

THE INDUSTRIAL TRIBUNALS

CASE REF: 7400/17IT

CLAIMANT: Elemir Nogli

RESPONDENT: Terramac Fabrication Ltd

DECISION ON A PRE-HEARING REVIEW

The claimant's application to include a claim for disability discrimination and related heads of claim was brought outside the statutory time limit of three months. The tribunal concludes however that it is just and equitable in all the circumstances of his case to permit him to amend his original claim to include such a claim.

Constitution of Tribunal:

Employment Judge (sitting alone): Employment Judge Browne

Appearances:

The claimant was represented by Mr E Foster, Barrister-at-Law, instructed by Fox Law Solicitors.

The respondent was instructed by Mr T Warnock, Barrister-at-Law, instructed by Murphy O'Rawe Solicitors.

1. The claimant lodged a claim for constructive unfair dismissal; no written terms and conditions of his contract of employment; notice pay; and holiday pay, on 17 November 2017, arising from his resignation on 16 August 2017. His complaint was therefore received by the tribunals' office one day within the statutory time-limit to lodge such a claim.
2. The original claim was prepared and lodged on his behalf by a firm of Solicitors.
3. The claimant now seeks to add to his original claim a number of headings of disability discrimination, namely a failure to make reasonable adjustments; and direct and indirect disability discrimination. It was argued on his behalf that he had in fact substantially made out the case of unfair constructive dismissal arising from one or more of the proposed new heads of claim in his initial complaint to the tribunal.

4. The respondent entered a response to his claim, in which it denied his assertions as to requesting any alternative work, and actually refers to its usual practice when an employee has a disability. It also raises what appears to be a detailed refutation of the sequence of events as asserted by the claimant around his prolonged sickness absence.
5. Their response would strongly suggest that the respondent has already marshalled a defence based upon his reliability as a witness.
6. The claimant appears to have been professionally legally represented from before his claim was lodged. It was argued on his behalf that the proposed amendment is as a result of counsel being instructed in his case.
7. Unsurprisingly in situations like this, the question arises as to why, if such proposed new heads of claim are so worthy of addition, they were not included from the outset.
8. The respondent contends that, in view of having the benefit of professional legal advice, his original claim ought to have made specific reference to the claims under the disability legislation.
9. The respondent additionally argues that the claimant has not identified from what disability he suffered at the material time, or provided any salient supporting information in this type of case, such as reasonable adjustments or a comparator.
10. His complaint in the ET1, on my reading of it, makes a clear connection between his assertion that he at the material time was suffering from pains in his elbows, and, later during that period, pains in his shoulders. He states that as a result, he asked his employer for alternative work, but that it was not made available to him, despite his opinion that such alternative work existed. On his case, as originally stated, he felt that he had no alternative but to resign.
11. I consider that, bearing in mind the respondent's immediate refutation in its response, referring specifically to disability, supports the view that the only surprise to the respondents was that these proposed heads of claim were not specified in the original complaint.
12. The leading case of ***Selkent Bus Company Ltd -v- Moore [1996] IRLR 661*** refers any tribunal considering this issue to balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
13. The fact that the respondent immediately identified and addressed the issue of disability does not necessarily mean that it should later be held to account for it. The respondent is entitled to focus on and prepare its case upon the issues actually raised by the claimant, and not to expend valuable and expensive time and resources addressing others not pleaded by the claimant.
14. It seems to me that this application has been made well before the case has crystallised in to a form suitable for listing for hearing.
15. I regard this application as falling under category (ii) of the three identified in **Harvey** at para 311.03 of Division PI, based upon my reading of the claimant's assertions in his ET1 and the respondent's clear recognition of the central allegations in its response of their basis for contesting the case.

16. I consider that the respondent's concerns regarding predicted hardship in understanding the claimant's specific case regarding reasonable adjustments, a comparator, et cetera, can readily be addressed by the claimant in his witness statement and supporting documentation, and refuted by the respondent's witnesses and documentation.
17. I consider that any such issues throw up much less of an obstacle to a fair hearing than to deny the claimant the right to have these new heads of claim added to his complaint. The essence of his complaint from the outset was that he felt that he had no option but to resign because of his physical condition, which, on his case, the respondent failed to address. For such a case to be presented at a hearing of the issues without that clear foundation being addressed or assessed by the tribunal, in my view, would be unworkable, and therefore inherently unfair to the claimant.
18. I therefore direct that the existing claim be amended to include the three new heads of claim, namely: failure to make reasonable adjustments; direct disability discrimination; and disability related discrimination.

Employment Judge:

Date and place of hearing: 2 May 2018, Belfast.

Date decision recorded in register and issued to parties: