EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4111716/2021

Deliberation day on 19 April 2022

Employment Judge W A Meiklejohn

Mr D Duployen — **Claimant In person**

Whyte & Mackay Ltd — **Respondent Represented by: Ms K Norval - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal in respect of the claimant's application to amend is as follows -

(a) to the extent that the claimant's Further and Better Particulars submitted on 13 January 2022 and 17 January 2022 introduce new facts not mentioned in his ET1, the application to amend is granted;

(b) to the extent that those Further and Better Particulars introduce a claim of direct discrimination under section 13 of the Equality Act 2010, the application to amend is refused; and

(c) to the extent that those Further and Better Particulars introduce a claim of disability arising from discrimination under section 15 of the Equality Act 2010, the application to amend is granted.

REASONS

1. I dealt with a closed preliminary hearing in this case on 12 April 2022 at which the claimant participated in person and the respondent was represented by Ms

Norval (the "12.04.22 PH"). In my Note following that hearing I summarised the procedural history of the case so I will not repeat that here.

2. At an earlier preliminary hearing on 14 December 2021 (also before me) I directed the claimant to provide further and better particulars of his claim. The claimant complied with my direction by submitting a number of documents. These included -

   (a) a document headed "*Further particulars to unfair dismissal and failure to make reasonable adjustments"* submitted by the claimant on 13 January 2022 (the "13.01 .22 document"), and

   (b) a document headed "*Addition to further particulars"* submitted on 17 January 2022 (the "17.01 .22 document").

3. Recognising that these documents (i) introduced a number of facts not mentioned in the claimant's ET1 and (ii) referred to types of disability discrimination, other than the claim of failure to make reasonable adjustments asserted in the ET1, including direct discrimination, the respondent objected on 3 February 2022. At this point the claimant had not actually made an application to amend but he did so in his email of 4 February 2022. In response to this the respondent, replying to an enquiry from the Tribunal as to whether they accepted that the claimant's amendment application constituted a re-labelling of incidents already set out in the ET1 , renewed their objection. The respondent resubmitted a document headed "*Objection to amendment application".*

Overriding objective

4. I reminded myself of the overriding objective which is found in Rule 2 of the Employment Tribunal Rules of Procedure 2013 -

Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing in cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Case management orders

5. Rules 29 and 30 provide as follows -

29 Case management orders

The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to Rule 30A(2) and (3) the particular powers identified in the following Rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party did not have a reasonable opportunity to make representations before it was made.

30 Applications for case management orders

(1) An application by a party for a particular case management order may be made either at a hearing or presented in writing to the Tribunal.

(2) Where a party applies in writing, they shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible.

(3) The Tribunal may deal with such an application in writing or order that it be dealt with at a preliminary hearing or final hearing.

Applicable law

6. I am grateful to Ms Norval for setting out a summary of the relevant caselaw dealing relating to amendments in her objection document. This included the case of ***Selkent Bus Co Ltd v Moore [1996] ICR 836*** where Mummery J (as he then was) said this -

"(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account <u>all</u> 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) <u>The nature of the amendment</u>

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 substitution of other labels to 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 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) <u>The applicability of time limits</u>

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 should be extended under the applicable statutory provisions.…

(c) <u>The timing and manner of the application</u>

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

1. Parties are not at liberty to amend whenever it suits them to do so - ***Chandok v Tirkey2015 iRLR 195.*** The Court of Appeal reminded Employment Tribunals in ***Abercrombie and others v Aga Rangemaster Ltd 2013 IRLR 953*** that in considering applications to amend which arguably raise new causes of action they should 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 the legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. "*

8. In ***Reuters Ltd v Cole UKEAT/0258/17*** the Employment Appeal Tribunal held that a Tribunal had been wrong to grant an application to amend a claim of discrimination arising from disability to include a direct discrimination claim. The amendment could not be a mere relabelling exercise because there was a higher test and different issues involved in a direct discrimination case.

9. Section 123 of the Equality Act 2010 deals with the time limit for presenting a claim under the Act. It provides as follows -

123 Time limits

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of -

(a) the period of 3 months 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.

(2) ….

(3) For the purposes of this section -

(a) conduct extending over a period is to be treated as done at the end of the period....

Amendments sought by claimant

10. In the claimant's 13.01.22 document he included the following matters to which he had not made reference in his ET1 -

(a) That he had emailed Mr P Ratti on 16 August 2021 to raise a grievance.

(b) That he had emailed Mr Ratti on 26 August 2021 to ask for reconsideration of the decision on his reduced hours request.

11. In the claimant's 17.01.22 document he included the following matters to which he had not made reference in his ET1 -

(a) That he had advised the respondent at his return to work meeting on 28 June 2021 that he expected to have problems with attendance because of his condition, and this had been recorded in the meeting notes.

(b) That on 25 August 2021 he had told his supervisor that he was struggling with his ongoing health problems and had asked if he could use a half day of holiday to get some rest, which request was granted but the decision was then reversed, and that he then raised a grievance about this with Mr Ratti.

12. On 3 February 2022 the Tribunal wrote to the parties in terms which included the following -

"Employment Judge Wiseman invites the claimant to give consideration to whether he does wish to bring another type of claim, or whether the information provided relates to the complaints already made."

13. In his email reply of 4 February 2022, the claimant said this -

"The only amendment would be to add an additional label of "direct discrimination" to a series of incidents already detailed in my ET1 which I said contributed to my constructive dismissal."

14. To this the respondent objected. In her email to the Tribunal on 17 February 2022, Ms Norval stated -

"The Respondent does not accept that the Claimant's amendment application constitutes a "re-labelling" of incidents already set out in the ET1 Claim form. No mention is made of the incident of 25 August 2021, whereby the Claimant alleges to have made a holiday [rejquest which was initially allowed then refused. No mention is made of the Claimant's subsequent complaint to Pier Luigi Ratti. Indeed, the Claimant acknowledges this in his "Addition to further particulars" dated 17 January 2022, when he says 'There is only one other incident of potential direct discrimination I want to add which was not mentioned on my ET1"."

Discussion

15. Notwithstanding what the claimant said about his only amendment being the addition of a *"direct discrimination"* label, I was satisfied that he was in fact adding a number of factual matters which were not covered in his ET1. That was not surprising in the context of providing Further and Better Particulars. I considered that all of the factual matters referred to above could be categorised in that way (ie as Further and Better Particulars), apart from the events of 25 August 2021. This was a new allegation of discriminatory conduct towards the claimant. I approached this on the basis of the ***Selkent*** relevant factors.

Nature of the amendment

16. The explanation the claimant gave me at the preliminary hearing on 12 April 2022 for not mentioning the events of 25 August 2021 in his ET1 was that he initially

felt they were quite trivial but on reflection he saw them as more significant. I would like to think that, if the claimant had been legally represented when his ET1 was prepared, his solicitor would have recognised that the events said to have occurred on 25 August 2021 were worthy of mention. I felt it was reasonably clear that an allegation that the claimant had asked to take a half day holiday because he was struggling with a health problem, and that this request had been granted then refused, was capable of forming the basis of a claim of failure to make reasonable adjustments, and potentially also discrimination arising from disability.

17. I reminded myself that the overriding objective includes ensuring that the parties are on an equal footing. Allowing the claimant to add a part of his narrative of events which he had initially omitted because he had not appreciated its significance, and which a solicitor might well have included, seemed to be consistent with putting the parties on an equal footing. It was not exactly at the bottom end of what I might call the ***Selkent*** spectrum, ie the addition of factual details to existing allegations, because it introduced a new allegation of discriminatory conduct. It might be better characterised as a missing piece of the existing narrative, said to involve a further discriminatory act, which the claimant had omitted but a solicitor almost certainly would have included.

Applicability of time limits

18. The proposed addition of this allegation came well outwith the time limit under section 123 EqA for bringing a freestanding complaint about it. Was it just and equitable to extend time? I considered the factors listed in section 33(3) of the Limitation Act 1980 per ***British Coal Corporation v Keeble 1997 IRLR 336,*** while bearing in mind that the Court of Appeal said in ***Southwark London Borough Council v Afolabi 2003 ICR 800*** that this checklist should not be followed slavishly, as follows -

    (a) Balance of prejudice - the claimant would be unable to bring this part of his claim if time was not extended; conversely the respondent would have to answer a complaint brought out of time.

(b) Length of the delay - for an incident occurring on 25 August 2021 the primary time limit expired on 24 November 2021 , extended in this case by one day being the duration of ACAS early conciliation.

(c) Reason for delay - the claimant's explanation was as set out in the preceding paragraph, namely that he had not appreciated the significance of the factual matters he now sought to add.

(d) Cogency of evidence - would not in my view be adversely affected in this case.

(e) Co-operation with requests for information - not relevant in this case.

(f) Promptness with which claimant acted - the claimant had provided his Further and Better Particulars when asked by me to do so.

(g) Steps taken by claimant to obtain advice - not really relevant as the proceedings had already been raised.

19. Looking at matters in the round, I decided that this was a case where it would be just and equitable to extend time. The claimant was in effect arguing that there had been a course of conduct on the part of the respondent which amounted to unlawful discrimination. In his ET1 he had failed to mention one matter. There was a statable argument that the omitted matter formed part of a course of conduct extending over a period, and should therefore be treated as done at the end of that period. That only took the claimant so far, as the last act of alleged discrimination appeared to have occurred near the end of August 2021 so a claim brought on 13 or 17 January 2022 would be out of time. However, as an unrepresented party without the benefit of legal advice, seeking to pursue a claim in an area where the law is not without complication, there was a good argument that it was just and equitable to extend time.

Timing and manner of the application

20. In relation to the timing and manner of the application to amend, it came about as a consequence of my directing the claimant to provide Further and Better Particulars. These had been sought by the respondent in its ET3 (at paragraphs

1.5 and 1.6 of the grounds of resistance). I believed it would be inequitable to count this against the claimant in assessing the balance of prejudice.

21. By *"balance of prejudice"* I mean the balance between the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. I was satisfied that, in relation to adding the events said to have occurred on 25 August 2021, that balance favoured the claimant. He had omitted part of the narrative of events. That omission was to his prejudice. The prejudice to the respondent lay in having to answer the allegation of discrimination founded on the events of 25 August 2021, rather than in the addition of the missing facts.

Addition of direct discrimination claim

22. The amendment sought by the claimant was to add the additional label of direct discrimination to the series of incidents already detailed in his ET1 which he said contributed to his constructive dismissal.

23. In approaching this I reminded myself of what the claimant had told me at the preliminary hearing on 12 April 2022. He said that he found it difficult to understand the difference between direct discrimination under section 13 EqA and discrimination arising from disability under section 15 EqA. I will try to explain briefly what that difference is.

24. Section 13 EqA **(Direct discrimination)** provides as follows -

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. …

25. This means that B must be able to point to having received <u>less favourable treatment</u> than an actual comparator *("A treats....")* or a hypothetical comparator ("A *would treat....").* The comparator is a person whose circumstances are not materially different from B but who does not have the protected characteristic. The less favourable treatment must be <u>because</u> of the protected characteristic.

26. Section 15 EqA **(Discrimination arising from disability)** provides as follows -

(1) A person (A) discriminates against a disabled person (B) if-

(a) A treats B unfavourably because of something arising in consequence of B's disability , and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

27. This means that B must be able to point to being treated unfavourably by A in circumstances where that treatment was because of something arising in conseguence of B's disability. There is no requirement for an actual or hypothetical comparator to be identified. B needs to (i) specify the alleged unfavourable treatment and (ii) explain why the reason for that treatment was something which arose in consequence of his disability. In the present case the *"something" said* to arise in consequence of the claimant's disability might be his absence record and/or his fatigue.

28. In his 13.01.22 document the claimant twice referred to *"discrimination arising from disability".* This was in relation to the disciplinary action taken against him and the withholding of company sick pay. Only in his 17.01.22 document did he allege direct discrimination, relating to the events of 25 August 2021. When the claimant made his application to amend on 4 February 2022, he sought to characterise the incidents mentioned in his ET1 as direct discrimination.

29. My view of this was that -

(a) it served to confirm the claimant's difficulty in differentiating between direct discrimination and discrimination arising from disability, and

(b) reminding myself of the overriding objective and the need to ensure that, so far as practicable, the parties were on an equal footing, with the benefit of legal advice the claimant might well have (i) sought to add by way of amendment a complaint of discrimination arising from disability, rather than direct discrimination, in respect of the incidents mentioned in his ET1 and (ii) characterised the 25 August 2021 events as discrimination arising from disability, rather than direct discrimination.

30. If I had been dealing with the claimant's application to amend, to add a complaint of direct discrimination, at a hearing I would in all probability have invited him to consider whether adding instead a complaint of discrimination arising from disability made more sense, particularly when he clearly had that in mind when preparing his 13.01.22 document I considered whether it would be a step too far, when dealing with the matter on the basis of written submissions, to treat the claimant's application to amend as if it referred to discrimination arising from disability rather than direct discrimination.

31. The overriding objective refers to avoiding unnecessary formality and seeking flexibility, avoiding delay and saving expense. I could deal with the claimant's application to amend as it stood (ie to add a complaint of direct discrimination) but, if I refused that, I would have felt obliged to tell the claimant as an unrepresented party that he might wish to resubmit the application referring to discrimination arising from disability instead of direct discrimination. That would probably lead to another preliminary hearing, or consideration of further written submissions. It seemed to me that such a course would involve unnecessary formality and cause both delay and expense.

32. I was keenly aware that the respondent's objection related to the claimant's application to add a complaint of direct discrimination. If that application had been to add a complaint of discrimination arising from disability, might the respondent have objected on different grounds? I believed that this was unlikely. There would no doubt have been the same focus on the ***Selkent*** factors. The point about *"exploration of different legal* teste" would still apply.

33. I decided that it would be appropriate to treat the claimant's application to amend as if it referred to discrimination arising from disability rather than direct discrimination. I considered that this was consistent with the overriding objective. If the respondent disagrees, and believes that the interests of justice require it, they have the right to seek a reconsideration under Rules 70-72.

34. As before, I considered the relevant factors per ***Selkent.***

Nature of the amendment

35. I believed that the passage from the decision in ***Abercrombie*** quoted above (see paragraph 7) was relevant here. Would adding a complaint of discrimination arising from disability involve substantially different areas of enquiry from a complaint of failure to make reasonable adjustments? There would certainly be the application of different legal tests. However, they would be applied to the same facts as found by the Tribunal. Allowing the amendment would not create the need for a new avenue of factual enquiry.

36. As I have already decided to allow the claimant to amend to add the events of 25 August 2021 , 1believed that the amendment now sought involved the addition of another label to facts already pleaded. What was already argued to be failure to make reasonable adjustments was now also argued to be discrimination arising from disability.

Applicability of time limits

37. I believed that the points made at paragraphs 18 and 19 above applied equally here.

Timing and manner of the application

38. In the respondent's objection document there was reference to the case of ***Ladbrokes Racing Ltd v Traynor EA TS/0067/06*** which indicates that a Tribunal should consider -

    (a) why the application is made at the stage at which it is made and why it was not made earlier;

    (b) 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

(c) 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.

39. In relation to point (a), my comments at paragraph 20 above also applied here.

40. In relation to point (b), I did not believe that granting the claimant's application to amend should cause delay, nor cause the final hearing to be lengthened so as to involve additional costs. Dates for a final hearing have been fixed and the time allocated should be sufficient to deal with all matters including those brought in by my granting the claimant's application to amend.

41. In relation to point (c), as the final hearing should not require to be delayed, there should be no impact on the availability or quality of the evidence. I noted that the respondent had already included Mr Ratti in their list of proposed witnesses.

42. I considered the balance of prejudice in allowing or refusing the application to add a complaint of discrimination arising from disability. I found that the injustice and hardship to each party was finely balanced. The claimant would have the benefit of a second line of legal argument. The respondent would suffer the prejudice of having to answer that. I came to the view that the prejudice to the claimant in being unable to run that second line of legal argument outweighed the prejudice to the respondent in having to answer it.

43. In exercising my discretion as to whether or not to allow the amendment on the basis of the parties' written submissions, I was applying Rules 29 and 30. That took me back to the overriding objective in Rule 2 as I was exercising a power given to me by those Rules. Doing so fairly and justly included ensuring that the parties were on an equal footing. I believed that if the claimant had had legal advice available to him, it was more likely than not that a complaint of discrimination arising from disability would have been brought alongside the complaint of failure to make reasonable adjustments.

Decision

44. For the reasons set out above I decided to allow the claimant's application to amend (a) to add new facts not mentioned in his ET1 as set out in his 13.01 .22

document and his 17.01.22 document and (b) to add a complaint of discrimination arising from disability. I decided to refuse his application to amend (as originally submitted) to add a complaint of direct discrimination.

45. The respondent may, if so advised, amend its grounds of resistance to respond to the claimant's amendment. Any such amendment to the grounds of resistance should be submitted to the Tribunal not later than 21 days from the date upon which this Judgment is sent to the parties.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 26 April 2022
Entered in register: 29 April 2022
and copied to parties