



EMPLOYMENT TRIBUNALS

Claimant: Mr Graeme Whyman

Respondent: Nuffield Health

Heard at: Birmingham (West) Employment Tribunal **On:** 15.05.2024

Before: Judge L Mensah

Representation

Claimant: Mr Whyman (in person)

Respondent: Mr P Bownes (Solicitor)

JUDGMENT

1. This came before me pursuant to an order of Judge dated 30.10.2023. The Claimant makes an application to amend his claim to add in new matters not raised before Judge Steward. The new matters involve a claim the Respondent failed to make reasonable adjustments. This is not documented in the Case Management Order of Judge Steward as having been raised by the Claimant and is not in the list of Issues identified by the Judge in the same order.

Notice pay claim dismissed.

2. The Claimant confirmed he is not pursuing a claim for notice pay and withdraw the claim. That claim is therefore withdrawn and dismissed. I made it clear the consequences of such a withdrawal before the Claimant confirmed again his withdrawal.

Reasonable Adjustment application

3. Mr Bownes had a note from the case management hearing before Judge Steward and referred me to the correspondence between the parties and the Tribunal as to what had happened and whether the order accurately reflected the discussion. I accept the order of Judge Steward is to the effect the Claimant was being ordered to provide further and better particulars of the claims the Judge had identified in the list of Issues set out at the bottom of the case management order. It is not an open-ended order for the Claimant to add in any new claim and would make no sense as such. The Claimant says in his original claim.

In June 2021, I was unwell with work related stress and palpitations and was off work for 7 weeks. The recommendations provided within the Occupational Health report were started, though weren't continued, followed through, or acted upon. Essentially nothing changed.

In December 2021, I became unwell again with work related stress and palpitations and was off work for several weeks, returning in January 2022. The recommendations provided within the Occupational Health report weren't followed or acted upon

4. The Claimant says he did raise a claim for reasonable adjustments with Judge Steward and he wanted to provide further and better particulars alleging the Occupational Health reports and recommendations were not followed and he thought by not withdrawing this information from his claim form he was able to provide more detail after the case management hearing. The Claimant also told me he thought 'Reasonable adjustments' were covered under heading of Direct discrimination and if this is wrong it is down to his limited understanding of the law as he thought it would be covered.

Law and reasoning

5. In the claim form the Claimant ticked age and race discrimination on section 8 and Unfair dismissal and arrears of pay and other payments. He identified an unpaid achieved bonus.

6. The Claimant made an application under Rule 29 and 30 of The Employment Tribunals Rules of Procedure 2013. An application to amend should not usually be allowed unless the Claimant has properly formulated and particularised the amendment sought, so the respondent can make submissions and know the case it is required to meet: *British Gas Services Ltd v Basra* UKEAT/0194/14 (2014, unreported); *Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge* [2016] UKEAT 0007_16_1208.

7. Mr Bownes accepted the recommendations in the Occupational Health reports dated 29.07.2021 and 20.01.2022 were sufficiently particularised.

8. In *Vaughan v Modality Partnership* UKEAT/0147/20 (9 November 2020, unreported), Judge James Tayler reviewed the authorities and described the approach a Tribunal should adopt when considering an application to amend. The Tribunal should have regard to all the circumstances of the

case but the paramount consideration is the relative injustice and hardship involved in refusing or granting an amendment: *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650 (NIRC); *Selkent Bus Co Ltd v Moore* [1996] ICR 836 (EAT); *Transport and General Workers Union v Safeway Stores Ltd* [2007] All ER (D) 14 (Jun); *Abercrombie v Aga Rangemaster Ltd* [2013] IRLR 953, [2014] ICR 209.

9. In *Selkent*, Mummery J identified three particular factors that may be relevant in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment:

- (a) the nature of the amendment;
- (b) the applicability of time limits; and
- (c) the timing and manner of the application.

10. Regarding the first of those factors, Mummery J observed that amendments range:

"on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded, to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim".

11. I agree this is not just a relabelling application. The set of facts to prove direct discrimination are not sufficient for the purposes of proving a reasonable adjustment under Section 20 and 21. As per *Reuters Ltd v Cole* UKEAT/0258/17), see,

"Their discussion about the degree of difference in the factual area of enquiry, see e.g. *Abercrombie & Others v Aga Rangemaster Ltd* at paragraphs 48 and 50, relates to the exercise of discretion when it is not a mere relabelling."

12. The Judge in *Selkent* said that the Tribunal,

'will have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action'

13. More recent cases, including *Abercrombie* and *Vaughan*, have stressed that the focus should not be on questions of formal classification but on the extent to which the proposed amended claim 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 by the old, the less likely it is that it will be permitted. Expanding on this point in *Vaughan*, Judge James Tayler made the following points:

- The focus should be on the practical consequences of allowing, or not allowing, an 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?

- This requires a focus on reality rather than assumptions or supposition; parties should tell the Tribunal about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment.
- A party's 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. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence'.
- Where the prejudice of allowing an amendment is additional expense, consideration should be given to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.
- While maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.

14. The Claimant says the reasonable adjustments were ongoing when he is dismissed on the 13.04.2022. He told me he understood the time limits and expected the adjustments recommended by Occupational health to be acted upon. He told me whilst he was waiting to meet with his employer to discuss the recommendations he was instead called into a meeting and dismissed. He argued the second report referred back to the recommendations of the first report and so was a building picture of recommendations.

15. Mr Bownes argued at the previous hearing before Judge Stewart discussion about reasonable adjustments is not likely to have taken place and so the application to amend is needed.

16. Mr Bownes referred me to various cases which confirm the Employment Appeal Tribunal held where this application is not a simple relabelling and where it seeks to add new legal labels, this is a significant change, and the time limit will be the date of the amendments and I should take that into account.

17. In terms of prejudice Mr Bownes argued Judge Stewart had listed the case for final hearing and case management orders have been made and if the application is successful, it may require revisiting those orders. He argued the prejudice to Respondent would be time and cost and potentially losing the final hearing which is currently listed for 5 days including remedy. The Claimant said in his Agenda for today's hearing he would be calling six witnesses, and the Respondent is likely to call at least 4 or 5. Disclosure is one month from today and the bundle is due in mid-April and witness statements to be exchanged by the 17 May 2024. He argued the Respondent would incur additional investigation and expense if the new allegations were added.

18. Mr Whyman argued the amendments would not have any significant impact on preparation for the case and the Occupational health recommendations were essential to his case because he has a condition and is a disabled person.

19. Having listened to the parties I accept the amendments are significant and do add in a new claim that had not been identified before. I do not accept the Claimant had, as he accepts, raised a claim for reasonable adjustments before the previous Judge. I accept he had misunderstood the legal labels and had raised in his claim form his complaint about the failure of his employer to follow occupational health recommendations but had not pleaded it as a legal claim. I also accept the Respondent will have to carry out some further investigation but that is in my view fairly limited to the extent it is about what occupational health recommended and why the Respondent did not follow those investigations.

20. I would have thought the investigation manager identified in the current pleadings is likely to be able to address this and if not, a manager involved in the investigations. I accept this may increase some modest cost, but I do not accept this will cause the final hearing to be delayed. There is ample time for the parties to prepare given they have another month before disclosure, mid-April for a bundle and until the 17 May 2024 for the exchange of witness statements.

21. Mr Bownes does not refer me to any specific details of witnesses who are prejudice by the passage of time or are no longer contactable. Ultimately, I am satisfied the prejudice to the Respondent is not outweighed by the prejudice to the Claimant. The Claimant did provide a details account of events and I accept he had not completely understood the purpose of the list of issues and the Judge's orders for furthers and betters.

22. Furthermore, the EAT has held that a tribunal need not determine, conclusively, the time point before deciding whether to exercise its discretion to allow the amendment: see *Galilee v The Commissioner of Police of The Metropolis* UKEAT/0207/16, [2018] ICR 634 in which Judge Hand ruled that earlier EAT cases to the contrary were wrongly decided.

23. I accept the Claimant is an inexperienced litigant in person but what he says about why he brings his claim indicates there is an argument to be decided as to whether the conduct of the Respondent is a course of conduct to the termination of his employment. There is also a legal issue as to whether jurisdictional time limits would be considered as of the date of the amendment. I am not able to come to any findings on those time limits. On the face of the case, it is not hopeless so as a render the balance of hardship in the Respondent's favour for that reason.

24. I accept the Claimant has always intended to complain about the failure of the management to make adjustments recommended by Occupational health and overall he needs this amendment to be able to do so. I consider the timing consistent with his inexperience.

25. I therefore granted the amendment as I find the balance of hardship falls in the Claimant's favour.

26. I spent considerable time dealing with this and have agreed some further case management orders and identified a more detailed list of issues I attach to the Case Management order I make of the same date.

Judge L Mensah

Employment Judge **Mensah**

Date 15.02.2024

JUDGMENT SENT TO THE PARTIES ON

Miss Z Ravat
21 February 2024

FOR THE TRIBUNAL OFFICE

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