



EMPLOYMENT TRIBUNALS

Claimant

Mr M Jabbar

v

Respondent

1. Splendid Hospitality Group

2. Mr S Boghani

3. Mr N Boghani

PRELIMINARY HEARING

Heard at: Watford

On: 10 January 2018

Before: Employment Judge Bedeau

Appearances:

For the Claimant: In person

For the Respondents: Ms C McCann, Counsel

JUDGMENT

The claimant's application to amend is refused.

REASONS

1. This is an application by the claimant to add new matters and new claims to those already identified by Employment Judge Henry at the preliminary hearing held on 5 May 2017, when the learned judge set out, in my view, extensively, the claims and the issues. They cover the national minimum wage; expenses; direct discrimination because of religion/belief; direct race discrimination; indirect race discrimination; harassment; breach of contract; commission drawing/plans; and holiday pay; and issues in respect of remedy.
2. The claimant was ordered to provide further particulars by 15 May 2017, in relation to his indirect race discrimination claim by setting out the provision, criterion or practice he alleged the respondent applied that placed him at a particular disadvantage. The further particulars were received by the tribunal on 19 May 2017, a copy of it was also sent to the respondent's solicitors and it is at pages 56 to 63 in the bundle of documents before me. It was also in the bundle

before Employment Judge Heal at the preliminary hearing held on 23 November 2017, to consider the respondent's strike out and/or deposit order application as well as an order preventing the claimant from making new claims.

3. In paragraph 4 of EJ Heal's judgment, the learned judge concluded that,

“The claim for race discrimination set out in the claimant's document dated 19 May 2017 is struck out (so far as may be necessary) insofar as it relates to indirect discrimination. (Insofar as this claim raises new issues of direct discrimination, it must be the subject of an application to amend. This will be decided at the hearing on 10 January 2018.)”
4. The claimant's case is that the particulars in his 19 May document are not new claims because he has simply expanded the existing claims and referred me to pages 50 to 60 in the bundle. Ms McCann took me through the same document starting from page 57 all the way through to page 63 expressing concerns that the respondent may be required to address entirely new acts and claims.
5. I bear in mind that the claimant was dismissed from his employment on 3 November 2016 and presented his claim form to the tribunal on 31 January 2017. He is a lay person, but upon reading the very detailed further information document, it is apparent to me that he must have spent some time clarifying for himself the distinctions between direct, indirect, harassment, victimisation, breach of contract, all of which are legal terms. The predominant concern on the part of the respondent is the issue of prejudice.
6. This case was listed for a final hearing by EJ Henry on 5 May 2017 for 9 days to start on the 9 to 19 April 2018. In other words, the final hearing of this case was listed nearly a year ahead, and in listing the case for hearing the parties would have identified to the learned judge, the witnesses they would be calling to give evidence and relevant documents, based on their understanding of the claims and of the issues.
7. I am satisfied that in respect of the conversion of those matters from indirect discrimination to direct discrimination, the claimant is putting forward a new basis namely, that the indirect matters, having been rejected by Employment Judge Heal, now properly falls under the claim of direct discrimination.

The issue

8. The issue before me is whether the claimant raised new matters of direct discrimination as well as additional matters not previously pleaded?

The law

9. Under section 123, Equality Act 2010, a complaint must be presented within three months,

“(a)...starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable,”

and “conduct extending over a period is to be treated as done at the end of the period,”
(3)(a).

10. Under the ACAS conciliation provisions in section 140B, EqA 2010, the statutory time can be extended.
11. Time limits are to be applied strictly. The Court of Appeal held that the exercise of discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors a judge may consider in exercising his or her discretion are: the reason for and the extent of the delay; whether the Claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed; and the merits of the claim. There is no general rule and the matter remains one of fact.
12. I have taken into account the cases of Selkent Bus Co Ltd v Moore [1996] ICR 836, a judgment of the Employment Appeal Tribunal and Ali v office of National Statistics [2005] IRLR 201, Court of Appeal as well as the Presidential Guidance on General Case Management.
13. In considering whether to grant an application to amend a claim form, the tribunal must engage in a balancing exercise taking into account all relevant factors and to have regard to the interests of justice as well as the relative hardship that would be caused to the parties in granting or refusing the application, Selkent. The factors which should be taken into account are: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

Conclusion

14. Having regard to the 19 May further information document, in relation to indirect discrimination, in the second paragraph, there is the absence of references to direct race, religion or belief of discrimination, in relation to the claimant’s health and well-being. These would be new claims requiring additional evidence. Likewise, the claim of disability discrimination. In relation to paragraph 1.1, relocating the claimant without notice, there is no reference to race, religion or belief. Under working hours, again there is no reference to race, religion or belief. The same applies to the paragraphs under draft revised contract.
15. With reference to access to cash credit and credit card, as set out, this is a new complaint requiring the respondent at this stage to search for evidence in rebuttal.
16. In relation to attending hospitality group award event, the claimant alleged that this was based on those who had more than 2 years’ service but no reference is made to direct race, religion or belief discrimination.
17. As regards holidays, this is a new claim not previously pleaded and there is no reference to either race, religion or belief.

