



EMPLOYMENT TRIBUNALS

Claimant: Mr Nihad Makhoulf Dit Moghrabi

Respondent: Refugee and Migrant Forum of Essex (RAMFEL)

Heard at: East London

On: 15 August 2024

Before: Employment Judge Reid

Representation

Claimant: Ms Bamieh, Counsel

Respondent: Mr Henry, Solicitor

The amendment application decision having been sent to the parties on 19 August 2024 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant applied to amend his claim on 21 May 2024. His solicitor at that point was unwell and so the Claimant made the application himself (with help drafting that email from his solicitor as far as he could).
2. His solicitor followed up on 22 July 2024 with a mark up of the claim showing the proposed amendment in para 65 and 79 of the attachment to the claim form.
3. I therefore treat the amendment application as made on 21 May 2024 in the circumstances.
4. The Respondent objected to the application on 21 May 2024.
5. The amendment was to add in an instance of what was said to be either direct discrimination or harassment, on the grounds of disability.
6. I clarified at the hearing today that the act complained of was the Respondent's claimed failure between 4 Jan 2022 and 21 Jan 2022 (when the Claimant resigned with notice) to tell the Claimant that he in fact had more than 72 hours

from 4 January 2022 to respond to the Respondent's request for written submissions for the Claimant's medical capability meeting originally originally due to be heard on 7 January 2022 (and due to be held in the Claimant's absence as he was off sick). The new claim was in effect that because the Claimant did not know time had been extended he lost out on the opportunity to provide his written submissions because he thought the deadline had expired and he was too late; the Claimant said he had only found out about what he called the extension when he got the Croner's report in May 2024 which referred to an extension the report said Claimant was not told about.

7. The Respondent said in response to the application to amend that the deadline was 11 January 2022 and the Claimant had been aware of that at the time; he was also said to have been aware of that deadline from later correspondence in February 2022 ; the Respondent said it was therefore not the case that the Claimant only found out about the deadline in May 2024.
8. I heard oral submissions on both sides.

Relevant law

9. The power to amend is a general case management power (Rule 29 of the 2013 Rules of Procedure). I need to consider whether to grant or refuse the application to amend is in accordance with the overriding objective (Rule 2).
10. The power to amend is a judicial discretion to be exercised "in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions": see *Selkent Bus Co v Moore* [1996] IRLR 661. I have reminded myself of the *Selkent* factors (see below) (which are not a checklist) and the Presidential Guidance at relevant paragraphs including 4-5.
11. Whenever the discretion to grant an amendment is invoked, a tribunal should take into account all the circumstances, including the nature of the amendment, the applicability of time limits and the timing and manner of the application. The Tribunal may take into account as potentially relevant factors the factors set out in s33(5) Limitation Act 1980 , namely (a) the length of and reasons for the delay (b) the effect of the delay on the cogency of the evidence (c) the conduct of the parties including the provision of information and whether they acted promptly once aware of relevant information and (d) steps taken to obtain advice. These are not however a checklist (*Adedeji v University Hospitals Birmingham NHS Foundation Trust*. [2021] EWCA Civ 23).
12. It is then necessary to balance the hardship and injustice of allowing the amendment against the injustice and hardship of refusing it. (*Cocking v Sandhurst* [1974] ICR 650).
13. The consequences of a refusal should be considered ie what are the real practical consequences of allowing or refusing the amendment, taking into account how severe the consequences of a refusal would be and if considering allowing it, what the practical problems might be in responding, looking at the

reality; this involves consideration of witnesses' memory and the availability of relevant records (*Vaughan v Modality Partnership [2021] IRLR 97*).

Relevant factors

Nature of the amendment

14. The application is to add in one further instance of disability discrimination either as a direct discrimination claim or as a harassment claim; the Claimant has already brought a number of claims of disability discrimination (claim attachment, para 75-78). This amendment was linked to existing para 77 about the deadline for the Claimant's written submissions for the medical capability meeting but now a claim that he was not told of an 'extension' of time, rather than not being given enough time.
15. It is factually linked to the matters in para 77 but from a different angle; it arises out of the same facts as in para 77 and it does not involve a large new area of enquiry.

Timing and manner

16. The application was said to be made now because the Claimant had only received (via disclosure) in May 2024 a copy of the report dated 17 February 2022 by an external consultant Croners which report (report para 28) had referred to the Claimant having 7 days to respond from the date of the invitation to the meeting sent on 4 January 2022. The report said that there had been a decision to 'extend' the time period but that the Claimant had not been told.
17. The Claimant had instructed a solicitor Mr Tuckett in the summer of 2021 to help with his grievance appeal. He was therefore represented at the time of the medical capability meeting.
18. The Claimant was off sick during January 2022 with mental health problems.

