EMPLOYMENT TRIBUNALS

Claimant: Mr H Resber

Respondent: Rimad Ltd

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On:** 26 September 2022

Before: Employment Judge Britton

Appearances
For the claimant: Mr A Kamara, Counsel
For the respondent: Mr L Davies, Solicitor

JUDGMENT

The application to amend the claim to include one of harassment pursuant to section 26 of the Equality Act 2010 is dismissed.

REASONS

Introduction

1. The application before me is that of the claimant, namely for me to grant leave to amend the current claim to additionally include a claim of harassment pursuant to section 26 of the Equality Act 2010 (the EqA). It is conceded by Mr Kamara that this does constitute a new head of claim. The application is opposed. To assist me I have a bundle prepared by the Respondent.

2. The seminal authority when dealing with issues of whether or not to grant an amendment is that of **Selkent Bus Company Limited v Moore 1996 [ICR 836] EAT.**

Procedural history and first observations.

3. The claim ET1) was presented to the Tribunal as long ago as 12 March 2019. It was made plain in terms of the boxes ticked that it was claims for unfair dismissal, non-payment of wages and non-payment of outstanding holiday entitlement. I will accept that this claim was, on the face of it, presented by the claimant acting in person and with limited language skills although the narrative is actually well written insofar as it goes, but it is very brief. He is I gather Turkish. He was employed by the Respondent at the TRIOA restaurant between 10 September 2016 and 4 November 2018 as a chef. He stated that he worked 16 hours per week at a wage of £125 per week. As to that narrative first he set out how the Respondent employed illegal workers and was *"not paying the legal wages mostly underpaid"*. He did not say that he was one of those workers. But he did say he was "*forced to work*" overtime which was "*not registered*" on his pay slip and *"forced to send this money through my account".* He said nothing out of his fear for his family. Into the context comes that the proprietors and it seems a senior manager, Raife Aydan, were "*supporting terrorism in Turkey under PKK and to which he was opposed."* Him having voiced his opposition: *"She was constantly making it difficult for me to feel safe, she was also asking other illegal workers to support her mission. Therefore I decided to stop working for them at the time. When she became aware she started to manipulate me in front of other employees tried to accuse me with things – throw stuff at me made me feel awful and vulnerable. Therefore I started suffering trauma and depression as a result of this. I was unfairly dismissed at work."*

4. In due course there was a response (ET3) presented to the claim. It was prepared by Mr P Holmes, Employment Consultant of a business known as Wireless. He continued to competently represent the respondent until very recently when Mr Davies was appointed to act. Set out therein and further particularised including before me, the respondent runs Turkish themed restaurants at one of which the claimant was employed as a part-time chef. It seems that everybody involved in this case is either Turkish or Kurdish The primary language obviously used in the restaurant in terms of the work force was Turkish or I surmise a variant thereof such as Kurdish. Comprehensively pleaded is a history of concerns about the claimant culminating in an incident, which on the face of it was serious in that on 4 November 2018 he threatened Mr S Aytek, the quality control manager for the chain, on the premises in front of witnesses and with a knife. He was suspended on pay whilst the employed investigated. It implemented a fair process including allowing him to have an external person fluent in Turkish present to assist him at the disciplinary hearing held on the 13 December 2018. He was summarily dismissed for gross misconduct, and which was confirmed to him in writing on 26 December 2018. So pleaded was that the dismissal was fair. All other allegations including the Claimant being threatened

viz the PKK issue or employing illegal workers or forcing the Claimant to work overtime were denied.

5. On the 25 July 2019 there came on record as acting for the claimant a firm of solicitors known as KC Law Chambers Limited. On that day they sought permission to amend the particulars of claim Bp 31-32[1]). No particulars of the proposed amendment or the reasons for joinder were provided. Stopping there, there was already confusion in the way that these solicitors were acting because those that they were endeavouring to join, as to which see the subsequent applications, were, in fact, already cited by the claimant in the ET1 as respondents namely Mr Ibrahim Dogus, who seems to be the proprietor of Rimad Limited, and Mr Raife Aytek or maybe he meant to say Aydin. In any event, all that needs to said in that respect is that when the ET1 on presentation was put before a Judge because of issues do with ACAS EC early conciliation certification of the claim, Aytek Aydin was refused as a respondent because there was no ACAS Certificate for him. And it seems that the Judge also took the view that in terms of Mr Dogus the claim was intended to be against Rimad Limited. Ever since it has been agreed between the parties that the correct respondent for the purposes of this claim is, in fact, Rimad Limited. As it is the application seems to have not been put before an employment judge.

