

EMPLOYMENT TRIBUNALS



Claimant
Mr. R. Chute

V

Respondent
Serco Group Plc

**HELD AT: London Central
2018**

ON: 11 April 2019

BEFORE: Employment Judge Mason

Representation

For the Claimant: Mr. R. O’Keeffe, Trade Union

For the Respondent: Mr. C. Henney, solicitor

**EMPLOYMENT TRIBUNAL
OPEN PRELIMINARY HEARING
JUDGMENT**

1. The Claimant’s claim for age discrimination is dismissed on withdrawal.
2. The Claimant’s application to amend his claim to bring a claim pursuant to s11 ERA 1996 is refused as there is no extant claim before the Tribunal to amend. In any event, the Tribunal would not have allowed the amendment for the reasons given at the hearing.
3. The Claimant’s claim is therefore dismissed and the final hearing (9, 10 and 11 July 2019) is cancelled.

[Reasons were given verbally to the parties and are provided in writing below at the request of the Claimant]

REASONS

1. The Respondent operates a number of refuse contracts for local government including a refuse collection for Hammersmith and Fulham.
2. The Claimant is employed as an HGV driver and transferred to the Respondent's employment by way of TUPE transfer in March 2008. His continuous service commenced on 6 July 1999. He remains employed by the Respondent.
3. On 19 November 2018, the Claimant brought this claim of age discrimination.
4. On or about 29 March 2018 he sought permission to take leave for the period 28 August 2018 to 24 December 2018, three months as unpaid leave and four weeks holiday.
5. The Claimant says one week before his absence was due to start, the Respondent denied him permission to take this period of leave on the basis it was the Respondent's policy not to have more than four drivers on annual leave at any time. The Respondent denies this and says the Claimant was told that his leave requests were rejected about a week after he submitted the leave requests.
6. The Respondent accepts that for the leave years 2008 to 2017, the Claimant was allowed to take three months unpaid absence and four weeks holiday in the period end of August to end of December. However, for operational reasons and on grounds of cost, the Respondent says it decided not to support the Claimant's request in 2018.
7. The Claimant raised an internal grievance which was heard on 4 December 2018; he was not successful.
8. At a closed Preliminary Hearing (PH) on 22 March 2019 before EJ Glennie the Claimant clarified that his claim is one of indirect discrimination because of his age. EJ Glennie records that he says the Respondent's decision not to grant unpaid leave was indirect discrimination against older staff, because it is recognised that older people have wider interests, including looking after grandchildren, getting involved in civic bodies etc and have greater difficulties adjusting for planned retirement.
9. EJ Glennie listed this case for a further open PH today before me to consider the Respondent's application to strike-out this claim on the grounds that it has no reasonable prospect of success, or for a deposit order on the grounds that it has little reasonable prospects of success.
10. On 9 April 2019, the Claimant wrote to the Tribunal (copy to the Respondent) with an application to amend his claim. He now asks the Tribunal under s11(1) Employment Rights Act 1996 (ERA) to determine what particulars ought to have been included or referred to in the statement of particulars in order to comply with s1 ERA. Alternatively, he asks the Tribunal under ss 11(2)

and 12(2) ERA to amend the Claimant's particulars as to holiday, or substitute other particulars for them. He also seeks compensation of four weeks pay under s38 ERA.

11. At the start of the hearing, Mr. O'Keeffe on behalf of the Claimant withdrew the age discrimination claim. I pointed out that as this was the Claimant's only claim it presented an obvious difficulty with his application to amend as there was in fact no claim left to amend. However, I heard his application in full and also heard from Mr. Henney, the Respondent's representative, who objected to the application to amend.
12. Mr. O'Keeffe on behalf of the Claimant submits:
 - 12.1 It is clear from the particulars given in the ET1 that it is the Claimant's case that he was contractually entitled to leave over 17 weeks, comprising 11 weeks unpaid leave and 6 weeks paid leave in a block from mid-September until Christmas. The Claimant relies on (i) an express verbal agreement with Mr. David Port (Contract Manager) on 15 April 2003 and (ii) (as Mr O'Keeffe clarified at the hearing) an implied term to this effect on the basis of custom and practice.
 - 12.2 The particulars given to the Claimant are incorrect or incomplete as regards holiday as they fail to reflect this contractual arrangement.
 - 12.3 He accepts the Claimant could bring a fresh claim as he is still employed by the Respondent but says the Claimant would be prejudiced by the delay as the proceedings are hanging over him and he wants to exercise his right to take leave this year to carry out charity work.
 - 12.4 In accordance with the overriding objective (Rule 2) "simple" cases of this kind should be dealt with in a proportionate manner.
13. Mr. Henney on behalf of the Respondent submits:
 - 13.1 There is no clear link between the particulars in the ET1 and the proposed amended claim; there is no indication that the Claimant considers the Respondent to be in breach of contract. The proposed amendments are therefore entirely unconnected with the original claim.
 - 13.2 In any event, the merits of the proposed amended claim are thin as it is not open to the Tribunal to construct the contract; this is not the purpose of s11.
 - 13.3 He accepts that the Claimant could bring fresh proceedings and says this is the right course as the Respondent will not be ready for the full merits hearing in July if the existing claim is amended. The Respondent has thus far prepared on the basis that this is an age discrimination claim and if allowed to amend, it will need to meet an entirely new claim; the R will be required to provide evidence regarding the alleged (express and implied) agreement which will require going back many years and finding witnesses who are possibly no longer in the Respondent's employment.

Conclusion

14. The Claimant having withdrawn his claim of age discrimination at the outset and this being his only claim, the claim to amend must fail.

15. However, I would have refused the application to amend in any event having had regard to the overriding objective, the principles set out in **Selkent Bus Co v Moore** [1996] ICR 836 and all the circumstances in particular any injustice or hardship which would result from the amendment or a refusal to make it. In reaching this decision I have taken into account the following factors:
 - 15.1 The Claimant only indicated in his claim form that he was claiming age discrimination. At the PH before EJ Glennie he again said that his claim was of age discrimination and gave further details; he clarified that his claim was indirect discrimination and explained why. He did not mention that the Respondent had failed to give him correct particulars of his employment.
 - 15.2 There has been a considerable delay in making this application to amend. The application to amend was only made on 9 April 2019, 2 days before this hearing and nearly 5 months after this claim was presented in November 2018. Furthermore, Mr. O’Keefe added to the proposed amendments today.
 - 15.3 This is more than effectively a relabeling exercise and is an entirely new claim on a different legal basis requiring consideration of a different factual matrix. The age discrimination claim focussed on refusal of the Claimant’s leave request in 2018 but the proposed new claim is likely to involve substantially different areas of enquiry as it will be necessary to consider what was agreed, with whom and when over a lengthy period.
 - 15.4 I am not persuaded that the Claimant will suffer any significant injustice or hardship as he remains in the Respondent’s employment and can bring a fresh, properly pleaded claim at any time. The Respondent on the other hand would suffer some hardship if the amendment is allowed as it would be required to prepare for an essentially different case requiring investigation going back several years and is unlikely to be ready for the full hearing.
16. For the reasons set out above the Claimant’s claim is dismissed.
17. Mr. Henney made an application for a costs order against the Claimant. Mr. O’Keefe objected. Having listened to both sides, I refused to make an order for costs taking into account. The Claimant was unrepresented until very recently and having taken advice, he promptly withdrew his age discrimination claim. I do not accept that his claim was speculative or vexatious; he genuinely believed - and still believes – that the Respondent was wrong to refuse his application for extended leave of absence in 2018 and that the only course of action left open to him was to present this claim, his internal grievance having been unsuccessful.

Employment Judge Mason

11 April 2019

Sent to the parties on:

12 April 2019

For the Tribunal