EMPLOYMENT TRIBUNALS

Claimant: Mr. J. Morgan

Respondent: East of England Ambulance Service NHS Trust

OPEN PRELIMINARY HEARING

Heard at: Bury St Edmunds Employment Tribunal (in private via CVP)
On: 15 February 2022

Before: Employment Judge Mason

Appearances

For the Claimant: Ms R. Owusu-Agyei, counsel
For the Respondent: Mr. T. Sheppard, counsel

JUDGMENT

Background

1. The hearing was to consider and determine the Claimant's application to amend his claim.

2. I heard evidence from the Claimant and considered various documentation to which my attention was drawn by both parties. I also considered the submissions of the parties.

3. The Claimant's employment with the Respondent commenced on 1 October 2015. His employment is continuing. His role is Emergency Care Practitioner. He suffers from noise induced sensorineural deafness and tinnitus and the Respondent now accepts that this impairment meets the definition of disability (s6 Equality Act 2010 (EqA)) and that he was disabled at all material times.

4. By a claim form presented on 20 April 2020, following a period of early conciliation from 14 February 2020 to 20 March 2020, the Claimant brought complaints of disability discrimination for a failure to make reasonable adjustments (under ss 20-21 of the Equality Act 2010 ("EqA")) and disability-related discrimination under s15 EqA.

5. On 6 April 2021, at a closed Preliminary Hearing (PH), EJ Dobbie recorded that the claim is essentially about the requirement for the Claimant to work in an urban

environment (namely Ipswich) from 27 December 2019 onwards, which he says placed him at a substantial disadvantage in comparison to persons who do not suffer from noise induced sensorineural deafness and tinnitus and/or that this requirement amounted to unfavourable treatment arising in consequence of his disability.

6. EJ Dobbie made various orders (sent to the parties on 21 May 2021) to include: the parties to agree a final list of issues by 22 June 2021; disclosure to be completed by 20 July 2021 and a bundle by 3 August 2021. Since that hearing: on 26 April 2021 the Claimant provided a Schedule of Loss; on 26 April 2021, the Respondent submitted Grounds of Resistance; on 22 May 2021 the Claimant provided a disability impact witness statement; on 15 June 2021, the Respondent conceded that the Claimant was disabled at all material times.

7. On 24 June 2021, the Claimant applied to substantially amend the Grounds of Complaint On 30 June 2021, the Respondent wrote to the Tribunal and the Claimant objecting to the amendments.

8. The correspondence was placed before EJ Dobbie and on 5 October 2021, EJ Dobbie listed this hearing to take place today to determine the application to amend, list the final hearing and make suitable directions.

Procedure at PH on 15 February 2022

9. At the hearing before me, I was provided with a bundle (181 pages) prepared by the Claimant and a witness statement from the Claimant (6 pages). Mr. Sheppard confirmed the Respondent had received both these documents. Any reference to a page number in this summary is to a page number in the bundle.

10. The Claimant gave witness evidence. He confirmed his statement was accurate and truthful and answered supplementary question from Ms. Owus-Agyi and was cross-examined by Mr. Sheppard. I also asked the Claimant one question by way of clarification. Ms. Owusu-Agyei re-examined the Claimant.

11. Having heard the evidence from the Claimant I then listened to submissions from both representatives. I adjourned for a 10 minute comfort break at 11.35. I adjourned for 30 minutes at 12.00 to make my decision; after the adjournment I gave my decision and proceeded to list the final hearing and make directions.

Issues and Law

12. In determining whether to allow the application to amend the claim, I bore in mind the Presidential Guidance on amendments and the primary case authority, that of **Selkent Bus Company Ltd v Moore** [1996] ICR 836, must be considered. Both the Presidential Guidance and the **Selkent** case direct that regard should be had to all the circumstances, and in particular any injustice or hardship which would result from the amendment or the refusal to amend.

13. The **Selkent** case set out a non-exhaustive list of factors to be considered, namely; the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. The Presidential Guidance

reiterated the Selkent factors, but also noted that there is a distinction to be drawn between applications to amend which add new claims essentially out of facts that have already been pleaded, i.e. "relabelling", and applications to add new claims which are entirely unconnected with the original claim.

