

# THE INDUSTRIAL TRIBUNALS

CASE REF: 467/19IT

**CLAIMANT:** Claire Martin

**RESPONDENTS:** Student Roost

## DECISION ON A PRE-HEARING REVIEW

The decision of the tribunal (Employment Judge Sitting Alone) is that:

- (1) the claimant's claim does not contains a complaint of failure to make reasonable adjustments in relation to working conditions and the dismissal process, and
- (2) leave is not granted to amend the claim.

### Constitution of Tribunal:

**Employment Judge (sitting alone):** Employment Judge Knight

### Appearances:

**The claimant was represented by Mr Ryan Cushley, Barrister-at-Law, instructed by the Equality Commission for Northern Ireland.**

**The respondent was represented by Ms Rachel Best, Barrister-at-Law, instructed by Shoosmiths LLP.**

### ISSUES

1. This Pre-Hearing Review was arranged to determine the issues:
  - (1) Whether the claimant's claim contains a complaint of failure to make reasonable adjustments in relation to working conditions and the dismissal process in addition to her claim of direct disability discrimination; and if not,
  - (2) Whether the claimant's claim should be amended to include such a complaint.

### CLAIM AND RESPONSE

2. The claimant lodged her originating claim form with the Office of the Industrial Tribunals and the Fair Employment Tribunal on 4 December 2018 in which she made complaints of unfair dismissal and disability discrimination. (The unfair dismissal claim was dismissed at a case management discussion ("CMD") on 9 April 2019, following its withdrawal by the claimant as she did not have one year's qualifying service.) It is not disputed that the originating claim includes a complaint

of direct disability discrimination. This includes an allegation that the respondent decided to terminate the claimant's employment after the claimant disclosed information to the respondent about her mental health/disability in a telephone call on 27 September 2019.

3. The respondent, in its response dated 26 February 2019, disputes that the decision to make her role redundant was in response to her alleged disability. The respondent does not admit that the claimant is disabled within the meaning of the DDA; or if she was a disabled person at the relevant time, the respondent asserts that the claimant did not inform them of her alleged disability nor were there any matters which would have put the respondent on notice of her disability. The respondent's case is that in the telephone call of 27 September 2018, the claimant did no more than raise concerns about her role and relationship with her line manager and that her alleged disability was not discussed. The respondent denies that any decisions concerning the termination of the claimant's employment were related to the claimant's alleged disability. It is clear from the contents of the response that the respondent understands that the claimant is asserting that she has been subjected to direct disability discrimination.
4. At the CMD, the respondent disputed whether the originating claim form contains a complaint of disability discrimination in relation to an alleged failure by the respondent to make reasonable adjustments. This had not been previously raised by either party.

## EVIDENCE

5. The claimant gave evidence by a written witness statement and was cross examined. The respondent did not call any witnesses.
6. The following documents were before the tribunal: the originating claim and response forms; a typed record of the telephone conversation on 27 September 2018 between the claimant and Ms Laura Mathews, People Business Partner (HR), made by the latter; a copy of handwritten notes which the claimant said she made as an aide memoire in preparation for the telephone conversation with Ms Mathews on 27 September 2018; and an email dated 27 November 2018 sent by the claimant to Ms Mathews. There was no medical evidence.

## RELEVANT LAW

### Amending the Claim

7. The tribunal has a general case management power to give leave to amend the claim or response (Rule 10(q) Schedule 1 of the Industrial Tribunal (Rules of Procedure) Regulations (Northern Ireland) 2005 as amended.) In exercising that power, the tribunal must consider all relevant circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. In the leading case of ***Selkent Bus Co Ltd v Moore [1996] IRLR 661, [1996] ICR 836***, EAT, Mummery J at section 5 of his judgment, identified relevant factors to be taken into account, as applicable, in the the circumstances of the case to be:

“1. The nature of the amendment

*Distinctions may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim and which may involve a “relabelling” of facts already pleaded; and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.*

2. 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.*

3. 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 – before, 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, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision”.*

8. It is accepted that category 1 and 2 amendments do not require a consideration of the time limits. Category 3 amendments which seek to add a new cause of action will require a consideration of the applicable statutory time limits. This, however, is 'only a factor, albeit an important and potentially decisive one', in the exercise of the overall discretion whether or not to grant leave to amend. (**Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07**) (6 June 2007, unreported), at para 10 per Underhill J.)

9. In determining whether the amendment amounts to a wholly new claim, as opposed to a change of label, it will be necessary to examine the case as set out in the original application to see if it provides a 'causative link' with the proposed amendment (see **Housing Corp'n v Bryant [1999] ICR 123, CA**). In **Ali v Office of National Statistics [2004] EWCA Civ 1363 [2005] IRLR 201** it was held that whether an originating application contains a claim has to be judged by reference to the whole document:

*“That means that although box 1 may contain a very general description of the complaint and a bare reference to an event, particularisation may make it*

*clear that a particular claim, for example, indirect discrimination is not being pursued. The employment tribunal erred in finding that the applicant did not need permission to amend his claim of race discrimination to add a claim of indirect discrimination because this was already included in his originating application alleging that he had been discriminated against on racial ground. In the present case, the particulars clearly asserted less favourable treatment on racial grounds, but there was no assertion of indirect discrimination in the originating application. The applicant's application for leave to amend to add a claim of indirect discrimination therefore sought to bring into the proceedings a new claim."*

Accordingly, the correct test for the tribunal was whether in all the circumstances of the case it was "just and equitable" to allow the amendment. Interestingly at paragraph 40 of his judgment after an analysis of the authorities, Lord Waller states:

*"I find impossible to think an ET should find that it makes any difference whether the test it should apply is 'just and equitable' or on the 'balance of hardship and justice'."*

### **Duty to make Reasonable Adjustments**

10. In determining the issues before the tribunal, it is necessary also to consider the provisions in the ***Disability Discrimination Act 1995 as amended ("DDA")*** which sets out when the duty to make reasonable adjustments will arise:

**Section 4A** of the DDA provides:

*"(1) Where –*

- (a) a provision, criterion or practice applied by or on behalf of an employer, or*
- (b) any physical feature of premises occupied by the employer,*

*places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect ...*

- (3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –*
  - (b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1)."*

11. In ***Environment Agency v Rowan [2008] IRLR 20, [2008] ICR 218***, the EAT restated the guidance given in ***Smiths Detection v Berriman [2005] All ER (D) 56 (Sep), EAT*** the matters to be identified by the tribunal in a reasonable adjustments case:

*"(a) the provision, criterion or practice applied by or on behalf of an employer, or;*

(b) *the physical feature of premises occupied by the employer;*

...

(d) *the nature and extent of the substantial disadvantage suffered by the claimant”.*

### **Time Limits for Presenting a DDA Claim**

Paragraph 3 of Schedule 3 to the DDA provides that:

“(1) *An employment tribunal shall not consider a complaint under section 17A or 25(8)] unless it is presented before the end of the period of three months beginning when the act complained of was done.*

(2) *A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so”.*

12. There is no presumption that the discretion should be exercised to extend the statutory time and the onus is on the claimant to convince the tribunal that it is just and equitable to extend the normally strictly applied statutory time limit. Exercising this discretion requires consideration of the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (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 had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause 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. (***British Coal Corp v Keeble [1997] IRLR 336***).

