Appeal No. UKEAT/0254/14/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 August 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MRS R ROBERTS APPELLANT

CHIEF CONSTABLE OF HAMPSHIRE AND ISLE OF WIGHT RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MISS NABILA MALLICK (of Counsel) Instructed by: Pattinson & Brewer 14th Floor Colston Tower Colston Street Bristol BS1 4XE
For the Respondent	MR GARY SELF (of Counsel) Instructed by: Hampshire County Council Legal Services EII Court South The Castle Winchester SO23 8UJ

SUMMARY

PRACTICE AND PROCEDURE - Amendment

The Employment Judge, while identifying that the application for permission to amend should be determined according to **Selkent** principles, did not apply them in his reasons.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Rebecca Denise Roberts ("the Claimant") against part of a Judgment of Employment Judge Cowling dated 7 March 2014. The Claimant had commenced proceedings against the Chief Constable of Hampshire and Isle of Wight ("the Respondent") alleging disability discrimination. She sought to add claims of discrimination related to pregnancy and maternity and sex discrimination. The Employment Judge refused permission to amend.

The Background Facts

2. The Claimant was a police officer with the Hampshire Constabulary. She commenced her service in 2002. She had periods of maternity leave from December 2009 to February 2011 and again from July 2011 to August 2012. It was common ground that she had a rare condition of her eyes by virtue of which she had a disability for the purposes of the **Equality Act 2010**. It was her case that she also had a disability by virtue of a shoulder injury at work.

3. Following her return to work the Claimant applied for a role as Event Planning Constable in Winchester. She was unsuccessful. She wrote an e-mail of complaint:

> **"I wish to appeal the decision made in respect of the Event Planning Constable Post (Winchester). I feel I have been unfairly treated and discriminated against because of my disability. Secondly I feel I have...also been the victim of sex discrimination. Being a female having had two recent periods of maternity level from December 2009 to February 2011 and then from July 2011 to August 2012 of course means that the time spent in my actual post is going to be significantly diminished when compared to others.**
>
> **I wish for this matter to be fully reviewed and investigated."**

4. Later the Claimant applied for another role as a trainer. She made the application in April. When she applied, she mentioned her need for a posting which would enable her to fulfil her responsibilities to care for young children, particularly in an emergency or at short notice.

She was shortlisted and interviewed on 16 May. On 17 May she was told her application was unsuccessful. The successful candidate took up the post on 24 June 2013.

5. The Claimant was aggrieved by this decision. On 31 May 2013 she approached the Police Federation for legal assistance. It is her case that the Police Federation took some time to decide whether she would be supported and that, in the meantime, she was helped by the local branch to complete an ET1 form in July to avoid the application of Employment Tribunal fees.

6. The ET1 form named a local official at the Police Federation as her representative. It was rudimentary in the extreme. It ticked the box for "Disability discrimination" but not for any other type of discrimination. It said only that:

> **"Further details to follow, but I have applied for a role within the force and was discriminated on the grounds that no reasonable adjustments were made in order for me to fulfil the role."**

7. In August the Police Federation decided to back her claim. Solicitors were instructed. On 12 September they sent Further and Better Particulars to the Respondent and to the Employment Tribunal. The Further and Better Particulars, for the most part, claim disability discrimination in relation to the trainer post. The key statement of her complaint appears to relate to the reasons given for the decision of the panel which rejected her application. Paragraph 13 of the Particulars reads:

> **"The panel had therefore judged the standard/strength of my operational examples according to the standard they would expect of an officer with 11 years frontline experience/service. No consideration had been given to the fact that for long period[s] during those 11 years of service, I had been either absent from work on maternity leave, or unable to perform frontline duties, either due to pregnancy or disability."**

8. The Further and Better Particulars, however, also included a claim for discrimination on other grounds. Paragraphs 4 and 5 read as follows:

> **"Further and in the alternative, the Claimant also claims discrimination on the ground of the protected characteristic of pregnancy and maternity, pursuant to section 18 of the EA 2010.**
>
> **5. Further and in the alternative she claims sex discrimination pursuant to s13 or s19 of the EA 2010."**

9. Paragraphs 22 and 23 read as follows:

> **"22. Further and in the alternative, the Claimant contends that the Respondent's application of a criterion according to which candidates for the Initial Frontline Trainer post were expected to provide operational examples, whose standard would be judged in accordance with the candidates length of service, regardless of how much time that candidate had actually spent deployed on the front line, was unfavourable because of pregnancy and maternity.**
>
> **23. As a protective measure, in the alternative the Claimant also claims that the treatment complained of was direct or indirect sex discrimination, and reserves the right to provide further particulars in due course."**

10. There is no claim concerning the earlier post as Event Planning Constable.

The Employment Judge's Reasons

11. On 10 February 2014 the case was listed for a Preliminary Hearing to determine the Claimant's application to amend the claim form. The Employment Judge permitted amendment insofar as it concerned disability discrimination. He refused it in respect of the claims relating to sex, pregnancy and maternity. He heard evidence from the Claimant and submissions from the parties. The Employment Judge referred to **Selkent Bus Company Ltd v Moore** [1996] ICR 836, which remains the leading case on the question whether to permit amendment. He summarised it, rather in his own words, in paragraph 4-6 of his Reasons.

12. The Employment Judge set out his own reasoning in paragraphs 7-12 of his Reasons. In paragraphs 7-8 he referred to the e-mail dated 14 March 2014, commenting that the Claimant had spelled out there exactly what her concerns were. He then continued:

> **"9. This is not the wording that appears in the originating claim. The claimant has explained that the originating claim form was completed on her behalf by a representative of the Police Federation. She said that there was some pressure on her to present the claim form quickly because the fees scheme was about to be introduced at the end of July 2013. Her originating application was presented to the Tribunal on 26 July 2013. She had been told that if she delayed any longer then a fee would be payable.**

10. An employer is entitled to know the nature of the claim they have to answer in the Employment Tribunal. With this in mind I have some difficulty in accepting Mrs Mallick's proposition that it would be sufficient for a claimant to present an originating claim simply claiming discrimination, possibly by a reference to the Equality Act 2010, without specifying which of the nine protected acts of discrimination is pleaded by the claimant.

11. Applying the *Selkent* guidelines, I am satisfied that the amendment that the claimant seeks in relation to the various disability discrimination claims should be allowed. I reach that view because the claimant claims disability discrimination in the originating claim. I am satisfied that it is really a labelling issue, and for that reason I allow the amendment by adding the various forms of disability discrimination that the claimant claims.

12. I take a different view in relation to the application to add claims of direct and indirect sex discrimination and claims of pregnancy and maternity related discrimination. There is no reference to any of these matters in the originating claim. They have not previously been pleaded. The email sent by the claimant on 14 March 2013 showed that she was alert to the opportunity to make such claims."

The Law Relating to Amendment

13. The Employment Tribunal's power to grant leave to amend a claim derives from its general case management powers, which are extremely wide (see rule 1(3)(ii) and rule 29 of the **Employment Tribunal Rules 2013**, contained in Schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**. In exercising those powers the Employment Tribunal will seek to give effect to the overriding objective set out in rule 2.

14. In **Selkent Bus Company Ltd v Moore** Mummery J, the President, gave general guidance as to how applications for leave to amend including applications for amendments raising a new cause of action should be approached. The **Selkent** principles, as they are generally known, include the following:

"(4) Whenever the discretion to grant an 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.

(5) 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 additions 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 have 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 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 eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the 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 may be made at any time - before, at, 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 on 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 of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

15. On the question of time limits, it is important to remember that many types of complaint are subject to time limits which may be extended if it just and equitable to do so (see particularly section 120(3)(i) of the **Equality Act 2010**). In such a case an Employment Tribunal, when considering whether to grant permission to amend outside the primary time limit, will need to consider whether it is just and equitable to do so. In practice, this imports the same test as the "balance of hardship" test set out in paragraph 4 of the **Selkent** principles (see **Ali v Office of National Statistics** [2005] IRLR 201 at paragraphs 40 and 47).

Submissions

16. On behalf of the Claimant Miss Nabila Mallick submits that, while the Employment Judge made reference to the **Selkent** principles, his reasoning shows that he failed to apply them. He focussed on the question whether the amendment raised a new claim without carrying out any analysis of the question whether the claim was in time or out of time, how far it was out of time, why it was out of time, and critically where the balance of hardship lay. The new claim was intimated on 30 August. At that stage it was in time or, if it was out time, it was only by a very short period. There was an explanation for the delay, which the Employment Judge did not evaluate. While the claim was a new claim, he did not take account that it arose out of the same fact as the disability discrimination claim which he allowed to proceed. The prejudice to

the Claimant in not being able to advance her case was plain. There was no countervailing prejudice to the Respondent, who would have to call the same witnesses to address the issues. There was a public interest in hearing discrimination claims relevant to the exercise of the Employment Judge's discretion (see **Barwick v Avon & Somerset Constabulary** [2009] UKEAT/0009/09 at paragraph 13).

17. On behalf of the Respondent Mr Gary Self submits that the Employment Judge gave himself a correct self-direction in law and reached a conclusion which was open to him. The relevance of the e-mail in March was that it showed that the Claimant was able to identify and state issues of discrimination if she believed they had occurred. There was no acceptable explanation for their absence from the claim form. It was certainly not an acceptable explanation that the claim form was completed in a hurry to avoid fees, nor will it be acceptable for the Police Federation to take several months to decide whether to support a claim. He points out that even now in certain respects the precise basis of the claim is unclear. Mr Self accepts that there is no plain evaluation of the balance of hardship in the Employment Judge's Reasons, but he says it is implicit in the Employment Judge's reference to the **Selkent** test that he must have carried out that evaluation. He would describe the Employment Judge's Reasons as "pithy and proportionate".

Discussion and Conclusions

18. This is an appeal against a case management decision. Employment Tribunals have a broad discretion to exercise when making such decisions. The Employment Appeal Tribunal is empowered to intervene only where there had been an error of law on the part of the Employment Tribunal. The Appeal Tribunal must recognise that different Employment Judges may decide cases in different ways without having made any error of law. Challenges are

essentially to be brought only where the Employment Tribunal exercised its discretion on wrong legal principles or taking into account that which was legally irrelevant or leaving out of account that which was legally relevant or reaching a conclusion outside the generous ambit within which reasonable disagreement is possible.

19. I have reached the conclusion that, although the Employment Judge made reference to **Selkent**, his reasons showed that he did not apply the **Selkent** principles when he refused permission to amend. Most fundamentally, there is no analysis at all of where the balance of injustice and hardship lay. This is the key principle to be applied. Specific circumstances of three kinds are identified in the **Selkent** guidelines, but they are not freestanding requirements. Rather, they are features which will feed into the fundamental assessment of what justice requires.

20. As to the nature of the amendment, the Employment Judge correctly noted that it was to plead new causes of action. It should be remembered, however, that the relevant part of the **Selkent** guidance does not set out watertight categories. There is a continuum from amendments which are merely clerical right through to amendments which plead not only new causes of action but significantly different facts. This amendment pleaded a new cause of action but it arose largely from the same facts as the disability claim which the Employment Judge allowed to proceed. This is a point to be taken into account. The Employment Judge does not appear to have done so.

21. As to time limits, the Employment Judge did not analyse whether the proposed amendment introduced claims which are in time or out of time. If they were out of time, he would have to consider whether it was just and equitable to extend time. This exercise, which

as **Ali** explains is essentially the same exercise as the balance of hardship test, was not undertaken at all.

22. As to the timing and manner of the application, the Employment Judge noted the explanation given by the Claimant, namely that the form was filled in by a local Police Federation officer to avoid the payment of fees while the matter was being considered for support by the Federation. He did not, however, evaluate this matter at all or even say whether he accepted the explanation. So far as prejudice to the Respondent is concerned, there are simply no findings at all.

23. To my mind, the Employment Judge did not apply the **Selkent** guidelines. I am not suggesting that lengthy reasons were required for him to do so, but his reasons should have addressed the key issues in a way which applied settled principles of law.

Disposal

24. In two recent cases, **Jafri v Lincoln College Oxford** [2014] IRLR 544 and **Burrell v Micheldever Tyre Services** [2014] IRLR 630, the Court of Appeal has restated principles applicable to the disposal of an appeal where the Employment Appeal Tribunal finds that there has been an error of law in the reasoning of an Employment Tribunal. If, on a true appreciation of the law, only one result is reasonably possible, the Employment Appeal Tribunal may substitute its own conclusion. Its specialist experience perhaps enables it to be more robust and confident in making this assessment than would otherwise be the case, but the test must be conscientiously applied. The only exception is if the parties agree to the Employment Appeal Tribunal making its own assessment of the matter in issue. In this case, I do not have the agreement of the parties to take that course.

25. Conscientiously applying the Court of Appeal's guidance, I cannot say that only one result is reasonably possible. On the one hand, the linkage between the proposed amendments and the existing disability discrimination claim which is to proceed is clear, and the delay is short. It is not easy to see any prejudice to the Respondent, although Mr Self engagingly suggested that the Police Federation's avoidance of the fee might in some way be prejudicial to his client. On the other hand, however, it has to be said that the sex discrimination claim has never been particularised. I do not find it difficult to see, given the existing particulars, how an indirect discrimination claim might be put, but it has not actually been pleaded properly. It is more difficult again to see how a direct sex discrimination claim is put.

26. In these circumstances I do not think it can be said that the arguments are all one way. The case will be remitted to an Employment Tribunal for consideration. I think it is best considered by a different Employment Judge. It seems to me that, if the application to amend is pursued in all respects in front of the Employment Judge the Claimant should go armed not only with a Skeleton Argument but with Further and Better Particulars, which have been served in good time in advance on the Respondent.