



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102580/2020 (A)

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Held remotely at Glasgow on 30 September 2020

Employment Judge: R King

10 **Ms N Hughes**

**Claimant
Represented by:
Miss Neil –
Solicitor**

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Greater Glasgow Health Board

**Respondent
Represented by:
Mr Reeve –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's amendment dated 24 July 2020 is allowed.

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REASONS

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1. Both parties were content that the Tribunal should deal with the amendment application in the course of the preliminary hearing. The hearing took place remotely given the implications of the Covid 19 pandemic. It was an audio (A) hearing held entirely by telephone. The parties did not object to that format.

2. By application dated 24 July 2020 the claimant seeks to amend her claim by adding the following allegation of indirect discrimination contrary to Section 19 of the Equality Act 2010:-

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“The respondent sent letters to Murray and Specsavers some time between 26 November 2019 and 20 December 2019. Each of these letters asked “Can

you confirm the number of days the individual was absent in the last 2 years and the number of occasions?" Neither letter specified the date from which the respondent required information regarding the claimant's absences. The dates of absence confirmed by Murray and Specsavers were not passed on to the claimant. The wording of these reference requests and the failure to pass on the dates of absence confirmed by her former employers amounts to a provision, criterion or practice (PCP) which indirectly discriminated against the claimant and persons with her disability. It put the claimant and persons with her disability at a substantial disadvantage because the nature of her disability was such that she had difficulty recalling specific dates of absence and the reason for them at the time, particularly during a particular period of low mood. The respondent will not be able to show that the PCP was a proportionate means of achieving a legitimate aim. The particular disadvantage the claimant was placed at was that her absence was assumed to cover the last 2 years of her employment. Due to the claimant's condition she would have difficulty recalling the particular dates of her absences in order to correct this incorrect assumption. As a consequence, the respondent became suspicious of her absence. Her lack of clarity was taken to be "vagueness" and the respondent used this as a justification not to hire her."

3. By letter dated 24 August 2020 the respondent's representative confirmed that this application was opposed, setting out its reasons.
4. The Tribunal had before it the proposed amendment, the claimant's representative's covering letter of 24 July 2020 with submissions and the respondent's representative's letter of 24 August 2020 setting out its objections to the amendment.
5. The Tribunal also invited both representatives to make any additional submissions they wished to make in support of their written submissions and in response to the other party's submissions.

Claimant's submissions

6. In support of her application Miss Neil submitted that the proposed amendment was based on information that had only come to light in the

respondent's ET3, which she had received on 1 July 2020. The information in question was the precise wording of the reference request that the respondent had sent to the claimant's former employers about the number of her absences and the number of periods of absence in the previous two years. The claimant now relied on the wording of that request as the PCP relevant to her proposed indirect discrimination claim. As claimant had not been aware of the wording of that request prior to her receipt of the ET3 this allegation could not have been incorporated in the claim form that was originally presented.

7. Relying on the guidance in the cases of ***Abercrombie and Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148*** and ***Selkent Bus Company Ltd v Moore [1996] ICR 836*** Miss Neil explained that she sought to add this further claim in circumstances where the same disputed selection process had given rise to the existing claims under sections 13, 15 and 27 of the Equality Act 2010. The amendment did not therefore represent a material change to the claim already in existence.
8. Miss Neil acknowledged that the indirect discrimination claim was not initially particularised within the ET1 claim form but, following ***Abercrombie***, she submitted that this new allegation should be allowed nonetheless. The indirect discrimination allegations arose from the same set of circumstances that were the basis of the existing disability discrimination claims, namely the respondent's treatment of the claimant's references. While the claimant had initially been concerned about the respondent's interpretation of the references it had received, the terms of the ET3 had caused her additional concern about the respondent's method of requesting those references.
9. Alternatively, Miss Neil submitted that should the Tribunal take the view that the indirect discrimination claim did not arise out of the same facts or substantially the same facts as had already been put in issue by the ET1 the Tribunal should nevertheless use its discretion to allow the amendment on the basis that it would be just and equitable to do so.

10. It was accepted that the allegations had been made out of time; the alleged indirect discrimination having taken place between 26 November 2019 and 20 December 2019, the ET1 having been presented on 14 May 2020 and the amendment application having been made on 24 July 2020. That delay should be viewed in the context of the claimant only having become aware of a potential indirect discrimination claim on 1 July 2020, after which she had taken swift action to seek to amend. In all the circumstances and because of the claimant's previous ignorance of the indirect discrimination it would be just and equitable to accept its late inclusion.

11. Miss Neil also submitted that the claimant had sought to amend the ET1 as soon as possible and as early as possible ahead of the preliminary hearing in order to avoid any unnecessary delay and prejudice to the respondent. As at the date of the application in July 2020 the case had not yet been subject to any case management orders and no merits hearing had been set. Furthermore, due to the delays caused by the Covid 19 outbreak she did not anticipate a final hearing would be able to be fixed for some time, The respondent had therefore been given adequate time to consider the application and would also have adequate time to respond and make the necessary preparations for the final hearing.

20 Respondent's submissions

12. Mr Reeve referred to the written submissions set out in his letter of 24 August 2020. Referring to ***Reuters Ltd v Cole UKEAT/0258/17*** he submitted that the claimant's application was not simply a relabelling exercise, but sought to introduce a substantial new cause of action, which *'would require different considerations of evidence and different burdens placed on the Respondent.'*

13. The claimant's current claims were for direct discrimination, discrimination arising from disability and victimisation. The addition of an indirect discrimination claim would bring additional complexities in relation to the *'identification of, preparation for, and analysis of an alleged group disadvantage'*. Further, for an indirect discrimination claim to succeed the employer's knowledge of disability was not required. That was fundamentally

different to the claimant's existing claims. These two elements were substantial and would place additional burdens on the respondent.

14. The proposed amended claim would require different witness evidence to be led and would also require medical evidence to be sought, particularly on the issue of the alleged disadvantage to the claimant and her comparator group. Such medical evidence would no doubt cause the respondent to incur additional expense.
15. The new head of claim contained within the proposed amendment was not, as Miss Neil had claimed, contingent on new information that had come to light in July when the ET3 was lodged. The claimant sought to justify her amendment on the basis that she only knew in July the exact wording used by the respondent to request the details of absences sought from her referees. However the exact wording was not a crucial element of the claimant's alleged new indirect discrimination claim.
16. It had never been in dispute that the respondent had requested from the claimant's former employers details of her absences over the past two years and had taken their replies into account. The fact that she now knew the exact wording of the request for these details made no difference to whether she would have been aware of a potential indirect discrimination claim. Her alleged disadvantage could not be said to be predicated on her recent knowledge of the exact wording of the reference request.
17. It was clear that the claimant knew that the referees had been asked about the absences during the time she was employed by those referees. She knew that the period in question went back to 2016. The fact that she was now aware of the exact wording of the reference requested had not changed this. In the circumstances she was well aware of the facts upon which she now advanced her indirect discrimination claim well in advance of lodging her original ET1.
18. Furthermore, Mr Reeve submitted that the claimant's indirect discrimination claim was lacking in merit. It was not at all clear who was alleged to have made the alleged "incorrect assumption" relied on. Further the claimant had

not properly identified any real disadvantage caused by the alleged PCP. The proposed amendment was illogical, lacked clarity and did not have reasonable prospects of success.

- 5 19. Turning to the balance of hardship Mr Reeve submitted that the claimant would not suffer any substantial hardship if her application was refused. She had already lodged claims of direct discrimination, discrimination arising from disability and victimisation in her original ET1 and she was already entitled to a hearing on those claims.
- 10 20. Conversely the respondent would suffer the hardship of having to provide additional and more extensive witness evidence, which was likely to include expert medical evidence on group disadvantage, in defence of a claim that was substantially out of time and which did not appear to have reasonable prospects of success.
- 15 21. On the time bar point Mr Reeve submitted that the indirect discrimination claim was substantially out of time and that it would also have been out of time when the ET1 was originally lodged; the alleged PCP having been applied on 11 December 2019 and the original ET1 having been lodged on 14 May 2020, more than five months later. In the circumstances he submitted that it would not be just and equitable to now grant an extension of time to allow the claimant to rely on this new claim.
- 20 22. In summary Mr Reeve submitted that the application to amend was only raised once the claimant had sight of the clear and cogent defences put forward by the respondent in its ET3 and appeared to be an attempt to gain “*a second bite at the cherry*”. While the claimant had put forward an assertion that the new claim arose from new information coming to light, she was in fact already aware of the information, which would have allowed her to raise an indirect discrimination claim when lodging the original ET1. She had not done so, despite being represented by solicitors at that time, and she should not be allowed to amend in all these circumstances.
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The relevant law

23. The leading authority is **Selkent Bus Company Ltd trading as Stagecoach Selkent v Moore [1996] IRLR 661**, where the EAT confirmed that 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, the relevant factors to be considered including:-

(1) The nature of the amendment, i.e. whether the amendment sought is minor, such as correction of typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels on facts already pled, or whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim;

(2) The application of time limits, and in particular where a new claim is sought to be added by way of amendment whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions;

(3) The timing and manner of the application.

24. In the subsequent case of **Ladbrokes Racing Limited v Traynor UKEATS/0067/06**, the EAT held that:-

“20. When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship in allowing the amendment against the injustice and hardship of refusing it. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether 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 they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of a lesser quality than it would have been earlier."

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Discussion and decision

25. The relevant circumstances of this particular application are those referred to in **Selkent**, the respondent's denial that the amendment was dependent on new information and the merits of the case.

10 *The nature of the amendment*

26. There is no doubt that the inclusion of an indirect discrimination claim to an existing claim involving other types of discrimination, even arising from the same set of circumstances, is more than a relabelling exercise and involves different tests to be applied. The proposed amendment is therefore a new claim, although substantially related to the claims originally pled.

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Is the new claim dependent on new information?

27. The Tribunal was satisfied that the amendment was dependent on the new information set out in the respondent's ET3 response, which the claimant received on 1 July 2020. While she had hitherto raised concerns about the respondent's treatment of her application for the position of receptionist, her amendment application is based on the precise wording of the reference request, which she was previously unaware of, and now relies on as a relevant PCP in her claim.

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Time limits

28. It is not in dispute that the amendment application is made out of time in circumstances where it was presented on 24 July 2020 and the alleged indirect discrimination took place between 26 November 2019 and 20 December 2019.

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29. While the claim originally presented was based on the claimant's assertions about the respondent's treatment of the recruitment process, she was unaware until she received the ET3 on 1 July 2020 about the precise terms of the respondent's request to the claimant's previous employers for information about her absences. It is significant that the claimant's amendment is based solely on the terms of this request, which she could not reasonably have been aware of before she received the respondent's ET3.

30. The Tribunal accepted that the claimant was unaware until 1 July 2020 of the grounds for adding this indirect discrimination claim. The Tribunal was also satisfied that the claimant made her application sufficiently promptly thereafter because it was made within a period of just over 3 weeks of having obtained that knowledge.

31. The Tribunal was also satisfied that the cogency of the evidence in the case was unlikely to be affected by her delay, as the indirect discrimination claim is substantially related to the claims originally pled and depends on facts that have already been alleged.

32. While accepting that on the face of it the amendment is out of time, the Tribunal finds that in all the circumstances it would be just and equitable to extend time.

20 *The timing and manner of the application*

33. As the Tribunal has accepted that the claimant was unaware of the grounds for adding her indirect discrimination claim until 1 July 2020 it finds that by presenting her amendment application on 24 July 2020, which was within just over three weeks of receiving the ET3 and within just over two months of presenting her ET1, the claimant made her application sufficiently promptly.

34. No substantive hearing has yet been fixed and indeed the next hearing in the case will be a further preliminary hearing, either to deal with disability or case management. There is therefore still plenty of time to complete any necessary preparatory work in advance of a full hearing, which will only proceed if disability is established.

35. It is therefore unlikely that any delay will ensue to the proceedings if the amendment is allowed. It is also unlikely that any hearing will be lengthened significantly in circumstances where many of the facts in support of the indirect discrimination claim have already been foreshadowed in the originating ET1. Although the Tribunal accepts that the respondent may incur additional expense in dealing with the new allegations there is no suggestion that it will be unable to prepare a defence to them.

Prospects of success

36. The respondent has also put in issue the merits of the amendment application. The Tribunal was however satisfied that it was still open to the claimant to deal with the respondent's criticism of her case and, in particular, for her to establish the particular disadvantage relied on. It could not be said that the claim had no prospects of success.

The balance of hardship

37. Taking into account all of the circumstances, while it is accepted that there may be some additional cost to the respondent and that the length of the hearing may be extended, the injustice and hardship to the claimant of refusing the amendment would be greater than the injustice and hardship to the respondent of allowing the amendment.

38. The Tribunal's judgment is that the amendment application should be allowed.

Employment Judge: Robert King
Date of Judgment: 28 October 2020
Entered in register: 18 November 2020
and copied to parties