14. The second issue for me to consider was whether to extend time to allow new claims to be pursued. In that regard, section 123 EqA notes that a claim must be brought within three months of the act complained of. If the claims were lodged outside the required time frame I would need to consider whether it would appropriate to extend time on the "just and equitable" basis. In that regard, I was mindful of the case law in this area, notably that of Bexley Community Centre v Robertson [2003] IRLR 434, which noted that time limits are to be complied with, that there is no presumption in favour of the exercise of the discretion to extend time, and that is the exception rather than the rule. I also took into account the direction provided by the case of British Coal Case Number: 1601909/2018 3 Corporation v Keeble [1997] IRLR 336, and the indication in that case that the factors applicable in applications to amend in civil cases under section 33 of the Limitation Act 1980 should be considered.

15. That section directs that the primary consideration is of the prejudice that each party would suffer having regard to all the circumstances of the case, with particular factors being: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected; the extent to which the opposing party has cooperated with any request for information; the promptness with which the Claimant acted when they knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice when they knew of the possibility of taking action.

16. I also noted the guidance provided by the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, which was that the application of the section 33 factors does not require the tribunal to be satisfied there was a good reason for the delay, but that the reason advanced is a relevant matter to which to have regard. I also noted the case of **Hutchinson v Westward Television Ltd [**1977] IRLR 69, which indicated that an employment tribunal in this type of case is entitled to take into account anything it considers relevant. Ms Owusu-Agyei has also drawn my attention **to Prakash v Wolverhampton City Counci**l [2006] 9 WLUK 51, EAT 4 which is authority for the principle that the Tribunal has jurisdiction to exercise its discretion to allow a claim to be amended so as to include a claim which did not exist at the time the claim form was originally presented; discretion must be exercised in accordance with the factors in **Selken**t. Ms Owusu-Agyei has also provided a copy of **Vaughan v Modality Partnership** [2021] I.C.R. 535 EAT which is a reminder that "..the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise the Employment Judge for failing to conduct the balancing exercise properly. The balancing exercise is fundamental. The Selkent factors should not be treated as if they are a list to be checked off."

Claimant's application to amend

17. The application to amend dated 24 June 2021 is at pages 86-87; the text of the proposed Amended Grounds of Complaint is at pages 89-100.

18. The Claimant's solicitors, Thompsons, state in the letter of application (pages 86-88) as follows:

"The nature of the amendment

3. The ET form was submitted by the Claimant on 20 April 2021 as a litigant in person. After considering the Case Management Summary of the Preliminary Hearing received on 21 May 2021, the Claimant has instructed that certain issues regarding his working arrangements and reasonable adjustments set out as part of his original claim need to be clarified. The Claimant has also instructed that a comment was made to him in the workplace because of his disability.

4. We have therefore sought to address these matters by providing further details in the Amended Grounds of Complaint, including the following:

a. The PCP under s.21 Equality Act 2010, has been clarified to reflect the Claimant's current working arrangements.

b. The claim for discrimination arising from disability (s. 15 Equality Act 20 10) is now being argued in a different way, to entail the comment made by the Claimant's manager.

c. The comment made by the Claimant's manager is now also being brought under a new claim, as harassment on the grounds of disability (s.26 Equality Act 2010).

5. The Claims to be considered by the Tribunal are dependent on the facts of the case and therefore it is important that these issues are clarified.

Time limit

6. We respectfully submit that the amendments sought in respect of s.15 and s.21 Equality Act 2010 (as set out under 4.a and 4.b above) constitute clarification of the claims and relate to the same claims submitted. As such, we do not believe that there are any applicable time limit issues to be considered in view of our application to amend the claim save to say we are making our application promptly.

7. In the event that the Tribunal considers the Claimant's harassment claim is a new claim, we acknowledge that such a claim would be presented to the Tribunal outside of the applicable time limit. Accordingly, we would invite the Tribunal to exercise their wide discretionary powers under justice and equity and pursuant to s.I23(1)(b) Equality Act 2010 to extend time so as to accept the late claim. In particular:

a. We do not believe that the delay will prejudice the Respondent who have not yet provided a full Response.

b. The Claimant would suffer greater prejudice if his amended claim is not accepted.

*c. There is no requirement for a Tribunal to be satisfied that there was a good reason for the delay before it can conclude that it is just and equitable to extend time (**Abertawe Bra Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, CA).*

Timing and manner of the application

8. We consider that an order in the terms requested would assist the Employment Tribunal in dealing with the proceedings efficiently and fairly and in accordance with the overriding objective because:

a. The proceedings are at an early stage and there will be no prejudice to the Respondent if the amendment is allowed;

a. The Respondent has not lodged a full Response and no Hearing date has been listed."

Respondent's objections to the application

19. The Respondent's objections to the application are set out in a letter dated 30 June 2021 (pages 103-106):

"The Respondent objects to the Claimant's application to amend. In support of the Respondent's objection, we make the following submissions.

1. Selkent Bus Company Ltd (tradinq as Staqecoach Selkent) v Moore [19961 IRLR 661, makes clear that, when faced with an application to amend, an Employment Tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of "relevance, reason, justice and

fairness inherent in all judicial discretion." The Employment Appeal Tribunal considered that the relevant circumstances would include the nature of the amendment, the applicability of time limits and the timing and manner of the application. These circumstances are also reflected in the relevant Employment Tribunal Presidential Guidance.

Timing and manner of the application

2. *The Claimant's ET1 Claim Form was received by the Employment Tribunal on 20 April 2020. The Claimant's ET1 Claim Form at item 11 lists Mr Samuel Older, UNISON Eastern Region, as the Claimant's representative.*
3. *On 26 March 2021, Thompsons Solicitors went on record as representative for the Claimant.*
4. *On 1 April 2021, the parties agreed a List of Issues.*
5. *A Case Management Preliminary Hearing took place on 6 April 2021 before Employment Judge Dobbie. The Claimant was represented by Counsel, Beth Grossman from Doughty Street Chambers. At no point during the Case Management Preliminary Hearing did the Claimant's representative indicate that the Claimant wished to amend his claim.*
6. *In response to paragraphs 7a and 8 of the Claimant's application, a full Response to the Claimant's Grounds of Complaint was lodged by the Respondent on 26 April 2021.*
7. *On 21 May 2021 the parties received a copy of the Case Management Summary and the Orders made at the Case Management Preliminary Hearing on 6 April 2021.*
8. *On 15 June 2021 the Respondent confirmed that upon review of the medical documentation, the Respondent concedes that the Claimant is disabled by virtue of 'noise induced sensinaural deafness and tinnitus' for the period relevant to the Claimant's claims.*
9. *Employment Judge Dobbie at the Case Management Preliminary Hearing on 6 April 2021, stated, as at paragraph 5 of the Case Management Summary, "in the absence of a full response from the Respondent, and given that the draft list of issues did not contain specific factual details, 1 make orders for the parties to further amend the list of issues and submit a final version".*
10. *On 23 June 2021 the Respondent emailed the Claimant's representative regarding the List of Issues.*
11. *The Respondent avers that the timing of the Claimant's application to amend his claim is much too late. The Claimant had sufficient opportunity to amend his claim prior to the Case Management Preliminary Hearing on 6 April 2021, when the parties sought to agree the List of Issues, and at the Case Management Preliminary Hearing itself. The Claimant did not do so. It appears that the Claimant's application to amend is a direct consequence of the Respondent's correspondence on 23 June 2021 requesting that the List of Issues be agreed between the parties. It would seem that at this point, the Claimant's representative reviewed the List of Issues and sought to bolster the Claimant's claim with an application to amend instead.*
12. *It is further averred that the facts pleaded at paragraphs 1 - 26 of the Grounds of Complaint were all known to the Claimant at the time he submitted his ET1 in April 2020, and that the facts pleaded at paragraphs 27 — 31 were known at the time of the Preliminary Hearing held on 6 April 2021.*
13. *The Claimant cannot seek to justify the lateness of the application to amend on the basis that new facts or information have just been discovered. The matters to which the Claimant relies, save for the reference to a grievance in paragraph 32 of the amended Grounds of Complaint, were known to the Claimant in advance of the Case Management Preliminary Hearing on 6 April 2021. In particular, the alleged comment from Mr Round on 2 February 2021 on which the Claimant predicates his new claim for Harassment was known to the Claimant well in advance of the Case Management Preliminary Hearing. The Respondent argues that the appropriate time to make an application to amend would have been in February 2021, following the alleged comment, or at the least at the Preliminary Hearing on 6 April 2021, by which time the Claimant was represented both by Thompsons and Counsel.*
14. *The Respondent avers that the application should be refused because there has been considerable delay in making it. The application has not been made promptly, as asserted by the Claimant's representative at paragraph 6 of the application. Importantly and significantly, the application will also affect the remaining Case Management Orders, as the parties are due to disclose documents in July 2021 and agree the contents of the Final Hearing Bundle in August 2021.*

Nature of the Amendment

15. The Claimant seeks to bring a new claim for Harassment on the grounds of disability (s.26 Equality Act 2010), not originally pleaded by the Claimant in his ET1. Contrary to the assertions made on behalf of the Claimant in his application, this amendment is substantial in nature and raises an entirely new factual allegation which seeks to change the basis of the existing claim.

