



EMPLOYMENT TRIBUNALS

Claimant: Mr A Bevis

Respondent: HDR Consulting Limited

Heard at: London South (by video)

On: 20 May 2024

Before: Employment Judge R Russell

Representation

Claimant: In person (supported by his daughter Ms V Bevis, Solicitor)

Respondent: Mr P Starcevic, Counsel

JUDGMENT having been given orally to the parties on 20 May 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. This hearing was listed to consider whether the Claimant should be permitted to amend his claim, and then to deal with further case management.
2. The Claimant submitted his claim form on 14 June 2023. He alleged that he had been discriminated against on grounds of disability and/or age. He set out a number of factual matters which he contended gave rise to those claims. On 11 July 2023 he wrote to the Tribunal to amend his Claim to include an allegation that he had resigned in circumstances amounting to constructive unfair dismissal. This was not objected to by the Respondent.
3. An earlier preliminary hearing in this case had taken place before Employment Judge Robinson on 13 February 2024 to identify the claims and issues, and to make case management directions and orders with a view to progressing the case to a final hearing. The Claimant's daughter attended that hearing to support him. The Claimant accepted at that hearing that he had not, up to that point, made a claim in relation to harassment and victimisation. He confirmed at that hearing that he wished to apply in writing to the Tribunal to amend his claim to cover harassment and victimisation. He was ordered to submit an application to amend his claim by 15 March 2024, which would be heard at a preliminary hearing on 20 May 2024.

4. On 15 March 2024 the Claimant presented a written application to amend his claim to include complaints of harassment and victimisation. He noted that the amendment was, in part, to re-label matters already pleaded or to provide further detail of allegations set out in the initial claim form. He also noted that, in other respects, the allegations took place after the Claim had been presented. In respect of these entirely new allegations, he explained that he had raised these with the Tribunal within three months of the acts complained of (having mentioned the allegations at the February 2024 preliminary hearing). He therefore considered that it would be in accordance with the Tribunal's overriding objective to include these allegations in the Claim.
5. The Respondent did not object to part of the Claimant's amendment application. It did, however, object to two amendments arising out of an alleged failure to deal with a subject access request. These were to include a complaint of post-employment victimisation in relation to the handling of that request, and further allegations of harassment related to age and/or disability in relation to that request. The draft list of issues prepared for the purposes of the preliminary hearing on 20 May 2024 also included further allegations of a failure to refer the Claimant for an occupational health assessment, which the Respondent considered required an amendment application.
6. I had a bundle of 64 pages setting out the application to amend and the Respondent's position on why parts of the application should not be granted. I was assisted by the oral submissions of the Claimant and Claimant's daughter, and Respondent.
7. Oral reasons were given at the hearing. Further case management orders are set out in my Orders dated 20 May 2024. The Claimant requested written reasons at the end of the hearing in respect of the refusal of his post-employment victimisation complaint. I have set out below my reasons for refusing the application to amend to include this complaint and the further allegation of discrimination regarding the occupational health assessment.

Issue and the law

8. The issue for me to address was whether the Claimant should be allowed to amend his Claim in accordance with his application of 15 March 2024.
9. The test involves the assessment of the balance of injustice and hardship of allowing or refusing the amendment (*Selkent Bus Co Limited v Moore* [1996] ICR 836). In *Selkent* the EAT set out a list of relevant circumstances which should be considered including the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. Those points have subsequently been encapsulated within the Employment Tribunals (England & Wales) Presidential Guidance on General Case Management (2018), Guidance Note 1.
10. In *Vaughan v Modality Partnership* ([2021] ICR 535) the EAT explained that the factors in *Selkent* were not an exhaustive checklist to be followed. The Tribunal must focus on the balance of injustice and hardship in allowing or refusing the application, and on the real practical consequences of allowing or refusing the amendment.

11. With regard to time limits, *Selkent* suggested that if a Claimant intended to add a new complaint, it would be "essential" for the Tribunal to consider whether that complaint was out of time and, if so, whether the time limit should be extended. The Presidential Guidance repeats this point at paragraph 5.2. Amendment can, however, be granted with the issue of time limits being decided separately (*Galilee v The Commissioner of Police of the Metropolis* [2018] ICR 634).
12. In *Prakash v Wolverhampton City Council* (UKEAT/0140/06) the EAT held that there is no reason in principle why a cause of action that has accrued after the presentation of the Claim form should not be added by amendment if it is appropriate to do so. If a new claim could be brought within the relevant time limit, that is a matter to which the Tribunal should attach considerable weight (*Gillett v Bridge 86 Limited* EAT 0051/17).
13. The risk of the balance of hardship being in favour of refusing the amendment increases the later the application is made (*Martin v Microgeneration Wealth Management Systems Ltd* (UKEAT/05/006)). It is for the Claimant to show why an application was not made earlier (*Ladbroke Racing Ltd v Trainer* (UKEATS/0067/06)).
14. It may be appropriate to consider the prospects of success when weighing up whether to allow or refuse an amendment (*Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132).
15. In respect of harassment, this is unwanted conduct 'related to' a protected characteristic and the conduct has the effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the person (section 26(1) Equality Act 2010). With regards to victimisation, section 27(1) of the Equality Act 2010 provides that a person victimises another if he subjects the person to a detriment because the person does a protected act or it is believed that he has done or may do a protected act. Guidance on the causative test can be found in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 where the House of Lords held that the causative test for victimisation was not a strict 'but for' test. Instead the Tribunal should focus on what was the real reason for the Respondent's conduct.

Claimant's submissions

16. The Claimant is a litigant in person albeit that he has had support from his daughter who is a solicitor. The Claimant was the Head of the Lift Department for the Respondent, an engineering consultancy firm. The Claim form is relatively sparse.
17. The Claimant had explained at the preliminary hearing on 13 February 2024 that it was his intention to apply to amend his claim to add complaints of harassment and post-employment victimisation. He set out his application in writing by the relevant date ordered by Employment Judge Robinson.
18. The post-employment victimisation complaint relates to a subject access request to which the Respondent has now replied. The Claimant says that the Respondent did not respond to his request initially due to the ongoing litigation between the parties. The Claimant says that his Claim is a protected

act and that the refusal to respond to his subject access request is specifically linked to the ongoing litigation, namely the protected act.

19. The principal reason for the Claimant not including the additional matters in his initial Claim was that the alleged victimisation had not then occurred. The Respondent referred to the Claimant's Claim in an email dated 02 February 2024 when explaining its position in respect of the subject access request. When the Respondent changed its position a few days later on 06 February 2024, no apology was given to the Claimant. The witness who can address matters related to victimisation is already a witness in respect of the allegations in the Claim.
20. The Claimant accepted that he could have contacted ACAS regarding early conciliation and put in a second Claim regarding victimisation. He was aware of the relevant time limits. He considered it more efficient to deal with the matter by way of an amendment application. He was within time when he raised the matter initially at the preliminary hearing on 13 February 2024.
21. With regards the allegation regarding the failure to refer to occupational health, the Claimant explained that the failure went back several years to 2012. He submitted that his Claim, based on the Respondent's refusal to allow him to work reduced hours, was related to a failure to refer him for occupational health assessments and that this failure continued up to the end of his employment. He sought to add this failure as an allegation of direct age and/or disability discrimination, discrimination arising from disability, and a failure to make reasonable adjustments.

Respondent's Submissions

22. The Respondent contended that the victimisation complaint lacked merit. Its view was that the Claimant was seeking to rely on a strict 'but for' test in respect of this complaint in that 'but for' the ongoing litigation, the Respondent would have responded to the subject access request. This is not sufficient to prove victimisation, where what is necessary is to show that the alleged treatment is because of a protected act.
23. The Respondent noted that its response to the subject access request was a normal response in the context of litigation with its own process of disclosure. Disclosure in this case had been imminent at the time of the subject access request. It relied on an extract from *Harvey* that subject access requests should not be used as a substitute for disclosure where other considerations may apply (such as litigation privilege). If the Claimant considers that the Respondent has failed to comply properly with a subject access request, there are other methods for enforcing any alleged breach.
24. In the event that the application to amend was granted to include the victimisation complaint, the Respondent would seek an order that the Claimant pay a deposit as a condition for continuing to advance this complaint as the Respondent considered that it had little reasonable prospect of success. It also considered the Claimant's conduct to be unreasonable in seeking to add a victimisation complaint in respect of this issue.
25. The Respondent maintained that the Claimant could have presented a second Claim for victimisation and gone through the early conciliation

process in respect of this. He would have been within time to do so at the time of the preliminary hearing in February 2024 and when he made his written application in March 2024. He had chosen to use the amendment process instead.

26. In respect of the allegation that failing to respond to the subject access request was harassment, the Respondent submitted that this has little prospect of success. It observed that there is a risk, if an amendment were granted to include this complaint, that the Claimant would seek to add further grievances as complaints if there were other matters with which he disagreed which were ancillary to the current litigation.
27. The Respondent acknowledged that there was no prejudice to a fair trial in the sense that the issue of subject access was relatively recent. However, it may add some time to the hearing as it was a separate allegation that needed to be responded to.
28. In respect of the allegations regarding the occupational health assessment, this had not been mentioned in the original Claim. It could not be said that this was a simple re-labelling but was adding a new line of enquiry. The allegations related to matters that had happened some time ago. Issues of time limits were relevant.

Conclusions

29. In reaching my conclusions, I focused on the balance of injustice and hardship and the real practical consequences of allowing or refusing the amendment.
30. The Claimant's Claim is about the circumstances that led to his resignation, which centre on a refusal to allow him to reduce his working hours when he turned 70, which had been his intention for some time. In his initial claim form, he had noted this treatment which he contended amounted to discrimination.
31. The amendments sought were three-fold: (1) to add in the failure to refer to occupational health as another allegation of age and/or disability discrimination, discrimination arising from disability, and failure to make reasonable adjustments; (2) to add the Respondent's treatment of the subject access request as an allegation of harassment related to age and/or disability; and (3) to add the Respondent's treatment of the subject access request as an act of victimisation.
32. The addition of the victimisation complaint was an entirely new cause of action. It was therefore substantial in nature. Complaints had already been brought of harassment (by way of amendment to which the Respondent did not object), direct age and/or disability discrimination, discrimination arising from disability, and a failure to make reasonable adjustments. The inclusion of the allegations regarding (i) occupational health referrals and (ii) the subject access request in respect of these heads of claim did not introduce new causes of action but did introduce new factual lines of enquiry. Again, these amendments were substantial in nature.
33. With regards to the applicability of time limits, the Claimant contended that the failure to refer to occupational health from 2012 onwards formed part of a course of conduct extending over a period, the end of which fell within time.

The allegations regarding the subject access request related to events in early February 2024 and were clearly in time when first discussed at the preliminary hearing on 13 February 2024. I make no decision as to whether any or all of the Claimant's claims (whether initially pleaded or in the sought amendment) have been brought in time but considered that issues of time would now be relevant considerations and that this would be a live issue that would need to be determined by the Tribunal.

34. With regards the timing of the application, the allegation regarding occupational health could have been raised in the initial claim form. The Claimant was complaining about matters going back more than a decade of which he was aware. The allegations regarding subject access were discussed at the February 2024 preliminary hearing. The Claimant had complied with the time limit given by Employment Judge Robinson to submit a written application to amend.
35. I considered carefully whether the timing of the application put the Respondent to any particular prejudice. Insofar as the occupational health referrals were concerned, these were matters of which the Claimant was aware at the time of presenting the initial claim form in June 2023. He was aware of the relevant time limits. He had, within a month of submitting his initial claim form, written to the Tribunal to amend his Claim to include a complaint of constructive unfair dismissal. There may be particular difficulties caused to the Respondent arising from matters now being added that relate to events that happened some years ago. The same considerations do not apply to the subject access request allegations, which are more recent.
36. In weighing up carefully the balance of injustice and hardship and real practical consequences of either allowing or refusing the application, I noted that there is a final hearing listed in this case for February 2025. We are at a relatively early stage in the progress of this case. The Respondent's witness who is likely to give evidence in respect of the victimisation complaint will already be required to give evidence in respect of matters that have already been pleaded in the Claim. In this respect, there would be little practical hardship of the Respondent having to deal with additional factual matters related to the subject access allegation. Different considerations apply to the occupational health referral allegations. Evidence will need to be led about events that happened over a decade ago and considerations of time will need to be considered. I was not addressed on which individuals may need to address this issue. Even if the witnesses are those who will already be witnesses in the case, there may well be issues about the quality of the evidence before the Tribunal if parties are asked to speak to events that happened some years ago.
37. In considering the disadvantage to the Claimant of not allowing his amendments, I was addressed by the Claimant on whether the allegations regarding occupational health referrals were intended as background information about why the Respondent had refused his application to work reduced hours. He clarified that he intended to pursue this an allegation, not background information. It was not clear to me, however, whether the Claimant would face significant disadvantage if his application to include the allegation regarding occupational health were not allowed to proceed. His claim form already included factual matters which, if proven to have taken

place, could potentially point towards discriminatory treatment. I do not comment on the potential merit of these complaints (this is a matter for the Tribunal hearing the case) but simply note the addition of allegations regarding occupational health may not strengthen his case significantly. On this basis, the application to include the allegations regarding occupational health was refused.

38. Turning to the subject access request, the Claimant sought to amend the Claim to include this as an allegation of harassment and to found a new cause of action of victimisation. The addition of this allegation may not strengthen the Claimant's harassment case significantly. While I acknowledge the broad scope of the phrase 'related to a protected characteristic', it was not entirely clear that the alleged conduct would constitute harassment as statutorily defined. In respect of the victimisation complaint, this arises because the Claimant is unhappy about how the Respondent dealt with his subject access request in early February 2024. He maintains that because the Respondent relied on the ongoing litigation (in which disclosure under the Tribunal process was due to take place) as a reason not to deal initially with his request, that is sufficient to satisfy the statutory test of causation. However, the test is not strictly 'but for' the protected act.
39. I considered carefully whether to allow the allegations regarding the subject access request to proceed. Pointing in favour of allowing an amendment is the fact that proceedings are at a relatively early stage, the allegations relate to events in the recent past, there is already a witness attending the hearing who can speak to the matters raised allowing the Tribunal to form a view on the motivations behind any alleged conduct, and considerations of causation may be addressed in submissions. Against this, I weighed the disadvantage to the Respondent of being asked to address allegations that have different evidential and legal considerations from those already pleaded, the Claimant's awareness of the possibility of bringing a second claim but preference for making an amendment application, and that I did not consider that he would be impacted significantly if the matters he had asked to be included were not allowed to be aired.
40. Overall, I considered that the balance of hardship and convenience lay in refusing the applications to amend in relation to those matters which referred to the occupational health referral and the subject access request. This decision should not be taken to be any comment on the potential merits of the Claim. This is a matter for the Tribunal which deals with the final hearing.

Employment Judge R Russell

30 May 2024