EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr S Hayes	AND	Pell Frischmann Consultants Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY PHONE AT Exeter **ON** 24 January 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Miss N Mallick of Counsel
For the Respondent: Miss C Bell of Counsel

RESERVED JUDGMENT ON APPLICATION TO AMEND

The claimant's application to amend the originating application is refused.

REASONS

1. In this case the claimant seeks leave to amend the claim which is currently before the Tribunal, and the respondent opposes that application. I have been assisted by Miss Mallick who made the application on behalf of the claimant, and by Miss Bell who opposed the application on behalf of the respondent.
2. The claim as it currently stands:
3. The general background and procedural history of the claim as it stands before the determination of this application is as follows.
4. The claimant was employed as a Senior Mechanical Engineer by the respondent from 19 November 2016 until 6 November 2017 when he was dismissed by reason of misconduct. The claimant prepared and issued these proceedings himself on 24 March 2018. He brought complaints of unfair dismissal, discrimination on the grounds of both his age and his disability, and for unlawful deductions from wages in respect of allegedly underpaid sick pay. The disability relied upon is

anxiety/depression. The respondent responded by way of denial of these claims and denying that the claimant was disabled.

5. The claimant prepared a very detailed Claim Statement (effectively his particulars of claim) which was dated 24 March 2018 and which supports his originating application to this Tribunal. It is an extremely detailed document running to 24 pages. It starts with four bullet points, namely: "unfair dismissal; disability discrimination; failure to correctly follow procedures and processes associated with the disciplinary process; other - harassment or bullying and placement under duress during the disciplinary process whilst off sick." This is then followed by an "Executive Summary", in which the main complaints appear to be: "The onset of work-related stress and anxiety in the work environment caused by lack of experienced resources … That the reason for dismissal of "gross misconduct" was not representative of the alleged incidents, which in themselves were greatly exaggerated … My employer did not provide me with the opportunity to review my referral criteria to BUPA … An inadequate referral was provided by my employer and as a result added little value … Inconsistencies in the management of the disciplinary process … Grievances have been ignored … My employer did not act on the recommendation by BUPA."
6. This Executive Summary was then followed by eight separate and lengthy sections expanding on the above, before a concluding section. In my judgment the claimant does not complain at any stage in his originating application or this Claim Statement that his dismissal was in any way an act of disability discrimination. Although Miss Mallick of Counsel who represented the claimant today suggests that there is an entry to this effect towards the end of section 7 of the Claim Statement, I do not agree. At that part of his Claim Statement the claimant gives six bullet points which are his grounds of appeal against dismissal, the second of which suggests: "disability discrimination – illness/corrective action not considered." In my judgment this does not complain that the act of dismissal was one of disability discrimination. There is no other mention of the same in the 24 pages of the Claim Statement. Accordingly, I conclude that there was no complaint included in the claimant's very detailed Claim Statement to the effect that the reason for his dismissal was on the ground of, or related to, his disability.
7. In any event the matter then came before me for a case management preliminary hearing, which was heard by telephone on 12 June 2018. One of the main purposes of such a hearing is to discuss the claim with the parties and to agree the issues which the Tribunal will eventually have to determine. The claimant was not represented at that time and attended the hearing in person. I discussed the claimant's various claims with him in considerable detail. I explained to the claimant that he did not have sufficient length of service to complain of unfair dismissal for the reasons relied upon, and I dismissed that claim. Following discussion, the claimant also chose to withdraw his claim for discrimination on the ground of his age, which claim was also dismissed. Immediately after that telephone hearing I prepared a case management order ("the First Order") which is also dated 12 June 2018. Paragraph 6 of the preamble to the First Order records as follows:
8. [6] "In the absence of an unfair dismissal claim because of insufficient service, the claimant's remaining claims are those of disability discrimination relying on anxiety/depression. After lengthy discussion the claimant conceded that there is no direct discrimination claim, and that he has no claim under section 15 for discrimination arising from disability. He does complain that when he was sent by the respondent for a medical assessment by BUPA he was not involved in the

referral process and did not have any input on the appropriate questions to be asked, which resulted in BUPA's conclusion that he was unlikely to be a disabled person, which then had adverse consequences. The claimant asserts that the respondent should have made a reasonable adjustment by involving him in the referral and questioning process. In addition, the claimant contends that it was his unnecessarily high workload which caused his depression and anxiety and that the respondent should have made a reasonable adjustment and reduced his workload with effect from January 2017. He does not pursue complaints relating to his desk or his noisy office. Finally, the harassment claim is limited to the respondent's repeated requirements for him to attend the disciplinary and appeal process notwithstanding his absence because of sickness."

9. As at 12 June 2018 therefore, despite the fact that I had discussed in detail with the claimant the nature of potential claims under both section 13 and section 15 of the Equality Act 2010 ("the EqA") for both direct discrimination and discrimination arising from disability, the claimant confirmed that he did not bring any such claims. The First Order carefully records this, and sets out in detail the remaining extant claims of harassment, failure to make reasonable adjustments, and for unlawful deduction from wages. I then listed the matter for a further case management preliminary hearing to allow the respondent time to consider medical evidence which I had ordered the claimant to produce. As I suspected might be the case, the respondent subsequently conceded that the claimant was a disabled person by reason of anxiety/depression, although it still denies knowledge of the same.
10. Following receipt of that First Order, the claimant subsequently complained to the effect that he wished to bring a complaint that his dismissal was an act of discrimination, and that he had made that clear at the case management hearing. I have seen his notes of that meeting in which he suggests that he raised that matter. I have also seen the respondent's notes of that hearing, which are consistent with the terms of the First Order, to the effect that the claimant confirmed exactly the opposite, namely that he had no such complaint.
11. The second case management preliminary hearing was before Employment Judge Matthews on 17 August 2018, at which the claimant was now represented by Miss Mallick of Counsel. She made an application on behalf of the claimant to amend the claimant's claim to include a complaint to the effect that the dismissal was an additional act of harassment, and that it was direct disability discrimination contrary to section 13 EqA. I have seen the notes of that hearing taken by the respondent's solicitors. There is no mention of any claim of discrimination arising from disability under section 15 EqA. The respondent objected to the proposed amendment. EJ Matthews determined that such an amendment was at odds with the First Order, and postponed the application and referred it to me to deal with the matter, which has now taken place.
12. There seems to have been some confusion as to whether (and if so when) any proposed amendment to the claim was set out in writing. Miss Mallick has not prepared any proposed amended particulars of claim (and I imply no criticism because she may not have been instructed to do so). I received late yesterday, on the eve of this hearing, a document headed "Application for Grounds of Amendment" prepared by the claimant personally. This document seeks to introduce claims of both direct discrimination under section 13 EqA and (for the first time) discrimination arising from disability under section 15 EqA. The proposed amendments go some way beyond merely claiming that the act of dismissal was one of direct discrimination and/or an act of discrimination arising from his disability. In addition, it does not mention the earlier suggestion that the dismissal

was also an act of harassment. The claimant suggests that he had sent this to the respondent's solicitors some time earlier. The respondent denies this and says it only received this document yesterday, and was only on notice of the proposed new amendments (to include section 15 EqA) yesterday. The respondent continues to object to the proposed amendments.

