



EMPLOYMENT TRIBUNALS

Claimant: Mr S Mainali

Respondent: New Godalming Sushi Ltd

Heard at: Reading (by CVP)

On: 22 April 2022

Before: Employment Judge Reindorf (sitting alone)

Representation:

Claimant: Ms A Nanhoo-Robinson (counsel)

Respondent: Mr H Dhorajiwala (counsel)

JUDGMENT

- (1) The Claimant is granted permission to amend his ET1 to add complaints of direct disability discrimination and harassment (detriment only).
- (2) The Claimant is refused permission to amend his ET1 to add claims for:
 - a. direct disability discrimination and harassment in respect of his alleged dismissal;
 - b. automatically unfair dismissal and detriment (public interest disclosure); and
 - c. unpaid travel allowance.
- (3) The Respondent's application to strike out the claim for accrued holiday pay succeeds.
- (4) The remainder of the Respondent's strike out application fails.

RESERVED REASONS

INTRODUCTION

1. The Claimant was employed by the Respondent as an Operational Manager working within the Respondent's franchise in the Waitrose store in Godalming. He was a shareholder in the business. His employment began on or around 18 June 2018 and ended after his resignation on 22 January 2020.
2. After a period of ACAS Early Conciliation from 3 March to 3 April 2020 the Claimant lodged his ET1 on 16 April 2020. The effective date of termination given in the ET1 was 28 April 2020. In Box 8 of his ET1 the Claimant ticked the boxes for ordinary unfair dismissal, pregnancy discrimination, disability discrimination, sex discrimination, redundancy pay, notice pay, holiday pay, arrears of pay and other payments.
3. In Box 8.2 of the ET1 the Claimant gave a very short description of his case as follows:

I was bullied and verbally abused in front of staff and accountant and alone in training room. I was also abused due to my family back home. I never got holiday pay, did not get holiday properly. Deduction from my salary to pay room rent. But shown as company expenditure
4. The Claimant also ticked Box 10 which relates to information to regulators in protected disclosure cases.
5. A claim for ordinary unfair dismissal was rejected by the Tribunal because the Claimant did not have two years' service with the Respondent.
6. In its ET3 the Respondent sought further particulars of the ET1, which were ordered at a Preliminary Hearing on 12 October 2021. At that hearing the Claimant withdrew his claims for sex discrimination and redundancy pay.
7. The Claimant's Further Particulars, drafted by counsel and lodged on 22 November 2021, gave his effective date of termination as around 22 January 2022, stated that he had been dismissed, and identified the disability upon which he relied as "mental health issues which include anxiety, insomnia and panic attacks". It set out some details of the following claims:
 - 7.1. direct disability discrimination and harassment, relating to various incidents from August 2019 to 17 January 2020;

- 7.2. direct disability discrimination and harassment by way of dismissal;
 - 7.3. detriment for exercising his right to take paternity leave, relating to incidents following the birth of his child in August 2019;
 - 7.4. detriment for making protected disclosures, arising from various oral and written communications made between October 2019 and January 2020;
 - 7.5. automatically unfair dismissal for making protected disclosures; and
 - 7.6. outstanding payments, namely accrued holiday pay, travel allowance and six months' contractual notice pay.
8. The Further Particulars contained an application to amend insofar as it contained claims not raised in the ET1.
 9. In its Amended Grounds of Resistance served in response to the Further Particulars the Respondent argued that:
 - 9.1. the Claimant was not a disabled person and the Respondent did not know at the material times that he had any of the alleged impairments;
 - 9.2. the direct disability discrimination complaints remained inadequately pleaded and that in any event they were new claims which were raised out of time;
 - 9.3. the harassment complaints were new and out of time;
 - 9.4. no legal basis had been pleaded for the claim relating to detriment for taking paternity leave (noting that the Claimant had not withdrawn his claim for pregnancy discrimination), and it was both inadequately particularised and out of time;
 - 9.5. the public interest disclosure detriment and dismissal claims were new, out of time and inadequately particularised; and
 - 9.6. the Claimant had been paid all outstanding sums and was not contractually entitled to six months' notice.
 10. The Respondent sought an order striking out the all the claims other than the pay claims on the basis that they had no reasonable prospects of success; and

THE HEARING

11. The hearing was conducted remotely by video (CVP) over a full day. Judgment was given orally.
12. I had a bundle of 266 pages and a skeleton argument and authorities from the Respondent.
13. I heard oral submissions from both counsel, for which I am grateful.
14. At the conclusion of the hearing counsel helpfully cooperated to produce a list of issues for the final hearing. A separate case management order will be sent to the parties containing the list of issues.

THE ISSUES

15. The case came before me to determine:
 - 15.1. the Claimant's application to amend his claim; and
 - 15.2. the Respondent's strike out application.

THE LAW

Amendments

16. The principles relevant to the amendment of claims are described in *Selkent Bus Co v Moore* [1996] IRLR 661. The Tribunal should consider:
 - 16.1. the nature of the amendment;
 - 16.2. the applicability of statutory time limits; and
 - 16.3. the timing and manner of the application.
17. The Tribunal should take into account all the circumstances and balance the hardship and prejudice of allowing the amendment against the injustice and hardship of refusing it.
18. The discretion to permit a party to amend its claim is not unconfined. An ET1 is "not something just to set the ball rolling " (*Chandhok v Tirkey* [2015] IRLR 195).

Striking out

19. A Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success (Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 (as amended) (“the ET Rules”).
20. Tribunals should not be deterred from striking out a claim that may involve a dispute of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established (*Ahir v British Airways plc* [2017] EWCA Civ 1392).

Deposit orders

21. By Rule 39 of the ET Rules a Tribunal may impose a deposit order if it considers that any specific allegation or argument in a claim or response has little reasonable prospect of success.
22. The order may require the paying party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
23. The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

CONCLUSIONS

The Claimant’s amendment application

Direct disability discrimination and harassment

24. The direct disability discrimination and harassment claims as presented in the Further Particulars relate to three incidents of alleged detriment (paragraph 9(a) of the Further Particulars) as follows:
 - a) *On 15 and/or 16 January 2020 the Claimant felt bullied because Sumin Lohani told the Claimant he was not liked by members of staff and told him to leave his employment, the inference being that it was because of the Claimant’s disability.*
 - b) *On 17 January 2020 the Claimant was called ‘mental’, ‘psycho’, and felt bullied. The Claimant was also concerned by the expression of aggression by Sumin Lohani to the extent that the Claimant perceived he was trying to headbutt him.*

c) On or around the 17 January, Sumin Lohani told the Claimant that staff were scared of him, the inference being that it was because of the Claimant's disability.

25. It is also alleged at paragraph 10 of the Further Particulars that the Claimant's alleged dismissal amounted to direct disability discrimination and harassment.
26. Ms Nanhoo-Robinson argues that these are not new complaints and amount to no more than particulars of the original ET1. She says that the particulars were foreshadowed in the Case Management Agenda prepared for the Preliminary Hearing in October 2021, so the Further Particulars were not the first time the Respondent received them.
27. Mr Dhorajiwala argues that the original ET1 does not encompass these complaints. He says that the Claimant should be expected to provide more in his ET1 than the scant details he set out in Box 8.2, which are not adequate to cover the complaint now advanced.
28. As to the detriment elements of the direct disability discrimination claim:
 - 28.1. I am satisfied that these complaints amount to further particulars of the ET1.
 - 28.2. I bear in mind that the Claimant was acting in person when he submitted the ET1. I also have regard to the fact that in its ET3 the Respondent requested Further Particulars of the disability discrimination complaint, rather than arguing that it should be struck out for lack of particularisation at that stage. The position now taken by the Respondent amounts to an argument that the ET1 is so deficient in particularisation that it does not disclose a claim for disability discrimination at all. By extension, the Respondent appears to argue, no particulars of the ET1 would amount to anything other than an application to amend.
 - 28.3. In my judgment the particulars now given fall within what was already pleaded by way of the combination of a partially particularised allegation of "bullying" and the fact that the Box for disability discrimination was ticked.
29. As to the dismissal complaint:
 - 29.1. I do not conclude that this falls within the original ET1. There is no reference to the alleged dismissal in Box 8.2 at all. The only indication on the claim form that the Claimant intended to complain about his alleged dismissal is the fact that he ticked the box for unfair dismissal (that complaint having been rejected by the Tribunal at the outset of the proceedings). This is not sufficient, in my judgment, to raise a complaint of discriminatory dismissal. Nor

is there any mention of a discriminatory dismissal in the Case Management Agenda prepared for the previous Preliminary Hearing or in the Case Management Summary of that hearing.

- 29.2. Accordingly I approach this element of the Further Particulars as an application to amend.
- 29.3. Applying the principles in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 (EAT):
 - a. This is not a minor amendment, albeit that it is not the addition of an entirely new cause of action.
 - b. The amendment is substantially out of time, having been made some 22 months after the alleged dismissal.
 - c. No good reason has been given to explain why the amendment was raised for the first time in the Further Particulars. The fact that the Claimant was not represented is not sufficient, without more, to account for this. In any event the Claimant was represented from at least October 2021.
 - d. Moreover the manner in which the amendment is sought to be made is not satisfactory. No facts are pleaded in the Further Particulars relating to the Claimant's dismissal other than under a different cause of action (automatically unfair dismissal), and the basis upon which it is said that the dismissal was discriminatory is not stated. If the claim were to be allowed to proceed, yet more Further Particulars would be required.
 - e. Considering the prejudice caused to the Claimant by depriving him of an opportunity to present the complaint as well as that caused to the Respondent by requiring them to respond to a complaint brought extremely late and in a barely particularised form, I find that that the balance of prejudice lies in favour of rejecting the amendment.
 - f. I therefore do not allow the amendment.

Paternity leave

30. The Claimant withdraws the complaint relating to his paternity leave in August 2019. That claim will be dismissed on withdrawal in a separate judgment.

Public interest disclosure complaints

31. The only indication of a protected disclosure complaint on the ET1 is that the Claimant ticked Box 10.
32. In the Further Particulars the Claimant advances complaints that he was subjected to detriments because he made protected disclosures and that he was automatically unfairly dismissed for the same reason.
33. In her submissions Ms Nanhoo-Robinson cut down the protected disclosure disclosures relied upon to the following:

17. The Claimant relies on email communications dated 17 and 20 January 2020 from the Claimant to Robin Elson and Daniel Coole, where he raised:

a) Withdrawal from the company account by Sumin Lohani and failure to repay/declare it.

b) Sumin Lohani declared £12,000, when the correct sum was £50,000.

c) Overdrawn accounts.

h) ... fraud.

18. The Claimant had also raised orally:

a) A member of staff had been paid in cash (Natalie) – the Claimant first raised this with Robin Elson around October 2019. The Claimant had been instructed by Sumin Lohani to pay Natalie in cash in August 2019-September 2019, but the Claimant informed Sumin Lohani that it was wrong to make the cash payments and refused to do it again.

34. Ms Nanhoo-Robinson also removed some of the detriments relied upon. The final list was:

21. In response to the Claimant raising the protected disclosures, the Respondent:

a) Removed the Claimant's travel allowance.

b) Attempted to force the Claimant to resign.

...

d) Failed to provide the Claimant the correct notice (and pay) under the contract, causing a financial loss.

35. The alleged dismissal is described at paragraph 19 as follows:

The Claimant feared he was being forced out and/or being pressured to resign, because Sumin Lohani had shown a pre-prepared resignation letter to the Claimant for him to sign (the Claimant recollects that he was shown it in or around October 2019 and late November 2019, and 22 January 2020).

36. Ms Nanhoo-Robinson submitted that the detriment complaints do not amount to an amendment. She said that some details of the complaints were contained in the Case Management Agenda from the last Preliminary Hearing, in which it was stated in Box 2.2 (which asks “Is there any application to amend the claim or response?”):

Potentially – the Claimant has raised that the Respondent threatened the Claimant with dismissal and forced him to resign in response to the Claimant raising: - Suspected Tax avoidance/failure to abide by UK law by the R [Cash payments to staff]