### **FINDINGS AND SUBMISSIONS**

13. The starting position for the claimant was that the originating claim form already contains a complaint that the respondent failed as from 27 September 2018 to make reasonable adjustments for her, in addition to her claim of direct disability discrimination and therefore no amendment is necessary. On this basis, claimant’s counsel indicated that he had not drafted any amendment for consideration at the PHR.
14. The claimant’s case was that she had intended to convey that she was making claims of both direct disability discrimination and a failure to make reasonable adjustments by ticking the box for disability discrimination at section 7.1 of the originating claim form. It was argued as it is not possible to stipulate the type of disability discrimination claim by ticking this box, any form of disability discrimination is included. Further, the claimant included details in the first paragraph of section 7.4 (Details of Claim) which although not technically drafted, amounts to an allegation that there had been a failure by the respondent to make reasonable adjustments. The words relied upon by the claimant in this regard are as follows:

*“On Thursday 27 September (2018) I contacted my company people department (Laura Mathews) by telephone to discuss the concerns I had with my position the lack of support I was receiving and in turn the negative effect that these issues were having on my mental health. During this telephone call I explained my struggles with anxiety and depression, I cried during the call and so the strain was audible. It was decided during this call that the (sic) Laura Mathews would speak with my line manager Phil Luckett and come back to me on a way to move forward or how to address the situation”.*

15. The second and third paragraphs of section 7.4 then continue on:

*“The following day I received an outlook calendar invitation for a telephone ‘catch up’ on Tuesday 2 October with Laura and Phil, on Monday 1<sup>st</sup> October this was then changed to a meeting at the Merchant Hotel in Belfast. On entering the meeting with I was presented with a letter outlining that my role was redundant.”*

*“On 27<sup>th</sup> November I made a complaint to Laura Mathews, the facts of the complaint are detailed below.”*

The claimant then goes on to detail the five points of her substantive complaint, the first being: *“The treatment I received amounts to unlawful discrimination on the grounds of disability contrary to the Disability Discrimination Act 1995 as amended, and/or relevant European Law”.* Under this heading she contends that her redundancy is as a direct consequence of having spoken to Ms Mathews about her mental health. The remaining points raise allegations that there has been a lack of prior consultation, breach of confidentiality, and the failure to consider her for alternative roles. She concludes by asserting that redundancy was being *“used as a deceptive means to end my employment....”*

16. The entire contents of section 7.4 are practically identical to the complaint sent by the claimant by email to Ms Mathews on 27 November 2018. At the time of drafting her claim form she had little or no knowledge of the substantive law. I did not find the claimant’s evidence to be credible when she told the tribunal that the Equality Commission only provided *“general information regarding the employment tribunal process”* when she sought their advice on 22 November 2018. She admitted that she did not seek any further legal advice prior to lodging her claim form.
17. At the PHR the claimant further alleged that on 27 September 2018 she had discussed with Ms Mathews, matters relating to her alleged disability, including potential adjustments that were required, as noted in her aide memoire. This is disputed by the respondent.
18. It was submitted that because the claimant had referred to a lack of support in work, that her mental health was affected and stated that her employer said that they would come back to her on how to address the situation, this was sufficient to ground a failure to make reasonable adjustments claim. As such this case falls within either Category 1 or 2 in **Selkent** and therefore is not affected by time limits. If necessary, the respondent could be provided with additional information of this claim.
19. The respondent’s case was to the contrary, that a Category 3 amendment would be required to add an entirely fresh claim which would necessarily involve pleading new facts concerning the nature of the provision, criterion or practice, the

substantial disadvantage suffered by the claimant, the adjustments required and what was the effect upon the claimant. It was disputed that these matters are in fact pleaded in the details of claim or that any matters for clarification could simply be dealt with by way of the provision of additional information.