6. In any event there was scheduled a case management hearing in the usual way to take place on 4 October 2019. The respondent via Mr Holmes submitted its agenda confirming that it understood the case it had to meet was as to unfair dismissal and non payment of wages as per the ET1. Stated was that it would call four witnesses at the main hearing and that there would need to be an interpreter in Turkish. Dates to avoid for the hearing were provided.

7. On 3 October 2019 the claimant's solicitors submitted an agenda (Bp40-41). The application for joinder was repeated. The second and most important point is that they now wished to amend to include claims of constructive unfair dismissal, victimisation and bullying and harassment. The problem there which goes to professional competency is the application to claim constructive unfair dismissal. How could that engage when the claimant had clearly been dismissed? Cross referencing to the particularisation provided in that agenda on this issue, it was all about the unfairness of the dismissal. No wonder therefore that much later on it was made plain that the constructive unfair dismissal amendment was no longer pursued. As to the bullying and harassment and victimisation claims, no labelling as to statutory provisions and how they were engaged was provided. Taking on board the written submissions for the purposes of today of Mr Davies, and which I agree with in this respect, bullying and harassment in itself is not a head of claim before the Tribunal. It could be brought, however, for instance by way of detrimental treatment if say there was a claim based upon whistle blowing and thus deploying s43A and s47B of the Employment Rights Act1996 or the equivalent relating to Health and Safety discrimination, i.e., section 44. Or if it is

[1] Bp = bundle page)

going to be brought under the Equality Act 2010 (the EqA), then obviously there has to be mindfulness of the definition and therefore there needs to be set out what is the protected characteristic relied upon and specifics of the alleged harassment and how it related to that protected characteristic. This is fundamental. Likewise as to victimisation, if s27 of the EqA was relied on needing to be set out was what was the protected act relied upon and then specifics of the alleged victimisation and how it flowed from the protected act. All was conspicuously lacking. These shortcomings were made plain by the respondent on 16 October 2019 (Bp 46).

8. In any event, there was then the attended[2] case management hearing before Employment Judge Hyams-Parish on 4 October 2019.The claimant was represented by Mr J Komeh, case worker, of the claimant's solicitors. The respondent was represented by Mr Holmes. What is absolutely fundamental is, and I refer to the record of that hearing (Bp 47-56) is that, the Judge having made observations, I suspect along the lines I have now gone into, suggested that Mr Komeh get some instructions from his client. There was an adjournment for Mr Komeh to get those instructions. After which the Judge records that Mr Komeh, clearly acting on instructions, made plain that the claimant was not wishing to proceed with any application to amend to add 'discrimination claims' and that he confirmed that the claims pursued before the Tribunal were therefore ones of unfair dismissal and the non-payment of the wages. In those circumstances, the Judge made directions and listed a hearing before a Judge sitting alone for some eight days commencing on 15 February 2021 inter alia because the claimant had indicated that he was calling some seven witnesses. His orders were sent to the parties on 19 October 2019.2019.

9. Stopping there, and going forward to the clarification of the claimant's proposed amendments to his claims and to which I shall in due course turn and which comes back in again circa 21 September 2020, it is suggested for the claimant that the reason why the claimant withdrew the application was because he did not understand what he was being asked about and felt under pressure because of his health and, it now seems additionally relied on is the language barrier. However, I am with Mr Davies that if that was the position that Mr Komeh faced at that hearing, then he was under a professional duty to inform the Judge of the difficulties he was therefore facing and obviously he should have asked the Judge to adjourn the application to amend until such time as he was able to obtain proper instructions. It is self-evident that this was not said to the Judge. Furthermore, there was never a subsequent application to the Judge that his record of the hearing should be corrected if that was contended. I stress that in his published record of that hearing and to which I have referred, the Judge **put in bold**[3] that if either party anyone disagreed with anything he had recorded, then they had a period of time and which he spelt out to so inform the tribunal. It did not happen.

