



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K McGregor

**Respondent:** Lancashire County Council

**HELD AT:** Manchester

**ON:** 11 April 2017

**BEFORE:** Employment Judge Holmes

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Ms Green, Solicitor

## JUDGMENT ON APPLICATION TO AMEND

It is the judgment of the Tribunal that the claimant has permission to amend his claims to include a complaint of failure to make reasonable adjustments in respect of a further disability, namely the claimant's hearing impairment in respect of the positioning of his workstation in the Marsh Lane office from March 2016.

## REASONS

1. The Tribunal this morning has been considering an application made by the claimant, Mr McGregor, to amend his claims of disability discrimination to include a complaint in relation to the alleged disability of a hearing impairment and a failure to make reasonable adjustments in respect of that impairment arising out of the positioning of his workstation in the Marsh Lane office from around about March 2016. The application arises out of a document that Mr McGregor has submitted to the Tribunal in compliance with previous orders made at a case management hearing on 21 December 2016 when he was ordered at paragraph 3 to provide a Scott Schedule, as it was described, in order to clarify his case.

2. The claimant had presented a claim form on 4 October 2016 and to that he had appended a five page document in which he set out the narrative of the claims that he wished to make. It was as a result of that narrative and the need to clarify precisely what claims were being made in respect of disability discrimination that the

claimant was ordered to provide this further information which he did, and he did so in a 13 page document received by the Tribunal on 26 January 2017.

3. It is in relation to page 12 of that document that this application arises because in the details he set out on that page under the heading of the events of 15 July 2016 he says this:

*“The equipment and workstation in its present location places me, the user, in social isolation from my colleagues. I have a substantial hearing disability which requires my use of hearing aids in place at all times. With my hearing aids to be effective I need to be facing a person so as to hear and lip read to understand their conversation. With the location and position of this desk and equipment I am unable to actively participate with any form of general communications or active communion with colleagues in the office as I would have my back to them all. In addition this desk is some distance from other colleagues and the desk is facing a glass wall making me totally ostracised from the health and safety team on the whole.”*

4. That, the claimant concedes, raises a potential new claim because in relation to the other claims set out in his original claim form, and indeed as clarified further in his document of January 2017, the condition giving rise to the claims that the claimant has thus far made are in relation to his urological system and the symptoms and condition that he suffers from in relation to that condition, and the rest of his claims relate to and derive from that condition and nothing up until this document had been said in relation to his hearing impairment. Consequently, if he is to make any claim in relation to the further disability of the hearing impairment that would be a different type of claim in terms of the disability relied upon, and would be an allegation that could stand alone in relation to any complaint of a failure to make reasonable adjustments.

5. Consequently, the claimant having indicated he does wish to make such a complaint, he has applied today to amend the claims and that application has been considered by the Tribunal and is opposed by the respondent. Ms Green who appears for the respondent today is in a position to deal with the application and had indeed prepared for it and so did not need an adjournment to take instructions which she has done, and she has opposed it.

6. In terms of the reason that the claimant is making the application now and why he had not included these matters in these terms in his original claim form is, he has explained to the Tribunal, one of oversight. He had overlooked his hearing condition; he did not regard it as a disability, and in many ways, on a day-to-day basis because of the effect of his hearing aids, it may not be as prominent in his thinking as his other rather more serious condition is, but he explains his failure to put the claim in that way earlier than he has done on that basis and seeks the Tribunal's permission to bring this particular claim at this stage.

7. The respondent, through Ms Green, takes the not unreasonable objection that this is very late in the day. The Tribunal has already held one preliminary hearing and the claims are listed for hearing, in fact, in November 2017. In terms of the matters relied upon by the claimant, the respondent would concede that he has a hearing problem of which they are aware and that that would amount to a disability,

but in terms of whether these issues have been raised specifically in the discussions that took place in 2015 and 2016 about his workstation the respondent does not accept the claimant's contention that these matters have already been raised, either by way of grievance or in other documents. The claimant, however, contends that they have. Consequently the respondent opposes the application and it falls to me to decide whether it should be granted.

8. In doing so, of course, I have a discretion under the rules to permit an amendment and in terms of how that discretion is to be exercised the leading case on that issue is **Selkent Bus v Moore [1996] ICR 836** which considered applications of this nature, and in that judgment amendments were categorised into three types:

- (1) Amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint;
- (2) 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
- (3) Amendments which add or substitute a wholly new claim or cause of action which is not connected with the original claim at all.

9. In relation to each of those categories, slightly different considerations apply in terms of the test to be applied by the Tribunal, but in respect of all of them the Tribunal has a discretion to be exercised judicially and ultimately must decide how to exercise it on such an application.

10. In terms of the type of amendment this is, one can see an argument that it falls possibly under the second or the third type. In relation to the second, of course, that is in respect of 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. Pausing there one can see an argument that the claims that the claimant seeks to raise by way of amendment are clearly linked to the same facts as the original claim because they all arise in relation to his workstation, its location and the need to make reasonable adjustments in respect of his other condition that is conceded to be a disability. Where, however, it could be said to be a new claim is that the disability in question for this application is a different one, the hearing impairment, and the allegation is that that in itself gave rise to the need to make the reasonable adjustment and the positioning of his workstation failed to do that in respect of this disability as a stand alone claim potentially, regardless of whether it would amount to that in respect of his other claims. So it seems to me to be somewhere between the two, really, in the sense that it clearly is connected with the facts of the original claim but, given that this is a different disability that is relied upon, and gives rise to potentially different needs to make reasonable adjustments, it is more arguably to be regarded as a wholly new claim, but as I say it is perhaps somewhere between the two.

11. In terms of that, and taking the position, as it were, at its most favourable to the respondent and treating it as a wholly new claim, one factor to be considered, of course, is that if it was presented as a new claim now it would be considerably out of

time, going back as it does to at the latest July 2016. The claimant, of course, complains that matters were already an issue for him earlier than that, but taking it at its latest it would be July 2016 and therefore to present a fresh claim now in respect of that would mean it would be out of time, and time limits are indeed, as the judgment in ***Selkent*** makes clear, a factor to be taken into account in the exercise of the discretion. But ultimately it is a question of balancing the interests of justice and the interests of the party, and considering whether or not to allow the amendment would create hardship to either side and involves a consideration of the reasons why the claim was not brought forward in the original claim.

12. In terms of the reasons, of course, the claimant has very frankly accepted that this was by way of oversight. The condition that he is seeking to rely upon in relation to his hearing is clearly less substantial, and less important in terms of the overall effects upon his health than the urological condition that he set out in some detail in his claim form and in respect of which he has suffered, he alleges, a number of instances of “injury” as a result of the failure to make adjustments for that condition. It is perhaps not surprising in those circumstances that he did overlook the effect of his hearing condition, but I accept it is an entirely genuine oversight, and on that basis he has made his application for this permission.

13. In terms of the respondents, they do concede that he has the condition and indeed that it would be a disability. It therefore seems likely that they were aware of the condition; in terms of whether they were aware of any particular complaint in relation to it and the positioning of the desk, that is in dispute, but it is likely to be a well documented case in which everything that was discussed will be available in terms of reports from meetings and things of that nature. Also, it is common ground between the parties that no new witnesses will be required to deal with this allegation. The same people that dealt with the claimant's application for adjustments to be made in respect of his other conditions will be the same people that deal with any complaint in relation to this one.

14. To some extent the Tribunal appreciates that this issue may arise in any event, because in determining whether the adjustments that the claimant seeks in respect of his other conditions in relation to the positioning of his workstation, whether or not where it was positioned and other aspects of it would have been a reasonable adjustment will perhaps fall to be determined in the light of all of his health issues, and to some extent this issue may nonetheless arise in terms of the reasonableness of any adjustments. It may be said that it is not, strictly speaking, necessary for the claimant to bring that as a separate claim. It may well turn out to be a facet of whether the adjustment that was proposed for the other condition was reasonable in the circumstances given his hearing deficiencies. That said, of course, the converse of that is “well, if that’s the case and it’s going to be an issue in any event, why should the claimant not be permitted to actually bring a claim in relation to it?”. One can see these matters are fairly evenly balanced.

15. The Tribunal has to make a decision and exercise its discretion, and ultimately given the absence of any prejudice to the respondents, who are clearly likely to be in a position to deal with this with the same witnesses and probably the same evidence as will be put forward in respect of the rest of the claimant's claims, and given that it is a discrete and separate condition which they concede he has, and which they concede would be a disability in its own right, then the Tribunal

considers on balance, taking into account the interests of both parties, that no undue prejudice to the respondent arises out of allowing the amendment, and there may be some to the claimant if he is precluded from relying upon that as a separate disability. It really is in his interests that all potential disabilities are before the Tribunal. I accept that it was merely an oversight, and an understandable one given the focus of his claims on the rather more serious condition, and the disability that he has in relation to the bulk of the claim, so his reasons are understandable and not bad ones, and for all those reasons the Tribunal will accept his application and allow him to amend his claims to include the additional disability in relation to the hearing impairment , with the alleged failure to make reasonable adjustments as set out on page 12 of his Scott Schedule in relation to that potential claim.

Employment Judge Holmes

Date : 11 May 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 May 2017

FOR THE TRIBUNAL OFFICE