EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Stephen Antoine	**v**	**Bandford House UK Limited**

RECORD OF OPEN PRELIMINARY HEARING

Heard at: Watford **On**: 13 January 2020

Before: Employment Judge Alliott (Sitting alone)

Appearances

For the Claimant: In person
For the Respondent: Mr D Bansal, Solicitor

JUDGMENT

1. The claimant's application to amend his claim to include a claim of disability discrimination is dismissed.

REASONS

1. At a closed preliminary hearing held on 19 August 2019, I observed as follows:

> "The claimant has provided further and better particulars of his claim pursuant to an order of Employment Judge Henry. Within that document, the claimant has gone further than elaborating on his racial discrimination claims and has referred to discrimination on the ground of disability. I indicated to the claimant that I did not consider his original claim form to include a claim for disability discrimination and that if he wishes to pursue that claim he will have

to make an application to amend his claim, along with a draft of the amendments he wishes to introduce"

2. In the light of that observation, on 26 September 2019, an application was made on behalf of the claimant to amend the claim, reliant upon paragraphs 18 to 24 of the further and better particulars submitted to the tribunal on 31 May 2019.

3. The application to amend is opposed by the respondent in an e-mail dated 11 October 2019.

The Law

4. From the IDS Employment Law handbook on Employment Tribunal Practice and Procedure, at paragraph 8.16, I note the following:

> "In Chapman & Others v Goonvean & Rostowrack China Clay Co Limited 1973, ICR50 NIRC, Sir John Donaldson stressed that, in making use of their discretionary power to amend, tribunals should seek to do justice between the parties having regard to the circumstances of the case. Then, in Cocking v Sandhurst (Stationers) Limited & Another 1974, ICR 650, NIRC, he laid down a general procedure for tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim or adding or substituting respondents. The key principle was that in exercising their discretion, tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it."

5. Further, at 8.18, dealing with the balancing of hardship and injustice, the case of Selkent is referred to and in particular, the relevant factors to be considered which include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

6. At 8.19, the following is set out:

> "It is important to note that the balance of hardship and injustice test is a balancing exercise. Lady Smith noted in Trimble and another v North Lanarkshire Council & another, EATS 0048/12, that it is inevitable that each party will point to their being a down side to them if the proposed amendment is allowed or not allowed. Thus, it will rarely be enough to look at only at the down sides or 'prejudices' themselves. These need to be put in context and that is why it is important to look at the whole surrounding circumstances. Moreover, it is important to ensure that the amendments are not denied purely punitively or where no real prejudice will be done by their being granted – Sefton Metropolitan Borough Council & another v Hincks & Others,
> 2011 ICR 1357, EAT."

7. As regards new causes of action, at 8.27 the following is set out:

> "Following the approach indicated by Abercrombie, tribunals should, when considering applications to amend that arguably raise new causes of action, 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 legal issues raised by the new claim and by the old, the less likely it is that it will be permitted*"

8. In addition, Mr Bansal has cited to me the case of Reuters Limited v Cole UK EAT/0258/17/BA. I have read that judgment which, in my view, invites me to consider when assessing the extent to which an amendment is a relabelling exercise, the extent to which the factual enquiry is widened.

The facts

9. The claimant worked at the respondent between 1 July and 26 October 2018.

10. ACAS was notified on 27 November and the ACAS certificate is dated 27 December 2018. Thus, the latest that a claim could be presented within the primary three-month time limit was 26 January 2019.

11. The claimant presented his claim form on 3 January 2019. The claimant told me that he was assisted by Paula Howell, a case worker at the West London Equality Centre. In the claim form, the claimant ticked the box to present a claim of race discrimination. The disability discrimination box was not filled in. At section 12, to the question "Do you have a disability?", the box marked "no" has been filled in. I accept that the context of that question is primarily to assess the extent to which an individual may need special assistance in presenting his claim, but it does indicate that at that stage the claimant did not consider himself as disabled.

12. The claim form does state:

> "Blandford House were also made aware of my mental health concerns, as I disclosed personal details to them. They also stated that they would support me during my time working for them if required. This incident has affected my mental health as I have not been able to be in a position to defend myself against what I call is a defamation of character."

13. On 4 April 2019, Employment Judge Henry directed as follows:

> "The claimant is asked to state how he alleges the acts of which he complains was because of consideration of race otherwise than him having no other explanation."

14. On 31 May 2019, the West London Equality Centre sent in the claimant's further and better particulars. Paragraphs 18 to 24 deal with the claimant's proposed disability claim. Mr Bansal took a preliminary point that there was no formal draft amendment before the face of the tribunal but I am prepared to deal with this application on the basis that the amendment sought is in the like terms to paragraphs 18 to 24 of the further and better particulars.

15. In essence, the proposed claim is as follows:

> "24. I believe the respondent has unlawfully discriminated against me as follows:
>
> ….
>
> 24.2 The respondent's failure to investigate whether my disability may have played a part in any alleged inappropriate behaviour on my part and chose to dismiss me without reference to my disability was less favourable treatment because of my disability and amounted to direct and/or indirect discrimination contrary to sections 13 and 19 of the act."

16. It was on the basis of that pleading that I made the observation I did that has been quoted above on 19 August 2019. And hence, the application to amend dated 26 September has been made.

17. This claim is currently listed for hearing on **6 July 2020**, with a time estimate of three days. Listing is such that in the event that that hearing could not take place due to the time estimate being insufficient, then a four-day hearing would be listed not before 30 November 2020, and five days plus would not before 4 January 2021.

18. I now turn to consider the nature of the amendment. In my judgment, this is a completely new cause of action, namely a disability discrimination claim. Although the proposed amendment refers to sections 13 and 19, ie direct and indirect discrimination, in my judgment, this is probably more appropriately related to section 15, disability discrimination. I say that because the way it is pleaded, it would appear that the something arising in consequence of the disability was the alleged inappropriate behaviour and the unfavourable treatment was a failure to investigate the claimant's condition and, presumably, the termination of his engagement. Quite how the indirect discrimination claim is put I do not know as no PCP is referred to.

19. In my judgment, however the disability discrimination claim is advanced, it does raise significant new and different areas of enquiry. The respondent will have to deal with the question of whether or not it accepts that the claimant was, at all material times, disabled within the meaning of the Equality Act. The claimant seeks to rely on the issue of bipolar disorder or manic depression. There will be factual issues in relation to whether or not the claimant was disabled within the meaning of the Equality Act and also the extent to which the respondent knew or ought to have known of the claimant's disability. In particular, it is to be envisaged that the respondent may potentially seek its own medical evidence as to the extent to which bipolar disorder and/or manic depression could impact on an individual's propensity to make inappropriate comments or indulge in inappropriate behaviour.

20. In this context, I note that the claimant vehemently denies that he indulged in any appropriate behaviour and/or made any inappropriate comments of a sexual nature at all. Consequently, the claimant's primary case is that he did

not make any inappropriate comments and as such his disability claim is presented on a secondary basis. That is to say, that if he did make inappropriate remarks, then his disability was in some way involved or provided an explanation that should have been taken into account by the respondent.

21. Consequently, I have concluded that when addressing the nature of the amendment, there is very significant difference between the factual and legal issues raised by the new claim and the old. That points towards the fact that the amendment will not be permitted.

22. I now turn to consider the extent to which the claim is out of time.

23. The further and better particulars were provided on 31 May, which is approximately four months out of date. The application to amend was made on 26 September 2019, approximately nine months late.

24. I now turn to consider the reason why the application was made so late.

25. The claimant told me that prior to working for the agency, he had been employed by Ealing Council. Unfortunately, he had been made redundant in 2016 which came as something as a shock to him. However, the claimant told me that throughout his employment with Ealing Council he had been supported through his depression. This suggests to me that the claimant was well aware of his bipolar disorder and/or manic depression and also that it was incumbent upon employers to support individuals who may have that disorder.

26. In addition, it is a fact that the claimant alluded to his mental health in his original claim form. Consequently, the claimant, in my judgment, was well aware of his mental state but clearly made no connection between his treatment and his alleged disability. This is not a case where a primary fact upon which the claim would have to be brought was unknown to the claimant at the time of making his claim form. In addition, the claimant was being assisted by a case worker at the West London Equality Centre.

27. The claimant gave evidence to me that, in essence, he was unaware of his full employment rights and was kept in the dark for some time, until the response form, as to precisely why it was that he had been treated in the way he was treated. However, that did not prevent him presenting a claim for race discrimination.

28. In my judgment, the claimant ought to have been able to have formulate his claim for disability discrimination from the outset had he considered that there was a link with the termination of his engagement.

29. Consequently, I do not consider that it would be just and equitable to extend time for the bringing of the claim for disability discrimination.

30. Dealing with the timing and manner of the application, in my judgment it should have been apparent upon the filing of the further and better particulars on 31 May 2019 that an application to amend was necessary. This application to amend was only made following comments of myself at the closed preliminary hearing on 19 August 2019 and, even then, there was some delay before making the application on 26 September, (albeit that the record of the preliminary hearing on 19 August was only sent out on 2 September).

31. I now consider the balance of hardship. As observed, both sides can in general terms point to hardship in the sense that the claimant is being deprived of a claim, whereas the respondent would be put to defending a new head of claim. In my judgment, there is prejudice to the respondent. I have examined whether that that could be characterised as synthetic and opportunistic but I have decided that it is genuine. The respondent will have to make enquiries into such areas as the extent to which the claimant did or did not disclose to individuals at the respondent matters relating to his mental health. In addition, there would have to be disclosure of the claimant's medical records and consideration of the same by the respondent. The claimant would have to file an impact statement dealing with the extent to which his disability impacted on his day-to-day activities. As already mentioned, the respondent would potentially have to seek its own medical evidence as to the extent to which, if any, bipolar disorder and/or manic depression, can impact an individual's behaviour. All of this would cause considerable cost to the respondent in dealing with a new claim that represents the claimant's secondary or fall-back position.

32. In my judgment it could very well be that if all matters were disputed, three days for the hearing of this case would be insufficient. Given the state of the listing, I consider there would be further prejudice to all parties by further delaying the hearing of this matter.

33. Consequently, taking into account all the circumstances of the case, in my judgment, I must exercise my discretion against allowing this amendment.

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Employment Judge Alliott

16.01.2020

Date: ……..

27.01.2020

Sent to the parties on: .....

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For the Tribunal Office