# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Osborne

**Respondent:** Boots Management Services Limited

**At:** Leeds (in chambers) **On:** 28 June 2024

**Before:** Employment Judge T Knowles

# JUDGMENT UPON CLAIMANT'S APPLICATION TO AMEND THE CLAIM

The Judgment of the Tribunal is that the Claimant's application to amend the claim to add a new complain of harassment under Section 26 of the Equality Act 2010 and to add dyslexia as an additional impairment for the purposes of Section 6 are refused.

# REASONS

1. The issue considered by me today is the Claimant's application to amend her claim to add a new complaint of harassment under Section 26 of the Equality Act 2010 and to add dyslexia as an additional impairment for the purposes of Section 6.

2. I have considered the Claimant's email dated 3 June 2024 which sets out the application and the Respondent's response to the application sent to the Tribunal in their email dated 20 June 2024.

3. The claimant was employed by the respondent, a pharmacy, as a Pharmacy Advisor, from 15 September 2018 until 29 November 2023. Early conciliation started on 30 November 2023 and ended on 11 January 2024. The claim form was presented on 13 January 2024. The original claim is about events leading up to the Claimant's resignation. The respondent's defence is that the Claimant was not constructively dismissed nor was there any disability discrimination.

4. In her original claim form dated 13 January 2024, the Claimant had ticked the boxes for complains of unfair dismissal and disability discrimination in part 8.1 then set out the background details of her claim in part 8.2 as follows:

*"Failure to provide reasonable adjustments which was verbally requested in April 2023 and up to the date of leaving were not in place and plan created, also failure to provide my government apprenticeship."*

5. There was no mention of any claim of harassment.

6. Attached to the claim form was a grievance letter dated 13 November 2023 from the Claimant to the Respondent entitled "formal grievance against Boots".

7. The grievance letter contains no reference to harassment. There is a reference to hearing people talking about her on 19 September 2023 behind a closed door but no further details or any intimation that what she heard related in any way to her asserted disability.

8. The letter of grievance clearly states that the disabilities, therefore impairments, are fibromyalgia, ADHD and anxiety. There is no mention of any impairment of dyslexia.

9. The Respondent denies the Claimant's claims of unfair dismissal and failure to make reasonable adjustments. In its response form, it has not answered any claim of harassment given that none was evidence from the claim form. The Respondent conceded that the Claimant was a disabled person due to her fibromyalgia, ADHD and anxiety and that had knowledge of these disabilities at the material time. The Respondent does not address dyslexia, which is again understandable given that no mention of that was made in the claim form.

10. The matter came before me for a preliminary hearing for case management by video on 28 May 2024.

11. Prior to that hearing, on 19 May 2024, the Claimant submitted an agenda form indicating that she wished to make an application to amend the claim to add a complaint of harassment. No particulars were provided. No mention was made to adding dyslexia as a condition.

12. During the preliminary hearing on 28 May 2024, the Claimant reiterated that she wished to apply to add a complaint of harassment and I explained to her that I could not consider the application, nor could the Respondent confirm whether it consented or objected to the application, because it was not particularised and was not set out fully in writing.

13. Later during the hearing, when we discussed the issues in the original claims, the Claimant sought to add dyslexia as an impairment. No mentioned had been made of that beforehand.

14. I made the following orders concerning the amendments:

> *4. On or before 4 June 2024, the Claimant shall set out in writing her application to amend her claim and send it to the Tribunal (and copy to the Respondent), providing details of her claim of harassment, what happened, who did the act of harassment, when, and whether or not there any other*

*witnesses (and if so naming them). The Claimant should also set out why that claim was not included in her original claim form.*

*5. On or before 18 June 2024 the Respondent should write to the Tribunal (and copy to the Claimant) setting out whether or not they have any objection to the addition of the harassment claim, or to the addition of dyslexia to the Claimant's disability status claim, and if it does object setting out the grounds of their objection.*

15. The Claimant emailed the Tribunal on 3 June 2024 as follows:

*I act as the Claimant in this case.*

*I do apologise for the late response ive been in and out of hospital this last week.*

*Please could I amend my tribunal claim to add harassment and dyslexia to my claim as I advised on 21 June 2024.*

*This is due to the working conditions I endured over the last 9 months of working for Boots. I felt intimidated, humiliated, belittled, ignored, pushed out. I can elaborate on these amendments and provide dates and times as and when required.*

*I have had dyslexia since I was at school, which I have mentioned on numerous occasions throughout my employment.*

16. I note from the application that the Claimant has not set out the details I ordered and has instead suggested that these can be provided as and when required. They have already been ordered to be provided, by 4 June 2024, but have not been provided by the Claimant.

17. The Respondent sent an email 20 June 2024 objecting to the application on the grounds of the nature of the amendment being a significant new claim which would require new facts, that the application is made considerably out of time given that the Claimant was not in work from September 2023, and referring to the absence of any explanation why the claim was not provided earlier. They refer to the potential to list a longer hearing than that set for 10-13 September 2024 to include the issue of dyslexia in terms of disability status and to deal with the harassment complaint.

18. The Tribunal's power to consider amendments to a claim is set out in the Employment Tribunal Rules 2013 which are contained in Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the Rules".

19. The overriding objective of the Rules is set out as follows:

*"2. Overriding objective*

*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

*(a) ensuring that the parties are on an equal footing;*

*(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*

*(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*

*(d) avoiding delay, so far as compatible with proper consideration of the issues; and*

*(e) saving expense.*

*A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*"

20. The specific rules which contain the powers are Rule 29 which permits the Tribunal to make case management orders and Rule 41 which allows the Tribunal to regulate their own procedure in the manner they consider fair, having regard to the overriding objective set out above. Amendments are thus a matter of judicial discretion.

21. Guidance given by Mummery J in ***Selkent Bus Company Ltd v Moore [1996] ICR 836*** at the time when he was President of the EAT is frequently quoted as the key test for determining an application to amend a claim. These were the key points made:

*"(1) The discretion of a Tribunal to regulate its procedure includes a discretion to grant leave for the amendment of the originating application and/or notice of appearance: Regulation 13. See Cocking v. Sandhurst Ltd [1974] ICR 650 at 656G - 657D. That discretion is usually exercised on application to a Chairman alone prior to the substantive hearing by the Tribunal.*

*(2) There is no express obligation in the Industrial Tribunal Rules of Procedure requiring a Tribunal (or the Chairman of a Tribunal) to seek or consider written or oral representations from each side before deciding whether to grant or refuse an application for leave to amend. It is, however, common ground that the discretion to grant leave is a judicial discretion to be exercised in a judicial manner ie, in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions.*

*(3) Consistently with those principles, a Chairman or a Tribunal may exercise the discretion on an application for leave to amend in a number of ways:*

*(a) It may be a proper exercise of discretion to refuse an application for leave to amend without seeking or considering representations from the other side. For example, it may be obvious on the face of the application and/or in the circumstances in which it is made that it is hopeless and should be refused. If the Tribunal forms that view that is the end of the matter, subject to any appeal. On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the Appeal Tribunal that the Industrial Tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into*

*account relevant considerations or had taken irrelevant factors into account, or that no reasonable Tribunal, properly directing itself, could have refused the amendment. See Adams v. West Sussex County Council [1990] ICR 546.*

*(b) If, however, the amendment sought is arguable and is one of substance which the Tribunal considers could reasonably be opposed by the other side, the Tribunal may then ask the other party whether they consent to the amendment or whether they oppose it and, if they oppose it, to state the grounds of opposition. In those cases the Tribunal would make a decision on the question of amendment after hearing both sides. The party disappointed with the result might then appeal to this Tribunal on one or more of the limited grounds mentioned in (a) above.*

