



EMPLOYMENT TRIBUNALS

Claimant

Mr Kanchana Dodanwala

Respondent

Unisnacks Europe Ltd

Heard at: Watford by Telephone

On: 23 November 2021

Before: Employment Judge Bedeau

Appearances:

For the Claimant: Mr I Ahmed, Counsel

For the Respondent: Mr D Gray-Jones, Counsel

JUDGMENT

1. The claimant's application to amend is, in part, allowed.
2. The claim of indirect discrimination is dismissed upon withdrawal by the claimant.
3. The case is listed for a further preliminary hearing, by telephone, on Tuesday 14 December 2021, at 10.00am, for 2 hours.

REASONS

1. By a claim form presented to the tribunal on 30 December 2020, the claimant made claims of: harassment due to his reporting of a fraud; victimisation; indirect discrimination; discrimination against mental health; intimidation, police involvement and severe stress and anxiety leading to suicidal thoughts; unfair dismissal; failure to grant an appeal to refer the decision of termination; failure to grant grievance requested; and unpaid wages for sickness that was caused as a direct result of the employers actions. He worked for the respondent as a Key Accounts Manager from 26 March 2018 to his dismissal on 4 October 2020. His Grounds of Complaint are in 62 paragraphs covering 7 pages.
2. ACAS was notified on 29 October 2020 and a certificate was issued on that same day.
3. The business of the respondent is the importation of snacks foods to be sold to retailers in the United Kingdom and Europe. The claimant worked at premises

in Welham Green, Hertfordshire. His work was in sales with targets being set for him to achieve.

4. In the response presented to the tribunal on 10 February 2021, the claims are denied. The respondent avers that there were issues with the claimant's performance and conduct for which he was given warnings. He had been involved in three car accidents with his company car, one of which cost the respondent loss of business of £7,000. He unsuccessfully appealed against his dismissal, and his grievance was not upheld. He was paid one month's notice while on sick leave.
5. On 18 April 2021, the parties were informed that Employment Judge R Lewis had directed that, as the claimant had ticked the disability box but had not provided any information, "the only claims before the tribunal are for unfair dismissal and notice pay."
6. On 13 August 2021, the claimant's legal representatives wrote to the tribunal stating that the "claims includes a disability discrimination and whistleblowing and will consider filing Further and Better Particulars of Claim."
7. In a letter dated 29 September 2021, they sent in their application to amend comprising of 110 paragraphs. The application was objected to by the respondent's representatives who alleged that the claimant's representative's conduct amounted to an abuse of the process as the claimant was pursuing entirely different claims to the ones in his claim form.
8. On 20 June 2021, the case was listed for a final hearing on 13-14 December 2021.
9. By letter dated 16 November 2021, the tribunal listed a preliminary hearing to take place on 23 November for an Employment Judge to hear and determine the claimant's application to amend and to make case management orders.

Application to amend - the law

10. A party can apply to amend the claim or response at any time in proceedings, Selkent Bus Co Ltd v Moore 1996 ICR 836 and rule 29, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
11. Whether an amendment is required will depend on whether the claim form or response provides, in sufficient detail, the complaint or defence the party seeks to make. The mere fact that a box is ticked indicating a specific claim such as direct race discrimination does not mean that it raises a complaint of indirect race discrimination and victimisation. In considering whether the claim form contains a particular complaint that the claimant is seeking to raise, the claim form must be considered as a whole. The mere fact that a box is ticked indicating that a certain claim is being made may not be conclusive in determining whether it sets out the basis for such a complaint, Ali v office of National Statistics 2005 IRLR 201, Court of Appeal.
12. Sir John Donaldson, in Cocking v Sandhurst (Stationers) Ltd and Another, 1974 ICR, in the National Industrial Relations Court, set down, generally, the procedure when considering whether to allow an amendment. He stated that Tribunals must have regard to all the circumstances, in particular, any hardship which would result from either granting or refusing the amendment. This judgment was approved in Selkent.

13. In Selkent, Mr Justice Mummery, President, held that in determining whether to grant the amendment application, the Tribunal must always carry out a balancing exercise of all relevant factors, having regard to the interests of justice and to the relative hardship cause to the parties if the application is either granted or refused. The relevant factors are: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.
14. Whether the claim would be in time if the amendment is a new claim, is not determinative of the application to amend.
15. In the case of New Star Asset Management Ltd v Evershed [2010] EWCA Civ 870, the Court of Appeal allowed the claimant to add public interest disclosure to a constructive unfair dismissal claim as the amendment did not raise new factual allegations.
16. Where the proposed amendment is likely to involve substantially different areas of inquiry the greater the difference between the new and old factual allegations, the less likely the new amendments will be permitted, Abercrombe and Others v Aga Rangemaster Ltd [2014] ICR 209, Underhill LJ, paragraph 48.
17. In Ahuja v Inghams [2002] ICR 1485, the CA held, Mummery LJ, that Employment Tribunals have the power to allow an amendment even at a late stage based on the evidence given at the hearing. They have a wide jurisdiction to do justice in the case and "...should not be discouraged in appropriate cases from allowing applicants to amend their applications, if the evidence comes out somewhat differently from was originally pleaded. If there is no injustice to the respondent in allowing such an amendment, then it would be appropriate for the Employment Tribunal to allow it rather than allow what might otherwise be a good claim to be defeated.", paragraph 43.
18. It may be appropriate to consider, as another factor, whether the claim, as amended, has any reasonable prospects of success, but the Tribunal should proceed with caution as evidence will be required in support of the amendment, Cooper v Chief Constable of West Yorkshire Police and Another UKEAT0035/06; and Woodhouse v Hampshire Hospitals NHS Trust EAT0132/12.
19. In the Presidential Guidance – General Case Management, issued on 22 January 2018, amending a claim or response falls within rule 29 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the power of the Tribunal to issue case management orders. "In deciding whether the proposed amendment is within the scope of an existing claim or whether it constitutes an entirely new claim, the entirety of the claim form must be considered.", paragraph 7.
20. "The fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment", sub-paragraph 11.1. See also TGWU v Safeway Stores Ltd UKEAT/0092/07/LA.

21. The test is the balance of injustice and hardship in allowing or refusing the application and should be approached by considering the practical consequences of allowing an amendment, HHJ Tayler, Vaughan v Modality Partnership UKEAT/0147/20, paragraph 21.
22. The balance of prejudice can include an assessment of the merits of the proposed amended claim, Gillett v Bridge 86 Ltd UKEAT/0051/17.
23. In his Further Particulars and Amended Details of Complaint, the claimant his detailed pleaded case in 119 paragraphs.
24. In relation to time issues, where the amendment is granted, time takes effect at that point and not at the date of the original claim form or the date of the application, Galilee v Commissioner of Police of the Metropolis [2018] ICR 667, a judgment of the EAT, paragraphs 67-68, HHJ Hand QC.

Submissions

25. Mr Ahmed, counsel on behalf of the claimant, said that the claimant was assisted by his union, USDAW, but the claim form was presented by him and gave his union as his representative. The additional particulars are relabelling, new factual allegations, and a new claim. The claimant was no longer pursuing indirect discrimination. By reference to proposed amended particulars, he stated that paragraphs 35-78, 40-45, 48-51, and 59 are new detriments. He also applied to add a post-employment victimisation claim. He supplemented orally what is contained in the application and further particulars. He submitted that the respondent would suffer little or no hardship and is not prejudiced by the amendment application being allowed.
26. Mr Gray-Jones, counsel on behalf of the respondent, conceded that some of the factual allegations have been pleaded and some not. He further contended that there are new claims, and the respondent will be prejudiced if the application is allowed. He relied on his written submissions.
27. I do not propose to go through the detailed submissions having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, except to say that I have taken them into account as well as the authorities I have been referred to.

Conclusion

28. From the documents it appears that the claimant was assisted internally, during the disciplinary process by his union, USDAW. In his claim form he referred to his union being his representative.
29. In his Grounds of Complaint, under “Parties”, he refers to bringing claims under “section 13(direct discrimination), 15 (discrimination arising from disability), 19 (indirect discrimination) 21 (failure to make reasonable adjustments), 26 (harassment), and 27 (victimisation) of the Equality Act 2010”.
30. His Further Particulars and Amended Details of Complaint, which I have and will refer to as the amended particulars, comprises of 119 paragraphs, covering 22 pages, whereas his claim form has 61 paragraphs over 7 pages.

31. I bear in mind that the claimant worked for the respondent for a comparatively short period, two years and seven months. Amongst his proposed amendments are: 5 protected disclosures and 33 detriments covering public interest disclosures as well as claims under the Equality Act 2010; automatic unfair dismissal under section 103A Employment Rights Act 1996; direct race discrimination; harassment related to race; and post-employment victimisation. I accept there are other claims. Having read the claim form and the proposed amendments, I have concluded that the application to amend amount to a significant change in how the case was originally pleaded, Abercrombie, and New Star Asset Management.
32. I do take into account the delay in making the application and any out of time issues; the injustice and hardship to the parties; and the cogency of the evidence.
33. He was line managed by Mr Thusitha Silva, Director of Sales, against who he has made numerous allegations. They are both of Sri Lankan national origins. The Chief Executive Officer was at all material times Mr Hyder Haniffa.
34. With reference to the paragraph numbers in the amended particulars, paragraph 31 is a reference to a public interest disclosure detriment. Although I do accept that the protected disclosure 2 was made with reference to an alleged fraud, detriment 3 is not referred to in the claim form presented on 30 December 2020. It relates to an event on 3 May 2019, considerably out of time. Public interest disclosure was not a claim identified by EJ Lewis and not specifically pleaded in the claim form. I accept that it is a claim based on facts pleaded in the claim form. The respondent would be required to produce evidence to challenge this allegation. I have decided to refuse this application.
35. Paragraphs 35-38, 40-45, 48-51, and 59, are new allegations of detriments. They cover the period from 20 May 2019 to 5 July 2020. They are out of time and could have been presented in time as the claimant had his union to assist and to consult. They would each require the respondent to produce evidence in rebuttal, nearly a year after the last of the allegations. They would add to its costs in so doing. I was not satisfied that there was a good reason for the delay. The claimant's application in respect of these new detriments is refused.
36. In relation to paragraph 62, reference is made to paragraph 47 of the original Grounds of Complaint which states, "I also email Hyder Haniffa explaining what was happening. Knowing he will simply ignore my email as he has done in the past." Paragraph 62 of the amended particulars purports to establish that the claimant had in fact made a qualifying disclosure of an alleged criminal offence on 24 August 2020. Paragraph 47 makes no mention of a qualifying disclosure. Even upon reading the preceding paragraphs 43 to 46, there is neither an obvious nor an implicit reference to the claimant having made a qualifying disclosure of information. This is a new alleged protected act made eight months after the event. It would require the respondent to produce contrary evidence and arguments. It would add to its time and costs. Accordingly, this application to add protected disclosure number 3 is refused.
37. In relation to the automatic unfair dismissal claim, section 103A ERA 1996, I accept that facts in support of it are pleaded in paragraph 57 of the Grounds of Complaint in the claim form, in particular, paragraph 56D. His case is that he was dismissed as he accused the manager of fraud. This application is allowed.

38. As regards the disability claims, following EJ Lewis's direction, the claimant clarified his position that he was pursuing discrimination claims including direct disability discrimination, harassment related to disability, discrimination arising in consequence of disability, and failure to make reasonable adjustments. He did tick the disability box on the claim form. In paragraph 18 of the Grounds of Complaint, he refers to depression, anxiety, insomnia, and work-related stress. His case is that reference to insomnia includes sleep apnoea, which I am willing to accept as in paragraph 32, he wrote, "struggling to sleep after his threats.."
39. The direct disability discrimination and harassment related to disability claims, are cited at the beginning of the Grounds of Complaint. I accept Mr Ahmed's submissions that the facts are as pleaded in the claim form save for paragraphs 88e and f, in the amended particulars, which are new. Paragraph 88e is a statement allegedly attributed to Mr Haniffa, which he would be able to respond. Paragraph 88f refers to what is in the dismissal letter. They do not significantly alter the claims and I do not conclude that they are likely to cause the respondent any prejudice or hardship. They are, therefore, allowed.
40. In relation to the claim of discrimination arising in consequence of disability, as set out in paragraph 96a to e of the amended particulars, they are pleaded in paragraphs 50-54 in the claim form. This is a relabelling exercise.
41. The failure to make reasonable adjustments claim is referred to at the beginning of the Grounds of Complaint, but there are no details until the application to amend. The claimant gives six provisions, criteria, or practices and fifteen alleged reasonable steps the respondent should have taken to address his alleged substantial disadvantages. Mr Ahmed submitted that there is no prejudice to the respondent.
42. I agree with Mr Gray-Jones' submissions. He submitted that with the pcps and reasonable steps, evidence would be required to be produced by the respondent on work practices. The pcps are inherently weak, for example, what is meant by a requirement to work, paragraph 98a; reporting to Mr Silva, 98b; to take regular and frequent calls from Mr Silva, 98g, in the amended particulars. Further, it is not clear what the substantial disadvantages are as they are vague. Moreover, this is an entirely new claim and is out of time. No good reason has been given for the delay. If allowed the claim would add to the length of the hearing and further cost to the respondent. Accordingly, I refused this application to amend.
43. As regards the claims of direct race discrimination and harassment related to race, I accept that the claimant did not tick the box on race, but he referred to direct discrimination and harassment at the beginning of the Grounds of Complaint and in paragraphs 19 to 21, to the statements allegedly made on 3 May 2019, and on 3 January 2020, paragraph 25. These are matters already in the claim form and the claimant had attached direct race and harassment related to race claims to them. This application is allowed but not the reference to "bugger" as set out in paragraph 50 of the amended particulars which is new. No good reason has been given for the delay. The claimant is not prejudiced as he is able to rely on the assertions already in his claim form.
44. The unauthorised deduction from wages claim in the claim form is pleaded as the deduction of a £600 excess following a car accident. What is not pleaded are the additional two claims in the amended particulars in paragraphs 105ii and

- iii, £553.85 deducted on 5 July 2020 when the business closed because of the Covid-19 lockdown, and £60 deducted on 5 September 2020 for a parking fine.
45. The claimant has not provided a good reason why these sums were not in the claim form. He was clearly aware of these alleged deductions at the time. They are new claims and are out of time. He is not prejudiced as he is able to proceed against the respondent for the £600. The application to add paragraphs 105ii and iii is refused.
46. With respect to the post-victimisation claim, this is allowed as it was presented in time and in line with sections 39(4) and 108. The merits of it will be left to the full tribunal to determine after considering all relevant evidence and submissions.
47. This case is listed for a further telephone preliminary hearing on 14 December 2021 at 10.00am for two hours either before me or any other Judge, if I am not available.

Employment Judge Bedeau

8 December 2021

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Sent to the parties on:

9 December 2021

For the Tribunal: