EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102717/19

Held at Aberdeen on 14 August 2019

Employment Judge: N M Hosie

A	**Claimant** **In Person**
B	**Respondent** **Represented by:** **Ms A Irvine,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to amend is refused.

REASONS

Introduction

1. The claimant submitted a claim of direct disability discrimination in terms of s.13 of the Equality Act 2010 ("the 2010 Act") on 26 February 2019. His claim is denied in its entirety by the respondent.

2. After various procedures, the claimant was directed to provide further and better particulars of his claim which he did by e-mail on 5 June. The respondent's solicitor replied by e-mail on 19 June. She sought clarification

from the claimant as to whether it was his intention to also advance a complaint of a failure to make reasonable adjustments.

3. By e-mail on 19 June 2019 the claimant confirmed that he did wish to advance such a complaint.

Application to amend

4. At a preliminary hearing, which I conducted on 20 June 2019, I directed the claimant to provide further and better particulars of his complaint of a failure to make reasonable adjustments. He did so by e-mails on 20 June. This was an application to amend the claim form to add a new complaint.

5. The respondent's solicitor replied by e-mail on 1 July 2019, in which she intimated her objection to the claimant's application to amend.

6. The parties agreed, having regard to the "overriding objective" in the Rules of Procedure, that I could determine the issue of the application to amend "on the papers": on the basis of the parties' written submissions. However, I found I was unable to do so without further information. Accordingly, on 18 July the Tribunal sent an e-mail to the parties. The following are excerpts:-

"*Employment Judge Hosie has been considering the claimant's application to amend, which he understands to be an application to introduce a complaint of a failure to make reasonable adjustments in terms of s.20 of the Equality Act 2010*……...

While Employment Judge Hosie understands that the claimant has brought a complaint of direct discrimination in terms of s.13 on the basis of an allegation that it was the respondent's intention to dismiss him once they received the Occupational Health report, the basis for the complaint of a failure to make reasonable adjustments is not clear. However, having regard to the fact that the claimant is not represented and the "overriding objective" in the Rules of Procedure, he has decided to afford the claimant an opportunity of clarifying his position in writing to the Tribunal within the next 7 days, copied to the respondent's solicitor.
He is required to identify the "provision, criterion or practice" ("the PCP") of the respondent which put him, as a disabled person, at a substantial

disadvantage and to specify the nature and extent of that disadvantage. Also, what adjustments does he say the respondent should have made?

The respondent's solicitor should also respond in writing to the Tribunal and at the same time copy the claimant within 7 days, once he has provided these details."

7. The claimant responded by e-mail on 22 July. He maintained that the "PCP" was, *"an assumption or expectation for all offshore employees to work at any locations requested including overseas".*

8. The respondent's solicitor responded by e-mail on 29 July with further details of her objection to the application to amend.

9. Thereafter, the Tribunal received a further e-mail from the claimant on 29 July, with further submissions attached, including a reference to **Galilee v. The Commissioner of Police of The Metropolis UKEAT/0207/16/RN** and a number of other cases.

Discussion & Decision

10. In ***Cocking v. Sandhurst (Stationers) Ltd & Another*** [1974] ICR 650, Sir John Donaldson, when delivering the Judgment of the NRIC, laid down a general procedure for Tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several subsequent cases and were re-stated in ***Selkent Bus Co. Ltd v. Moore*** [1996] ICR 836. In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that will be caused to parties by granting or refusing the amendment. Useful guidance on this issue was also given by the EAT in, ***Argyll & Clyde Health Board v. Foulds & Others*** UKEATS/0009/06/RN and ***Transport & General Workers' Union v. Safeway Stores Ltd*** UKEAT/0092/07/LA.

11. In both these cases, the EAT referred, with approval, to the terms of paragraph 311.03 in section P1 of Harvey on Industrial Relations in Employment Law:-

"(***b) Altering Existing Claims and Making New Claims [311.03]***

A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting 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; and (iii) amendments which add or substitute a wholly or new cause of action which is not connected to the original at all."

12. Valuable guidance was also provided by Mummery LJ at pages 843 and 844 in ***Selkent***:-

"*……..*

(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 substituting a further labels for facts already pleaded to, to on the other hand, making of entirely new factual allegations which change the basis of the existing claims. 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 could be extended under the applicable statutory provisions e.g. in the case of unfair dismissal s.67 of the Employment Protection (Consolidation) Act 1978.

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

An application should not be refused wholly because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 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 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 amendments. Questions of delay, as a result of adjournment and additional costs particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

Present case

"Nature of the amendment"

13. In my view this was a new cause of action but was one which was at least linked to the facts of the original claim. This was not just a "re-labelling exercise".

"The applicability of time limits"

14. I was satisfied that the application to amend was well out of time and that the submissions by the respondent's solicitor in this regard were well-founded: *"The alleged acts relied upon by the claimant are alleged to have occurred in October 2018 and November 2018. The claimant made his application to amend in June 2019. The claimant was offered work in Nigeria on 7 November 2018, and ought to have been aware at that stage of any alleged failure to make reasonable adjustments. The claimant has previously informed the Tribunal that he was receiving legal assistance from the Citizens Advice Bureau at the time of submitting his application to the Tribunal. The claimant has provided no cogent reason for the delay. In receiving the respondent's response to the claimant's further and better particulars on 19*

June 2019, as the claimant seeks to rely upon, does not negate the fact that the claimant was aware of the facts giving rise to the alleged failure to make a reasonable adjustment claim. The claimant was aware of the contents of the occupational health report, which is dated 19 October 2018. Further, the claimant was aware that he had been offered work in Nigeria".

15. It appeared to me that the decision to include a complaint of a failure to make reasonable adjustments was something of an afterthought on the part of the claimant.

16. However, while the claimant had advice from the CAB, I was mindful that he has no experience of conducting Employment Tribunal proceedings and that complaints of this nature can be complex.

17. Nevertheless, the claimant has corresponded at some considerable length, in an articulate manner, since he brought this claim and had I been required to do so I would not have exercised my discretion and allowed the complaint to proceed on the basis that it is just and equitable to do so.

18. However, the issue of time-bar is not determinative and, as Mummery LJ said in ***Selkent***, the paramount consideration is the relative injustice and hardship involved in refusing or granting an amendment.

The timing and manner of the application/prejudice and hardship

19. Although some allowance requires to be made for the fact that the claimant is unrepresented, he did have the benefit of advice from the CAB at one time and, as the respondent's solicitor submitted, he ought to have been aware when he was offered work in Nigeria on 7 November 2018 of any alleged failure to make reasonable adjustments.

20. Already, there has been extensive correspondence, adjustment of pleadings and case management hearings in this case, disproportionate to the nature of the claim, in my view. There have been further written particulars from the claimant to which the respondent has had to respond; lengthy correspondence about an application by the claimant for the hearing to be conducted in private which was objected to and which I refused; and further lengthy correspondence about an issue over the venue for the hearing. This has meant, no doubt, that the respondent has already incurred considerable time and legal expenses defending the claim and were I to allow the amendment, further adjustment of the written pleadings would be required which would involve more case management and this would involve the respondent in further expense.

21. Also, the claimant was an "ad-hoc" employee which meant that the respondent was only required to offer him work as and when it arose, and the claimant was not required to accept. I also understood that it was not disputed that the claimant had been offered work in locations where he could work. He declined one offer and accepted another. While I would require to hear further submissions before determining the matter, it appeared to me that the submission by the respondent's solicitor that the complaint of a failure to make reasonable adjustments, *"has no reasonable prospect of success"*, might have merit and, if so, were I to allow the amendment I would have to consider whether the complaint of a failure to make reasonable adjustments should be struck out on that basis. That would require either further written submissions or a preliminary hearing with the parties present, which would add to the cost.

22. I was also mindful that were I to refuse the claimant's application all would not be lost for him, as he would still be able to pursue his direct discrimination complaint.

23. I am of the view, therefore, that the balance of prejudice favours the respondent.

24. For all these reasons, I have decided to refuse the claimant's application to amend.

Employment Judge: **Nicol Hosie**
Date of Judgment: **16 August 2019**
Date sent to parties: **20 August 2019**