18. In relation to the claim of harassment by Mr Nadeem Boghani, although the claimant made reference to comments on his physical appearance, out of the 8 bullet points, points 4 and 5 are new matters. Under a separate heading of Bullying by Nadeem, out of the 10 bullet points, points 4,5,6,7 and 10 are new matters.
19. With reference to harassment in the office by Ms Sue Loosely, Ms Shelley Gleeson, and Ms Jean Robinson, this claim and the acts relied upon, were not previously referred to. This is a new claim.
20. As regards victimisation, this is against Ms Loosley, the alleged perpetrator and is considerably out of time.
21. In relation to those matters on pages 57 and 58, under direct discrimination by Mr Nadeem Boghani, out of the 12 bullet points, points 9, 10 and 11 are new matters and the last bullet point, 12, is a new act.
22. The claim of direct discrimination by Mr Shiraz Boghani, it is accepted by the respondent that the claimant can put his case on the alternative basis of either direct discrimination or harassment by relying on the same acts, section 212 EqA 2010.
23. In relation to the sub-heading of direct discrimination by Ms Loosley after complaining to her and to Mr Nadeem Boghani, those matters relied upon are entirely new and Ms Loosley no longer works for the first respondent.
24. I have come to the conclusion that prejudice here is the central factor. The claimant has a number of claims already set down for hearing. Were I to allow what I considered to be new claims as well as additional matters, it would require the respondent to take time out to search for additional evidence both orally as well as in documentary form. It is likely to lead to the hearing in April 2018 being vacated after the tribunal gave the parties nearly a year's advance notice of it. If the case is to be taken out I can tell the parties that a 10-day hearing or more is likely to be heard towards the end of the year based on the current listing information.
25. As Ms Loosley no longer works for the respondent, it is unclear whether she would be ready, willing and able to be contacted to give evidence in respect of the additional allegations against her.
26. Balancing the prejudice the claimant is likely to suffer were I to refuse his application with the prejudice the respondents are likely to suffer were I to grant the application, I am satisfied the prejudice on the part of the respondents outweighs the prejudice the claimant is likely to suffer.
27. The claimant was dismissed from his employment as a Chauffeur and Executive Administrative after nearly seven months' service on 3 November 2016. He notified ACAS on 3 January 2017 and a certificate was issued on 20 January 2017. The statutory time limit expired on 2 February 2017. He presented his claim on 31 January 2017. As some of the claims are new, I also consider that the application to amend by virtue of the 19 May 2017 document, is considerably

out of time. I do not extend time based on justice and equity as the claimant, in my view, demonstrated in the way he prepared his further information document, that he has knowledge of his employment rights. Applying Robertson v Bexley Community Centre, time limits are to be strictly applied. The claimant has provided no good reason for the delay.

28. The respondents are concerned about being required to constantly address new claims and issues making difficult preparing their case for the final hearing as it would be an ever-ongoing case of “shifting sands”
29. For those reasons I have come to the conclusion that the application to amend is refused. The claimant will be able to rely on those matters clarified by EJ Henry and expanded, albeit to a limited extent, by EJ Heal.
30. I gave judgment orally at the hearing after which the claimant asked for written reasons.
31. I made the following case management orders.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Disclosure of documents

- 1.1 The parties shall make disclosure of documents by list together with copies by not later than **4pm 14 February 2018**.
- 1.2 The respondent shall prepare and serve the joint bundle of documents by not later than **4pm 7 March 2018**.
- 1.3 Witness statements shall be exchanged on or before **26 March 2018**.

2. Other matters

- 2.1 Ms McCann told me that Mr Nadeem Boghani and Mr Shiraz Boghani were told on Friday 5 January 2018 that there will be at a family wedding in Calgary, Canada on 13 and 14 April 2018 and there are invited to attend. They both would like to present but it would mean travelling, at the latest, on Thursday 12 April 2018. Ms McCann applied for these individual respondents to give evidence first as it is unlikely that the tribunal will hear the evidence from them before their departure on Thursday should the claimant give evidence first. Video link would not be of benefit to the claimant as he would prefer to cross-examine these two witnesses at an open hearing.
- 2.2 The claimant objected on the basis that he would like to observe and take into account the questions put to him before he cross-examined the respondent's witnesses.

- 2.3 I bear in mind that the tribunal has power to regulate its own proceedings and do take into account the claimant's concerns as well as the issues raised by Ms McCann.
- 2.4 A fair trial could still take place if the respondents are allowed to call their evidence first as the claimant will have from now to 9 April 2018 sufficient time to prepare his cross-examination. Should the respondents' witnesses go first it would mean that Mr Nadeem and Mr Shiraz Boghani would be able to complete their evidence and attend the wedding.
- 2.5 In exercising my case management powers under rules 29 and 41, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended, I order that the respondents should present their evidence first.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Bedeau

Sent to the parties on:

21 February 2018

For the Tribunal:

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