13. One final point to note is that the claim as originally brought has now been listed for its full main hearing for five days in July 2019, which timetable affords time to allow the claimant to take breaks to accommodate his disability.
14. The parties' submissions:
15. The submissions made by Miss Mallick to support the claimant's application are to this effect. In short there has been a misunderstanding on the part of the claimant who always intended to bring a claim of disability discrimination relating to his dismissal. He now realises that the claim he described as unfair dismissal cannot be brought as such under the Employment Rights Act 1996 because of his insufficient service, but his claim was always about the unfair way in which he was treated when he was dismissed which includes the act of dismissal because he was disabled. If it is the case that the claimant is deemed to have withdrawn the discrimination claims relating to his dismissal then there was a misunderstanding and he should be allowed to reinstate them. If not, then the amendment should be allowed because it is not a new claim, and it is a mere relabelling of the existing claim which complains of the reasons why he was dismissed. When balancing the hardship and prejudice to the parties, if the claimant is not allowed to amend his claim then he will suffer the greater prejudice in that he will be unable to complain about his dismissal, whereas the respondent was always on notice from the outset of the claim that the claimant complained of the reasons for his dismissal and they will be in a position to defend that claim. The respondent still has time to prepare the defence and they are not prejudiced. In any event, even if it were a new claim, the respondent is in a position to request full particulars of the same and to prepare the necessary defence to the claim, and the greater hardship still lies against the claimant if the application were to be refused.
16. The submissions made by Miss Bell to oppose the application on behalf of the respondent are to this effect. First, with regard to the nature of the amendment it is clearly a new claim. The originating application as pleaded in detail does not mention either section 13 or section 15 EqA, nor complain about disability discrimination in the context of the claimant's dismissal. The claimant confirmed personally that he had no such claims on 12 June 2018 as recorded correctly in the First Order. The respondent has still not seen adequate particularisation of either proposed new claim. Effectively the claimant is now trying to have a third bite of the cherry, having failed to include the claim when he issued proceedings, and having confirmed before the First Order that he had no such claims. Given that the effective date of termination of the claimant's employment was 27 November 2017 the application now is considerably out of time. No application has been made to extend time. There is substantial prejudice to the respondent because after considerable passage of time the respondent will now have to commence its preparation to defend an entirely new claim to include evidence about causation, comparators, and potential justification. The respondent is effectively ready to proceed to trial on the claims as they currently exist, and will incur substantial further preparation costs if the amendment is allowed. The nature of the respondent's consultancy business in addition is such that employees are more likely to be of a transitory nature, and depending on the exact nature of the

claim (which the respondent says is still not clear) it may not be able to adduce evidence to defend them.

17. The applicable law:
18. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.
19. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.
20. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:
21. 1 - The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition 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 has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and
22. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended [the word “essential” is considered further below]; and
23. 3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. 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.
24. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim). The more detailed position with regard to each of these elements is as follows, dealing with each of them in turn:
25. 1 - The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called “relabelling”); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.
26. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only

necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless, whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).

27. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus "not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".
28. 2 - The applicability of time limits: This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).
29. On the applicability of time limits and the "doctrine of relation back", the doctrine of relation back does not apply to Employment Tribunal proceedings, see Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN. The guidance given by Mummery J in Selkent and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207 and Abercrombie v AGA Rangemaster Limited [2014] ICR 209 CA emphasised that the discretion to permit amendment was not constrained necessarily by limitation.
30. See also Reuters Ltd v Cole UKEAT/0258/17/BA at para 31 per HHJ Soole: "In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in Galilee, I would follow the latter approach."
31. 3 - The timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. However, an application to amend should not be

refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).

32. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs 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 these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.
33. In Reuters Ltd v Cole UKEAT/0258/17/BA, the claimant had a chronic depressive illness. He presented a claim to the Tribunal for discrimination arising from disability, and a failure to make reasonable adjustments. The claim was stayed pending the outcome of a grievance procedure. The claimant subsequently made an application to amend his claim to include an allegation of direct disability discrimination. The EAT rejected his application. In its view the more onerous test for direct discrimination and the wider factual enquiry needed for such a claim took the application outside the scope of a mere relabelling exercise. A direct discrimination claim imposes stringent tests of knowledge and causation, and requires the employee to show that he has been treated less favourably than a comparator. Granting the amendment would require the tribunal to undertake a wider factual enquiry, and in particular a comparative exercise to determine whether the claimant had been treated less favourably and if so whether this was on the ground of disability.
34. Langstaff P made the following observations in Chandhok v Turkey [2015] IRLR 195 EAT from paragraph 16: “The claim, as set out in the ET1, is not something to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning … the claim as set out in the ET1. [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was “their case”, and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which

goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

35. Judgment:
36. Applying these legal principles above to the current application, I find as follows.
37. In the first place I find that the proposed amendment seeks to introduce a new claim, and is not mere relabelling of an existing claim. For the reasons set out above I find that the claimant's originating application did not include any complaint to the effect that his dismissal was because of any disability discrimination. The claimant subsequently confirmed to me that this was the case following a detailed explanation of sections 13 and 15 EqA and a discussion to explore the nature of his complaints. This was recorded contemporaneously in the First Order. It has been suggested on behalf of the claimant that he was mistaken or confused, and this might be because of his disability of anxiety and stress. However, I have seen no medical evidence to support that contention, and it is clear from the very lengthy and detailed pleadings and documents which the claimant has prepared that he has not been hampered in presenting detailed arguments when he chooses to do so.
38. Given that I have determined that the proposed amendment raises a new cause of action, the proposed claims are approximately six months out of time. I have not heard any submissions or evidence on behalf of the claimant as to why it would be just and equitable to extend time. I do not dismiss the claimant's application merely because the claimant has failed to meet this test, but the fact that the claimant has not demonstrated even a prima facie case that the just and equitable ground is satisfied is a factor I have taken into account.
39. Applying Ladbrokes Racing Ltd v Traynor: (i) I have received no satisfactory explanation as to why the application to amend is made at this stage and why it was not made earlier; (ii) if the amendment is allowed it is likely to cause further delay and there will be additional costs in defending the hearing which in my judgment will have to be lengthened to determine the proposed new issues and these costs are unlikely to be recovered by the respondent, and (iii) the delay may well put the respondent in a position where evidence relevant to the proposed new issues is either no longer available, or is rendered of lesser quality than it would have been earlier.
40. In addition, the case of Reuters Ltd v Cole UKEAT/0258/17/BA, is very similar to the current case. The claimant made an application to amend his claim to include an allegation of direct disability discrimination. The EAT rejected his application. In its view the more onerous test for direct discrimination and the wider factual enquiry needed for such a claim took the application outside the scope of a mere relabelling exercise. A direct discrimination claim imposes stringent tests of knowledge and causation, and requires the employee to show that he has been treated less favourably than a comparator. Granting the amendment would require the tribunal to undertake a wider factual enquiry, and in particular a comparative exercise to determine whether the claimant had been treated less favourably and if so whether this was on the ground of disability. The same principles clearly apply in the current case.
41. I have considered in detail and I apply the Cocking test (as restated in Selkent and approved by Ali). I have reviewed all of the circumstances in detail as noted above

and I have considered the relative balance of injustice. The proposed amendment is a new claim and is out of time, and I have heard nothing to persuade me that there would be just and equitable grounds for extending time. If I were to allow the amendment there will be further delay and the respondent will incur greater inconvenience and costs in defending the extended claims and may not be in a position to adduce the necessary evidence to meet the new and wider factual enquiry.

42. If I refuse the amendment the claimant will not be in a position to pursue any complaint about the nature of his dismissal (in the context of it being somehow caused by or related to his disability). However, it is clear from his originating application that he disagrees with the finding of misconduct against him and complains about the procedure adopted by the respondent. These would be otherwise cogent grounds for a claim of unfair dismissal, but the claimant is unable to bring those arguments because he has insufficient service to complain of unfair dismissal. He has not been deprived of these arguments by reason of refusing his amendment, but rather because of his lack of service. The claimant is still able to proceed to trial imminently to pursue his original claims of harassment, failure to make reasonable adjustments, and unlawful deductions.
43. For these reasons therefore in my judgment the greater injustice and prejudice would lie against the respondent if I were to allow the application to amend. Accordingly, weighing the relative balance of injustice, in my judgment it is not in the interests of justice to allow the application, and the claimant's application to amend these proceedings is therefore dismissed.

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Employment Judge N J Roper
Dated 28 January 2019

Judgment sent to Parties on

28 January 2019