



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Ms D Monteiro

ASDA Stores Limited

Heard at: Watford (by telephone)

On: 27 January 2023

Before: Employment Judge Cowen

Appearances

For the Claimant: Ms Monteiro (in person)

For the Respondent: Mr Mortin (counsel)

JUDGMENT

- 1 The Claimant's claims for age discrimination are dismissed upon withdrawal.
- 2 The Claimant's application for amendment is successful to the extent set out at paragraph 21 of the reasons below.

REASONS

Background

1. This case has a long procedural history which can be summarised as follows:-
 - a. A claim was presented on 11 October 2021 and indicated a claim for age discrimination. Some details were provided but not specifically

asserted to be related to age.

- b. The Respondent entered their ET3 response on 14 December 2021, including a request for further information. A similar request was made directly between the parties. The Claimant asked for a longer period in which to reply and a time was agreed.
- c. The Claimant's further information was dated 8 March 2022 ('F1') and specifies types of claim and specific incidents.
- d. On 29 March the Respondent asked the Claimant for further details of the age claim and to confirm whether there was a disability discrimination claim
- e. On 31 March 2022, EJ Laidler directed that the Claimant should provide the Tribunal and the Respondent with further information and details of her disability.
- f. On 6 May 2022, the Claimant filed her "Amended Particulars of Claim" ("F12").
- g. On 8 August 2022, the Claimant filed another document providing further information ("F13"). This sets out 58 different acts, most of which are alleged to be multiple potential claims.
- h. On 16 August 2022, EJ Maxwell directed that the Claimant to set out the particulars of any disability discrimination claim. This was clarified on 16 August 2022.
- i. On 25 September 2022 the Claimant presented her second ET1 to the Tribunal (case number 3311804/2022) ("Second Claim").
- j. On 3 October 2022, a Preliminary Hearing before EJ Bedeau took place:
 - i. The Claimant confirmed she relied on F13
 - ii. The First and Second Claims were consolidated
 - iii. Case management orders were provided
- k. 26. On 18 October 2022, the Claimant filed further particulars of her claim ("F14") in response to EJ Bedeau's order.
- l. On 24 October 2022, the Claimant made an application to amend ("F15")
- m. On 11 November 2022, the Respondent filed its ET3 to the second claim.

- n. On 13 November 2022, EJ Bedeau directed that the Claimant's application to amend would be considered at the Preliminary Hearing.
 - o. On 14 November 2022, the Respondent provided a written response to the application to amend.
 - p. On 7 December 2022, the Respondent conceded disability in relation to back pain (but not in relation to depression/anxiety).
 - q. On 16 December 2022, an Open Preliminary Hearing took place before EJ Maxwell. The Claimant did not attend (she was not aware of the time of the hearing). An unless order was made for the Claimant to explain her absence and the hearing was relisted to be heard on 27 January 2023.
 - r. On 16 January 2022, the Claimant wrote to the Tribunal to explain her absence, satisfying the unless order.
 - s. On 26 January 2022, the Tribunal converted 27 January Preliminary Hearing to a telephone hearing.
 - t. On 26 January 2022, the Claimant filed a Preliminary Hearing Agenda form in which she confirmed that she relied on the FI4 and FI5. The Claimant also stated a wish to withdraw her claim for age discrimination.
2. The purpose of the hearing today was;
- a. To clarify the claims and rule on the amendment application
 - b. To draw up a List of Issues
 - c. To provide case management orders to the final hearing (listed in November 2024).
3. The Claimant was able to connect to the call, as was Mr Mortin (counsel) who represented the Respondent. I was provided with a bundle of documents which the Claimant also had with her. I was also provided with some additional documents which the Claimant had received by email yesterday, but was not able to access during our call due to problems with her laptop. The Claimant was also not able to access the written submissions of the Respondent and the table created by Mr Mortin for the assistance of the Tribunal in understanding the matters which were subject of the application and where they had first arisen. I had those documents and where they were referred to, I ensured that the Claimant was referred to the relevant pages in the bundle, as we went along.
4. Both the Claimant and Mr Mortin made submissions with regards to the application to amend the first claim to include the matters set out in the Claimant's documents of 18 October (FI4) and 24 October (FI5).