37. Ms Nanhoo-Robinson accepted that, the unfair dismissal claim having been rejected by the Tribunal, she now sought to reinstate it as an automatically unfair dismissal claim by way of amendment.
38. Mr Dhorajiwala submitted that the public interest disclosure complaints were entirely new and that it was still not entirely clear what the claims consisted of. The legal basis of the complaints had not been pleaded in the Further Particulars and the factual basis of the dismissal claim was not adequately set out.
39. In my judgment these complaints were not pleaded on the face of the ET1. The fact that the Claimant had ticked Box 10 does not amount to a protected disclosures complaint. That box is clearly not in the part of the claim form which requests details of the claim. There is no mention of protected disclosures anywhere else on the claim form.
40. I therefore approach these complaints as proposed amendments.
41. I do not permit the Claimant to proceed with these complaints. My reasons, applying *Selkent*, are that:
- 41.1. This is very substantial amendment introducing an entirely new cause of action.
- 41.2. The amendment is significantly out of time, having been made some 22 months after the alleged dismissal and even longer since the alleged detriments.
- 41.3. As with the discriminatory dismissal complaint, no good reason has been given to explain why the amendment was raised for the first time in the Further Particulars.

- 41.4. The manner in which the amendment is sought to be made is not satisfactory. The pleading remains inadequate for the reasons stated by Mr Dhorajiwala. If the claim were to be allowed to proceed, yet more Further Particulars would be required.
- 41.5. The balance of prejudice is the same as that for the discriminatory dismissal complaint referred to above.
- 41.6. I therefore do not allow the amendment.

Travel allowance

- 42. I do not grant permission for the Claimant to amend his claim to include the claim for unpaid travel allowance which appears in the Further Particulars. My reasons are that:
 - 42.1. it is an entirely new claim and therefore is a relatively substantial amendment;
 - 42.2. it is out of time;
 - 42.3. Ms Nanhoo-Robinson did not make submissions as to why it should be allowed to proceed; and
 - 42.4. It had not been raised before the last Preliminary Hearing.

Notice pay

- 43. The claim for six months' contractual notice pay is permitted to proceed. The Claimant ticked the box for notice pay on the ET1. This is therefore not a new claim.

Summary of remaining claims

- 44. The claims in respect of which I have allowed the Claimant's amendment application or which were already contained in the ET1 are:
 - 44.1. direct disability discrimination and harassment (detriment only);
 - 44.2. accrued holiday pay; and
 - 44.3. six months' contractual notice pay.

The Respondent's strike-out application

Disability

45. I am not able to conclude that the Claimant has no reasonable prospect of showing he was a disabled person at the relevant times.
46. However, I do conclude that the Claimant has little reasonable prospect of so doing. The Claimant's disability impact statement contains very little information about the impact of his condition on his day-to-day activities and the medical evidence provided is sparse.
47. I therefore make a Deposit Order relating to the issue of whether the Claimant was a disabled person at the relevant times. The Order will be made sum of £150, taking into account the information provided to me by Ms Nanhoo-Robinson about the Claimant's means, which was that:
- 47.1. he now earns £1,600 a month, which is slightly more than what he earned when he was working for the Respondent; and
- 47.2. his wife is working part time but because he had been out of work for some time they were still struggling financially.

Direct disability discrimination / harassment (detriment)

48. It is not possible for me to assess the substantive merits of the complaints of direct disability discrimination and harassment at this stage.
49. I therefore do not make any order that these claims be struck out.

Holiday pay

50. The claim for accrued holiday pay is struck out.
51. No factual basis for the claim was described to me. The Claimant has had legal representation for some six months and yet has not given coherent instructions on this to his counsel. He has produced no documentary evidence in support of it. The claim has no reasonable prospects of success.

Notice pay

52. The application to strike out the claim for six months' accrued notice pay fails.
53. The contractual documentation which was shown to me is ambiguous and it would not be safe for me to reach a preliminary view about its meaning in the absence of oral and potentially other documentary evidence. I take

account of the Respondent's submission that the Claimant clearly resigned voluntarily. However I do not consider it possible to reach the conclusion that he did has no reasonable prospects of showing that he was in fact dismissed based only on the fact that he signed a resignation letter. His account needs to be tested.

Summary

54. The remaining claims are:

- 54.1. direct disability discrimination and harassment (detriment only), subject to a deposit order on the issue of whether the Claimant was a disabled person at the relevant times; and
- 54.2. six months' contractual notice pay (i.e. wrongful dismissal).

Employment Judge Reindorf

Date: 9 May 2022

Sent to the parties on:

19/5/2022

For the Tribunal:

N Gotecha

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