EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms B Rogers	**v**	St Elizabeth's Centre

Heard at: Bury St Edmunds (by CVP) **On**: 18 February 2022

Before: Employment Judge K J Palmer (sitting alone)

Appearances
For the Claimant: Mr Ijezie (Solicitor)
For the Respondent: Mr Brotherton (non-practicing Solicitor)

JUDGMENT
PURSUANT to an APPLICATION to AMEND

The Claimant's Application to Amend is part allowed and part disallowed as detailed below.

REASONS

1. This matter came before me today pursuant to a Case Management Hearing before Employment Judge Bloom in December 2020. The Claimant first presented a claim to this Tribunal on 24 April 2020. The Claimant was employed by the Respondent from 15 May 2019 until she was dismissed summarily on 30 December 2019. The Respondent alleges that the reason for the dismissal was conduct. They rely on the seriousness of the alleged conduct to justify the summary dismissal and the failure to give notice or pay money in lieu of notice.

2. The Claimant was a Care Support Worker at the Respondent's care home and was dismissed for falling asleep during a shift. The Claimant's ET1 raises claims for discrimination arising out of a disability, a claim for reasonable adjustments and a wrongful dismissal claim. The Claimant was then, as is now, represented by Solicitors who have advised her throughout and who attended the Preliminary Hearing before Judge Bloom.

3. At that Preliminary Hearing, Judge Bloom correctly identified the Claimant's claims as pleaded in the ET1 and he set this out at paragraph 6 of his Case Management Summary. He identified the claims under Section 15 of the Equality Act 2010 and also a claim under Sections 20 and 21 of the Equality Act 2010. He also indicated at that Hearing that Mr Ijezie, who was before me today, had assisted the Claimant in drafting her ET1 and who appeared before Judge Bloom and raised the issue of certain amendments with Judge Bloom at that Hearing.

4. Judge Bloom clearly identified those amendments as being only amendments in harassment and victimisation. Mr Ijezie asked me to accept that the reference to a PCP in Judge Bloom's Summary is reference to his understanding that there would also be an Application for an amendment to include a claim under Section 19 for indirect discrimination. I disagree with that analysis. The reference by Judge Bloom to a PCP in his Summary is a reference to the claim under Sections 20 / 21 for reasonable adjustments.

5. Judge Bloom identified the nature of the protected act and the detriment being the disciplinary process and the dismissal. These detriments accord with the acts relied upon in the ET1 as being the acts of discrimination under Section 15.

6. Judge Bloom listed a Preliminary Hearing which is the Preliminary Hearing before me today, to deal with the issue of whether the Claimant was first, a disabled person under Section 6 Equality Act 2010 and also to deal with an Application to Amend to include the claims of harassment and victimisation. Those Applications to Amend were opposed by the Respondent. The issue of disability is no longer before me as the Respondents now concede that the Claimant is a disabled person and was a disabled person at the material time. They accept that the disability is ongoing knee pain and mobility difficulties. The material time is accepted as being the period throughout which the Claimant was employed by the Respondent.

7. Judge Bloom made certain directions to be complied with in advance of the Preliminary Hearing. One such direction was that by 19 February 2021, the Claimant should set out in full particulars of the amended claim. The intention was for that Application to Amend to be dealt with at the Preliminary Hearing. This is that Preliminary Hearing and the Application to Amend is now the only Application before me.

8. At paragraph 6 of the Order of Judge Bloom, he included a standard paragraph that should either party have any difficulties with the contents of the Case Management Summary, then they should within 14 days of the date of the Order raise any inaccuracies, difficulties, mistakes or issues with the Tribunal. No one raised any such issue with the contents of Judge Bloom's Summary.

9. In fact, the original Preliminary Hearing listed for June 2021 has been postponed and relisted and it is before me today.

10. The Claimant did not comply with the Order to produce particulars of the amendments sought until April 2021, so that is just over a year after the claim was issued. Far from just adding claims of harassment and victimisation on the basis of that which was set out by Judge Bloom, the Claimant lodged through Mr Ijezie a whole new claim not by way of amendment of the original ET1. In that new claim, those particulars which run to some 11 pages the Claimant introduces a whole series of new claims previously unmentioned in the ET1 or at the Preliminary Hearing before Judge Bloom. New claims are put for direct discrimination under Section 13, indirect discrimination under Section 19, automatic unfair dismissal for a health and safety related reason under what appears to be Section 100 of the Employment Rights Act 1996. As envisaged by Judge Bloom there are also ventured claims for harassment under Section 26 of the Equality Act 2010 and victimisation under Section 27. However, acts relied upon to support those s26 and 27 claims go way beyond the acts either in the ET1 or those put before Employment Judge Bloom.

