EMPLOYMENT TRIBUNALS

Claimant: **Sarah Brookes**

Respondent: **Dr Judith Bull (R1)**
Ms Lucy Howletts (R2)

Heard at: Birmingham **On:** **27 July 2018**

Before: Employment Judge Flood (sitting alone)

Appearances
For the claimant: Mr P Spencer (Solicitor)
For the respondent: Ms B Clayton (of Counsel)

JUDGMENT ON PRELIMINARY HEARING

1. The claimant's application for permission to amend her claim so as to add those allegations of discrimination numbered 2, 5, 6, 11, 13, 15, 16, 17, 18, 19, 20 and 21 of the 21 acts identified in the Case Management Order made following the hearing on 27 July 2018 (which were alleged acts of direct discrimination, unfavourable treatment for the purposes of discrimination arising from disability and acts of harassment) is allowed.

2. The claimant's application for permission to amend her claim so as to add a new PCP identified as "*requiring the claimant to work 5 sessions over four days"* which placed the claimant at a "*substantial disadvantage in comparison to a non disabled person in that this increased the risk of stress and tiredness for the claimant"* is refused.

REASONS

Background

(1) This application to amend was considered in the course of a preliminary hearing convened to review compliance with various case management orders and at which applications to amend were to be heard (if required).

(2) The claimant has made a number of allegations of disability discrimination under the Equality Act 2010 ("**EA 2010**") namely direct discrimination because of disability (section 13) discrimination arising from disability (section 15), a breach of the duty to make reasonable adjustments (sections

20 and 21) and harassment (section 26) in a claim form submitted on 31 January 2018 ("**the Claim Form**").

(3) The claimant provided further particulars of her claims on 29 June 2018 ("**the Further Particulars**"). The respondents then made an application on 20 July 2018 objecting to the Further Particulars. The objection was on the basis that numerous parts of the Further Particulars would, in the view of the respondents, require the claimant to apply to amend her claim (the respondents confirmed they would resist any such application that may be made). The claimant contacted the Tribunal on 23 July 2018 to confirm that to the extent this is required, an application to amend her claim was made as per the Further Particulars.

(4) At the case management hearing on 27 July 2018, 21 acts of alleged direct discrimination; unfavourable treatment for the purposes of the discrimination arising from disability complaint and instances of alleged harassment were identified together with the parties, and are recorded in the Case Management Order of even date issued following that hearing. Together with the parties I identified that acts numbered 2, 5, 6, 11, 13, 15, 16, 17, 18, 19, 20 and 21 of these 21 alleged acts potentially disclosed matters not specifically referred to in the Claim Form and needed to be considered as part of the amendment application. I considered these acts together as Amendment Application 1.

(5) In addition, in respect of the reasonable adjustments claim, the Further Particulars stated that the provision, criteria or practice ("PCP") relied upon was that of "*requiring the claimant to work 5 sessions over four days*" and that the PCP placed the claimant at a "*substantial disadvantage in comparison to a non disabled person in that this increased the risk of stress and tiredness for the claimant*". This was different PCP to that set out in the Claim Form which was identified as "*a provision, criteria or practice of sending unparticularised e mails of concerns to individuals*" and that such PCP placed the claimant at substantial disadvantage in that "*the claimant was more likely to suffer damage to her mental health as a consequence of a communication of this type*". I considered this separately as Amendment Application 2.

Relevant Legal Framework

(6) The general case management power in rule 29 of **First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (amended and reissued on 22 January 2018) **("the Rules")** together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments.

(7) In the case of **Selkent Bus Co Limited v Moore [1996] ICR 836**, the Employment Appeal Tribunal gave useful guidance, namely:

(4) Whenever a 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 substitution of other labels for 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)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 should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.
(c) The Timing and The Manner of the Application
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 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 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 factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question 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."

(8) This position is also summarised in the Presidential Guidance issued under the provisions of **Rule 7** of the Rules which I have also considered.

(9) In the case of **Remploy Ltd v Abbott and others UKEAT/0405/14,** the EAT allowed an appeal against a tribunal's decision to permit amendment to claims which had been professionally drafted by experienced solicitors and counsel, confirming that, in deciding whether or not to allow an amendment to a claim, employment judges must consider issues such as the reason for delay, and the impact that the amendment is likely to have on case management and preparation for hearings, in light of the prejudice to the parties.

