



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Liney

**Respondents:** 1. Department for Work and Pensions  
2. Mr Philip Royle

**HELD AT:** Manchester

**ON:** 12 September 2016

**BEFORE:** Employment Judge Tom Ryan

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Ms C Knowles, Counsel

## REASONS FOR JUDGMENT ON PRELIMINARY HEARING

1. These reasons are provided at the request of the respondent. The Tribunal apologises for the delay in their being provided. This is due to the fact that the recording of the reasons given orally was only partial.

2. By a claim presented to the Tribunal on 22 March 2016 the claimant claimed against both respondents disability discrimination and harassment and victimisation after what she said was raising an original complaint of disability discrimination and whistle-blowing. The claimant attached to her document a file headed "Background" identifying five incidents.

3. The first incident appeared to be concerning the claimant's consideration for a role for what she described as a "non-telephony position" on 28 January 2015.

4. The second incident concerned 3 December 2015 when she and others were informed that Sara Fishwick had been successful in a recent promotion exercise to SEO.

5. The third incident appeared to be the failure of the respondent to arrange a mediation meeting in mid December 2015.

6. The fourth incident alleged bullying, harassment and victimisation against Mr Royle although the claim form did not provide a date for that allegation.

7. In the fifth incident the claimant says that the department's whistle-blowing procedure did not appear to have afforded her protection from detrimental treatment or victimisation on the grounds of raising her complaint.

8. The respondent defended the complaints noting that, at paragraph 17 of the response, the claimant had set out five incidents but said her claim related to incidents 4 and 5 specifically. The respondent denied in general terms the allegations comprised in incidents 1-3. Incident 4 was denied and if the Tribunal were to find that the allegations were upheld against the second respondent as matters of fact, it denied the conduct related to the claimant's alleged disability or protected disclosure or grievance. Incident 5 was denied, with the respondent saying it was unclear what the precise nature of the allegations were.

9. A preliminary hearing for case management was held by Employment Judge Holmes on 11 May 2016. As set out in the record of that decision, the claimant intimated her wish to make an application to amend to include claims going back beyond those included in the claim form. Employment Judge Holmes directed that the claimant give further particulars of her existing claims and to set out in a table precisely what actions were complained of, the dates and type of discrimination each act or omission was alleged to comprise. He further directed that the claimant should, if she sought to amend her existing claims, set out her proposed amendments in similar form by 1 June 2016. He also listed this further preliminary hearing to determine whether, amongst other things, the claimant should be permitted to amend her claims. A further issue, namely whether the claimant was a disabled person, did not fall to be determined at this hearing because the respondent accepted that the claimant was a disabled person by reason of depression from 13 March 2015 until 26 January 2016.

10. The remainder of this judgment concerns the application to amend.

11. By a letter dated 31 May 2016 the claimant did apply to amend her claim to include, as she put it, "events that are relevant to the claim for disability discrimination for the period 22/5/14 to 20/12/15". The claimant attached a table which she asked to be used for both parts of the case Management Order which I have recited. She said that she felt the period leading up to the original claim incident of 21/12/15 was extremely important to her claim as it detailed the prolonged amount of time she had been suffering discrimination whilst working within the first respondent. She said that it detailed a further 35 acts of disability discrimination over the period 22/5/14 to 21/12/15.

12. By a letter dated 21 June 2016 the respondents indicated that they resisted the application to amend the claim.

13. The claimant's schedule, which I have numbered from points 1 to 35, sought to add numerous allegations against a variety of members of staff alleging indirect

discrimination, failure to make reasonable adjustments and direct discrimination and in some instances harassment and victimisation. As the claimant presaged in her application they run in time from 22 May 2014 to 26 January 2016.

14. As I set out below, the respondents resisted the application to amend. The relevant test, as I was reminded by Ms Knowles, is that contained in the case of Selkent Bus Co Ltd v Moore [1996] ICR 836 and which is reflected in the Presidential Guidance on Case Management, in the section on applications to amend.

15. I remind myself that the Tribunal is required to carry out an exercise in determining the balance of hardship in considering whether the refusal of the application would cause such hardship to the person seeking the application as would outweigh the hardship caused to the person resisting it if the application to amend were granted. The Tribunal must have regard to the factors which may be relevant. These include the nature of the amendment to be made, in particular whether it is an addition of facts or the additional substitution of labels for facts already described or the making of entirely new factual allegations which change the basis of the existing claim. A question for the Tribunal is whether the amendment applied for is a minor matter or a substantial alteration.