11. A whole new raft of factual allegations are raised. These include the extension of the Claimant's probationary period, an incident involving the Claimant refusing to take out a resident in the rain, an alleged incorrect allegation of rudeness against the Claimant arising out of the resident rain incident and other factual issues which had not been raised at any point previously either in the ET1 or before Judge Bloom. These go well beyond any amendments indicated to Judge Bloom at the Preliminary Hearing.

12. Therefore, I am faced with an odd hybrid of amendments in front of me. I have amendments raised with Employment Judge Bloom which add claims in respect of facts already stated in the ET1 and these are the claims for harassment under Section 26 and victimisation under Section 27. I have amendments raised with Judge Bloom which add claims in respect of facts not in the ET1 but were mentioned to Judge Bloom, largely that relates to the claim in victimisation under Section 27 and then I have a third category of amendments before me which are amendments which are not mentioned at any stage until the further and better particulars were provided in April 2021. These amendments were neither in the ET1 or mentioned to Judge Bloom and also relate to wholly new claims and wholly new facts which were not in the ET1 or mentioned to Judge Bloom or at any stage previously. These are the Health and Safety related unfair dismissal claim and the s 19 Indirect discrimination claim. I also have a fourth category for amendment for a claim not previously mentioned until the particulars in April 2021 but which relate to facts raised in the ET1, this is the s 13 claim.

13. I am grateful for the fact that I had written and oral submissions from both Mr Ijezie and Mr Brotherton in front of me. Both, I note, have been involved in this matter from the very start. Mr Ijezie asked me to accept all of the amendments, event those which fall into the third category I have mentioned above and he says I should accept them because the ET3 includes a paragraph where the Respondents pleaded a blanket denial to any and all claims, including claims under Section 13, Section 19, Section 26 and Section 27. This appears at paragraph 6.2.15 of their ET3. This blanket

denial appears even though at the time, no such claims had been pleaded. He says that this means and shows that the Respondents anticipated further claims and therefore the Claimant must be allowed to put them.

14. I find this a wholly unattractive argument. The fact remains that no such claims were pleaded or included in the Claimants claims at the outset and the fact that the Respondents superfluously pleaded to deny any claims under section 13, 19, 26 and 27 does not mean that the normal tests for allowing or refusing amendment to include such claims at a later date are bypassed.

15. He also suggests that the Respondents have in effect consented to some of the amendments as Mr Brotherton has in correspondence indicated that Employment Judge Bloom gave leave for certain amendments. It is very clear from Judge Bloom's Summary that he gave no leave for any amendments, only leave for a contested Application to be considered before this Preliminary Hearing. Mr Brotherton also accepts that he misused the word 'leave' in that sense and he understood that the Application was to be heard at this Preliminary Hearing and that it was to be contested. That indeed is the case.

16. One aspect which I can easily clear up is that the Application to Amend includes an Application for compensation arising out of the failure to provide the Claimant with a Section 1 Statement of Terms and Conditions. This is put as an Application to Amend to include such a claim and that is resisted by the Respondent. I can deal with that very simply and explain that it is not necessary for a Claimant to plead a failure to give a Section 1 Statement of Terms and Conditions. Section 38 of the Employment Act 2002 makes it very clear that in circumstances where certain claims are pursued in the Tribunal and a Claimant is successful, a Tribunal MUST make an award in circumstances where the Tribunal has made a finding of fact that the Claimant did not at the material time have a Section 1 Statement of Terms and Conditions.

17. That is a claim which needs no application to amend.

The Law

18. Turning to the Law on Amendment. This is a very well trodden path and there are a number of salient Authorities to which I must have mind to.

19. Probably the leading case on amendment is the case of Selkent Bus Company Limited v Moore [1996] ICR836 and it is in that case which Lord Justice Mummery sets out some useful principles. He says that a Tribunal must consider what the nature of the Amendment is and that effectively means where Applications to Amend range on the one hand from the correction of clerical or typing errors to the addition of factual details to existing allegations and the additional substitution of other labels for facts already pleaded to. On the other hand there are amendments which include

the making of entirely new factual allegations that change the basis of the existing claim.

20. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new course of action. The Tribunal must also have due cognisance to time limits, so in circumstances where an amendment essentially is a new course of action previously unpleaded a Tribunal must decide whether such a new claim is out of time and if it is out of time, whether the Tribunal should exercise its discretion on the just and equitable basis under Section 123 Equality Act 2010 to extend time to validate it.

21. Also, what must be taken into account is the timing and the manner of the Application. An Application should not be refused solely because there has been a long delay in making it, as amendments may be made at any stage of the proceedings. However, delaying making the Application is a factor which will be taken into account and is part of the factors that the Tribunal must balance and weigh as part of the exercise of its discretion upon an Application to Amend. It's relevant to consider why the Application was not made earlier and why it is now being made. For example, the identification of new facts or new information from documents disclosed on discovery.

22. Other cases which I have taken into account are:

- Cocking v Sandhurst (Stationers) Limited [1974] ICR650;
- Abercrombie v Aga Rangemaster Limited [2014] ICR209; and
- Transport and General Workers Union v Safeway Stores Limited EAT0092/07.

23. I am also grateful to Mr Ijezie for bringing to my attention the case of:

- Vaughan v Modality Partnership [2021] ICR535.

That case reminds us that despite looking at the nature of the Application and deciding whether it is a relabelling exercise and applying the various tests that are set out in Selkent, the key test for any Tribunal to apply and it is described in this case as the 'Core Test', is the balance of injustice and hardship in allowing or refusing the Application on the parties.

24. Selkent is a useful guide but it is not a check list to be simply ticked off.

25. I am also grateful to Mr Ijezie for producing the Presidential Guidance and I have due cognisance to that in arriving at my decision as well as all the other legal issues and authorities I have just cited.

Conclusions

26. In my judgment, applying the tests set out in the authorities I have cited above and in particular applying the core test being on the balance of injustice and hardship, I can allow certain of the amendments before me but not all.

27. Dealing with those claims raised totally fresh in the April further and better particulars which were claims not raised in the ET1, nor in the Preliminary Hearing before Judge Bloom, which are wholly new claims arising out of completely new facts not previously mentioned, I disallow them all. They were raised very late in the process, a year after the proceedings were issued. At the issue of the proceedings in the ET1, Mr Ijezie was advising the Claimant therefore the Claimant was no babe in arms and the Claimant was being advised by Solicitors. There was no change in the Solicitors who were advising the Claimant and therefore to produce wholly new claims and wholly new sets of facts a year later is, in my judgment, something that goes beyond what is appropriate and allowable.

28. Balancing that against the prejudice to the Respondent, I cannot allow those claims. The Respondents would have to seek to deal with claims that had been raised some three years after the event and therefore I cannot, in applying the tests in the authorities that I have set out, allow those wholly new claims on wholly new facts, raised so late in the day.

29. I point out that Judge Bloom made it clear what he understood to be the position in the Case Management Summary that he produced. In that Summary, as I have already indicated, there was a paragraph which indicated that if either party felt that the contents of that Summary were in any way inaccurate then they should contact the Tribunal. Neither party did so. Therefore, the contents of Judge Bloom's Summary are accurate.

30. The Respondent would be grievously prejudiced in having to deal with those claims and would be in huge difficulty in doing so. Therefore, in applying that careful balancing exercise, I think the balance of injustice weighs very heavily in the Respondent's favour and it would therefore not be just and equitable to allow such claims to be part of the Claimant's claims.

31. I am bound also to say, that all of those claims arising in the further and better particulars, the type of which I have described, those being new claims, neither in the ET1 nor before Judge Bloom, are all considerably out of time. I have considered whether taking into account all of the issues before me, I should exercise my discretion on the just and equitable principle under Section 123 Equality Act 2010, to extend time to validate them.

32. For the reasons I have set out, I do not exercise that discretion. I do not extend time. Those claims are not validated and they are disallowed.

33. Therefore, all claims for indirect discrimination fall into this category, as does the claim for automatic unfair dismissal under Section 100 Employment Rights Act 1996. They are disallowed.

34. Turning to those other claims, which are claims that are additional claims to claims already raised arising out of facts already referred to in the ET1, I regard those amendments as mere relabelling. In essence I am referring here to claims in direct discrimination under Section 13 and a claim for harassment; but only insofar as the facts relied upon and the acts relied upon as being the discrimination, are:

    a. calling the Claimant to a disciplinary process; and

    b. dismissing the Claimant.

35. I allow those acts to be part of the Claimant's claims and to form a new claims under Section 13 and Section 26. That is a mere relabelling of a claim that was already in existence in the ET1. The Respondents have argued that those claims are already adequately covered by the Section 15 claim. That may be so, but that should not preclude the Claimant from putting forward an argument in direct discrimination, it may be that that argument does not succeed and it may be that the argument in harassment does not succeed, but by applying simply a label being a new section number to facts which are already before the Tribunal in the ET1, t is permissible under the tests that I must apply under the authorities that I have already cited.

36. For that reason, those amendments are allowed.

37. Turning to the remaining claims which essentially are a hybrid falling between the claims that I have disallowed and the relabelling claims that I have allowed. Essentially, this is the claim for victimisation and relates to new facts which are raised in the further and better particulars but which were also mentioned to Judge Bloom at the Hearing in December 2020.

38. In my judgment they are claims which I can allow to go forward. The claim is a claim for victimisation, but it is limited only to the acts or facts raised originally in the ET1 and expanded upon before Judge Bloom. Therefore, none of the new facts which had never been previously put forward which are aired in the further and better particulars.

39. Where there is an explosion of extra facts relied upon in support of claims already existing under Section 15 and Section 21, these are disallowed as they place far too high a burden on the Respondents after so long.

40. It might be helpful if I set out what I see, pursuant to this rather complicated Application for amendment, as being the claims that survive.

List of Issues

41. This is a list of issues of the claims that survive, based on the ET1 and the allowed amendments that I have just made. Anything that is not in this list has been disallowed.

Direct Discrimination ~ Equality Act 2010 s.13

1. The Claimant pursues a claim for unfavourable treatment because of the protected characteristic of disability. The unfavourable treatment was:

1.1 the fact that the Respondents subjected the Claimant to a disciplinary process because she slept on duty which she says was caused by the prescribed medication she was taking for her disability; and

1.2 the Respondent's dismissal of the Claimant because she slept on duty, which she says was caused by the prescribed medication she was taking for her disability.

Discrimination Arising from Disability ~ Equality Act 2010 s.15

2. The Claimant pursues a claim under s.15 EqA 2010 and she claims she was discriminated against because of her disability as a result of something arising from her disability. The something arising she relies upon was her falling asleep on a shift as a result of she says medication she had taken which was prescribed for her knee condition. The unfavourable treatment relied upon is:

2.1 the fact that the Respondent subjected the Claimant to a disciplinary process because she slept on duty which was caused by the prescribed medication she was taking for her disability; and

2.2 that the Respondent dismissing the Claimant because she slept on duty which was caused by the prescribed medication she was taking for her disability.

3. The Respondents argue that they did not know, or could reasonably have been expected to know, that the Claimant was a disabled person and they rely on this as a defence under the s.15 claim. The Respondent will need in due course to identify whether they seek to rely upon the defence of justification and articulate what that is.

Reasonable Adjustments ~ Equality Act 2010 §20 and 21

4. The Claimant pursues a claim under §20 and 21 for a failure to make reasonable adjustments. The Claimant relies on the provision, criterion or practice imposed on her being the requirement to work certain shifts; she says this puts her at a substantial disadvantage, namely having to work such shifts and the Respondents failed to allow her sufficient flexibility in order to

avoid her difficulties performing those shifts due to her knee condition and the effect of medication taken as a result of it.

5. The reasonable adjustment she relies upon which she says the Respondents failed to comply with are as follows:

   5.1 the fact that the Claimant was stopped from swapping shifts with colleagues; and

   5.2 the fact that the Respondents failed to give the Claimant shifts she requested and instead gave her a mixture of early and late shifts.

Harassment ~ Equality Act 2010 s.26

6. The Claimant alleges that she suffered harassment related to her disability. The acts relied upon are:

   6.1 the Respondent subjecting the Claimant to a disciplinary process because she slept on duty which she says was caused by her prescribed medication she was taking for her disability; and

   6.2 the Respondent dismissing the Claimant because she slept on duty which she says was caused by the prescribed medication she was taking for her disability.

Victimisation ~ Equality Act 2010 s.27

7. The Claimant also brings a claim of victimisation. The detriments she relies upon are:

   7.1 the Respondent subjecting the Claimant to a disciplinary process because she slept on duty which she says was caused by the prescribed medication she was taking for her disability; and

   7.2 the Respondent dismissing the Claimant because she slept on duty which she says was caused by the prescribed medication she was taking for her disability.

8. The protected act the Claimant relies upon in furtherance of that claim under s.27 is a complaint she says she raised to the Respondents about the failure to make reasonable adjustments. She says this complaint was made to a number of people, Ray Somerfield, Janet Brown, Jill Rankin and someone called Felicity in Human Resources. She claims to have made these complaints in writing and orally.

Employment Act 2002 s.38

9. The Claimant claims that in the event that the Claimant is successful in these proceedings, an award should be made under s.38 Employment Act 2002 because at no stage had the Respondent provided the Claimant with

a Section 1 Statement of Terms and Conditions compliant with s.1 Employment Rights Act 1996.

10. The Claimant pursues a claim for wrongful dismissal for notice pay.

11. The matter will be set down for a 2 hour Preliminary Hearing by telephone on 7 April 2022 at Bury St Edmunds Employment Tribunal at 10 am to determine case management issues including the listing of a Full Merits hearing and the giving of other relevant directions.

28 February 2022

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Employment Judge K J Palmer

Sent to the parties on: 13th March 2022

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For the Tribunal Office