



EMPLOYMENT TRIBUNALS

Claimant

Mr B Sanchez-Stoker

v

Respondents

Reiss Edwards Limited (1)

Mr J Dinh (2)

Mr A Ali (3)

WRITTEN REASONS – APPLICATION TO AMEND CLAIM

Background

1. I conducted a Preliminary Hearing (PH) in this matter on 28 March 2024 on the preliminary point of whether the Claimant was at the relevant time disabled by reason of his hernia and/or his flat feet. I reserved my decision and in light of the proximity of the main Hearing (3-10 June 2024), expedited it over the Easter weekend, signing it on 1 April 2024. My finding was that the Claimant's flat feet were a disability within the Equality Act 2010 at the relevant time but his hernia was not. It transpires that the decision was not sent to the parties until 10 April 2024.
2. On the morning of the PH, the Claimant had made an application to amend his claim, to add two further disabilities. I had refused that application orally at the PH.
3. Two days after the decision on disability status was sent to the parties, the Respondents applied for written reasons (even though the Claimant's application had been refused). The Claimant then wrote later on 12 April 2022, saying that he also wanted written reasons.
4. These requests were not sent to me until 22 April and other professional commitments have meant I have been unable to produce them until now. For the avoidance of doubt, there is one single set of reasons – this document - which is being sent to both parties.

Original claim

5. The original grounds of complaint contain a heading "*Disability*". It says at paragraph 5 of the document "*The Claimant suffers from Hernia which the Claimant started suffering from 8 years ago. The Claimant also has flat feet since birth*".

Application to amend

6. The application made on the morning of the PH was for the Claimant to be able to add an injured toe and "*poor mental health*" as impairments under the Equality Act 2010. What the Claimant had not done in his application

was to give any indication of the complaints associated with those impairments. He contended that the facts on which he relied were those in the Grounds of Complaint and that the amendments were mere relabelling.

7. So far as the toe injury is concerned, the Claimant said that it has "*now become a permanent deformity that was there at the relevant time and is ongoing*". He claims that his poor mental health has been ongoing for many years and that the Respondents' conduct at the relevant time brought it "*to the forefront*".
8. The Claimant contended that the application had been made "*at an early stage*" and that the Respondents would have ample time to address the issues raised before the final Hearing.
9. The Claimant supplemented his application by oral argument. He acknowledged that he had had legal representation both in the drafting his grounds of complaint in the ET1 submitted on 3 May 2023 and at the Preliminary Hearing (Case Management) (PHCM) before EJ Tinnion on 31 July 2023. He initially confirmed he had seen the grounds of complaint before they were submitted (though he subsequently seemed unsure about this). He said he only found out about the PHCM about an hour beforehand and he was confused and anxious. However, EJ Tinnion had given him the opportunity to provide further particulars.
10. The Claimant observed that on 8 March 2024, he had submitted a complaint to his lawyer about her services and that on 11 March 2024, she had terminated his retainer with her firm. He said that he had had to "*pick up where she left off*" and that was why he was making the application himself on 28 March.
11. I asked if the Claimant was saying that there was something in the existing claim that said he was disabled by reason of his mental ill-health. He said he was suffering distress during his employment and he believed he had mentioned it to his lawyer before she submitted the claim. He said that his mental ill-health had been "*triggered*" while he was working for the Respondent and continues to this day. He agreed that the downturn in his mental health was the effect of the Respondents' conduct, not the cause of it. However, he then said that the Respondents did not like him raising stress and anxiety and conducted no risk assessment for either his mental health or his toe injury.
12. The Claimant also said that he had taken time off when he was stressed and anxious. I asked him about this. He said he had taken one day off – 1 March 2022 – and that this had been held against him.
13. So far as the toe injury is concerned, the Claimant said he had noticed in EJ Tinnion's case management order that each individual disability should be listed separately, so he was raising it now. He had fractured his toe during an accident in November 2021. That meant he could not get his shoes on because his foot was so swollen. Thus he could not wear his orthotics. While the swelling has reduced subsequently, his fracture remains. The Claimant said it will never heal properly and that the

Respondents could see he was limping when he came in to the office. They emailed him to come in and took issue with him when he did not, calling him lazy.

Discussion

14. I have noted above that the original grounds of complaint contained specific reference to the Claimant's hernia and flat feet only. The new impairments were not specified as disabilities in their own right, and were referred to only indirectly and/or in the context of other complaints:

- a. Under an introductory sentence "*The Claimant feels discomfort which affects him in different ways*", there was what I believe was a reference to the toe injury in the context of his flat feet: "*He is unable to stand for prolonged periods of time. walking and standing on his feet is difficult. He experiences discomfort, pains and aches. Given his fracture, this has had a further negative impact on his feet which makes standing and walking painful*". (emphasis added)
- b. At paragraphs 18-27, the Claimant says (in summary) that on 19 November 2021 he notified the Second and Third Respondents that he had suffered a severe injury to his foot. He requested permission to work from home. On 16 December 2021 and 19 January 2022, he provided fit notes saying he was fit to work with adjustments (working from home as he was unable to weight bear). Following the Claimant's MRI scan on 27 January 2022, a clinician told the Claimant by phone a week later that he had fractured his foot. The Claimant was apparently in the office at that time and the Third Respondent called him "*lazy*" because he was not helping out. The Claimant expressed concerns to the Second Respondent about the comments and advised him of the fracture.
- c. At paragraph 32 the Claimant says that he was chastised for not moving office filing cabinets but that due to his foot and his hernia he was unable to do heavy lifting. The Claimant mentions in paragraph 33 that between March and June 2022, he was attending podiatry appointments for the fracture and for his flat feet.
- d. Under a heading "Effect on Claimant", the grounds of complaint say, "*The Claimant suffered distress as a result of the Respondent's conduct and as a result of the dismissal and discriminatory acts above. The Claimant has been prescribed anti-anxiety medication*".

15. At the PHCM on 31 July 2023, EJ Tinnion confirmed that the two disabilities relied on were inguinal hernia and flat feet. He ordered the Claimant to produce a separate disability impact statement for each of those impairments. He also ordered the Claimant to particularise each of his disability complaints, including, notably, which disability was relied on for the purposes of his direct and indirect discrimination complaints, his complaint under section 15 EQA, the allegation of a failure to make reasonable adjustments and the harassment complaint. He wrote:

"Amendments to ET1. It is the Claimant's responsibility to determine

whether he needs to make an application to amend his ET1 to rely upon any matters stated in his further and better particulars, and, if he does, to timely make that application. Any application to amend necessary should be made by 4pm on 25 September 2023”.

16. EJ Tinnion expressly set out in the case management summary and orders a provision for the parties to seek to correct any matter, error or omission within 14 days of receipt. The Claimant, through his solicitor, did not a) seek to correct EJ Tinnion’s summary as to the disabilities he relied on or b) apply to amend his claim by 25 September 2023 (or at all until 28 March 2024, more than six months later).
17. In his disability impact statement, the Claimant said that as a result of his flat feet, he experiences a lack of stability when walking. That led to his fall in November 2021 during which he sustained the toe fracture, which he says in turn put more pressure on his right foot, exacerbating his flat feet symptoms. He also said that his flat feet have caused a lot of stress in his life and can affect his mood. There is no mention of depression.

Conclusions

18. I am satisfied that neither the toe injury nor the mental ill-health were set out in the original claim as impairments under the definition in the Equality Act 2010. The Claimant did not suggest to Employment Judge Tinnion at the PHCM in July 2023 that the two impairments identified were not the only two on which he relied.
19. I am further satisfied that the Claimant did not take the opportunity to set out the additional impairments on which he now seeks to rely when he submitted his disability impact statement. It therefore follows that for the Claimant to rely on either or both new impairments would require not just relabelling but entirely new heads of claim.
20. Even by the morning of the PH, the Claimant had still not said what act or acts he relies on as discriminatory conduct by the Respondents or any of them, in relation to either or both of the impairments. Any such claims would be very considerably out of time. Allowing for ACAS Early Conciliation, acts of discrimination that are said to have taken place before 21 November 2022 would have been out of time if they were just relabelling, but I have found that is not the case. The Claimant’s termination date was 12 January 2023 so they cannot have taken place after that. Since they would require an entirely new head or heads of claim, the delay in raising them is very significant.
21. It is also notable that until the last two weeks, throughout the entire period of delay in question, the Claimant was represented by a solicitor. The Claimant seeks to cast blame on his solicitor for inadequate representation, but he accepts that he read documents submitted on his behalf, attended the PHCM and then put his name to the disability impact statement that was served on the Respondents. I do not accept that it was reasonable for him to have failed to notice the omission of impairments that he now contends are pivotal to his claim.

