



EMPLOYMENT TRIBUNALS

Claimant: Ms E Rodrigues

Respondent: The Governing Body of Stockport School

HELD AT: Manchester

ON: 10 July 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr C Sousa (Claimant's Friend)

Respondent: Ms R Wedderspoon (Counsel)

JUDGMENT

1. The complaint of direct disability discrimination contrary to section 13 Equality Act 2010 is dismissed upon withdrawal by the claimant.
2. The claimant's application for permission to amend her claim so as to rely on allegations of race discrimination against Mrs Broadhurst prior to dismissal is refused.

REASONS

1. This was a preliminary hearing for case management purposes. In the course of the discussion the claimant confirmed through Mr Sousa that she did not pursue the argument that her dismissal amounted to direct disability discrimination. That allegation was therefore dismissed on withdrawal.

2. The claimant also sought permission to amend her claim so as to introduce allegations which related to her treatment by Debbie Broadhurst in the period prior to dismissal. The remainder of these reasons is concerned with that application.

Procedural Background

3. The claim form in these proceedings was presented on 17 February 2016. It brought complaints of unfair dismissal, race and disability discrimination in relation to the decision to dismiss the claimant made on 13 October 2015, and the decision to reject her appeal against dismissal made on 30 November 2015. The details attached to the claim form were typed by the claimant's then representative and were expressly very brief because of the need to get the claim lodged before the time limit expired one month after the date on which ACAS issued its early conciliation certificate (18 January 2017). There was no complaint about anything other than dismissal.

4. The proceedings were then delayed due to an administrative error by Employment Tribunal staff. This took place at the Central Processing Unit in Leicester. The proceedings were not provided to the North West region until January 2017, whereupon they were served on the respondent. The response form of 14 February 2017 defended the proceedings on their merits and denied any discriminatory treatment.

5. I conducted a telephone preliminary hearing for case management purposes on 22 March 2017. The complaints and issues were clarified and recorded in Annex B to that Case Management Order. The claimant was given until 5 April 2017 to provide further particulars of her claim, and I recorded in paragraph 11 of Annex A to that Case Management Order that if the further particulars sought to introduce any new matters permission to amend would be required.

6. The claimant's representative, Mr Nolan, ceased to represent the claimant on 31 March 2017, and an extension of time for the further particulars was granted to 12 April 2017.

7. The further particulars were provided that day. Mr Sousa was assisting the claimant. They included information which fleshed out the case about dismissal. However, the fifth and sixth paragraphs of those further particulars sought to introduce an allegation that Mrs Broadhurst had discriminated against the claimant on the grounds of race by moving her to work which involved cleaning the toilets and giving her old job to a British worker; by making comments to other people about the claimant's stature, appearance, smell and language; and by socialising with the British workers but not doing so with the claimant. Reference was made to a grievance about Mrs Broadhurst lodged by other foreign workers in January 2016,

after the claimant had been dismissed. None of those allegations were apparent from the claim form and therefore permission to amend was required.

Claimant's Application

8. In making the application on behalf of the claimant Mr Sousa explained that the claimant had supplied her previous advisers with a handwritten claim form which included reference to the claimant having been persecuted by Mrs Broadhurst. He could not explain, however, why those handwritten details had not been used when the claim form was actually lodged, being replaced by a typed addition to the claim form. The claimant had therefore intended to raise these matters when presenting her claim but they had been left out of the claim by her representative.

9. He said the amended claim was related to her complaint about dismissal because the claimant believed that Mrs Broadhurst's attitude towards her affected the way Mrs Broadhurst carried out the investigation in the disciplinary proceedings.

Respondent's Submission

10. On behalf of the respondent Ms Wedderspoon opposed the application for permission to amend. She said that the amendment lacked clarity. It did not give any dates or details of the comments made.

11. Further, these were completely fresh claims not related to the dismissal and they were substantially out of time.

12. They lacked merit in any event because, for example, it was not Mrs Broadhurst who decided the claimant should be moved to doing work involving cleaning the toilets. That is pleaded in paragraph 22 of the amended response form.

13. Importantly, she submitted that the respondent would be prejudiced by the delay because it had never been put on notice of these allegations before and it would be difficult to investigate them now.

Relevant Legal Framework

14. It is inherent within the general case management power in rule 29 of the Employment Tribunal Rules of Procedure 2013 that the Tribunal has power to refuse to allow a party to amend a claim which has been lodged. Conversely the Tribunal has power to allow such an amendment. In common with all such powers under the rules, the Tribunal must have in mind the overriding objective in rule 2, which is to deal with the case fairly and justly. That includes, so far as practicable, ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and important of the issues, avoiding delays, so far as compatible with proper consideration of the issues, and saving expense.

15. The leading case on how this discretion should be exercised remains **Selkent Bus Co Limited v Moore [1996] ICR 836**, in which the then President of the Employment Appeal Tribunal, Mr Justice Mummery, gave guidance on how Tribunals should approach applications for permission to amend. At page 843 at F, the EAT said:

“Whenever the discretion to grant an amendment is invoked, the Tribunal should take account of all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.”

16. The EAT went on to identify some circumstances which would certainly be relevant, although such a list could not be exhaustive. It will be important to identify the nature of the amendment, distinguishing between minor amendments such as the addition of factual details to existing allegations, or major amendments such as the making of entirely new factual allegations which change the basis of the existing claim. A substantial alteration which pleads a new cause of action may have to be treated differently from a minor amendment.

17. It is also essential for the Tribunal to consider whether a new complaint would be out of time as at the date of the application to amend. That is not something which can be deferred to the final hearing if permission to amend is to be granted: **Amey Services Ltd & anor v Aldridge and others UKEATS/007/16 12 August 2016.**

18. Consideration of time limits must encompass the applicable statutory provision for extensions. The fact that an application would be out of time if lodged as a fresh claim is not an absolute bar to permission to amend being granted, but depending on the circumstances it can be an important consideration. In **Abercrombie and others v AGA Rangemaster Ltd [2014] ICR 209** the Court of Appeal said in paragraph 50 that

“Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim already pleaded – and *a fortiori* in a re-labelling case – justice does not require the same approach.”

19. In discrimination complaints the time limit is prescribed by section 123 of the Equality Act 2010. That provision gives the Tribunal power to extend time if it thinks it just and equitable to do so.

20. The case law shows that the fact there has been an error by professional advisers does not necessarily prevent time being extended: it is only a factor to be weighed in the balance (**Chohan v Derby Law Centre [2004] IRLR 685**, Employment Appeal Tribunal).

21. The timing and manner of the application is also relevant. An application should not be refused solely because there has been a delay in making it, but delay is relevant to the exercise of discretion. It is relevant to consider why the application was not made any earlier.

22. The EAT in **Selkent** concluded that passage with the following:

“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.”

Discussion and Conclusions

23. Having heard submissions from both parties and having considered the matter I took into account the following factors.

Nature of the amendment

24. I was satisfied that this was not simply a re-labelling exercise of facts already pleaded, and nor was it the addition of further particulars to an allegation already found on the claim form. The claim form contained no allegation about anything other than the dismissal. Although I acknowledged there was some connection between the allegations now made against Mrs Broadhurst and dismissal, in that the claimant believed Mrs Broadhurst's attitude towards her had tainted the investigation of the misconduct matters, this was still a significant amendment introducing as primary factual material matters which were currently relevant only by way of background if at all. It was a substantial alteration essentially raising a new claim.

Time Limits

25. That meant that the question of time limits was important. The application did not specify when the treatment from Mrs Broadhurst took effect. In submissions the claimant said it began about a year before she was dismissed (i.e. late 2014) and carried on until her dismissal. It seemed unlikely it carried on until then, because the whole point of the allegation was that Mrs Broadhurst only treated her badly when Ms Parker was absent. It appeared from a note about the dismissal issue supplied by Mr Sousa for today's hearing that Ms Parker was back at work by late August. However, even accepting at face value the claimant's assertion that this treatment continued until she no longer worked at the respondent (being placed on garden leave in mid October 2015 until her notice period expired), the application to amend was still made more than a year out of time. The three month time limit for bringing a claim about these matters would have expired in mid January 2016 but the application was not made until April 2017.

26. I considered whether it would be just and equitable to extend time in these circumstances. Mr Sousa did not identify any grounds for doing so. The claimant had provided the basic information to her advisers in February 2016 when the claim form was lodged, but those advisers had taken a conscious decision not to include that allegation when compiling the claim form. It did not appear to be an oversight but rather a reflection of how her advisers understood her case.

27. I therefore concluded that the time limit issue counted heavily against the claimant in the exercise of discretion.

Timing and manner of the application

28. It is appropriate to make an allowance for the fact that the claimant did not have access to professional representation when this application was drafted. Nevertheless, as Ms Wedderspoon pointed out, the wording used raised a number of further questions, and in reality further particulars would be required if permission to amend were to be granted. This weighed against granting permission to amend.

29. I was also concerned by the effect of the passage of time. The claimant had not lodged a grievance about her allegations against Mrs Broadhurst. The respondent had not had any opportunity to investigate those allegations. Potentially they went back almost 2½ years. It did not seem to me likely that the respondent would have a fair opportunity to defend these allegations if they were admitted at this stage. I accepted that if they had been included in the original claim form the respondent would have had only three months' more notice of them (January 2017 not April 2017), but where the primary time limit is only three months and there has already been almost a year's delay (caused by the Tribunal) any further passage of time can be given significant weight.

30. Putting all these matters together I concluded that the balance of prejudice and hardship favoured refusing permission to amend. The allegations were substantially out of time, and if they were permitted to proceed the fact they were brought so long after the events in question would effectively deny the respondent a fair hearing. The claimant can still pursue her case that Mrs Broadhurst's attitude towards her affected the dismissal decision. It was in the interests of justice to refuse permission to amend.

Employment Judge Franey

10 July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 July 2017

FOR THE TRIBUNAL OFFICE