20. Both sides agreed that, if deemed a category 3 case, the new claim would fall outside the statutory time limit and the tribunal would have to decide whether it is just and equitable to exercise its discretion to extend the period for presenting the claim. It was submitted for the claimant that the delay in making the application was in fact very short, the issue having only arisen at the first CMD and therefore this would not adversely affect the cogency of the evidence; that the claimant had a reasonable belief that her complaint was already before the tribunal; that the claimant was at the time of submitting her claim self represented with no knowledge of the law in this area or the procedures involved and had been suffering from mental health issues before and after her dismissal. Further it was submitted that the amendment would not significantly lengthen the hearing time, given that there was a very tight timeline as the reasonable adjustments case arose on 27 September 2018 and the direct discrimination occurred on 2 October 2018. It was submitted that there would be no prejudice whatsoever to the respondent if the tribunal were to allow the amendment but that if it was refused, the claimant would be deprived of pursuing a claim by a technicality, which would be grossly unfair and cause significant injustice to her.
21. For the respondent it was submitted that delay is significant given that the time began to run from 27 September 2018. The possibility of a reasonable adjustments claim had only been highlighted at the CMD on 9 April 2019, four months outside the statutory time limit. There was no medical evidence to support the proposition that the claimant's medical condition was such that she was unable to plead her case. There was clear evidence that the claimant was able to raise a complaint with her employer in the email sent by her on 27 November 2018. She had been able to seek advice from the Equality Commission for NI and another professional body but no reason was given for not seeking other legal advice. Although the claimant is a litigant in person, ignorance of her case is no excuse and there is no requirement for legalistic pleading. The claimant had not advanced any good reason for not including the foundation for a reasonable adjustments complaint in her claim form. It was suggested that in balancing the prejudice and hardship, the tribunal should consider that this may involve extra costs and hearing time, additional witnesses and extensive medical evidence in relation to the nature of the adjustments which may be required.

## CONCLUSIONS

22. Applying the reasoning in **Ali**, it is evident that direct disability discrimination is one type of unlawful act, distinct from the failure to make reasonable adjustments, which is another type of unlawful act. After careful consideration of the entire claim form and evidence, I do not accept that this is a category 1 or 2 case which involves the relabelling of facts already pleaded. I do not consider that, even in layperson's terms, the first paragraph contains reference to the necessary components of a complaint of failure to make reasonable adjustments identified in **Environment Agency v Rowan (cited above)**. I therefore conclude that the claimant's claim as presently formulated does not contain a complaint of failure to make reasonable adjustments in relation to working conditions and the dismissal process.
23. In these circumstances I determine that an amendment is required to add a wholly new claim which, as agreed by the parties, is now outside the statutory time limit

which expired on 27 December 2018. In considering whether it is just and equitable to extend the time limits, the burden for the claimant to show why the primary time limit has not been met and the reason why it was not brought soon than it was.

24. The claimant has stated that she intended from the outset to make a failure to make reasonable adjustments claim. If so, she has not given a satisfactory explanation as to why facts, which must have been within her knowledge and contemplation at the relevant time, on her own case concerning the contents of her aide memoire, are not included in the numbered paragraphs Section 7.4. Further there is no explanation as to why the matter was not raised until the CMD on 9 April 2019, apart from a lack of knowledge and mistaken presumption of the claimant. In this regard, I am not convinced that the claimant took reasonable steps to obtain appropriate legal advice before lodging her complaint. In the absence of medical evidence, I give no weight to the suggestion that the claimant's ability to formulate her claim was somehow impaired by her medical condition or alleged disability. In my view, allowing an amendment would require the reformulation of the claim as it presently appears on the claim form and I reject the assertion made that this will not result in prejudice or hardship for the respondent. I accept that this is likely to increase the hearing time required, involving additional expense as submitted by Ms Best.
25. On balance, I am satisfied that in practice refusal of leave to amend the claim will not cause hardship or injustice to the claimant as she will still be able to pursue her claim of direct disability discrimination, including the alleged discriminatory dismissal.
26. For these reasons I am not satisfied that the claimant has discharged her burden of showing why the time for presenting the claim should be extended and this is a decisive factor in this case. I therefore refuse to allow an amendment.

**Employment Judge:**

**Date and place of hearing: 23 May 2019, Belfast.**

**Date decision recorded in register and issued to parties:**