



EMPLOYMENT TRIBUNALS

Claimant: Mr M Khalid

Respondent: Shakespeare Martineau LLP

Heard at: Midlands West

On: 1 April 2021

Before: Employment Judge Woffenden

Representation

Claimant: In Person

Respondent: Ms O Dobbie of Counsel

RESERVED JUDGMENT

The claimant's application to amend his claim dated 15 February 2021 to include particulars numbered 3 4 5 and 12 is refused.

REASONS

1 Employment Judge Cookson conducted a preliminary hearing in this case on 21 January 2021. The claimant's claims included complaints of discrimination because of race and religion /belief. Employment Judge Cookson ordered the claimant to provide further particulars of the discrimination complaints he was making including the types of prohibited conduct alleged. She listed a preliminary hearing for 1 April 2021 (among other matters) to determine any amendment application which was subsequently made by the claimant. She also helpfully drew the claimant's attention to guidance on matters the tribunal considers if an amendment application is made contained in Employment Tribunals (England and Wales) Presidential Guidance -General Case Management (2018) and told him he should ensure he was prepared to address this tribunal on those matters.

2 The claimant made an application to amend his claim on 15 February 2021 (which was accompanied by 15 numbered paragraphs providing further particulars of his claim as ordered by Employment Judge Cookson). On 16 March 2021 the respondent served an amended response. Employment Judge Cookson

had ordered that the respondent must state whether it contended that any of the allegations detailed in the claimant's further information were not in the claim form and in respect of any that were not, whether it objected to the claimant being permitted to amend the claim form so that those allegations could be pursued; and if it objected what those objections were. The amended response stated the respondent opposed the claimant's application to amend in relation to the particulars numbered 3, 4, 5 and 12.

3 I therefore heard the parties' oral submissions in relation to the amendment application limited to those particulars.

The Claimant's Submissions

4 In his amendment application the claimant had said that he asked for clemency because he was an individual with limited resources and time and expertise in legal matters and had to balance his new job while pursuing his claim. He said the matters in his particulars may be perceived as new but in fact they were an expansion of the particulars in his claim form and the new matters were important for the tribunal to understand the issues he had to face. He told me the EC ACAS conciliation process had not been smooth because of the absence of the ACAS officer on holiday. The respondent's grievance process had been lengthy and delayed. By 11 October 2020 he was a very broken man. He had made his judgment about what to include in the claim form but thought there would be a further opportunity to provide evidence and it was only when he appeared before Employment Judge Cookson that he understood what was happening and how to reply. ACAS had told him he had to have some evidence to back up his claim and that others had been treated similarly would not go in his favour. He wanted to add these new matters because he had documentary evidence to support them. As far as particular numbered 3 was concerned he confirmed this was a claim of direct race and religion/belief discrimination or harassment related to race or religion/belief. He had documentary proof about particular numbered 4 which he confirmed was a claim of direct race and religion/belief discrimination. The additional particulars complemented the claims he had already made. The guidance he had received helped him to put things down and strengthen his case. He said particular numbered 5 (being given 'impossible tasks') was very 'key' to his allegations (the details of the impossible tasks being given in particular numbered 1. He confirmed this was a claim of direct race and religion/belief discrimination or harassment related to race or religion/belief. As far as particular numbered 12 was concerned (which he confirmed was a claim of direct race and religion/belief discrimination or harassment related to race or religion/belief but not victimisation) he said he had found this particularly humiliating but he could not explain why (if that was so) he had not put it in his claim form in this first place, saying he had been emotional, it was included in a lengthy grievance to the respondent, he had not understood the procedure and had not got the right advice and further that the respondent had evidence about these claims and needed to explain why the claimant had not been protected from this.

The Respondent's Submissions

5 In her submissions Ms Dobbie reminded me first of the overriding objective (which I have set out below). There had been a significant increase in the number of allegations of the same type of complaint which would increase expense to the respondent without any benefit to the claimant, although she conceded that, if

granted, this would not result in an increase in the current time estimate for the final hearing.

