



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr D Simpson

AND

Coutts and Co.

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 16 February 2017

Before: Employment Judge Shepherd

Appearances

For the Claimant: Mr Johnstone

For the Respondent: Ms Loraine

JUDGMENT ON A PRELIMINARY HEARING

The claimant's application to amend his claim to include an allegation that the decision to dismiss and the decision not to uphold the claimant's appeal against dismissal were acts of direct age discrimination is granted.

REASONS

1. I heard evidence from David Simpson, the claimant. I had sight of a bundle of documents prepared for this preliminary hearing consisting of 86 pages.
2. I heard helpful submissions from Mr Johnstone on behalf of the claimant and Ms Loraine on behalf of the respondent.
3. The claimant presented a claim of unfair dismissal to the Employment Tribunal on 1 November 2016. He was unrepresented at the time the claim was presented. He is now represented and an application to amend his claim was made on 15 December 2016, shortly after he appointed solicitors to act on his behalf.

4. The claimant had raised the issue of age discrimination in his appeal against his dismissal. He raised the issue of less favourable treatment within that appeal. The outcome of the appeal was that the appeal officer indicated that the claimant “had a feeling that his age was an issue and due to the claimant being a high cost to the respondent”. This appears to relate to the claimant’s allegation that a factor in the decision to dismiss him was the cost of terminating his employment which was related to his age and seniority in view of the respondent’s enhanced redundancy scheme. The claimant also refers to remarks made to him with regard to one comparators potential which he took to mean that the younger comparator was in an early phase of his career.

5. The claimant said that he did not realise the significance of taking a specific box on the ET1 form when presenting his claim and that this might prevent the tribunal from considering all of the relevant facts and complaints he wanted to raise about the way he had been treated. He had included a request for compensation for emotional stress on the ET1. The claimant referred to legal costs within that form.

6. I was concerned that the claimant was an intelligent man, the form is relatively simple and designed for unrepresented parties to complete. It is easy to understand. However, having heard the claimant’s evidence, I do accept that the claimant intended to present evidence to the Tribunal to include evidence relevant to claim of age discrimination.

7. The claimant admits he made a mistake and the completion of the on-line form. I considered the fact that the claimant had the benefit of legal advice at the time of his dismissal and when he raised the allegation of age discrimination at the appeal stage.

8. The allegations of age discrimination were not entirely clear and Mr Johnstone, on behalf of the claimant, drafted a proposed amendment. This included an allegation of indirect discrimination which he has now indicated can be withdrawn.

9. Ms Loraine, on behalf of the respondent, said that these claims are substantially out of time and will prejudice the respondent in respect of the need to consider evidence in respect of allegations raised against other members of the respondent staff as well as the dismissing officer and the appeals officer.

10. This is not a relabelling exercise. The application is for substantial amendments including new courses of action.

11. I have considered the decisions of Chief Constable of Essex v Mr D, Kovacevic UKEAT/0126/13/RN. The proposed amendment having been drafted in this case this morning. However in the Kovacevic case it was the morning of the substantive hearing. Here, there would be the opportunity for the respondent to deal with all the issues raised as the pleadings are not complete and the case is not listed for hearing. This case is not on all fours with the Kovacevic case as the respondent will now have the opportunity to respond appropriately.

12. I have considered the principles set out in Mummery J’s Judgment in the leading authority on amendments, **Selkent Bus v Moore [1996] ICR 836**

Whenever the discretion to grant an amendment is invoked, 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. What are the relevant circumstances? It is important and undesirable to attempt to list them exhaustively, but the following are certainly relevant:-

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action;

(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment 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, eg in the case of unfair dismissal (section 111 of the 1996 Act);

(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the rules for the making of amendments. The amendments may be made at any time – for, at, even after the hearing of the case. Delay in making the application is however a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particular if they are unlikely to be recovered by the successful party, are relevant in reaching a decision”.

13. Discretion to grant an extension of time under the just and equitable formula has been held to be as wide as that given to the Civil Courts by Section 33 of the Limitation Act 1980 **British Coal Corporation v Keeble DBP v Marshall** [1997] IRLR 336. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension having regard to all of the circumstances, in particular:-

- (a) the length of and the reason 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 parties sued had cooperated with any request for information;

(d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the course of action; and

(e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

These are checklists useful for a Tribunal to determine whether to extend time or not.

14. With regard to the balance of prejudice, the respondent was aware of the allegation of age discrimination at the time of the internal appeal. It has the opportunity to defend the claim. The claimant, should the amendment not be allowed, can still continue with his claim of unfair dismissal but will not be able to include the claim for injury to feelings which he refers to as emotional stress.

15. With regard to the lack of an Early Conciliation Certificate, I have considered the cases of *Science Warehouse Ltd v Mills* UKEAT/224/15. I'm satisfied that the lack of such a certificate is a factor but I can still consider an amendment pursuant to rule 29 without the need for a further notification to ACAS

16. I'm satisfied that this was a genuine error by the claimant who was unrepresented at the time he presented the claim to the Tribunal. He had been legally advised at the time of his dismissal and appeal when he raised the allegation of age discrimination but he was no longer so advised at the time he completed the claim to the tribunal.

17. The initial application to amend the claim was not made until 15 December 2016, some 23 days late. The respondent had been aware of the claim of age discrimination at the internal appeal stage and had the opportunity to investigate that allegation. If this had remained an unfair dismissal claim alone, the disparity of treatment still have been an issue before the tribunal and evidence would need to be considered in that regard.

18. I was concerned about the extent of the proposed amendment. I am of the view that taking into account all the factors in the *Selkent Bus* case and also the factors and *British Coal v Keeble*, the application to amend should be allowed. I have seen the terms of the proposed amendment and in allowing the amendment and, following discussions with the representatives, Mr Johnston has agreed to limit the amendment to a claim that the decision to dismiss and the decision not to uphold the claimant's appeal was an act of direct age discrimination and it is to that extent that I allow the application.

19. I consider it just and equitable to allow the application to amend. I have considered the balance of prejudice in respect of the application to amend to include a claim that the dismissal and the refusal of the appeal were acts of direct discrimination the other allegations were confirmed by Mr Johnston to be background information to be taken into account.

Case Number: 2501208/2016

EMPLOYMENT JUDGE SHEPHERD

**REASONS SIGNED BY EMPLOYMENT
JUDGE ON
17 February 2017**

**REASONS SENT TO THE PARTIES ON
17 February 2017**

**Miss K Featherstone
FOR THE TRIBUNAL**