Submissions

(10) In support of the claimant's applications to amend, Mr Spencer submitted that all the matters referred to in Amendment Application 1 were more in the nature of further particulars rather than an amendment. He referred to paragraph 17, 18 and 19 of the Claim Form where the claimant alleges that the respondents discriminated against the claimant "*in the manner in which it has dealt with the claimant's absences*" and "*by their conduct at the meetings facilitated by Dr Khan including requesting the Claimant to resign*". He alleges that all the matters referred to in Amendment Application 1 were

just additional facets or aspects of the factual matrix already set out and that were just finessing the detail of the circumstances and the factual basis of the claim, which he alleges, was already set out in the Claim Form. At worst, it is submitted, this is just a re-labelling of allegations that were already in the Claim Form and that further details of what exactly was said by whom will also be given in evidence. He submits that this is not a question of a new claim or cause of action and refers to examples given in the Presidential Guidance to support his argument.

(11) In respect of Amendment Application 2, Mr Spencer submitted that it was also the case that a complaint of failure to make reasonable adjustments was not a new claim and that the Claim Form already contained an allegation of this nature. He referred to paragraph 8 of the first page of the Claim Form, which he submits contains the factual circumstances which support the reasonable adjustments claim. He states that the respondents were already aware of a complaint regarding working pattern and were already on notice that they would need to justifiy the refusal to change the working pattern as part of the direct/arising from and harassment aspects of the disability discrimination claims.

(12) It was contended that the respondents were not in any way prejudiced by any of the amendments sought and it was still at a relatively early stage in the Tribunal process. It is submitted that it was not even clear that the respondents had spent much time looking at the factual matrix that led to the claim as no attempt had been made to address the factual circumstances described by the claimant in box 8.2 of the Claim Form. He states that there is no prejudice to the respondents(at least not set out in the letter of 20 July 2018. In terms of the timing and manner of the application to amend, the reason an amendment is sought now is that Mr Spencer himself made a judgment call that the Claim Form adequately set out the basis of the claims. With perhaps the acknowledged exception of the reasonable adjustment amendment sought, his view remains the same. It was only upon taking instructions on the response submitted by the respondents that it became apparent that it was also a claim for a failure to make reasonable adjustments in relation to the working pattern point and that is why it is necessary to seek an amendment to set this out as a PCP.

(13) The respondents objected to the applications made under both Amendments Applications 1 and 2. Ms Clayton referred to the **Selkent** principles and submitted that the Tribunal had to consider the nature of the amendments sought; the effect of any applicable time limits and the timing and manner of the application. More generally on the relative injustice and hardship point, she pointed out that the respondents now appeared to be facing 63 allegations of direct, arising from and harassment disability discrimination and 65 allegations in total if both of the reasonable adjustments claims are included.

(14) I was referred to the **Remploy** case (see above) and it was submitted that many of the amendments sought were substantial rather than minor. Whilst “umbrella” allegations had been made it paragraphs 17, 18 and 19 of the Claim Form, these were simply insufficient and did not set out how the various legal tests are said to have been breached by the respondents. It is contended that a number of the instances listed would be out of time and no application to extend time had been made in respect of all matters that

took place before 29 August 2017. In terms of the timing and the manner of the application, it was submitted that it was flagged as far back as the initial preliminary hearing in May 2018 that it appeared that the claimant would need to make an application to amend to pursue some of the points raised. No application to amend was made at or after this hearing. In addition even when the application to amend was received (Ms Clayton alleged that this had been done at the hearing today, although it is acknowledged that this had been done by an e mail on 22 July 2018) no written representations were made in support of this application. The respondents submit that there does not appear to be a good reason why the matters raised were not included in full in the Claim Form. Factual matters now relied upon have not been raised in the Claim Form before and the respondents will be put to extra cost in dealing with the various allegations made. In terms of the contention that the respondents have not applied themselves to the factual background, it is contended that the respondents need to submit a legal response to actual claims made, not just to respond to a chronology of facts more generally set out.

(15) In respect to Amendment Application 2 in particular, the respondents submit that it is even more difficult to justify permitting the amendment. It is submitted that this amounts to an entirely new PCP not referenced at all in the Claim Form - there is no reference to a change in working hours nor that it was refused. It is also alleged that this particular allegation is significantly out of time as if any such discussions took place the conversations were between 24 July and 25 August 2017 and the application to amend was only made in July 2018. It is submitted that it would not be just and equitable to extend time to allow these complaints to be made and accordingly this allegation has little or no reasonable prospects of success. I was invited to dismiss both applications to amend in their entirety.