*(c) In other cases an Industrial Tribunal may reasonably take the view that the proposed amendment is not sufficiently substantial or controversial to justify seeking representations from the other side and may order the amendment ex parte without doing so. If that course is adopted and the other side then objects, the Industrial Tribunal should consider those objections and decide whether to affirm, rescind or vary the order which has been made. The disappointed party may then appeal to this Tribunal on one or more of the limited grounds mentioned in (b) above.*

*(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*

*(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*

*(a) The nature of the amendment*

*Applications to amend are of many different kinds, ranging, 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. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*

*(b) The applicability of time limits*

*If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.*

*(c) The timing and manner of the application*

*An application should not be refused solely because there has been a*

*delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."*

22. ***Ladbrokes Racing Limited v Traynor [2006] EATS 0067/06*** highlights that an application to amend must include details of the amendment sought in precise terms. They draw my attention to paragraph 20:

*"When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and the manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier. These principles are discussed in the well known case of Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661."*

23. In ***Scottish Opera Limited v Winning [2009] EATS 0047/09*** it was held at paragraph 5 that "*clear and accurate pleadings are of importance in all cases, but particularly in discrimination claims. It is essential that parties seeking permission to amend to introduce such a claim formulate the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim; and tribunals should ensure that the terms of any such proposed amendments are clearly recorded.*"

24. The amendments sought add new causes of action.

25. They are more than minor and in both cases (adding harassment and dyslexia) are not set out in the original claim.

26. The Claimant would need to set out the claims in order that they could be answered.

27. Despite having been ordered to provide full details of the complaint of harassment, none have been provided.

28. The application lacks crucial details in relation to harassment, i.e. what are the acts of harassment, who committed the acts and when.

29. The harassment claim could not be answered by the Respondent if this amendment was allowed.

30. Although the addition of dyslexia may at first appear a minor addition to the claim, there is no mention in the application to amend of how this additional condition has any relevance to the original claim of failure to make reasonable adjustments.

31. It appears to have no relevance at present because when setting out in detail in her claim form her claim of failure to make reasonable adjustments the Claimant mentioned only fibromyalgia, ADHD and anxiety.

32. The nature of the amendments are therefore, in my conclusion, more than minor and would inevitably involve a need for significant further information before they could even be answered by the Respondent.

33. These claims are also significantly out of time. I ordered that the Claimant explain why they had not been set out in her original claim but the Claimant has provided no answer to that part of my order.

34. I am not in a position to conclude that it would be just and equitable to extend time; I do not know the reasons for the delay.

35. The impact of the timing of the application is that had it been properly particularised, the next step would be to require the Respondent to answer the amended claim.

36. However an amended claim cannot be answered in its present form therefore there would need to be additional details provided by the Claimant.

37. Then the amendment application would require further Judicial consideration, and there may need to be a further preliminary hearing.

38. If the application were then granted, the Respondent would need to be given time to answer the amended claim.

39. The amendment changes the evidence required potentially from both a documentation and witness evidence perspective.

40. This process could delay the next steps for several months.

41. Documents are due to be exchanged on 9 July 2024 and a file prepared by the Respondent by 20 July 2024. Witness statements are due to be exchanged 20 August 2024. The hearing is set for 4 days 10-13 September 2024.

42. The preparation timetable and hearing dates would be jeopardised by allowing an amendment at this late stage.

43. The Respondent would inevitably be but to considerable additional time and expense in answering the new elements that the Claimant is seeking to add to her complaints.

44. If the amendment application is not allowed, the Claimant will retain her complaints of failure to make reasonable adjustments and constructive dismissal. She will, therefore, retain significant claims to be heard by the Tribunal and is not left without any redress for the circumstances leading to the end of her employment if she is successful in those claims.

45. In all of the circumstances the Claimant has provided too little information too late.

46. The nature, timing and manner of the application leads me to conclude that the injustice and hardship of allowing the amendment considerable outweigh the hardship of refusing it.

47. The application to amend the claim is refused.

Employment Judge T Knowles

28 June 2024