[2] As opposed to a telephone hearing.
[3] My emphasis.

10. Instead on 7 November 2019 the claimant solicitors wrote to Mr Holmes (Bp 59-61) stating that an updated list of issues " will now include victimisation[4]" but that otherwise "*will pursue additional proceedings in the County Court which has jurisdiction on the following…*" And set out was that accordingly claims for bullying and harassment would be issued in that forum relaying inter alia on the Protection from Harassment Act 1997 and thereto the Health and Safety at Work Act 1973; also for "negligence" and thus a claim for "personal injury".

11. So first this appeared to suggest the victimisation claim had not been withdrawn when it clearly had, but otherwise the bullying and harassment claim would be pursued elsewhere.

12. In any event, despite the contention of Mr Kamara to the contrary, I have no hesitation in stating that Mr Komeh, acting in a professional capacity, clearly on instructions withdrew the application to amend. What I have otherwise now rehearsed smacks of at least professional incompetency. Albeit therefore there was no judgment dismissing the actual application, it has to be treated as having clearly been withdrawn. That goes to Mr Davies' abuse of process argument. And as to an expectancy of competence and which does not directly engage before me in that Mr Kamrar is not in his submissions relying on that as an explanation so as to mean that I might find it just and equitable to grant the amendment, I do observe further in that respect at paragraph 12 below.

13. On the 21 September 2020 (Bp 66-83 a second bite of the cherry, so to speak, was attempted by the Claimant via his solicitors by way of further application to the tribunal. It was stated to be an urgent application to amend despite some 10 months having elapsed since the orders of EJ Hyams-Parish. It was again raising an application to amend to include constructive unfair dismissal which on the face of it cannot but be fundamentally misconceived. Second was again made reference to bullying and harassment. Stated was that "*whether the respondent embarked on a course of conduct which set the claimant up to fail and had the undermining effect of humiliating, degrading and affecting the dignity of the claimant in the workplace."* No mention whatsoever of inter alia section 26 EqA, was made. None of the essentials which I have now rehearsed were pleaded. Also again raised was the wish to amend to include victimisation but no reference whatsoever made to section 27 and the essentials thereof. The same applies to the inference that this was based on health and safety issues. Nothing was pleaded as to s44 of the ERA. Implicit in what was stated was that the previous withdrawal at the case management hearing was because of pressure from the Employment Judge. But I repeat that no such contention was made having received the Judge's orders and therefore no argument to the effect that the claimant had wrongfully withdrawn his application due to some sort of improper pressure by that Judge. Also now inter alia pleaded was that a reason for the delay in bringing this application to amend, which it was accepted was out of time, was due to the closure of the solicitors' office because of lockdown due

[4] Reference to s27 of the EqA was therein made.

to the coronavirus pandemic. But I observe that this did not prevent such as solicitors working from home and I have heard no evidence on this issue from such as Mr Komeh.

14. The application was opposed by the respondent in summary for the reasons I have now rehearsed. Inter alia observed, and reiterated today by Mr Davies, is that the claimant's solicitors had actually supplied the respondent's representatives with a copy of a bill of costs rendered to the claimant and which showed that they had been engaged as far back as 26 June 2019 and at that date had raised this bill of costs for some £6,600 inter alia for the purposes of dealing with the amendment application. So this firm clearly holds itself out as being at the highest level of professional competency given the charge rate.

15. The application to amend was listed for hearing. This took place before Employment Judge S Jones QC on 26 February 2021. That judgement does not concern me given that following his granting a reconsideration on the application of the respondent, the matter was re-listed to be heard de-novo. Inter alia on 16 August 2021 the Claimant submitted further, and better particulars as ordered by EJ Jones KC. This is confined to particulars of the harassment. On 26 August 2021 the Respondent re-stated its opposition to the amendment. In due course the matter was listed for today.

16. On 7 December 2021 the solicitors for the claimant informed the tribunal that the application to amend to include constructive unfair dismissal was withdrawn but that the application to amend to include harassment and victimisation was pursued. Further details of the amendment now pleaded by Mr Kamara were provided. (Bp103-106). These are confined to harassment pursuant to s26. Nil is pleaded viz victimisation. In response, the respondent restated its opposition. Finally, before me I have updated submissions from Mr Kamara and Mr Davies. Mr Kamara has made clear that only the application to amend to include harassment pursuant to s26 of the EqA is pursued.

Submissions and findings

17. The application to amend as at 21 September 2020 was at least eighteen months out of time. It was also as I have now set out woefully deficient. In any event applying the Selkent check list the primary submission of Mr Kamara is that the greater prejudice will fall upon the claimant if I refuse the amendment in that the respondent knew the essentials of the claim which it was required to defend when it first presented its ET3. But Mr Davies points out that first this is not a re-labelling, it is stated to be a new head of claim. Second factual allegations are now made stretching back to May 2017. Thus granting the amendment will mean that the Respondent will be put to having to defend a far wider claim that that

within the narrow compass of the unfair dismissal claim[5] and particularly when witnesses may no longer be available such as having left the employ. Most important perhaps is that the application is well out of time and could have been properly pleaded way back on 25 July 2019 when Kc Law Chambers Ltd first came on record and applied to amend but provided no details and yet had obviously charged for the same. Furthermore, there is the abuse of process issue in terms of the withdrawal at the hearing before Judge Hyams- Parish.

18. Dealing first with the out of time point and as clarified by Mr Justice Underhill as he then was in TGWU v Safeway Stores Limited [EAT0092/97], albeit out of time could be said to be simply a factor, it is however an important and potentially decisive one in the exercise of the discretion. That point is reiterated in a line of authorities thereafter and as the learned authors therefore point out in IDS Handbook Employment Tribunal Practice and Procedure 2013 edition as at paragraph 8.41 and in that sense also referring to the Presidential Guidance, that although out of time is not fatal in the exercise of the discretion to permit an amendment it "*does not mean that consideration of time limits is not a significant factor for the Tribunal to weigh in the balance when considering how to exercise its discretion"*

19. And so given what I have rehearsed, I am not persuaded that the perfected application could not have been made circa 25 July 2019. I have heard no evidence via such as the Claimant or in particular Mr Komeh to the contrary. The medical evidence referred to in the application dated 21 September 2020 does not detract from that the Claimant could set out at least some of the factual matrix in the ET1 and was able to instruct solicitors and attend the hearing on the 4 October 2019.

20. The second fundamental is that the application to amend was in any event withdrawn at the hearing on the 4 October 2019. I repeat that if Mr Komeh on 4 October 2019 and having had the opportunity to take instructions, to which I have referred, had been unable to meaningfully get the same because of either the claimant's mental ill-health or language barrier, then he should have made that absolutely plain to the Judge and which he clearly did not. I am also intrigued about the language barrier point. That is to say, it clearly did not mean that the original application to amend could not be made unless the solicitor was acting without instructions or the clarification as to what the amendment was about on 3 October 2019. I have not had the benefit of hearing from Mr Komeh. I would detect, and obviously it has to be no more than an observation, that it may very well be that he is able to converse with the claimant, i.e., in Turkish, otherwise how could he have been instructed and got instructions to make the applications in the first place? I note that there was no application by Mr Komeh that there should be an interpreter at the hearing before Judge Hyams-Parish and in all the

[5] As to the wages claim it of course is limited to backdated 2 years if it succeeds and as to the holiday pay aspect there is the three month obstacle which the claimant will need to surmount apropos the Bear v Scotland line of authority.

submissions made thereafter on the claimant's, it has never been said that the tribunal erred in failing to provide an interpreter, Mr Komeh or the solicitors for whom he is employed having previously made said such application. A point that Mr Davies eloquently makes in his written submissions.

21. What it means is this. Yes, it could be said that the application to amend relies to some extent on facts already pleaded but it nevertheless is a new head of claim. The extent to which the claimant wishes by his particularisation to include additional facts now pleaded therein cannot but mean that the respondent will be put to a considerable additional work as to which I now referred and, of course, it is also prejudiced if it has to deal with a case that is well out of time and where there is no good reason as per my findings as to why it was presented so late and when it had in in fact been withdrawn.

Conclusion

22. Thus I conclude that it is not in the interests of justice to grant the application to amend.

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Employment Judge Britton

Dated: 10 October 2022

Sent to the parties on

For the Tribunal Office