

THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REF: 16429/19

CLAIMANT: Catherine Cassells

RESPONDENT: Department of Finance

PRELIMINARY HEARING (AMENDMENT)

JUDGMENT

The judgment of the tribunal is that the claimant is permitted to amend her claim as set out in this judgment.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Ò Murray

APPEARANCES:

The claimant was represented by Mr O Friel, Barrister-at-Law, instructed by Worthingtons Solicitors.

The respondent was represented by Ms L Gillen, Barrister-at-Law, instructed by the Departmental Solicitor's Office.

APPLICATION

1. This is the claimant's application to amend her claim form to include:
 - (i) A claim for discrimination on grounds of being a part-time worker by way of a relabelling of the facts already contained within her claim form; and.
 - (ii) The inclusion of the following text in relation to an allegation that she was denied an EOII post in the Craigavon office and that this amounted to an act of discrimination on grounds of disability and on grounds of her being a part-time worker:

"On 30 April 2019, the Claimant contacted Ms Valerie Campbell (HR) by e-mail to confirm that she had returned to working

30 hours per week on a permanent basis. Within this e-mail the Claimant informed Ms Campbell that she was aware that the EOII in her current department (Revenues – Craigavon Branch) was successful in the EOI promotion board and as such an EOII vacancy had arisen within her own department. The Claimant asked Ms Campbell if this was a position that she would be considered for given that she was awaiting promotion to an EOII post.

Ms Campbell replied to the Claimant on 30 April 2019 by e-mail, that the EOII vacancy within the Revenues (Craigavon Branch) would be filled by following normal procedures, this would include considering the ‘restricted mobility’ list which the Claimant was on. The claimant was informed that if the post was declared as full-time, this would not accommodate her working pattern.

On 07 May 2019, the Claimant received a staff-wide e-mail advising that Ms Denise McGivern (EOII in the Revenues – Castlereagh Branch) would be transferred into the post. The Claimant was not provided with an explanation as to why she was not considered for this post, either on a full-time (37 hours) or part-time (30 hours) basis.

The Claimant is aware that another EOII, employed with the Revenues – Craigavon Branch, who was formally employed on a part-time basis (30 hours a week), had since returned to work on a full-time basis (37 hours a week). The Claimant therefore does not accept that she could not fill the new EOII vacancy on a part-time basis (30 hours per week) given that a former part-time member of staff had returned to full-time hours.

Further, as set out earlier within the ET1 Claim Form, the Claimant states within her e-mail to Ms Campbell on 20 August 2018, “I may be able to consider a full-time post depending on the demands of each job”. The Claimant therefore submits that she should have been offered the EOII post within Revenues – Craigavon, regardless of whether same was a full-time (37 hours) post or a part-time (30 hours) post.

The claimant submits that the failure to offer her the EOII vacancy within her own department despite being eligible for same to be a further act of discrimination on the grounds of her disability and on the grounds of her being a part-time worker.”

THE EVIDENCE

2. The tribunal was referred to several documents including the claim form, response form, the CMD record of 9 December 2019 together with a number

of emails and a medical report from the claimant's GP. The claimant also gave sworn testimony.

THE LAW

3. The decision on whether or not to allow an amendment is an exercise of discretion on the part of the tribunal. The tribunal must take account of all the circumstances and must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
4. Harvey at Division P1 paragraphs 311 onwards deal with amendment of claims.
5. **Harvey** states at Paragraph 311.3 of Part T:-

“A distinction may be drawn between –

- (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.*
- (3) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.”*

6. In the case of **Selkent Bus Company v Moore 1996 ICR 836** it was stated as follows:-

“Whenever the discretion to grant amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

...

What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively but the following are certainly relevant;

- (a) The nature of the amendment; applications to amend are of many different kinds, ranging, on the one hand from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual*

allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

- (b) *The applicability of statutory 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.*
- (c) *The timing and manner of an 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 can be made at any time before, at, or 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 in 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 from adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.”*

7. In relation to the issue of whether an amendment alters an existing claim or makes a new claim the following paragraph in Harvey (312.04) relates to the comments of Underhill LJ in the case of **Abercrombie v Aga Rangemaster Ltd**:

“Underhill LJ summarised the approach adopted by the EAT and Court of Appeal when considering applications to amend ‘which arguably raise new causes of action’ (para 48). This is:

“... to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted.”

8. At paragraph 312.08 of Harvey the Court of Appeal decision in **Housing Corporation v Bryant [1999] ICR 123 CA** is referred to as follows:

“In order to determine 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 Corpn v Bryant [1999] ICR 123, CA.**)"*

9. Harvey at paragraph 312.08 refers to the case of **Foxtons Limited v Ruweil UKEAT/0056/08** where Elias J stated as follows:

"It is not enough even to make certain observations in the claim form which might indicate that certain forms of discrimination have taken place; in order for the exercise to be truly a relabelling one, the claim must demonstrate the causal link between the unlawful act and the alleged reason for it. In other words, in this case it would have to identify not merely that there had been some discrimination but that the dismissal was by reason of sex discrimination."

10. At paragraph 312.09 of **Harvey** it states:

*"However, although there may be an absence of a link between the case as pleaded in the original claim and the proposed amendment, this will not be conclusive against the amendment being allowed. In **Evershed v New Star Asset Management UKEAT/0249/09 (31 July 2009, unreported)**, Underhill J pointed out that it is no more than a factor, the weight to be given to it being a matter of judgment in each case (para 24). When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence."*

11. In **British Coal v Keeble [1997] IRLR 336** the EAT suggested that a tribunal would be assisted by the factors mentioned in Section 33 of the Limitation Act 1980, (the Northern Ireland equivalent of which is the Limitation (NI) Order (1989) which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also take regard to all the circumstances of the case and in particular to:-

- "(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 cooperated with any request for information;*
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and*
- (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

FINDINGS OF FACT AND CONCLUSIONS

12. The claimant was successful in a promotion board to EOII level in May 2018. In August 2018 the claimant was placed on the restricted mobility list for three reasons:
 - (i) She had restricted geographically her mobility;
 - (ii) She required reasonable adjustments due to a disability; and,
 - (iii) She had a part-time working pattern.
13. In brief the claimant's claim is that she was denied specific promotion opportunities because she was a part-time worker who worked part-time because of her disability. On the claimant's case, the two claims are intertwined. The claim form was presented to the tribunal on 8 July 2019.

The Relabelling Amendment

14. The tribunal accepts that proposed amendment of the claim set out at paragraph 1(i) above, namely, to include a claim of part-time worker discrimination, amounts to a relabelling of the claim already made. Whilst the claimant did not tick the box on the form for part-time worker discrimination, the narrative of her claim form mentions repeatedly her status as a part-time worker and the consequences of that, namely, that she was denied promotion posts because of her part-time worker status. In addition, it is common case that being placed on the restricted mobility list was, in part, because of her part-time pattern and her requirement for reasonable adjustments due to a medical condition.
15. Throughout the narrative in the claim form the complaint is clearly a complaint of adverse treatment due to both her part-time working pattern and the reasonable adjustments which the claimant claims are required for her medical condition. The two elements are therefore clearly intertwined.
16. The respondent alleges that some of the adverse acts alleged are out of time stating that time runs from the date of each alleged adverse act. The claimant's case, in contrast, is that time runs from the date of the last act (which is alleged to be 12 April 2019) and that the adverse acts all form a continuing act. The tribunal finds that it is not appropriate to determine that particular time limit point at this stage as that will require the full evidence to be heard and submissions on the legal position put forward. This is not a claim that is clearly out of time, as the claim form was presented within three months of the last act relied upon.
17. The tribunal finds that the claimant has shown the causative link between the claim form and the detail contained within that form and the relabelling which is the subject of her application. Time limit issues do not arise in relation to the relabelling exercise, and the extent of the evidence is unlikely to be

affected by allowing the amendment.

The allegation of denial of promotion

18. The second aspect of the application is in relation to the specific allegation that the claimant was denied the post in her current office. The scope of that amendment is set out at paragraph 1(ii) above.
19. Mr Friel made two alternative submissions in this regard:
 - (i) That it amounted to a category three amendment, that there were time limit issues, and that time should be extended on just and equitable grounds; and
 - (ii) That if his first application to include a part-time worker claim by way of relabelling were successful then this amendment would amount to a particularisation of a claim already made and would not necessarily involve time limits.
20. The tribunal is satisfied that this is a new allegation of discrimination on grounds of disability and/or part-time working. The issue is whether or not it is a particularisation of a claim already made or whether it amounts to a new factual allegation.
21. As Mr Justice Underhill stated in the case of **Abercrombie**, such issues of classification are not necessarily the primary focus of the tribunal when deciding whether to grant an amendment. The key assessment is the extent to which the new pleading is likely to involve: "*substantially different areas of inquiry than the old*".
22. Ms Gillen submitted that to allow the amendment to include that specific allegation would involve the Department in extensive investigations, with possibly a number of witnesses, and an extension to the hearing and evidence. Aside from making this general point, no information had been sought in order to establish the scope of any additional evidence or the number of new witnesses.
23. On the face of it, the allegation relates to one decision which was the decision to deny the request by the claimant in her email of April 2019 to allow her to be placed in the EOII vacancy that had become available in her office. In the absence of any information from the respondent it appears to this tribunal that that would be a discrete enquiry possibly involving one further witness. The allegation can reasonably be viewed as part and parcel of the case as a whole, as the case as a whole involves the way in which the status of the claimant as a part-time worker with a medical condition and her placement on the restricted mobility list, had an adverse effect on the ability to offer her posts.
24. The emails to which the tribunal was referred make clear that it is accepted that there was a vacancy in her office and that it was filled by someone else

despite the claimant having written to ask for her to be placed in it. The reasons for that decision will clearly be under scrutiny but it is not the case that there is a dispute on the factual underpinning of the allegation. For this reason the tribunal's assessment is that the extent of further evidence will be limited.

25. The tribunal's assessment of the proposed amendment is therefore that it would likely not involve extensive evidence and would not place the respondent at undue hardship. In contrast the hardship to the claimant would be that she would be denied the opportunity to make a key point in her claim namely, that when a vacancy that would have been eminently suitable for her arose she was denied it.

Time limit issues

26. Insofar as there are any time limit issues raised by the second aspect of the amendment set out above at paragraph 1(ii), the tribunal has considered carefully the medical evidence and the claimant's evidence in relation to her medical condition. The claimant suffers from fibromyalgia. In the brief medical report the claimant's GP confirms that, as part of this condition, the claimant suffers from severe fatigue. The claimant's evidence augmented that evidence by explaining that the fatigue has an adverse effect on her ability to concentrate and thus on her memory. The tribunal accepts that the claimant gave an honest account of the effect of her condition on her. The tribunal accepts therefore that she simply forgot to make specific reference to the issue of promotion in her current office in the claim form.
27. The tribunal is satisfied that its discretion should, if necessary, be exercised in favour of the claimant to extend time to allow the amendment to her claim form on just and equitable grounds. The principal reasons for so finding are set out below:
- (i) Whilst the claimant obtained general advice from the Equality Commission she had no specific advice from them on completing her claim form.
 - (ii) The claimant made efforts to have her trade union help her and, for various reasons given by the claimant which the tribunal accepts, the trade union did not give specific help to the claimant in relation to completion of her claim form.
 - (iii) The claimant felt under pressure in relation to submitting her claim to the tribunal in order not to fall foul of any time limits. The thrust of her claim is clear from the claim form that she did complete, namely that she believes that she was treated adversely because of her part-time status and her disability because that required reasonable adjustments to her work pattern.
 - (iv) The claimant during the CMD on 9 December made clear that she believed her claim included a claim of part-time worker discrimination.

On that date the claimant had expected the trade union representative to appear at the hearing on her behalf but that trade union representative had failed to turn up. The tribunal therefore accepts that it did not strike the claimant to mention the specific allegation about the promotion opportunity in her office at that hearing as it was clear during the hearing that she was stressed.

- (v) The claimant was clear in her evidence that the reason she ultimately went to seek advice from a solicitor was that at the Case Management Discussion which took place on 9 December 2019 it became apparent to her that, in her words, she was out of her depth as regards the legal technicalities involved in her claims.
 - (vi) The solicitors then moved promptly to set out the scope of the amendment sought in their letter of 18 December and there is no criticism therefore of the claimant's solicitors.
28. The tribunal notes at this point that the issue of whether or not the claimant was disabled at the relevant time for the purposes of DDA is in contention between the parties. In deciding this amendment application the tribunal expresses no view on whether or not the claimant will succeed in establishing that she was disabled at the relevant time within the meaning of DDA. What is beyond dispute is that the claimant does suffer from a medical condition as set out in the brief medical evidence presented in this hearing.

Summary

- 29. The claimant is permitted to relabel her claim as a claim of less favourable treatment due to her status as a part-time worker as set out above.
- 30. The claim is amended to include the text set out at paragraph 1(ii) above by way of a new claim and/or allegation or, in the alternative, by way of particularisation of the part-time worker claim.
- 31. Insofar as it is necessary to consider the timing of the amendment application, the tribunal exercises its discretion in favour of the claimant to allow the amendment sought.

Employment Judge:

Date and place of hearing: 4 February 2020, Belfast.

This judgment was entered in the register and issued to the parties on: