EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 1303710/2018

Held via Cloud Video Platform (CVP) on 30 October 2020

Employment Judge L Wiseman

Mr A	**Claimant** **In Person**
Home Office **Border Force**	**Respondent** **Represented by:** **Dr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The tribunal decided to refuse the claimant's application to amend the claim form to introduce a complaint of failure to make reasonable adjustments.

2. The claim of an unauthorised deduction from wages (in respect of the payment of injury benefit) will now proceed to be listed for hearing.

REASONS

3. The hearing today was arranged to determine the claimant's application to amend the claim to include a complaint under section 20 Equality Act, that the respondent had failed to make reasonable adjustments.

Background

4. The claimant presented a claim to an Employment Tribunal in England and Wales on the 7 August 2018. The claimant had, on the form, ticked the box indicating he was bringing a claim in respect of disability, arrears of pay and other payments. The narrative on the claim form related to an injury at work and a dispute regarding payment of an injury at work benefit.

5. A Preliminary Hearing took place on the 23 January 2019 at which the claimant confirmed he was seeking payment of injury at work benefit as an unauthorised deduction from wages. The Employment Judge, in the Note following the hearing, noted that during a lengthy discussion with the claimant to clarify the discrimination claim, *"the claimant explained that the non-payment of the benefit was not advanced as a claim of direct discrimination".*

6. The Note went on to set out that the claimant (who is a disabled person in terms of the Equality Act) did not have a return to work interview when he returned to work; he informed his manager that he was unable to stand for any lengthy period as a result of his long-standing conditions which had been made more difficult by his knee injury and that despite many requests during his shift to be permitted to sit down, he had been required to stand throughout the period of his shift.

7. The Employment Judge noted the claimant would have to make an application to amend his claim to include a complaint of failure to make reasonable adjustments, and the claimant confirmed he wished to do so.

8. The respondent's representative confirmed their objections to the application to amend by email of the 15 February 2019.

9. The claimant responded to this by email of the 18 February 2019, and the respondent's representative made further written comments by email of the 21 February 2019.

10. The application to amend was not dealt with: it was placed on the back burner pending resolution of the claimant's application to have the case transferred to Scotland. This was finally resolved when the case was transferred on the 4 February 2020.

11. The first case management preliminary hearing arranged for the 4 May 2020 did not take place because the claimant felt unwell. The preliminary hearing was rearranged for the 18 June 2020, at which point it was agreed the outstanding application to amend required to be determined.

12. I heard submissions from the claimant and Dr Gibson.

Claimant's submissions

13. The claimant's position was that he had, in the claim form, put forward the "bare bones" of his claim, thinking that he would have an opportunity to explain the whole story at a hearing. The claimant noted he was not represented and questioned how he was meant to understand what the correct completion of the form entailed.

14. The claimant did not consider the allegations were new because he had raised them with the employer at the time. The claimant did not believe the respondent would be prejudiced by the inclusion of the amendment because they kept meticulous records and all the witnesses were still employed by the respondent.

15. The claimant submitted it would be just and equitable to allow him to amend the claim form because he would suffer prejudice if not allowed to proceed with this aspect of his claim.

16. The claimant referred to the case of ***Abertawe Bro Morgannwe University v Morgan 2018 ICR 1194*** where the claim had been brought by someone with a depressive illness (like the claimant) and the tribunal had commented that "it should be assessed from the claimant's point of view".

17. The claimant considered the respondent knew exactly what his claim was about even though he had not set it all out in the claim form.

18. (The remainder of the claimant's submission related to his claim for payment of the injury benefit and is not included here because it is not relevant.)

Respondent's submissions

19. Dr Gibson set out the background to the claim and noted the respondent had, when returning the ET3, included a defence to a direct disability discrimination claim which they assumed the claimant was making in relation to the payment of injury benefit. Dr Gibson invited the tribunal to note the respondent also stated in the ET3 that the claimant had provided insufficient details to allow them to properly respond to the claim.

20. Dr Gibson referred to the Note issued by the Employment Judge following the first preliminary hearing on the 23 January 2019, where the reasonable adjustments claim was set out. The claimant's application to amend the claim related to the reasonable adjustments claim as articulated in that Note.

21. Dr Gibson noted the claimant's position that he thought he had to put "the bare bones" of the claim on the claim form, but submitted this was not correct. He referred to the case of ***Chandhok v Tirkey 2015 ICR 527*** where the EAT had made reference to the ET1 not simply being to set the ball rolling. The respondent must know what case they are facing.

22. Mr Gibson referred to the cases of ***Cocking v Sandhurst Stationers Ltd 1974 ICR 650*** and ***Selkent Bus Co Ltd v Moore 1996 ICR 836*** which had referred to the tribunal requiring to carry out a careful balancing exercise of all the circumstances, which would include relevance, reason, fairness, justice, and hardship to the parties of allowing or refusing the amendment. In particular the tribunal should consider the nature of the amendment, time limits and the timing and manner of the application.

23. Dr Gibson submitted, in relation to the nature of the amendment, that it sought to add an entirely new claim, unconnected to what was in the ET1 claim form. It was not a relabelling of existing facts. The parties could agree the claimant suffered an injury at work, but beyond that there was nothing in the claim form regarding the consequences of that injury beyond an alleged failure to pay more injury benefit. There was nothing in the claim form to give any clue to there being a reasonable adjustment claim.

24. Dr Gibson noted the alleged failure to make reasonable adjustments related to the period 15 September 2017 to 17 October 2017 when the claimant returned to work following the knee injury. The application to amend the claim was made 16 months after the alleged incident; and three years had now passed since those events. It was submitted there would be a prejudice to the respondent if the application to amend was allowed because of this passage of time impacting on the cogency of the evidence. Memories were likely to fade and it would not be fair to expect witnesses to recall accurately what they

said and why they said it. Furthermore, the respondent would likely need to call additional witnesses to speak to these events if the amendment is allowed.

25. Dr Gibson submitted, in relation to time limits, that the (oral) application to amend the claim was made five months after the claim had been presented (at the preliminary hearing on the 23 January 2019). The claim had been presented 10 months after the alleged incident. The claim was significantly late.

26. The claimant knew of the facts relating to the alleged failure to make reasonable adjustments and ought to have included this on the claim form.

27. Dr Gibson noted there was no suggestion of there being a continuing act. He submitted it was clear in any event that the alleged failure to make reasonable adjustments was a one-off act, and that time to make a claim started to run from the time of the alleged act.

28. In conclusion, Dr Gibson submitted the application to amend the claim sought to introduce a new claim which was timebarred, and that there would be significant prejudice to the respondent in allowing the amendment. Dr Gibson invited the tribunal to refuse the application.

Discussion and Decision

29. I had regard firstly to the fact employment tribunals have broad discretion to allow amendments at any stage of the proceedings, but such discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly. I was referred to the case of ***Selkent Bus Company Ltd v Moore*** (above) and it is helpful to set out the guidance given in that case as to how tribunals should approach applications for leave to amend. It was said that in determining whether to grant an application to amend, an employment tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. The relevant factors to consider would include:

- the nature of the amendment – is it a minor matter or a substantial alteration pleading a new cause of action;

- the applicability of time limits – if a new claim is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim is out of time and if so, whether the time limit should be extended and

- the timing and manner of the application – this includes considering why the application was not made earlier.

30. The EAT in ***Selkent*** also approved and restated the principles set out in the earlier case of ***Cocking v Sandhurst (Stationers) Ltd*** (above) where it was said that in exercising their discretion, tribunals must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it.

31. I next turned to consider the nature of the amendment sought by the claimant. I have set out above the fact the claimant, when completing the claim form, ticked the box indicating his claim concerned disability discrimination and payment of money (the injury benefit). The claimant, having ticked the box indicating disability discrimination, did not put any details or information in the claim form regarding this type of claim.

32. The first reference to a complaint regarding an alleged failure to make reasonable adjustments was at the preliminary hearing on the 23 January 2019, some five months after the claim had been presented.

33. The claimant, at this hearing, argued strongly that the complaint regarding an alleged failure to make reasonable adjustments, was not a new claim because he had previously raised it internally with his employer. This however misunderstands what is meant by “new claim” in the context of an amendment. A “new claim” relates to whether there was any reference to such a claim (either factually or otherwise) in the claim form. I was entirely satisfied, having had regard to the claim form, that there was no reference to any complaint of a failure to make reasonable adjustments and no reference to

any facts relating to that claim. Accordingly, when the matter was raised on the 23 January 2019, it was the first time it had been raised.

34. I accordingly concluded, with regard to the nature of the proposed amendment, that it sought to introduce a new cause of action.

35. I next considered the issue of time limits because if a new complaint is sought to be added, 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 (section 123 Equality Act).

36. There was no dispute regarding the fact the incident to which the claimant referred regarding the alleged failure to make reasonable adjustments, occurred during the period 15 September 2017 and 17 October 2017 when he returned to work. If we take the latest date, being 17 October 2017, the claimant had a period of three months (less one day) in which to bring his claim. The amendment application was not made until 23 January 2019. The proposed claim is therefore 15 months late.

37. I accepted Dr Gibson's submission that the incident referred to in the complaint of failure to make reasonable adjustments was a one-off act, and not a continuing act.

38. I must consider whether it would be just and equitable to extend the time limit for making the claim of failure to make reasonable adjustments. I was referred to the case of ***British Coal Corporation v Keeble 1997 IRLR 336*** where the EAT suggested tribunals considering whether to exercise their discretion to allow a late claim, may be assisted by considering the following factors: (a) the length of, and reasons for, the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued has co-operated with any requests for information; (d) the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and (e) the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

39. A number of subsequent cases ***(Department of Constitutional Affairs v Jones 2008 IRLR 128*** and ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194)*** have made clear that the above factors are a useful guide and nothing more.

40. I have set out above the fact there has been a delay in bringing the complaint of failure to make reasonable adjustments of some 15 months. The claimant explained the delay had been caused by his mistaken belief the claim form was simply a document to get the case going, and that he would have an opportunity to explain everything in full to an Employment Judge at a hearing. I could not accept this explanation from the claimant for three reasons. Firstly, although the claimant is an unrepresented party, it was clear from what he said that he has made at least three claims against his employer. The claimant told me he had made an earlier claim regarding failure to make reasonable adjustments, in connection with an adjusted chair. That claim had been successful. He had also made a harassment claim. He was, accordingly, not unfamiliar with the process, and not unfamiliar with completing a claim form.

41. Secondly, the claimant referred to setting out the "bare bones" of his case, but he had not even done this in respect of any complaint of discrimination. There was no hint of a complaint of failure to make reasonable adjustments in the claim form.

42. Thirdly, the case of ***Chandhok*** (above) to which I was referred, made clear that *"the claim, as set out in the claim form, was not something just to set the ball rolling or as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but necessary function. It sets out the essential case, and it is that to which a respondent is required to respond. … the starting point is that parties must set out the essence of their respective cases on paper"*

43. The claim form presented by the claimant was completely silent regarding any complaint of failure to make reasonable adjustments and silent regarding any

factual basis relating to that claim. The claimant gave no hint in the claim form of any complaint of failure to make reasonable adjustments.

44. The claimant argued the cogency of evidence would not be affected by the delay because the respondent kept meticulous records. I did not doubt the respondent, given the nature of its work, would keep very good records, but I accepted Dr Gibson's point that notwithstanding good record keeping, it was at the very least doubtful that records would go into the detail of whether the claimant had been required to stand, or whether he had made requests to sit during the shift. Accordingly, this point would come down to the memory of those involved regarding an incident alleged to have occurred three years' ago.

45. There was no issue with point (c) above. In relation to point (d), there was no dispute regarding the fact the claimant knew of the facts giving rise to the cause of action (failure to make reasonable adjustments) at the time he completed and presented the claim form.

46. I, in addition to the above factors, also took into account the prejudice to the parties of allowing or refusing the application to amend. On the claimant's side, he argued there would be prejudice to him if the application to amend was refused because he would lose the opportunity to pursue this part of the claim. I accepted this, on the face of it, was correct. However, I balanced this with the fact that it was very clear, from having spoken with the claimant and from his correspondence, that the essence of the claim related to the payment of the injury benefit. This is the theme to which the claimant returned time and again when speaking about his claim: it is the focus of the claim.

47. I noted that on the respondent's side the prejudice would arise from having to defend a claim which was not in the claim form. There was a dispute between the claimant and Dr Gibson regarding whether additional witnesses would require to be called if the amendment was allowed. I considered the issue of which witnesses to call is a matter for each party or their representative. I accordingly had no reason to doubt Dr Gibson's position that the amendment would result in different witnesses having to be called to give evidence

regarding the failure to make reasonable adjustments claim. In addition to this I accepted that although there may be records, reliance would be placed on the memories of those involved regarding the particular detail of what occurred during a shift three years ago and why any such decisions were made.

48. I also had regard to the fact the claimant referred to "mental health difficulties" which led to a preference to explain things orally than in writing. I considered however that this was a general point made by the claimant which did not relate specifically to the issue of why he had not included a complaint of failure to make reasonable adjustments in the claim form. Furthermore, the claimant's email of the 18 February 2019 demonstrated an ability to very fully respond to the objections raised by the respondent regarding the application to amend.

49. I, having had regard to all of the points set out above, concluded a complaint of failure to make reasonable adjustments had been raised late, and that it had not been brought within such other period as was just and equitable in all the circumstances.

50. I lastly considered the timing and manner of the application to amend, which includes consideration of why the complaint was not raised earlier. There was no dispute regarding the fact there was no hint of a complaint of failure to make reasonable adjustments in the claim form, and that it was raised for the first time during the preliminary hearing on the 23 January 2019, when the Employment Judge endeavoured to understand the basis of any discrimination claim. I understood that up to that point the assumption (due to lack of specification) was that any complaint of disability discrimination related to the limited payment of injury benefit.

51. I have now considered all of the relevant factors. I noted ***(TGWU v Safeway Stores Ltd EAT 0092/07)*** that the fact the relevant time limit for presenting the new claim has expired, this does not prevent the tribunal exercising its discretion to allow the amendment, although it will be an important factor on the side of the scales against allowing it.

52. I have concluded (above) that the amendment sought to introduce a new cause of action. There had been no hint of such a claim in the claim form. I further concluded the time limit for presenting a complaint of failure to make reasonable adjustments had expired, and that it had not been brought within such other period as was just and equitable. I considered those factors pointed to refusing the application to amend. However, before making a decision in this case, I asked myself whether there were any factors which would swing the balance back the other way. I concluded there were not, and I was persuaded in that conclusion by the fact the claimant had some experience of completing claim forms as demonstrated by the fact he had brought other claims against this employer and by the fact this claim is fundamentally about the payment of injury benefit.

53. I decided, having had regard to all of the above points, to refuse the application to amend the claim form.

54. The claimant's claim of an unauthorised deduction from wages in respect of the payment of injury benefit will now proceed to be listed for hearing.

55. The claimant will not require to call his GP as a witness for the hearing, or to demonstrate that he is a disabled person in respect of the mental impairment of anxiety because there is no complaint of disability discrimination to be determined by the tribunal. The only issue to be determined by the tribunal at a Hearing will be whether there was an unauthorised deduction from wages of the sum of 4.5 months injury benefit.

Correction to Note Following Preliminary Hearing dated 1 July 2020

56. The Note issued following the preliminary hearing on the 18 June 2020 states, at paragraph 2, that the claimant brings a claim of direct disability discrimination in terms of section 13 Equality Act and an unauthorised deduction from wages claim.

57. The claimant is **not** bringing a claim of direct disability discrimination and the statement made in paragraph 2 of the Note is an error. The claimant, at the preliminary hearing on the 23 January 2019 very clearly told the Employment

Judge that "The non-payment of the benefit was **not** advanced as a claim of discrimination".

58. The error in the Note dated 1 July 2020 is hereby corrected.

59. The only claim being pursued by the claimant is one of an unauthorised deduction of wages in respect of the payment of injury benefit.

Amount claimed by the claimant

60. The claimant clarified at today's hearing that he was seeking payment of 4.5 months injury benefit.

Employment Judge: Lucy Wiseman
Date of Judgment: 03 November 2020
Entered in register: 19 November 2020
and copied to parties