22. Even if I set aside the significant difficulties of the lengthy delay, multiple earlier opportunities to amend, the Claimant's represented status and the ongoing lack of clarity in the allegations, there would remain the difficulty that the Claimant would have to show that both these new impairments were disabilities at the relevant time. I considered it unlikely that he would be able to do so without having to conduct a further PH for that purpose, in light of the limited contemporaneous medical evidence to date on those specific matters.
23. I also have significant reservations that the Claimant could show that **at the relevant time** it was likely his toe injury and/or his mental health issues would last for at least 12 months. The relevant time for the toe injury complaint appears to be early February 2022 when the Third Respondent is said to have called the Claimant lazy because the Claimant was not helping out. The Claimant already relies on this incident in relation to the disability of flat feet. Without making any definitive findings, I could see that it would be difficult for the Claimant to show that a broken toe could reasonably be expected to last until November 2022 or beyond, or that the Respondents could reasonably have been expected to know that it would. On 8 December 2021, for instance, the Claimant had said to the Second Respondent, "*It's just really uncomfortable but should recover soon*". It appears to be only with hindsight that the Claimant now says it lasted for over a year.
24. The Claimant does not appear to be saying that there was any other conduct of which he would like to complain that is not already in his pleaded case. It would also be difficult to distinguish between conduct said to be discrimination because of the Claimant's flat feet and that which was said to be because of another part of one foot, i.e. his injured toe.
25. In relation to the mental health, as I have said, that is said to be the effect of the Respondents' discriminatory conduct and not the cause of it, but in any event the only point in time at which the Claimant said he was absent in this regard was a single day on 1 March 2022. On that occasion, the Claimant emailed the Third Respondent to say that he was taking the day off sick because he was exhausted, having not slept the night before after he had received a written warning "out of the blue". That written warning was revoked the following day.
26. It would be particularly difficult for the Claimant to show now, more than two years later, that in fact at that point his mental ill-health was a condition which had a substantial adverse effect on his day-to-day activities. His medical records indeed show only that his "minor past" includes a stress-related problem between November and December 2022. It would also be very unlikely again that the Respondents could have known or be expected to have known that what the Claimant himself has described as "anxiety" was a serious and long-lasting condition that amounted to a disability. It remains unclear what they are said to have done that amounted to discrimination connected to the mental ill-health impairment.
27. Directions would have to be made for the Claimant to produce full medical evidence in connection with both conditions and to draft a further disability

impact statement dealing with the two new impairments at the relevant time. The Respondents would have to be given time to reply. If they did not accept disability status, there would have to be a PH. In other words, the case would be put back to the position the parties were in when they appeared at the PHCM before EJ Tinnion in July 2023.

28. This would also inevitably mean that the full merits Hearing listed for June 2024 would be lost. The parties had already made substantial progress towards their preparation for that Hearing. Postponing it would have led to something in the region of six to nine months' delay, plus the cost of preparing for and conducting a further PH, both for the parties and for the Tribunal. Contrary to what the Claimant says in his application, he has not made it at "an early stage", but only just over two months before the final Hearing and 14 months after his dismissal.

29. Therefore in summary my conclusions were that:

- a. The delay was very long without any acceptable explanation from the Claimant;
- b. The cogency of the evidence was likely to be very substantially impacted by that delay;
- c. No part of the delay could be ascribed to anything done (or not done) by the Respondent. The fault for the delay was entirely the Claimant's;
- d. The Claimant now says that he knew from the outset that he wanted to rely on these two impairments. I do not accept that, but even if correct, it does not explain why he waited until the morning of the PH, nine weeks before the main Hearing, to make the application to amend; and
- e. The Claimant had professional representation at all relevant times.

30. The balance of prejudice in allowing amendments that were still only partly formed at the date of the application was wholly in favour of refusing the application. Two of the Respondents are named individuals and all the Respondents would be put to further cost and delay. They would be greatly prejudiced by allowing the application. By contrast, the Claimant will still have his disability discrimination claims heard in relation to the disability I found he has, as well as the other heads of claim that proceed. The prejudice to him in refusing the application is minimal. The application is refused.

Employment Judge Norris

Date: 12 May 2024

JUDGMENT SENT TO THE PARTIES ON

29 May 2024

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FOR THE TRIBUNAL OFFICE