Other relevant factors

19. On 4 January 2022 the Claimant was invited to a medical capability meeting at that point due to take place on 7 January 2022 (page 146); he was told he could provide written submissions as already recommended and that he would be sent a list of questions by the Croner consultant.
20. The letter then said he would have 72 hours to respond after the Croner consultant contacted him with the questions – that was a bit unclear because it pre-supposed Croners would contact him that same day if the hearing was on 7 January 2022 but it was nonetheless clear that the Claimant had to wait for the questions.

21. On 6 January 2022 the Claimant's solicitor (page 147) contacted Mr Tullet of the Respondent to say that 72 hours was not enough – but by that point the 72 hours had not started to run because the questions had not been provided yet.
22. Mr Tullet replied (page 148) that 72 hours was considered enough. He said nothing about when that started to run – the Respondent had already told the Claimant that he would get the questions and then have 72 hours.
23. On 7 Jan 2022 Diane Kubol of Croners sent the Claimant her list of questions (page 149). This was what the Claimant had been waiting for, before he could provide his response.
24. Her email said that the invitation to the meeting had said he would have 72 hours to respond but her email did not say when that started from; however it then posed the questions and said the Claimant had until 5pm on 11 January 2022 to respond. The Claimant had already been told who would contact him and that the 72 hours was to run from the questions being provided, which is what had now happened.
25. Taken in context the Claimant was therefore aware that he had until 11 January 2022 to respond and provide his submissions - he had never been told it was 72 hours from 4 January 2022 he had been told it was 72 hours after he got the questions and the person posing the questions was saying 11 January 2022 which fitted in with that 72 hour timeframe.
26. The issue in this application to amend is not whether that was enough time because that issue is already covered as a reasonable adjustments claim in para 77 of the Claimant's ET1 attachment.
27. From these documents the Claimant was aware on 7 January 2022 that the deadline was 11 January 2022 – it had not in fact been 'extended' because the 72 hours just hadn't started to run till 7 January 2022. The Croners' report was therefore not correct to say time had been 'extended'. It was also incorrect to state that the Claimant hadn't been told of the 'extension' – it wasn't an extension and in any event the Claimant was aware of the deadline as set out above.
28. The Claimant was further aware by letter dated 22 Feb 2022 (page 158) that the deadline had been 11 Jan 2022.
29. It was therefore not the case that the Claimant only became aware of the 11 January 2022 deadline in May 2024; whether or not the Claimant agrees that he had been given enough time is not the issue.
30. The Claimant's claim was presented on 19 June 2022. He had legal advice from July 2021 and at the time of drafting his claim

Balance of hardship

31. The claim was presented over 2 years ago and the Claimant was aware in January and February 2022 that the deadline was 11 Jan 2022; he also made a subsequent reasonable adjustments claim that he was not given enough time to respond. He still has this claim that it was insufficient time to respond.
32. As regards the practical effect on the Tribunal timetable, although no final hearing has yet been listed (there is a listing hearing booked for 30 September 2024) the parties have completed disclosure, done the bundle (subject to final changes) and exchanged witness statements – a final hearing had been listed for May 2024 but this did not go ahead.
33. There is prejudice to the Respondent who has prepared for the final hearing with all steps now completed except listing it and checking the parties' list of issues.
34. However limited new disclosure if any and same witnesses about the arrangements for the medical capability meeting would be required because the arrangements for the meeting are already in issue by virtue of para 77 of the claim attachment; the existing witness statements would need to be updated but the factual issues around the arrangements for the capability meeting are already in issue.
35. There is prejudice to the Claimant if he cannot also make these two additional claims of discrimination.
36. The context is a claimed long history of acts by the Respondent and this new claim is a discrimination claim.
37. There is therefore prejudice on both sides.
38. However the Claimant knew in January 2022 what the deadline was but now seeks to argue that he did not. That is relevant to the merits of the proposed amendment as regards the timing of the application. In addition the amendment application is made on the premise that there was an 'extension' he wasn't told about, which lacks merit.
39. The Claimant managed to include para 77 about the meeting in terms of the amount of notice he says he was given.
40. That is relevant to the balance of injustice because even before considering the merits (see below) the Claimant could have brought this new claim when he presented his claim form if he was still going to argue that he didn't know the deadline.

41. The Claimant has been legally represented throughout.

42. I accept he has mental health problems.

43. This amendment is based on the premise that the Claimant was kept in the dark and not told of an 'extension' but that claim lacks merit because there was no real extension and even if there was the impression of one (from 7 to 11 January 2022), the Claimant was aware of the deadline of 11 January 2022. The Claimant does not lose out if he cannot bring a claim which lacks merit and that has some weight.

44. Further had the Claimant considered he was being kept in the dark and did not know at the time what the deadline was this could have been included in his claim from the outset; he had included para 77 on the same topic of the meeting and the amount of time he was given.

Conclusion

45. Taking into account the fact that the claim is now at a late stage with all preparations largely completed and ready to list I conclude I do not allow the amendment application weighing up the various factors set out above including the merits and applying the overriding object in Rule 2.

**Employment Judge Reid
Date: 29 August 2024**