Conclusions

(16) In my judgment delivered in part at the hearing, I granted Amendment Application 1 on the basis that the nature of the amendments sought were relatively minor and more in the nature of re-labelling complaints already raised and further particularising how such complaints were made. The matters raised fell within the ambit of the general allegation that there had been acts of discrimination by the respondents *"in the manner in which it has dealt with the Claimant's absences"* and *"conduct at the meetings facilitated by Dr Khan, including requesting the Claimant to resign*" which are cited as complaints of direct discrimination, discrimination arising from disability and harassment at sections 17.1, 18.1, 19.1 and 17.4, 18.4 and 19.4 of Box 15 of the Claim Form.

(17) There may be some issues of time in respect of a number of complaints made but this will be dealt with at the final hearing of the claimant's claim. No <u>new</u> limitation issues arose as the complaints constituting the alleged acts of discrimination had already been made in the initial Claim Form.

(18) The respondents are accordingly not significantly prejudiced with regard to Amendment Application 1. Having conducted a careful balancing exercise, and having regard to all the circumstances of the case, including the nature of the amendments sought and delay on the part of the claimant in making

this application I permitted the claimant to amend to amend her claim in the manner sought in Amendment Application 1.

(19) In deciding Amendment Application 2 in my reserved decision, I also considered the factors identified by **Selkent** before addressing the balance of prejudice and hardship. I set out the analysis on each of these points below:

Nature of the amendment

(20) The amendment requested here appeared to me to be a much more substantial one than in Amendment Application 1, even though it consisted of one main factual allegation as opposed to a number of separate points. It was not, as the claimant contends, simply the addition of factual details to an existing allegation, or a re-labelling exercise. It sought to bring into the reasonable adjustments complaint an allegation, which at best, was referred to in passing only in the Claim Form and was not linked in any way to a duty to make reasonable adjustments or an alleged breach thereof. This was more in the nature of "*entirely new factual allegations which change the basis of the existing claim"* as identified in the **Selkent** case above. Moreover the Claim Form already particularised the nature of the reasonable adjustments complaint the claimant was making at this time at paragraph 20 of Box 13, namely that the PCP relied upon was the "*practice of sending unparticularised e mails of concerns to individuals*". There was no reference here to working hours at all (let alone requests being made and a refusal of that request). The only reference in the entire Claim Form to work pattern was at Box 8.2, paragraph 8 and again no complaint is made here of a request being refused or even what the discussions alleged to have taken place consisted of.

Applicability of time limits

(21) The complaint raised regarding discussions about changes to working patterns does appear to on its face to be out of time (see paragraph (15) in the respondents' submissions above). However, there are other complaints and allegations made already that are in the same position as regards time. It must be at least arguable that these were instances of an act extending over a period on an ongoing basis. The issue of whether there has been a continuing act will need to be considered more generally as part of the final hearing of the claimant's claim and at this point issues of whether it is just and equitable to extend time (if applicable) will be considered more broadly. Therefore whether the amendment requested was out of time was a factor that was broadly neutral. It did not tip the balance one way or the other. The complaints should have been brought earlier, however delay is unlikely to cause the respondents any difficulties in addressing the out of time issue, as it is substantially the same point as for the existing complaints.

Timing and manner of the application

(22) The application to amend was made 4 days before the preliminary hearing on 27 July 2018. The claimant has been legally represented from the outset (January 2018) and the Claim Form submitted (although lacking detail) set

out in legal language and form the basis for the reasonable adjustments claim that was being made. The claimant then sought to effectively completely change the basis upon which this complaint was made. No real reason is given as to why this particular complaint was not set out this way initially. The claimant states that it was only after the response was received that only upon taking instructions it became apparent that it was also a claim for a failure to make reasonable adjustments in relation to the working pattern point. Having reviewed the grounds of resistance submitted by the respondent on 8 March 2018, I cannot see how this could have arisen only at this time and not before and if this was the case why an application to amend was not made until some 4 months later in July 2018.

Balance of prejudice

(23) Putting these factors together I concluded that the balance of prejudice and hardship fa voured refusing the amendment. My main concern was that allowing Amendment Application 2 was allowing the amendment would simply be giving the claimant another “bite of the cherry” enabling her to try and correct deficiencies in the way her complaint was previously made. Her complaint could have put this way from the outset by her legal representative but it was not formulated at all in this fashion.

(24) This complaint was raised substantially after the primary limitation period and so the respondents would be prejudiced in addressing this new factual complaint as to do so would require additional work that would be burdensome. The claimant has numerous other disability discrimination complaints in play, in many cases pleaded in the alternative. She has had ample opportunity to set out what her claim actually is and make any applications to amend at a much earlier stage in the case. The relative prejudice to the claimant if the application is not granted would be relatively small whereas the disadvantage to the respondents if it were and the effect on the proceedings could be significant.

(25) For the above reasons, Amendment Application 2 is refused.

Employment Judge Flood

08/08/2018