Time Limit

16. The proposed amendment which seeks to introduce a new cause of action of Harassment, is over 4 months after the alleged incident and after the expiry of the applicable time limit. It is clearly out of time. The Respondent avers that it is not just and equitable to extend time. The Claimant had ample opportunity to make this application within time, especially given the listing of a Case Management Preliminary Hearing on 6 April 2021.

In addition, the Respondent, a public body, will incur extra cost and resource in responding to the new cause of action.

In all of the circumstances, the Respondent respectfully submits that the Employment Tribunal should not allow the Claimant to amend his claims."

Submissions

29. Ms Owusu-Agyei made comprehensive verbal submissions in support of the application.

29.1 The claim form was drafted by the Claimant and his Trade Union representative – the Claimant "assumes" but is not certain that solicitors were in the background; he was akin to a litigant in person when the claim was presented. The Claimant was not aware of his right to amend the claim and after he received the PH orders (sent 21 May 2021) the Claimant acted promptly.

29.2 With regard to the harassment claim, she accepts this is a new claim and that time ran out on 1 May 2021. However she submits that this application to amend was made on 24 June 2021, so only 6 weeks out of time which is not particularly late in all the circumstances.

29.3 With regard to the time limit for the amendment to the reasonable adjustments claim, the duty begins when the employer could take reasonable steps but time continues to run; however, she accepts that this requirement to accompany patients was happening prior to presentation of this claim in April 2020.

29.4 If the claims are out of time, it is just and equitable to extend time.

29.5 The balance of prejudice is against the Claimant; the alleged comment on 2 February 2021 upset him so much it made him want to quit his job. There is no evidence of prejudice to the Respondent: the final hearing has not yet been listed; the Respondent will have the opportunity to amends its response; the Respondent has had knowledge of the matters set out in the amendments since June 2021 and has had at least 6 months to consider it.

30. Opposing the application, Mr. Sheppard on behalf of the Respondent, submitted in summary as follows.

30.1 The Respondent will suffer greater prejudice; it is not necessary to provide evidence of this – it is self-evident; an amended response will be required and also forensic investigation to address the new allegations some two years later. There will also need to be an amended Schedule of Loss and a new List of Issues.

30.2 The Claimant accepts that all the proposed new claims are out of time. The alleged new PCP that the Claimant was required to accompany patients in a DSA was known to the Claimant before he presented this claim on 20 April 2020.

30.3 The timing and manner of this application is unacceptable. From the outset, the Claimant had a full time trade union representative assisting him and also Thompsons, solicitors. The new PCP should have been raised when the claim was originally presented or at least at the last PH in April 2021 when the Claimant was legally represented by counsel.

Findings of Facts

31. As this was only a preliminary hearing, my findings are limited to the issues relevant to the amendment application.

32. Having heard from the Claimant, I find that at the time the Claimant presented this application, he was assisted by Mr. Sam Older, a full time trade union official and that Thompsons solicitors have been involved and advising since prior to presentation of this claim. He confirmed this on cross-examination; he was asked if Mr. Older was acting with solicitors and replied *"Yes – it's fair to say*" and also confirmed that whilst he was liaising with Mr. Older, Mr. Older was liaising with the solicitors who did the drafting. When I asked him to clarify whether Thompsons were involved from the outset, he replied that they were involved after the Acas certificate was issued on 20 March 2020 but before the claim was issued on 20 April 2020. When asked the same question again by Ms. Owusu-Agyei, he sought to qualify this response by saying this was only his assumption but I find that the first answer he gave to me - which was specific and unequivocal - was truthful.

33. I find on the balance of probabilities, that the Claimant saw the Grounds of Complaint before this claim was presented. He says before his claim was lodged Mr. Older "*shared the Grounds of Complaint*" with him. He seeks to qualify this by saying he did not see the final version before it was submitted but does not say whether the final version differed in any material respects from the Grounds of Complaint shared with him by Mr. Older. He confirmed on cross- examination that he had been provided with a copy of his claim form after it was presented on 20 April 2020 and that he would have looked at it and read it.

34. In light of his answers on cross -examination, I find that Thompsons assisted with drafting his claim.

35. Therefore, whilst he was technically a litigant in person until he instructed Thompsons directly (around December 2020), he had significant assistance from both his union and Thompsons with preparation and drafting of his claim on 20 April 2020.

36. He was aware there was a deadline for submission of his claim (confirmed in verbal evidence).

37. It is not in dispute that he was legally represented by counsel at the last PH before EJ Dobbie. After the PH on 6 April 2021, Thompsons contacted him to advise him of directions made at the PH on 6 April 2021; on 21 May 2021, he received a copy

of EJ Dobbie's Case Management Summary. He then realised he wanted to amend his claim including the addition of a new claim of harassment as a result of an alleged comment made on 2 February 2021 which he says upset him so much it made him want to quit his job.

38. My impression of the Claimant is that he is intelligent and articulate and in view of the assistance he has had from UNISON and access to legal advice, I do not accept on the balance of probabilities that he did not apply to amend his claim until 24 June 2021 because he was not aware of the "mechanism" for amending his claim, or alternatively that he did not know that he could amend.

39. The time limit for presenting the harassment claim expired on 2 May 2021.

40. The Respondent's alleged failure to make a reasonable adjustment by not requiring him to accompany patients in a DSA is to be treated as occurring on the expiry of the period in which the Respondent might reasonably have been expected to make the adjustment. On the Claimant's own case, he says this adjustment should have been made sometime prior to April 2020; I find that time began to run no later than 1 April 2020 and on that basis this claim should have been presented by at least 1 July 2020.

Conclusions

41. The extent of the proposed amendments is noteworthy; the original Grounds of Complaint extend to 2 pages and the proposed Amended Grounds extend to over 10 pages. I have not allowed proposed amendments which are an explanation of factual events in narrative form; it is not appropriate to include these in a pleading; - that is the purpose of the witness statements. I would remind the Claimant of the EAT's observations in **C v D** UKEAT/0132/19 about using a narrative style for employment tribunal pleadings (which also applies to any proposed amendments). This wholesale rewriting of the claim to include extensive factual background made the task of addressing the application to amend more difficult and time-consuming.

42. I have considered the **Selken**t factors and the balance of prejudice and hardship and I have allowed the application to amend to add "to respond to calls in an urban area" as a PCP to the reasonable adjustments claim. This is effectively an extension/clarification of the original PCP specifically the requirement to work in an urban environment (as recorded by EJ Dobbie) .

43. Having consider the same factors, I am not allowing the Claimant's application to amend his claim to add as a new failure to make reasonable adjustments the requirement that he accompany patients to hospital in a DSA (ambulance):

42.1 The factual basis for this claim is not already pleaded in the Claim Form and this is not therefore a case of "relabeling". It is not the case that the Respondent would, as currently pleaded, be required to deal with this point in any event. This is therefore a new claim.

42.2 The timing and manner of the application weighs against the Claimant. The claim is out of time. As set out above in my findings of fact, the Claimant was assisted by his Trade Union and Thompsons with preparation and drafting of his claim and subsequently; he saw the Grounds of Complaint before they were presented. He was aware of this issue before the claim was presented but did not raise it. In

Chandok v Tirkey [2015] IRLR 195 the (former) President of the EAT, Mr Justice Langstaff said:
"*The claim, as set out in the ET1, is not something just toset the ball rolling, as an initial document necessary to comply with time limits …* "
Furthermore, he did not raise it a year later at the PH before EJ Dobbie on 6 April 2021 when he was represented by counsel. I have not accepted his explanation that he did not apply to amend his claim until 24 June 2021 because he was not aware of the "mechanism" for amending his claim, or alternatively that he did not know that he could amend.
I did not therefore consider that it was just and equitable to extend time to allow this claim.

42.3 I have considered the balance of prejudice and hardship. The Respondent will undoubtedly incur additional costs and time in making enquiries, gathering evidence and amending its response of this application is allowed. Furthermore, this would have a knock-on effect in terms of preparation for the hearing (e.g. documents, witness statements), increase the length of the hearing and the hearing itself would take place at a later date. There would therefore be hardship to the Respondent which outweighs any hardship to the Claimant.

43. I am also not allowing the Claimant's application to amend his claim to refer to the alleged comment on 2 February 2021, whether by way of a new claim of harassment or as part of the s15 EqA claim:

43.1 It is not in dispute that this is an entirely new claim.

43.2 Again, the timing and manner of the application weighs against the Claimant. Whilst this alleged comment was not made until after presentation of the ET1, he did not raise it at the PH before EJ Dobbie on 6 April 2021 when he was represented by counsel. I have not accepted his explanation that he did not apply to amend his claim until 24 June 2021 because he was not aware of the "mechanism" for amending his claim, or alternatively that he did not know that he could amend. I did not therefore consider that it was just and equitable to extend time to allow this claim.

43.3 For the same reasons as set out above, there would be hardship to the Respondent which outweighs hardship to the Claimant.

EJ **Mason**
17 February 2022

Sent to the parties on:

…27 February 2022…….
For the Tribunal Office:

…GDJ……..