6 Ms Dobbie then turned to the factors in Selkent (see below). She said there was no claim of victimisation under section 27 Equality Act 2010 in the claim form or in the application to amend as far as particulars numbered 5 and 12 were concerned. In view of the claimant having told me in his submissions that neither of these particulars were claims of victimisation I told her she need not address me on this.

7 Notwithstanding Ms Dobbie went on to submit the only alleged detriments in the further particulars which post-dated 1 June 2020 (the date of the alleged protected act which the claimant had identified for the first time in the discussions we had before I heard the claimant's amendment application) were particulars numbered 14 and 15. However, although particular numbered 14 referred to a termination letter sent by email on 5 June 2020 the decision to dismiss him had actually been communicated to him on 1 June 2020 and preceded the alleged protected act. The only detriment which post-dated the alleged protected act in reality was particular numbered 15 (the outcome of the grievance investigation dated 10 July 2020 and I should have regard to the prospects of success. The tribunal would have to 'grapple' with the law more time would be taken in evidence from the CEO about her discussion with the claimant. All the claimant had said in his claim form about his discussion with the CEO on 1 June 2020 was that he had disclosed to her 'irregularities' about customer data security and had previously disclosed to the grievance investigator and HR sexist behaviour by his manager, nor had he alleged in the claim form that he had been subjected to any detriment because of a protected act. She agreed with me that he had not described the type of complaint he was making in relation to particular numbered 15 as victimisation at all.

8 As far as particulars numbered 3 4 5 and 12 were concerned, this was not a question of relabelling but the raising of new facts. It now appeared that particular number 5 was a relabelling or repetition of particular numbered 1 but augmented it. Particulars numbered 3 4 and 12 would require broader disclosure and a greater number of witnesses and/or longer witness statements to deal with the greater number of allegations (though she did not tell me how many witnesses or the likely length of their witness statements) and would need to be covered in Mr Flint's evidence. The allegations complained of were out of time by at least 9 months and 6 months (in the case of particular numbered 12). Time limits are strictly enforced in the employment tribunal and only extended if the claimant persuades the employment tribunal it is just and equitable to do so. He had provided no real explanation why time should be extended or why the matters had not been raised earlier.

9 Ms Dobbie submitted the claimant had said there was a delay in the grievance procedure but the outcome of the investigation was given on 19 July 2020 and there was an appeal on 17 July 2020, the outcome of which was made on 21 August 2020. That could not have delayed the claimant in bringing the claims when he did. There was no evidence of ill-health or mental health problems. The claimant was able to marshal his thoughts such that he was able to present a claim on time and secure a new job. There is no suggestion that his memory was impaired. He had put a detailed grievance in writing ;he could have simply cut and pasted from his grievance. He had said ACAS had told him he needed evidence in support of his allegations but not all of those in the claim form were

backed up by documentary evidence and if he understood he could bring those claims why not these? He had been aware of the facts in relation to these particulars when the claim was presented which contained claims of legal wrongs of the same type. There was no suggestion he had received faulty legal advice. He said he had limited resources because of the new job but he was able to raise some claims in his claim form and many claimants bring claims without the benefit of legal advice. He was of course entitled to prioritise matters but had to bear the consequences. The respondent had already responded to his claims twice and may need to amend its response again. It would incur increased costs and time and the claimant was unlikely to derive any benefit greater than in respect of those claims he had already made, should they succeed. Hearing time saved could be expended on other claims. The delay would affect the cogency of witnesses and the claimant would have to cross-examine more witnesses. If the claims then ultimately failed at the final hearing there was a greater risk of a costs application against him.

The Law

10 Under its general power to regulate its own proceedings and specific case management powers, an Employment Tribunal can consider an application to amend a claim at any stage of the proceedings.

11 Regulation 2 of Employment Tribunal Rules of Procedure provides that :

‘The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a)ensuring that the parties are on an equal footing;

(b)dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c)avoiding unnecessary formality and seeking flexibility in the proceedings;

(d)avoiding delay, so far as compatible with proper consideration of the issues;
and

(e)saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.’