16. The next factor to take into account is that of time limits. It is necessary for the Tribunal to consider carefully whether the amendment would introduce a matter that was out of time and if so whether the Tribunal's discretion to extend time should be exercised.

17. In addition the Tribunal must consider the timing and manner of the application,

18. It is recognised that there is a broad discretion granted by the Employment Tribunals Rules of Procedure 2013 to make case management orders. The Tribunal must have regard to the overriding objective. The Tribunal will expect the person seeking the amendment to show why the application was not made earlier and why it has been made at that time.

19. In broad terms, Miss Knowles identified that a significant number of the earlier allegations in the schedule raised new matters that were not even hinted at in the claim form and, of course, given the range of dates that I have already identified, a great many of them were in fact out of time. Thus the nature of the amendments and the question of time limits and extensions are of particular significance.

20. I remind myself that in the case of British Coal Corporation v Keeble [1997] IRLR 337 the Employment Appeal Tribunal said that a Tribunal considering such applications might be assisted by considering section 30 of the Limitation Act 1980. This concerns applications for extensions of time for actions for damages for personal injury. There the Court is required to consider the balance of prejudice, all the circumstances of the case and five specific factors are identified, being:

- (1) The length of and reasons for the delay;
- (2) The effect upon the cogency of the evidence;

- (3) The degree to which the other party has responded to requests for information;
- (4) The steps taken by the claimant to seek assistance when she knew of the facts giving rise to the complaint; and
- (5) The promptness with which the claimant acted once they were aware of the possibility of bringing the complaint.

21. In the later case of Robertson v Bexley Community Centre [2003] EWCA Civ 576 the Court of Appeal laid down the principle that the granting of an application to extend time should be the exception rather than the rule, and that it is for the party seeking the extension of time to satisfy the Tribunal that it is just and equitable to grant it.

22. Against this background and, save as set out below, for the reasons advanced by Ms Knowles in oral argument, I refused the application to amend other than in respect of three specific allegations with which I will deal.

23. Ms Knowles addressed me on the question of time, pointing out that the earlier matters in the schedule are substantially out of time. The allegations were in some cases stale. She submitted that the balance of prejudice would weigh against granting the application in the full sense that the claimant wishes it because to allow the application to amend wholesale would turn what was at current a relatively small scale hearing into a substantial one. Whilst no witnesses were uncontactable or documents could be said to have been lost such that memories would have faded, particularly she submitted in the light of these being discrimination allegations and the shifting burden of proof, to allow the amendments wholesale would have required the respondent to call instead of as presently thought two or four witnesses some eight or ten witnesses.

24. For those reasons, as I say, other than in respect of the matters with which I now deal, I refused the application to amend.

25. I now turn to the specific sections of the claimant's schedule in respect of which I was prepared to grant the application to amend.

26. I first deal with the application in respect of point 23. This is an allegation that Miss Catherine Walsh, the telephony manager, on 13 March 2015, according to the claimant, told her that she could not have the role in Business Support which had limited phone work which the claimant said she wished to be considered for as a reasonable adjustment, Miss Walsh allegedly saying that due to equality it would have to be offered to everyone. That, the claimant submitted, could be an allegation of direct discrimination, indirect discrimination and failure to make reasonable adjustments. It seemed to me that indirect discrimination added nothing to the allegation of failure to make reasonable adjustments, but as regards that I allow this application. Principally my reason for doing so is that whilst the allegation is out of time it mirrors an allegation in the claim form. The allegation in the claim form, I accept, is only set out by the claimant as background.

27. Whilst I recognise that with this point, as with others, there is a time issue, because there are allegations that are in time in this instance it may be open to the

claimant to assert that this was part of a continuing act. If that argument fails she would have to try and persuade the Tribunal that it would be just and equitable to extend time. Bearing in mind that time had passed and a different person was involved in dealing with this matter as dealt with the later matters, the claimant might well not succeed in satisfying the Tribunal that it was a continuing act, or that it would be just and equitable to extend time. Nonetheless, I considered that in all the circumstances the balance of hardship weighed in favour of allowing that limited amendment in addition to the two others to which I now turn.

28. Point 32 I allow the claimant to amend to include this as an allegation of victimisation. This was an allegation against Mr Royle, against whom other allegations were already made in the claim form. The date of the allegation is said to be 5 August 2015 according to the schedule, and the allegation is that Mr Royle told the claimant that her complaint was against the department and not the individual managers named, and according to the claimant accused her of making potentially serious allegations against managers.

29. It appears to be that Mr Royle communicated this information by way of an email which I had not seen. Without seeing the email it is impossible to know whether in fact the email amounts to a detriment or not. However, given that the claimant's allegations in the claim form in relation to 21 December 2015 are relevant to Mr Royle's attitude, and because both this and those in the claim form are complaints against Mr Royle and therefore the possibility of establishing a continuing act arises, it seemed to me that it would be proportionate and reasonable to allow the claimant to amend in relation to that, having regard to the balance of hardship. It is an allegation that I suspect will not take long to resolve in the sense that a Tribunal will take a view of the email to which the claimant refers and decide whether Mr Royle is being detrimentally critical of the claimant in the email or not. It is of course not everything that a manager says in an email that amounts to a detriment even if the employee does not like it. It is a question of the tone of Mr Royle.

30. I deal in passing with point 34. This is an allegation of harassment and victimisation. It does not seem to me that it is an allegation of direct discrimination or indirect discrimination, but having discussed it with the parties I decided that no amendment was needed in relation to that because it effectively reflects the matters already included in the claim form at incidents 3 and 4.

31. Finally I turn to point 35. This was the other allegation that I was prepared to allow as an amendment to allege direct discrimination against Mr Keith Bembridge. The allegation is that he refused the claimant's request for special leave with pay because the claimant had complained about Mr Royle's treatment of her on 21 December 2015 to his manager, and that that complaint had been deleted without being read. The claimant described herself as being on the verge of a breakdown and the refusal of that request was a matter that she now sought to raise. There was no suggestion that it was in the claim form originally.

32. The claimant explained in her submissions that she had spoken to a solicitor. It was obvious that she had done so before the claim form was lodged, because the solicitor had clearly advised the claimant not to include matters that were more than three months old. This issue now sought to be raised was not then more than three months old; that is at the time when the claimant put the claim form in. The claimant

said she did not put it in because she did not think it was relevant. According to the respondent, on that basis an amendment could not be justified.

33. In my judgment it is too easy for lawyers to look at the way that litigants in person bring claims before the Tribunal and to say, "Well, that's not relevant". Ultimately that term may turn out to be correct at a hearing, but that is not necessarily how it is perceived by people acting on their own behalf, particularly if they are unwell at the time as the claimant was. In my judgment if the claimant had been represented at the time that the claim was in fact put in then any lawyer would have included this allegation because on the face of it, it is potentially an allegation of direct discrimination. The table and the basis of the claim as originally pleaded show to me clearly that the claimant had difficulty identifying what was or was not relevant to particular types of claim. She had, for example, listed against each of the proposed amendments either direct or indirect discrimination, failure to make reasonable adjustments, and in one case breach of the Data Protection Act. All that did in my view was to serve to show just how difficult it is for the claimant as a layperson, without specialist knowledge, to identify what is relevant and what is not relevant to any potential claim. It would be fair to say I think that the claimant, had she thought about it, might have realised that the facts can be highly material, but in my judgment it is too harsh a criticism of the claimant to say that the amendment should be refused simply on the grounds that she did not think it was relevant at the time. I recognise that it will require the respondent to meet the allegation and to call Mr Bembridge. That is on the assumption he was in fact the decision maker. But it seems to me that it would be appropriate to allow the amendment on this as on the other points having regard to the balance of hardship.

34. So I have given limited leave to amend. In limiting the allowable part of the application in that way, I recognise the thrust of the respondent's main submissions, and it is for the thrust of those submissions which I have set out above that I have refused the application save in respect of those three matters.

Employment Judge Tom Ryan

2 March 2017

REASONS SENT TO THE PARTIES ON

03 March 2017

FOR THE SECRETARY OF THE TRIBUNALS