The Law

5. In applications for amendment the Tribunal must consider the principles set out in *Selkent Bus Co v Moore* [1996] ICR 836 which guides the Tribunal to consider the balance of injustice and hardship that would be caused by granting or refusing an amendment. In particular the Tribunal may be helped by considering;
 - a. The nature of the amendment – whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action,
 - b. The Applicability of time limits- the tribunal should consider whether the claim/cause of action is out of time, if so, whether the time limit should be extended,
 - c. Timing and manner of the application – amendments can be made at any time in the proceedings. However delay in making the application is a discretionary factor. The Tribunal should consider why the application is being made now, and not at an earlier point.
6. The Tribunal also considered [*Vaughan v Modality Partnership 2021 ICR 535*](#), [*EAT*](#), where it highlighted that the parties must make submissions on the specific practical consequences of allowing or refusing the amendment.
7. This was also the focus of *Abercrombie and Ors v Aga Rangemaster Ltd* [2014] ICR 209, which urged the courts to focus on the “extent to which the new pleading is likely to involve substantially different areas of inquiry than the old; the greater the difference, the less likely that it will be permitted”.
8. The Tribunal also noted *TGWU v Safeway Stores Ltd* (UKEAT/0092/07(unreported)) which states that the adherence to time limits is an important factor in considering whether to allow an amendment.
9. Where the new claims arise out of facts which were asserted in the original ET1, there is no issue over time limit. It is where the facts asserted in an amended claim have not been raised previously, that the Tribunal should look at the time limit. The Tribunal has held in *Ali v Office of National Statistics* [2004] EWCA Civ 1363 that where a different type of discrimination is to be added, if it is an out of time claim, the extension of time under the just and equitable principles, must be considered.
10. The Tribunal was also reminded of the principles in *Ladbroke's Racing v Traynor* UKEATS/0067/06, which should be considered;
 - a. Why the application was not made earlier
 - b. The delay and impact on costs if the application is granted
 - c. Any prejudice in the evidence caused to the other party.

Decision

11. The Claimant has attempted on a number of occasions to provide further information of the claims she outlined in her ET1 on 15 June 2022. When she did so on 8 August (FI3), EJ Bedeau pointed out that these were such an expansion of her claim and that some post-date the claim form, that she would need to make an application to amend.
12. The Claimant therefore produced two separate documents. The first was filed on 18 October 2022 (FI4) which she asserted was further information of the existing claim. The second was a letter on 24 October 2022, (FI5) which set out a number of new claims, which were said to be an application to amend. It is these two documents which need to be considered in this application.
13. The Claimant says that all of the points made arise from the facts which she set out in her ET1 and that she believes that all of her treatment arises from the Respondent's attitude towards her since she was absent due to an accident whilst on holiday and the consequential spinal surgery. She also said that she was merely responding to the instruction given by EJ Bedeau in making an application. The Claimant acknowledges that she has had advice from ACAS and the CAB, but is not legally represented. The Claimant made no specific submissions in relation to the balance of prejudice of her amendment application. Nor did she provide any specific reasons why she had not included these points at the outset of her claim.
14. The Respondent urged me to consider that the continuing lack of particularisation should prevent the Claimant from making an amendment. I do not believe that this should be a bar to bringing a valid claim. I note that the Claimant remains an unrepresented litigant and that she is trying to comply with the repeated orders of the Tribunal to provide details of her claim.
15. The Claimant has attempted to set out the action which she says amounts to discrimination and has attempted to indicate the type of discrimination. This is a difficult task for a non-lawyer (and even for some lawyers) and therefore where it is clear that there is some type of discrimination asserted, I am satisfied that a further Preliminary Hearing may be able to clarify any outstanding issues with regards to any claims which are to be progressed to the final hearing.
16. The claims all arise from the Claimant's attempts to return to work after having sustained an injury and undergoing surgery on her spine. She claims to have continued to suffer back pain after her return to work and the Respondent accepts that she suffered a disability as a result of this.
17. The Claimant's ET1 identified in bullet points a number of ways in which she claims she was badly treated after her return to work. Her further information has provided more detail of these occasions and added further examples.
18. I must consider the balance to be struck between allowing the Claimant to bring further claims and the Respondent having to answer these claims, which

on the face of them are now out of time. There is a balance to be struck between allowing the Claimant to bring a claim which allows her to show the behaviour of the Respondent which she says was discriminatory, and ensuring that the issues in the case do not expand to the point where they are too expansive for the Tribunal to be able to address each of them in detail. This case is a prime example of where the Claimant may be better served by focusing on proving her core complaints and best examples, whilst acknowledging that there were other instances of a similar nature.

19. The amendments are said to be contained in document FI5. The Respondent has made submissions in relation to all the points raised by the Claimant in FI4 as well as reference to FI5.
20. I therefore consider each of the points contained in the FI4 and FI5 documents (some are overlapping). I note that in the introductory paragraph, the Claimant provides definitions of each of the types of discrimination on which she relies. I also note that in the Claimant's most recent correspondence with the Tribunal, she asked to withdraw her claim for age discrimination, I will make the relevant order to remove those claims. Given that the Claimant has therefore abandoned age as a protected characteristic, I consider each of these points in relation to the protected characteristic of disability only.
21. Using the numbered reference in the Respondent's table provided at the hearing, I consider as follows:-
 1. The Respondent accepts that the points raised are not amendment in relation to direct (s.13) and harassment (s.26). In relation to reasonable adjustments (s.20/21) and victimisation (s.27) the claimant relies on the same facts in relation to her treatment. This amendment is a purely technical point. The Claimant is allowed to proceed with this claim on all these points. No further written pleading is required.
 2. This particularises a claim referred to in the ET1. It places a new label on the claim, but is one which the Respondent can respond to. It will therefore be allowed to proceed as a claim for direct discrimination and victimisation on grounds of disability and complaint to HR manager.
 3. No amendment is required in relation to failure to provide PPE. The allegation in relation to PPE being hidden from the Claimant is an expansion of an existing allegation and should be allowed to

proceed.

4. No amendment is required as this is contained in the ET1.
5. This claim dates back to 16 June 2019 and is therefore out of time. The Claimant has not provided sufficient explanation of why it could not have been brought forward before now. The amendment will not be allowed.
6. (no amendment raised)
7. This claim is contained in the ET1. The further particularisation of it amounts to further examples of the same treatment which are labelled now as s.20/21 failure to make reasonable adjustments. The Respondent is not placed at any significant prejudice by allowing this claim to proceed. There is no explanation from the Claimant as to why this should be a s.27 claim and why it was not raised previously – to that extent it is not allowed to proceed.
8. (no amendment application)
9. No amendment is required as this amounts to further information.
10. (no amendment application)
11. No explanation has been provided by the Claimant as to why she did not name all the relevant parties within her ET1. The Tribunal considers that limiting her claims to those identified in the ET1 is sufficient for the Claimant to provide examples of the behaviour she alleges. No amendment is permitted to include the addition allegations in relation to Lee, Imran or Sanshil.

The allegations of pushing by Hasina are examples of the behaviour outlined in the ET1. The Respondent is able to investigate these identified incidents (dates have been provided). The Respondent requested further information and has been provided with it. These allegations should proceed.
12. The Claimant makes an allegation against Hasina, which is previously asserted against Praxtisa. The Claimant has offered no explanation as to why this allegation should now be made against Hasina. No amendment is allowed at this time.
13. This allegation lacks specificity. The Claimant has been allowed a number of opportunities to provide details. As she cannot provide them at this point, this allegation cannot proceed.

14. This allegation asserts that Lee Randall acted intentionally to put the phone down. There is no explanation from the Claimant as to why it was not raised earlier. I take into account the fact that what is a widely pleaded case would require further investigation and further Respondent witnesses to address this allegation. The prejudice to the Claimant of not allowing this allegation is not significant, given that she has a number of other allegations/examples of discriminatory behaviour. This amendment is not allowed to proceed.
15. The allegation against Lakis is specific as to date and identifies the relevant documentary evidence. The prejudice to the Respondent of investigating is therefore limited. The Claimant has raised this from her first further information and therefore together with point 16. And 18. These allegations ought to be allowed to proceed.
16. See 15. Above
17. This allegation relates to a further witness and does not directly relate to the allegation in the ET1 that the Claimant was sent home. This is therefore a new allegation in relation to lack of rostering. The Claimant did not raise this in the ET1 and should not now be allowed to expand the claim to encompass this.
18. See 15 above. This arises directly from the allegation in the ET1 that the Claimant was harassed upon her return to work and is a further example, as the Claimant was ordered to provide. This allegation should proceed.
19. See 17 above.
20. No amendment required
21. No amendment required
22. Specific allegation against Pratixa which the Claimant has not raised until the FI4, when it must have been known to the Claimant at the time of the FI1, cannot now be added to the claim. The issue of being forced to work in the kiosk as a s.20/21 claim is within the issues raised in the ET1 to the extent that it is being asked to work in a draught. If the Claimant asserts that the PCP is something else, then this should not be allowed to bring in a further PCP.
23. Even after the Claimant's various elaborations this claim is not clearly identified in terms of the type of claim being pursued. It is not appropriate to allow any further explanation to be provided at this

time. This claim is not allowed.

24. This is a new claim, which is not directly raised in the ET1. It is not clear why this was not raised at the time of the ET1 when it was known. As no reasonable explanation has been provided by the Claimant, this claim will not be allowed to proceed.
25. This claim also fails for the same reasons as 24. above.
26. It is not clear what the allegation of discrimination is in this allegation. The Claimant has had sufficient time and opportunity to identify this, amongst her other claims. As she has failed to do so, this claim will not be allowed to proceed.
27. This allegation has not been raised in the ET1. The type of discrimination is not identified. It would involve the Respondent carrying out further investigation with a totally separate witness. It will add to the number of incidents which require evidence to be heard and thus lengthen the hearing. Considering the balance of prejudice to the parties, there is a greater burden on the Respondent and thus this allegation will not be allowed to proceed.
28. This allegation goes beyond that which is in the ET1. It is not appropriate to extend the number of allegations without clarity of the type of discrimination being alleged. The Claimant has also not explained why this was not part of the original claim. This will not be allowed to proceed.
29. For the reasons outlined at 11 above this amendment is not allowed.
30. As 29. Above
31. No amendment is required for this allegation.
32. This allegation is not mentioned in the ET1 or earlier amendment. The Claimant must have been aware of it at the time of her ET1 and there is no explanation of why it was not included. This would involve a separate investigation and further evidence. It is therefore not appropriate to allow it to be added at this time.
33. This is a matter which was mentioned in a general manner in the ET1. It will involve the same witness as a previous issue. As it is a further example of shouting which is included elsewhere, this issue is allowed to proceed.
34. This claim occurred after the presentation of the ET1. It is not set out what type of claim is being alleged or in what way this is

linked to disability. This claim is not clear and it is not appropriate to give further time or opportunity to clarify at this stage. It will therefore not be allowed to proceed.

35. This is a claim which forms part of the original basis of the Claimant's claim. The Claimant wishes to add it as a ss.20 failure to make a reasonable adjustment claim. That is appropriate and can be added. The allegation that this is also a victimisation claim is not clear and it is not now acceptable for the Claimant to provide yet more information. The claim in relation to victimisation, will not be allowed to proceed.
36. This claim was introduced as an age discrimination. On the basis that the Claimant is not pursuing age, it is not clear on what basis the Claimant asserts this allegation. The allegation is also inconsistent with other parts of the pleaded case. It is therefore not appropriate to allow this claim to proceed.
37. These allegations are new and separate to others in the ET1. They would require investigation of old matters. They are significantly out of time and there is no explanation of why they were not raised in the original ET1. These cannot be added at this point.
38. It is not clear that this is alleged to be a discriminatory act, or what type of discrimination it would amount to. As it is also significantly out of time and there is no explanation of why it has not been set out before now, it is not allowed to proceed.
39. These matters are out of time. There is no explanation as to why they have not been mentioned before. They could have been raised in the ET1. They will involve memories of witnesses rather than documents. It is not clear how this could be a s.20 claim. Nor is it clear that this is a s.27 claim. It is an entirely new factual scenario. The Claimant cannot raise such a different issue at this point.
40. This ought to have been raised in the ET1 and it was not. It would require at least 1 extra witness, the Respondent would have to investigate this unrelated issue. The balance of prejudice is in favour of the Respondent. This amendment is not allowed.
41. For the same reasons (but in relation to another extra witness) as set out in 40 above, this amendment is not allowed.
42. This may form background information to the allegation in relation to the grievance process, but does not require to be an allegation of itself. No amendment is allowed.

43. It is not clear what the detriment is that the Claimant asserts by this allegation. It has not been raised before and is now out of time by a long way. It may form part of her background evidence about the grievance process, but does not require to be an allegation of itself. No amendment is allowed.
44. See 43 above.
45. See 11 above. The allegation in relation to Pratixa is not allowed.
46. This is also part of the Claimant's allegation in relation to the grievance process, but does not need to be an allegation of itself. It is not raised in the ET1 despite having occurred quite soon before it was issued. It is not appropriate to add this now. The amendment is not allowed.
47. This is not referred to in the ET1. It is a totally new claim. There is no explanation as to why it was not contained in the first ET1. It would require a new witness to be called to the final hearing and a separate investigation by the Respondent. The Claimant has a number of other claims and therefore the prejudice to her of not allowing this claim does not outweigh the prejudice of adding further issues. This amendment is not allowed.
48. This claim that Hasina cancelled the Claimant's holiday is an extension of the previous allegation that the hours were rejected. The Claimant has offered no explanation as to why this was not pleaded originally if it is connected to the other holiday claim. If it is not so connected then it is a totally new claim. Either way, it cannot be allowed to proceed at this stage.
49. This allegation is all part of the issue about the grievance process. It can form part of the Claimant's evidence, but does not require to be an issue of itself. No amendment is allowed.
50. This is a totally new issue. It would require an additional witness. There is no explanation as to why it needs to be a separate claim. It is therefore not allowed as an amendment.
51. See answer to 49 above.
52. See answer to 50 above.
53. It is not clear how this amounts to a claim of s.26 or s.27 discrimination. It is also not clear why it was not brought forward as an allegation until May 2022. It may form part of the Claimant's evidence about process, but does not require to be a separate

allegation. No amendment is allowed.

54. This claim appears to be raised as an issue which has occurred after the issue of the claim. It is not appropriate to add it to the issues at this stage.

55. The holding of the appeal in the Claimant's absence is part of her complaint of the process. Once again, this does not have to be separate claim and the amendment is not allowed.

56. See answer to 55 above

57. See answer to 55 above.

22. The parties are now asked to co-operate to provide a list of issues (as set out in the Case Management Order attached to this Judgment), which will act as a final list of the issues to be considered at the final hearing of the claim.

Employment Judge Cowen

Date: 10 May 2023

Sent to the parties on:

11 May 2023

For the Tribunal Office: