicola Burrows (HR) dated 2 April 2019 to discuss a phone call received from the claimant to Lisa Gibbs on the afternoon of 1 April 2019. Lisa summaries the content of the call being the claimant raising constantly working 11-11.5 hour days, not being paid overtime and being told that this can't be authorised, not being able to take breaks because of how busy they were, how this was having a negative effect on his health and that he had previously provided a letter from his GP stating he cannot work these hours. This document supporting the fact that the respondent had knowledge of the situation.
23. The claimant confirmed that he has belatedly discovered that his manager had not provided his resignation letter to the respondent and had instead handed in a different document to HR that his manager had asked the claimant to sign, which just confirmed his notice period and termination date. This is what the claimant references in his ET1, along with a previous example of when his manager had altered an accident report form. The claimant elaborated on this confirming that his manager had amended the form to remove reference to his response to the claimant at the time of the incident and any culpability for failing to respond correctly to it.
24. The claimant explained that this previous incident at work was that he had syringes sticking out of his fingers, having gone into the boot of a customer's car to retrieve the spare wheel. He immediately went into his manager's office with the syringes still sticking out of his fingers and asked him what he should do. He was told to continue with the job and put the wheel on the car and to sort this out after. However, his manager then altered the accident report form, after showing it to the claimant, to remove what he had said and done to avoid any culpability. The claimant had spotted this when he went back into the system and saw that the font of the report had been altered. He challenged his manager regarding this and in response his manager locked himself in the office and refused to discuss it. The claimant was relying on this purely regarding it having damaged trust in his manager and in support of this not being the first time his manager altered

documents. He was not claiming that there was any detrimental treatment resulting from raising this.

25. The claimant stated the following. He was furloughed by the respondent as he was clinically vulnerable because of his type 1 diabetes. HR visited his site just before he was due to leave and informed him that when he returned, he would be redeployed to a different site. This new site was much further from the claimant's home, and he would not be able to afford to commute there. There was no time to discuss this, as HR immediately left. When the claimant was due to return, he was told by his area manager that *'I know what is going on and have put a stop to it'*. However, upon his return to the Tamworth site on 6 July 2020, he was told by his line manager that it was he who had stopped his threatened site move, asserting his position of power over the claimant. His manager told the claimant that *'I don't want to hear anything about working late, not having lunch breaks, keep your gob shut'* with the implication that he would otherwise lose his position.
26. The claimant confirmed that he was worried about losing his job and that he could not afford to be in a position where he was out of a job. It was at this point that he started to look for a new job.
27. The claimant also confirmed that he and other colleagues (Reece Shackles and Ethan Barton, who he had provided written witness statements from) had complained about working through breaks and, in response, were given extra work to exacerbate the problem.
28. The claimant's manager would overbook work with 5 jobs going on at once which required overlapping them, and there are rules regarding not being able to interrupt bookings during an MOT. He provided annex 1 in support of the fact that these were booked in such a way it was not possible to take a break and relies on this document in support of the times where this occurred. The claimant confirmed that, as assistant manager, his role did not stop when the technicians went home. The jobs generated paperwork and there are ATS quality control requirements. When there was a mass of customers, everything got bumped and he and his manager would have to stay to complete this to meet criteria in case they had an unannounced inspection. This was a regular occurrence.
29. The centre had targets to reach and there was a lot of pressure. When HR came down, things would change with breaks for a few days and then the financial performance would dip and there would be pressure regarding this and the working through breaks and long hours, including the claimant working until 11 at night, would resume.
30. It is common ground that the claimant had not mentioned 'diabetes' in his ET1 form and that he had not ticked the box to indicate that he was disabled.
31. The reasons given by the claimant for this were that he had not appreciated that diabetes was a disability under the Equality Act 2010 at the time of issuing his

claim. He thought of being disabled as needing to be in wheelchair or having a disability badge. He referenced having spoken to four acquaintances with diabetes, some of whom he described as sophisticated, that also did not realise they would be considered disabled for the purpose of the Equality Act 2010. The claimant confirmed that he had thought that he would have the opportunity to discuss the claim and explain further at a preliminary hearing. His trade union has not responded with assistance with this claim as he had issued it prior to getting in contact with them and as such he has not had assistance with this claim.

32. On speaking with ACAS and the Tribunal staff shortly before the preliminary hearing scheduled for 6 October 2022, he discovered that his claim had only been accepted as a claim regarding not having been paid for all the additional hours he had worked, even though he had mentioned not being allowed breaks. He raised his diabetes with the judge at the preliminary hearing and was informed he would need to make an application to amend his claim to being a claim for disability discrimination should he wish to now bring this and was informed that he had 14 days from the date of the order of 7 October 2022 to do so.
33. The claimant made an application to amend the claim on 12 October 2022. In this application he confirmed his disability as type 1 diabetes and that he was amending his claim to bring a claim for disability discrimination.
34. The claimant accepted during cross examination that he had not pleaded a claim for disability discrimination or mentioned that he had diabetes in his original claim. This was evident from his ET1 form.
35. The respondent's representative put it to the claimant that he had resigned because he had got new employment. The claimant refuted this and confirmed the reason for his resignation was because of being made to work through breaks and excessive long hours, which prevented him from being able to effectively manage his diabetes. He did not however resign until he had new employment to go to.
36. The respondent's representative argues that this amendment was not properly particularised and the nature of the amendment being sought by the claimant is a substantial alteration to his pleaded claim of which there is no recognisable complaint in his original ET1 form. The respondent's representative highlights the fact that the complaint is significantly out of time, given the last act of discrimination could only have been up to the termination of his employment on 18 September 2021. Neither of these points are in dispute.
37. The respondent's representative raised that these are not new facts that were not known to the claimant prior to him issuing his original claim. The respondent raised in respect of the claim not being properly particularised, that the claim has not previously been set out in a form that it could properly respond to as the claimant has not said what type of discrimination he was claiming, i.e. direct, indirect, failure to make reasonable adjustments, or discrimination arising from disability.

38. The respondent's representative argued that the balance of hardship and injustice in this case, favoured refusing the application on the grounds that new pleadings would be necessary, additional disclosure required, additional witnesses for the respondent would need to be called and there would be a delay to the final hearing, which would need to be longer and there would be increased costs. The respondent also argued the impact of the passage of time, stating that evidence may no longer be available, and witnesses would be being asked to recall events that occurred a considerable time ago, especially by the time of a final hearing.
39. When this issue was probed further, it came to light that there appeared to be a long history of the claimant having complained about his working hours and the need for breaks and the impact this was having on the management of his diabetes. There is also clocking in records, and the MOT records I have already been shown, which evidence working hours. The claimant also stated that he had lost consciousness at work owing to his diabetes being poorly managed because of a lack of breaks and long hours and that an ambulance had needed to be called (the last time being 2 years prior to him leaving). This is something that the respondent indicates that the claimant has mentioned in a further statement that he provided to them in December 2022, after his application to amend his claim.
40. The claimant confirmed that he has had type 1 diabetes since he was 10 years old and has worked for the respondent for circa 20 years. During a break in the hearing the respondent's representative was ordered to confirm with the respondent what the position was with regards to whether the individual in HR (Nicola Burrow) who had held meetings with the claimant following him raising these issues was still there, and whether his manager (John Orton) who had left the respondent's employment but who the claimant understood had returned 3 days later, was still there. She confirmed that they both were. The area manager in charge when the claimant left the respondent's employment was also still there.
41. The respondent's representative confirmed that if the amendment to the claimant's claim to include unfair dismissal was allowed, the respondent would argue that the claimant never raised a formal grievance and he resigned because he had a new role rather than because of a formal breach.
42. I did point out to the respondent's representative that the claimant was saying that he had however raised the issues with HR.

## **Decision and reasons**

### *Disability discrimination*

43. I have taken into consideration the reasons as to why the claimant did not previously issue a claim for disability discrimination, the issues of time limits, whether the claim has been properly particularised and the prejudice which will be caused to the parties in allowing or not allowing the amendment to the claim.

44. Having considered this and the position as to prejudice, in the circumstances I find that the balance of prejudice lies firmly with the claimant if this amendment was not permitted.
45. The claimant has a long employment history with the respondent and has had type 1 diabetes, for which he takes medication, throughout his whole employment with the respondent. He provided documentation at the hearing which supported the claim that he had made them aware of this, and during evidence referenced several meetings held with HR. The respondent had also furloughed the claimant for being clinically vulnerable because of his type 1 diabetes. Taking this evidence at face value, he would meet the threshold to be considered disabled under the Equality Act, has more than an arguable claim for disability discrimination and would be severely prejudiced if he was not permitted to amend his claim to pursue this. In contrast, the respondent still has access to witnesses who were involved in these complaints and as such are still able to take witness evidence in respect of these incidents, proceedings are still at an early stage, with no final hearing having been listed. The respondent does not need to wait for the final hearing or further dates for witness statement exchange to take this evidence. There are also documents which support working hours, some of which are in the claimant's possession and some of which will be in the respondent's possession. The claimant refers to alarm records (as he was responsible for locking up) and computer shutdown records, as being what he has used to calculate the additional hours that he worked.
46. Whilst the claimant's original application to amend his claim was not detailed, the respondent acknowledged that he provided a statement to them in December 2022 setting out further details. I accept this is not pleadings and I was not provided with a copy, but the respondent's representative does appear to accept that this shed some light on the complaints being raised. More relevant to my decision is that I find that when the claimant's email dated 12 October 2022 is considered alongside the claimant's ET1, in which he mentions the fact that he was being made to work excessive hours and was not able to take a break, it is evident that he is claiming indirect discrimination in respect of the respondent's practice to not allow regular breaks and its practice of requiring the claimant to work excessive additional hours and a failure to make reasonable adjustments regarding this. It is also evident that he is claiming this treatment continued to termination and was the cause of his resignation. He did not consider he needed to repeat this information in his application as he had already said this in his claim. Whether these were the claims that he was making, was then clarified with the claimant at the beginning of this preliminary hearing - and he confirmed they were.
47. The respondent was aware of the claimant's type 1 diabetes as he has had it since he was a child and worked for the respondent for almost 20 years (according to the dates on the ET1 and ET3 forms). The claimant confirmed that an ambulance has been called out because of him becoming unconscious at work owing to his diabetes being badly managed because of the working hours and lack of breaks.



The respondent's representative confirms that such an incident was mentioned in the claimant's statement provided in December 2022. The claimant's diabetes is not therefore news to the respondent and is something it was aware of during his employment.

48. For these reasons, time is extended for the claimant to bring claims for indirect disability discrimination and failure to make reasonable adjustments and that his dismissal was discriminatory on the grounds of disability. If the respondent is arguing that there was not a continuing act which would bring all allegations of discrimination the claimant has complained of in time, this is left to be determined at the final hearing when all evidence is before the tribunal.

*Constructive unfair dismissal*

49. From the claimant's claim form he is complaining about the falsification of documents, excessive hours and not being able to take a break, and is clearly linking this to the reason for his resignation. For this reason, whilst I acknowledge that the claimant has not ticked the box that states he is claiming unfair dismissal, I do consider it to be clear from the original pleadings that he is raising such a complaint. The claimant states... *'For 14 years I was expected to work unpaid overtime as well as through lunches. A number of times HR was called in. Instead of organising with the manager about leaving times and set lunch breaks, they took a step back as the centre was making money and those who complained were a problem. They did not really do anything to help other than try to move me to another centre when I complained... my notice was edited by my manager to remove himself from responsibility. I found out later my reasons were.'* The claimant confirmed he had not ticked the 'unfair dismissal' box, because his was a resignation.
50. I therefore find that his application to bring a claim for unfair dismissal, is merely a re-labelling of facts that have already been pleaded and as such I allow the amendment.

*Detriments for asserting a statutory right*

51. The claimant had mentioned about not being allowed breaks in his original ET1 form and that the respondent tried to move him to a different site when he complained.
52. I therefore find that the claimant has already pleaded a claim that he has suffered a detriment for raising a statutory right to a break. This is again an application to label facts that have already been pleaded, with more meat being put on the bones regarding the details in the witness evidence and documents that he has provided to this Tribunal at this preliminary hearing and raising that he needs breaks and set finishing times because of his diabetes. I therefore again allow the amendment to bring claims he has suffered detriments for asserting statutory rights to breaks.

53. There was insufficient time at the hearing to draw up and finalise a list of issues and discuss further directions. An additional preliminary hearing has been listed for 3 hours on **18 April 2024 at 10 am** to do so and further directions in respect of orders in respect of that preliminary hearing accompany this judgment.

*K. Wright*

28 January 2024