



EMPLOYMENT TRIBUNALS

Claimant: Mr. P Butler

Respondent: Thames Water Utilities Limited

Heard at: London South (by video)

On: 8 June 2023

Before: Employment Judge G Cawthray

Representation

Claimant: Mr. Wood, Counsel

Respondent: Mr. Mitchell, Solicitor

RESERVED JUDGMENT

The Claimant's application to amend his claim is permitted.

The Claimant's complaints of victimisation under section 27 of the Equality Act 2010 and automatically unfair dismissal under section 103A of the Employment Rights Act 1996 will continue to a final hearing.

REASONS

Introduction, Background and Procedure

1. The Claimant participated in ACAS Early Conciliation between 16 February and 30 March 2021. The Claimant submitted his claim on 12 April 2021, and there was no legal representative on record at that time.
2. A Case Management Preliminary Hearing took place on 5 September 2022. At that hearing AREJ Balogun discussed the complaints with the parties and recorded that the complaints pursued were race discrimination and whistleblowing detriment. The Claimant was directed to provide further information. The Claimant represented himself at that hearing.
3. The Claimant provided some further information on 3 October 2022. A firm of solicitors briefly came on record for the Claimant on 12 December 2022

but withdrew from the record on 15 December 2022. The Claimant attempted to provide some further information on 9 January 2023.

4. The final hearing had initially been listed to take place between 20 and 23 February 2023, but this was vacated and converted to a Preliminary Hearing to take place on 20 February 2023 instead.
5. On 7 February 2023, the Claimant's current solicitors came on record.
6. On 16 February 2023 the Claimant provided a draft List of Issues. as at pages 134 – 141 of the Bundle.
7. The Respondent's representative notified the Claimant's representative of their concerns relating to the draft List of Issues and on 17 February 2023 the Claimant provided the Respondent (and the Tribunal) with the following:

A draft List of Issues – [page 66 Bundle]

An application to amend – [page 155 Bundle]

An Amended Particulars of Claim – [page 158 Bundle].

8. All three documents contain slightly different accounts of the amendments sought. I attempted to seek clarity on the basis of the amendments sought.
9. It would have been helpful for the details of the complaints that the Claimant was applying to amend to be included in one document, rather than across the draft List of Issues, the letter application to amend and an Amended Particulars of Claim. Mr. Wood explained that the Claimant's solicitors had attempted to deal with the approach to the application by categorising the dismissal related complaints (both in an automatically unfair dismissal complaint and as an act of victimisation) as a new head of claim that was different to the other three allegations of victimisation that they had deemed to be a case of relabelling.
10. Mr. Wood explained that the basis of the application to amend to include a victimisation complaint regarding allegations of detriment save for dismissal is set out in the draft List of Issues provided on 17 February 2023, that starts at page 66 of the Bundle. It sets out that two alleged protected acts are relied upon (both on 19 October 2020) and three alleged detriments under a heading "Victimisation – Section 27 EqA". The draft List of Issues does not cite the Claimant's dismissal as an act of detriment. The Amended Particulars of Claim does reference the dismissal as an alleged act of detriment pursued under a victimisation complaint.
11. The draft List of Issues, at page 66, sets out that the Claimant alleges he made five protected disclosures and cites 16 alleged acts of detriment at paragraph 5 a - p. The draft List of Issues does not reference an automatically unfair dismissal complaint. The Amended Particulars of Claim does refer to an automatically unfair dismissal – section 103A – complaint.

12. Taking the documents submitted on 17 February 2023 together, the Claimant's application to amend the claim involves the following:
 - a. A victimisation complaint relying on two alleged protected acts, the three alleged detriments set out within the draft List of Issues, and a fourth allegation of detriment being his dismissal;
 - b. An automatically unfair dismissal complaint relying on the five alleged protected disclosures that are relied upon in the whistleblowing detriment complaint.
13. The public preliminary hearing today had been listed following the Case Management Preliminary Hearing on 20 February 2023, to consider the Claimant's application to amend, as it was not possible to consider the Claimant's application to amend at that hearing.
14. The parties had provided a Bundle of 186 pages for the hearing today. The Claimant also provided some call logs and a witness statement. The Claimant affirmed, gave oral evidence and was cross-examined. I heard submissions from both parties.
15. The Respondent submits that the draft List of Issues contained new complaints. The Respondent's written objection to the application to amend was submitted on 24 May 2023.
16. A discussion took place about the harassment complaint, and the Respondent noted that had been responded to within the Amended Grounds of Resistance. It was accepted the claim, as currently understood, included complaints of direct race discrimination, harassment (race) and whistleblowing detriment.
17. The parties agreed that the only complaints that were subject to the application to amend today were a victimisation (section 27 Equality Act 2010) complaint and an automatically unfair dismissal (section 103A Employment Rights Act 1992) complaint.

Facts

18. It was not necessary to make significant findings of facts in order to consider the application to amend.
19. On 12 April 2021, the date of submission of the ET1, the Claimant was still employed by the Respondent.
20. A probation review meeting had been scheduled for 5 August 2021.
21. The Claimant contacted ACAS around 4 August 2021 to discuss bringing further claims. He says he was advised to add the complaints to his current claim, and not to submit another claim as that would slow matters down.
22. The Claimant's evidence was that he contacted the Tribunal around the same time he spoke with ACAS and gave them a new number that had been provided to him by ACAS.

23. There is no phone call record to evidence any call to the Employment Tribunal at the start of August 2021. The Claimant had a personal and a work phone at that time. The Claimant provided a log of calls from his personal phone.
24. The parties agree that the Claimant was dismissed on 10 August 2021 and notified of his dismissal on 12 August 2021.
25. The Claimant says that at the Case Management Preliminary Hearing on 5 September 2021 AREJ Balogun told him there was another claim on record but did not have the papers to hand.
26. The Record of Preliminary Hearing states “*Since presenting his claim, the claimant has been dismissed from his employment with the respondent. He claims to have presented a claim for unfair dismissal and unlawful deduction of wages but the Tribunal has no details of such a claim having been presented.*”
27. Ms. Hardy, Solicitor for the Respondent, attended the case management preliminary hearing and key extracts of her notes are copied below for ease:

PB says he's brought a second claim.

None of us have seen it. EJ says we'll have to leave this to one side.

You don't appear to have another claim.

PB – they deducted my wages. EJ none of this is in here. I'm going to focus on this claim.

- UD claim.

EJ significantly out of time.

PB thought ACAS would add on to his claim.

EJ explains ACAS' role.

28. The Claimant initially had some support from a trade union representative but the person dealing with the matter has since left and the Claimant had not been informed. After the Case Management Preliminary Hearing on 5 September 2022 the Claimant took steps to obtain legal advice. He contacted one law firm shortly after the hearing but did not instruct them due to cost and contacted another in December 2022/January 2023.

Law

29. I considered rules 29 and 34 of the Employment Tribunals (Constitution & Rules of Procedure) Regulation 2013, the Presidential Guidance on Case Management and the principles established in the leading cases including *Selkent Bus Company Ltd v Moore* 1996 ICR 836, *EAT*, *Chaudhry v Cerberus Security and Monitoring Services Ltd* 2022 *EAT* 172, *Vaughan v Modality Partnership UKEAT/0147/20/BA(V)* the cases referenced by the parties and the representations of the parties.

Conclusions

30. I considered the relevant factors, including the nature of the amendment, time limits, the timing and manner of the application, and in particular the balance of injustice and/or hardship in allowing or refusing the amendments. I have reminded myself that it is not necessary to use Selkent factors as a prescriptive checklist, but have considered relevant factors.
31. I asked the parties to address me on real prejudice.
32. I have summarised the parties' submissions in outline only below, and fully considered the written submissions from Mr. Mitchell that are not repeated here.
33. Mr. Mitchell submits that the Claimant's application to amend did not include the alleged detriments under the victimisation complaint. He further submitted the victimisation complaint was a new cause of action and was out of time, and that time limitation issues could be decided today.
34. Mr. Wood submitted that it was clear from the draft List of Issues that the Claimant was seeking to add a victimisation detriment complaint with three associated detriments that were considered to be relabelling and that his instructing solicitors had distinguished the approach in relation to dismissal related complaints. Mr. Wood submitted that the victimisation complaint was not a huge departure from what was already before the Tribunal and there was overlap with the race discrimination complaint. He also submitted that two of the three alleged detriments are also detriments being considered under the whistleblowing detriment complaint. In respect of time, Mr. Wood submitted that this was just one of the factors to consider, and an application to amend can be determined subject to time being determined at a final hearing.
35. Mr. Wood submitted it was not possible to include the automatically unfair dismissal complaint within the ET1 as the Claimant remained employed at that time. He submits the protected disclosures relied upon are already pleaded, and therefore there is no need for a new area of enquiry in this respect. He submits that there would be greater prejudice to the Claimant should the automatically unfair dismissal claim not be allowed, as he has an arguable case that he has been unlawfully dismissed and this would entitle him to compensation that outweighs any inconvenience to the Respondent.
36. In general, Mr. Mitchell submitted that the Respondent would suffer greater prejudice by the application being granted, than the Claimant would by it being refused, as it would incur further cost, a need to submit a further amended response and would likely increase the number of witnesses for the final hearing, being two witnesses involved in the decision making process. He submitted that the length of the final hearing may be impacted, but did not set out any specific detail on this. Mr. Mitchell also made reference to the fading of memories and that the Respondent had not been given the opportunity to preserve evidence.

37. I considered each amendment applied for separately. Of general consideration, in relation to each amendment application, I noted that the claimant was a litigant in person in the early stages of the litigation process and that it was through no fault of the claimant that the case management preliminary hearing did not take place until 5 September 2022.

38. I also noted that the final hearing is not due to take place until 5 September 2024.

Victimisation complaint

39. I have considered firstly the application to add a victimisation complaint.

40. As noted above, the victimisation complaint relies on two alleged protected disclosures that allegedly took place on 19 October 2020. This is set out in the draft List of Issues.

41. Nature of amend. I considered the ET1 as a whole, and compared this against the application to amend.

42. The ET1, at box 8.2, states:

“Racial abuse plus threats.

Letter in substantiation [SIC] of racial comment from line manager plus I had spoken to line manager regularly regarding all racial issues/threats/abuse and statements directed at me.

Failure to show duty of care to me whilst suspended since October 21st 2020. Left without help and or advise or communication by anybody from Thames Water.

Mental health and physical wellbeing has suffered during the extensive duration whilst waiting to find out a response to my workplace grievance [SIC] of racial abuse and threats”

43. Although not entirely clear, and no names or dates are provided, I do consider that it is discernible from the ET1 that the Claimant had raised concerns with his employer about treatment related to race, therefore done something that may potentially amount to a protected act, within his ET1.

44. The Claimant seeks to amend his claim to include four alleged detriments. The draft List of Issues sets out clearly and concisely the three alleged detriments. I will not repeat them in full here, but note that they provide the names and dates of those allegedly involved. The ET1 references the Claimant’s suspensions, lack of contact and delay, and although the precise detail of the alleged detriment is clear from the draft List of Issues, I consider that the basis of detriment claim flowing from raising concerns about detrimental treatment is within the scope of the ET1.

45. I consider the victimisation amendment in relation to the three alleged detriments in the List of Issues to be a matter of relabelling what was already within the ET1. I also kept in mind that when dealing with litigants in person, the Tribunal as a rule adopts a generous approach, and consideration of the ET1 as a whole is required.
46. The Claimant also relies on his dismissal as an act of detriment. As this is accepted as something that falls outside of the ET1, I have set out my conclusions in this respect alongside those relating to the automatically unfair dismissal complaint below.
47. Time limits. As I have determined that the information regarding the victimisation complaint, save for the dismissal, is within the ET1. However, it is noted there may need to be general determination of time limits at the final hearing, subject to clarification on the respondent's position.
48. Timing and manner of application. I noted that the Claimant had contacted ACAS and believed that he had added to his claim via a telephone call to the Tribunal. However, an application to amend was only formally made on 17 February 2023.
49. The balance of injustice and/or hardship. The Claimant took steps to contact ACAS and clearly thought he had done what he needed to do to add a complaint.
50. This is a key consideration, although the Respondent submits it will be more prejudiced by granting the application than the Claimant would be if were the application was refused, I did not consider this to be the case. This is a claim where there are multiple heads of claim.
51. All of the persons cited in relation to the alleged victimisation complaint appear in respect of the whistle blowing detriment complaint, which relates to matters in a similar timeframe, namely Mr. Pillai, Mr. Duncan, Mr, Fenner and Ms. Crowder. Further, alleged victimisation detriments (b) and (c) in the draft List of Issues are very similar to the alleged whistleblowing detriments (e), (f) and (g). The Respondent will already need to deal with such matters, and there appears to be considerable overlap.
52. Accordingly, I do not consider there would be a need for significant additional time at the final hearing as the alleged detriments overlap with the whistleblowing detriment complaint and the Tribunal will need to consider these matters in any event, albeit different legal tests apply.
53. Further, the Respondent submitted an amended response on 4 April 2023, which already appears to deal with elements of the victimisation complaint. On balance, I consider that not permitting the application in relation to the victimisation complaint as set out in the draft List of Issues and where there are identifiable matters within the claim form would cause more prejudice to the Claimant than the Respondent.
54. On balance, having considered all of the above and keeping in mind the overriding objective I have decided that the application to include a victimisation complaint as set out in the draft List of Issues should be permitted and this will continue and form part of the issues for determination at the final hearing.

Automatically unfair dismissal complaint

55. I next considered the application to add an automatically unfair dismissal complaint.
56. As above, I considered the ET1 as a whole, and compared this against the application to amend.
57. Box 8.1 of the ET1 states “*Whistleblowing on Covid and Health and Safety Issues*”. Further detail was set out in box 8.2, but this is brief and the basis of the claims is difficult to discern, hence the requirement for the Claimant to provide further information.
58. The draft List of Issues sets out that the Claimant alleges he made 5 protected disclosures. However, it does not reference an automatically unfair dismissal complaint, indeed it would not have been possible to do so as the Claimant was not dismissed for some months after the presentation of his ET1.
59. Nature of amend. The original ET1 only contains a whistleblowing detriment claim. It cannot have contained an unfair dismissal complaint as the Claimant was still employed at the time of presentation of the ET1. Mr. Wood accepts that an automatically unfair dismissal complaint is a new head of claim.
60. Time limits. Time limits are a factor that should be considered, but an application can be permitted pending resolution of time limits at a final hearing. It is noted that, based on the Respondent’s Amended Grounds of Resistance, that there are other time limit issues for determination at the final hearing in relation to the race discrimination, harassment and whistleblowing detriment complaints.
61. Timing and manner of application. I consider that the proper date of the application to amend was 17 February 2023. However, following the case management preliminary hearing on 5 September 2022 the Respondent was on notice that the Claimant believed he had brought an unfair dismissal complaint. The Claimant appears to have spoken with ACAS regarding submission of a further claim and considered that he had done what was needed in August 2021 to bring a further claim.
62. The balance of injustice and/or hardship. As noted above, the consideration of respective prejudice is key. The Respondent has been on notice of an unfair dismissal complaint since the case management preliminary hearing on 5 September 2022. Further, as noted above, the Respondent submitted an amended response on 4 April 2023, which already appears to deal with elements of the Claimant’s dismissal, thus indicating information in this respect is available. The Claimant was hoping for support from his trade union in the early days of this litigation, but this did not transpire and the Claimant is a litigant in person

63. On balance, considering that the only additional consideration for the Tribunal and the parties, if the application is granted, is whether or not the principal reason for the Claimant's dismissal was because he made one or more protected disclosure, I conclude that the prejudice to the Claimant would be significantly more as it would deny him the ability to consider such a complaint. The case is already listed for 8 days, and given that the Amended Grounds of Resistance sets out some detail regarding the Claimant's dismissal, and noting that no specific submissions were made in regard to difficulties with calling witnesses, I have concluded that the application should be granted as the Respondent has not demonstrated any real prejudice in this respect.
64. I deal here also with the allegation of dismissal as victimisation, and for the same reasons as set out in the paragraph above, I have permitted this. The only additional enquiry is in relation to the reason/s for dismissal.
65. Refusing the applications, in my view, would cause significant injustice and prejudice, to the Claimant.
66. On balance, having considered all of the above and keeping in mind the overriding objective I have decided that the application to include a victimisation dismissal complaint as set out in the Amended Particulars of Claim and an automatically unfair dismissal complaint should be permitted and these will continue and form part of the issues for determination at the final hearing.

Employment Judge Cawthray

Date 27 July 2023