12 The principles in relation to the grant or refusal of an amendment are set out in the case of **Selkent Bus Co Ltd v Moore [1996] ICR 836**. In **Selkent**, the EAT confirmed that 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? Whilst it was impossible and undesirable to attempt to list them exhaustively, the EAT considered that the following are relevant:

(a) The nature of the amendment – this can cover a variety of matters such as:

- i. the correction of clerical and typing errors;
- ii. the addition of factual details to existing allegations;
- iii. the addition or substitution of other labels for facts already pleaded;
- iv. the making of entirely new factual allegations which change the basis of the existing claim.

(b) The applicability of time limits - if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the ET 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 the application - it is relevant to consider why the application was not made earlier and why it is now being made: e.g. the discovery of new facts or new information appearing from documents disclosed on discovery. Guidance Note 1 paragraph 7 Employment Tribunals (England and Wales) Presidential Guidance -General Case Management (2018) states that : *'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.'*

13 I remind myself the claim ,as set out in the claim form is *'not just something to get the ball rolling as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so'* (Langstaff P in **Chandhok v Tirkey UKEAT/0190/14/KN**).

14 Section 123 Equality Act 2010 states that:

'(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(2)Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or

(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.'

15 The burden is on the claimant to persuade a tribunal that it is just and equitable to extend time (**Robertson v Bexley Community Centre [2003] IRLR 434.**

16 In the case of British Coal Corporation v Keeble [1997] IRLR 336 EAT it was suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980 .Those factors are consideration of the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case ,in particular the length of and reasons for the delay ;the extent to which the cogency of the evidence is likely to be affected by the delay ;whether the party sued had cooperated with any requests for information ;the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action ;and the steps taken to obtain appropriate advice once he or she knew of the possibility of taking action. However a tribunal is not required to go through the matters listed in section 33 (3) of the Limitation Act, provided that no significant factor is omitted.

Conclusions

The nature of the amendment

17 Section 8.2 of the claim asks the prospective claimant to ‘*set out the background and details of your claim in the space below*’ and says ‘*The details of your claim should include **the date(s) when the event(s) you are complaining about happened.***’ The claimant attached a typed document with 16 unnumbered paragraphs , 1 containing 20 separate bullet points . He set out in section 8.2 events from the commencement of his employment and after his employment ended. The allegations fell into 3 categories: bullying and harassment by Mr Flint (his manager) and dismissal by Mr Flint at a probation meeting ;failure by Dal Viridi and/or the respondent’s HR department to address his complaints about Mr Flint’s conduct; and post dismissal events.

18 Particular numbered 3 (which I now understand to be a claim of direct race and religion/belief discrimination or harassment related to race or religion/belief) concerned (in summary) the failure of the pilot Office 365 migration on 13 February 2020 after which Mr Flint publicly humiliated the claimant for not configuring the systems correctly in front of suppliers and the IT department , shouting at him and blaming him when he had reset the office 365 tenant without informing the suppliers or IT department or the claimant and communicating directly with the suppliers and Dal Viridi and removing the claimant from the email correspondence.

19 Particular numbered 4 (which I now understand to be a claim of direct race and religion/belief discrimination) concerned (in summary) Mr Flint’s conduct during an emergency change control review meeting on 4 March 2020 called by the claimant at Mr Flint’s request requiring the claimant to implement a change in front of everyone (which was successful) and making a bet that the claimant would buy lunch for everyone because he believed the claimant would fail and subsequently making the claimant take the blame for an email John Seal sent to the claimant (copied to Mr Flint) for losing the bet that the claimant would fail and buying lunch by apologising to colleagues in the IT department and to John Seal and on 8 March 2020 telling the claimant in an email he owed him a sausage egg and bacon sandwich after having ridiculed him by making him apologise.

20 Particular numbered 5 (which I now understand to be a claim of direct race and religion/belief discrimination or harassment related to race or religion/belief and not victimisation) is an allegation that on 4 March 2020 Mr Flint gave the claimant 'impossible tasks' the details of which are contained in particular numbered 1.

21 Particular numbered 12 (which I now understand to be a claim of direct race and religion/belief discrimination or harassment related to race or religion/belief but not victimisation) is an allegation that on 13 May 2020 Mr Flint at a Microsoft Teams meeting during Ramadan waved a packet of pork scratchings in front of the claimant and said the claimant should invest in the pork scratchings company while laughing ,though aware the claimant was a Muslim and of Muslim fasting during Ramadan.

22 After considering the entirety of the claim form I conclude that particulars numbered 3 4 and 12 are all new factual allegations against Mr Flint of either direct race and religious discrimination or harassment related to race or religion /belief .They are substantial amendments. The respondent has not objected to the inclusion of particular numbered 1.

Time Limits

23 If the dates provided by the claimant in his amendment application are correct the allegations in the particulars numbered 3 4 5 and 12 are all substantially out of time. The claimant has not suggested in his submission or the application itself that this is not the case .Should the time limit be extended on just and equitable grounds ? The claimant has put forward no satisfactory explanation why these matters were not included in his claim in the first place .He knew the relevant facts at the time he presented his claim. His original claim contains allegations of the same type of prohibited conduct as those he makes in the amendment application. He has not explained why having made a judgment about what to put in the claim form (which as I have set out above contains a number of detailed allegations in 16 paragraphs) he thought that he would have a further opportunity when providing evidence to include additional allegations.

24 The claimant's claim form was presented on 11 October 2020. He told me he did not get his new job until 7 December 2020. The pressures of a new job would not therefore have had any significant impact on his ability to complete his claim form and present his claim. The respondent's grievance procedure had concluded by 21 August 2020. There was no medical or other evidence put before me about the claimant's health at the time he presented his claim. I accept that the claimant is a litigant in person but there was no evidence that he was unable or hindered in his ability to obtain or understand advice or undertake his own enquiries about his claim and how such claims proceed. There is no evidence he was given incorrect advice by ACAS about what should be included in the claim .

25 There was no real force in Ms Dobbie's submission that delay would affect the cogency of witness evidence so this is a factor to which I have given little weight. However ,with the exception of particular numbered 5 , I accept that the respondent will be put to additional cost and delay by having to amend its response for a third time and consideration (with the concomitant increased cost) will have to be given to the need for broader disclosure and a greater number of witnesses and/or longer witness statements to deal with the greater

number of allegations and the allegations would need to be covered in Mr Flint's evidence although the length of the final hearing will not be increased. As far as prejudice to the claimant is concerned he will be deprived of the opportunity to include in his case the new allegations but will be able to pursue those claims already before the tribunal.

26 Taking all of the above factors into account and considering the prejudice which each party would suffer as a result of the decision reached, the claimant has failed to persuade me that it is just and equitable to extend time.

The Timing and Manner of the Application

27 The claimant told me it was not until the preliminary hearing with Employment Judge Cookson on 21 January 2021 (some 3 months after he presented his claim on 11 October 2020) that he understood what was happening and how to reply. There is no evidence he took any steps to obtain advice or undertake his own enquiries about his claim in the meantime. However the facts now alleged were not newly discovered by him nor did information come to light from the disclosure of documents. He knew of the relevant facts at the time he presented his claim. He chose what to include in section 8.2 of his claim form.

28 In my judgment if (as the claimant told me in submissions) the 'impossible tasks' of which he complains are already set out in Particular numbered 1, they are now included in his claim .He has not explained what purpose the amendment at particular numbered 5 is intended to serve. It is not in accordance with the overriding objective that supernumerary (and in this case unclear) complaints are determined by the tribunal.

29 As far as the remaining particulars are concerned (numbered 3 4 and 12), that the proposed amendments are out of time and it is not just and equitable for time to be extended in the claimant's favour is not a conclusive factor in the exercise of my discretion to amend and an application to amend can be made at any time However, the issue of time limits and the timing of applications to amend are relevant and important factors to be taken into account. The injustice and hardship of allowing the amendments against the injustice and hardship of refusing it is finely balanced. However, in my judgment the prejudice to the respondent if I were to grant the application outweighs the prejudice to the claimant if I were to refuse. As I stated above the claimant can still pursue his existing discrimination claims before the tribunal . The prejudice to the respondent is set out above.

30 Taking into account all the relevant circumstances and balancing the prejudice to the parties ,the claimant's application to amend is refused.

Employment Judge Woffenden
25 May 2021