EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr T Siby

- and –

Epsom and St Helier University Hospitals NHS Trust

PRELIMINARY HEARING

HELD AT **London South** **ON** 20 November 2017

EMPLOYMENT JUDGE PHILLIPS

Appearances

For Claimant: In person

For Respondent: Mr B Jones, Counsel

JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The Claimant's application to bring a claim of indirect race discrimination was rejected.

REASONS

1. The Claimant is seeking what he says is clarification that his Claim "still includes" an indirect as well as a direct race discrimination claim. He says that his original ET1 refers to factual matters that clearly infer an indirect discrimination claim. At box 8 he had ticked the discrimination on the grounds of race boxes. He has then provided separate Particulars of Claim. These include a heading "Direct and Indirect Race Discrimination and Harassment". The Particulars set out two paragraphs of factual matters relied upon to support these claims.

2. A Preliminary Hearing was held on 11 April 2017 before Judge Sage. The Respondent, accepting that the ET1 raised a potential indirect race claim, included such a claim in its draft list of issues for that Preliminary Hearing numbered 23 to 25. That list includes, "The Claimant to confirm the PCP relied on". The Claimant was accompanied at the Preliminary Hearing by a friend, Ms G McCann. The Respondent was represented by Ms D Nathan, solicitor. Mr Jones for the Respondent, who was not present at the Preliminary Hearing, said he was instructed that the issue of indirect discrimination was raised, had been discussed, and was considered by Judge Sage who indicated, after hearing from the Claimant as to the factual matters he was relying on, that these went to a direct discrimination claim, and as such there did not appear to be any basis for an indirect discrimination claim. Having checked the Judge's notes on the File, there is a note that says, regarding the indirect race discrimination claim, "not claiming". This appears to be consistent with Mr Jones's submission on this point.

3. Following that Preliminary Hearing of 6 May, the Claimant provided the Further and Better Particulars that he had been ordered to provide following the April Preliminary Hearing. These make no mention of indirect discrimination but do have a note at the end that says, "PS I note that your Order does not ask me to provide further details of Indirect Discrimination claims. I trust this is because they are covered fully enough in my Particulars of Claim, but please let me know if you need further details." Nothing further occurred with regard to this.

4. There was a further Preliminary Hearing on 6 June where Mr Siby was accompanied by Ms McCann. That Preliminary Hearing discussed, amongst other things, the issues in the case that were needed to be resolved at the Full Merits Hearing. The Case Management Summary sent to the parties on 5 July notes at paragraph 4 that the Judge, having "the benefit of the further information" that had been provided by the Claimant following the Preliminary Hearing on 11 April, "was able to discuss with the parties what issues were to be decided at the Final Hearing". There is no mention in the Case Management Summary of an indirect discrimination claim. There is nothing to suggest it was raised or discussed.

5. On 30 August, Mr Siby emailed the Employment Tribunal to say that he was "very concerned that some of the discrimination elements of my claim, detailed in my ET1, do not appear in the Order from Judge Crosfill dated 21 June. About 90% of the porters at the Trust are black but about 90% of those given employment benefits are white, so this is a very important part of my case." (In fact, although this information was not specifically included under the heading 'Direct and Indirect Race Discrimination and Harassment' in the Particulars of Claim, there was a reference to "policies being more likely to affect minority ethnic staff", and there was a reference in the opening paragraphs of the Particulars of Claim to "80% of the poverty ring workforce being Bank staff and to the majority of the Bank Porters being black".)

6. In the Respondent's response to this email dated 1 September, it said this appeared to be an application to amend the ET1 under Rule 30(1) of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013, which the Respondent opposed. This email pointed out that this had not been raised at either of the two Preliminary Hearings (but that we know is not correct, as stated above, it was raised at the 11 April 2017 Preliminary Hearing). It said that it was not clear whether the way it was put was in reality a direct rather than an indirect discrimination claim. The Respondent submitted that it would suffer significant disadvantage and prejudice as it was a late amendment, was unclear and vague, and no disclosure had been provided by the Claimant about it to date.

7. Mr Siby responded by email dated 4 September saying he was "extremely concerned that the main reasons for my lodging an Employment Tribunal claim have been overlooked". He referred to the ET1 and the Particulars and set out four matters that he said raised "direct/indirect racial discrimination by the Respondent." These repeated, in a slightly different way, the matters in the Particulars that I have described at Paragraph 1 above. He said these were not new claims, that Judge Sage's Order did not mention indirect discrimination, that he had mentioned this at the end of his 6 May Further and Better Particulars, and there was no mention in the Order of 6 June of Judge Crosfill of my claims of "direct/indirect discrimination … So, between the two preliminary hearings, I think these must have somehow been overlooked." He concluded that, "Given that the Final Hearing is listed for a long time away, namely July 2018, I do not think the Respondent will be prejudiced by the Tribunal ensuring that all the valid claims raised in my ET1 are heard at the Final Hearing."

Submissions

8. Both Mr Siby and Mr Jones made short oral submissions. Mr Siby, who explained that Ms McCann was unwell so he did not have the benefit of her assistance, relied primarily on the 4 September email, a copy of which he provided. He queried the reference to 90% in the Respondent's email and it was explained by Mr Jones that these were the figures in Mr Siby's initial 30 August email. He said discrimination was at the heart of his claim. Mr Siby was not able to set out in any clear way what the provision, criterion or practice was that he was seeking to rely on.

9. Mr Jones set out the factual procedural matters which had preceded this application. Mr Jones submitted that the Claimant was seeking to reopen a matter that had been determined, that the case had moved on, disclosure had been dealt with, and if this application was allowed it would effectively be back to "square one". Further, he said this was effectively a new claim and not a re-labelling; applying the test in Selkent he submitted:

    (1) the claim was vague and did not set out a provision, criterion or practice. It was not clear what the provision, criterion or practice could be and it was hard to work out what a provision, criterion or practice might look like. Much of the underlying facts were covered by other heads of claim already, particularly by the direct discrimination claim;

    (2) the application was late and came after two previous Preliminary Hearings and a set of Further and Better Particulars, and disclosure had now been made in the other claims;

    (3) in terms of the balance of prejudice, there was much more prejudice to the Respondent than to it the Claimant.

10. He pointed out that the Claimant already had a number of claims and the factual matters he relies upon are covered by, amongst other things, his direct discrimination claim. There is no certainty or specificity to this amendment and given the lack of any provision, criterion or practice it would probably necessitate another Preliminary Hearing, more particulars and a further set of Case Management Directions to deal with it. He said therefore the application should not be allowed.

Law

11. In *Selkent Bus Co v Moore* [1996] IRLR 661, the EAT set out some general principles as to how an employment tribunal should approach an application to amend. In essence it said that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, [including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]", before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it". This approach was approved by the Court of Appeal in *Ali v Office of National Statistics*, [2005] IRLR 201. The EAT in *Selkent* said it was impossible and undesirable to attempt to list the relevant circumstances exhaustively but the following circumstances 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 course of action.

    b) *the applicability of time limits*: if a new complaint and course of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether the 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*: 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 adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

Conclusion

12. I was not minded to allow the Claimant's application to include a claim of Indirect Race Discrimination. I made that judgment for four principle reasons.

13. Firstly, I find that this matter had already been raised, considered on the facts and dismissed at the Preliminary Hearing before Judge Sage in April. It is worth noting in that context that there is no reference in any of (1) the Case Management Summary following the Preliminary Hearing on 11 April; (2) the Further and Better Particulars provided by the Claimant on 6 May (although there was a postscript added about it), or (3) the Case Management Summary following a further Preliminary Hearing on 6 June, of an indirect race discrimination claim. Indeed, it was not contended by Mr Siby before me that it was raised at the June Preliminary Hearing.

14. Secondly, while it could be argued that this was a "label on the facts already pleaded" case, as I have said, that had already been considered, and dismissed, by Judge Sage. There was no reason advanced as to why that deciding should be reconsidered. On that basis, however, I considered whether it should be treated as an application to add a new course of action, applying Section 123(1) of the Equality Act 2010. Clearly the application to amend was out of time. I therefore considered what period it was just and equitable for such a claim to have been made within. I was of the view, given the postscript in the 6 May letter which shows the Claimant was aware of a possible issue around the indirect discrimination claim, that the relevant additional just and equitable period would have been for it to have been raised by or at the further Preliminary Hearing in June. This was not done. I am therefore not minded to exercise my discretion to allow an out of time amendment.

15. Thirdly, I am of the view that the facts relied upon do not sustain such a claim.

16. Fourthly, considering the application under *Selkent*, and acknowledging that there is no absolute bar to a very late application to add a new cause of action:

    i. *the nature of the amendment*: as discussed above, there is an argument that what is being sought here amounts to the addition or substitution of other labels for facts already pleaded. Even if that is the case, in my judgment, the amendment sought cannot be said to be merely a minor matter, it is still seeking to plead a new course of action. Further, on the facts, there is considerable doubt as to whether the factual matters relied upon, which are already included in the ET1, do support such a claim. Clearly Judge Sage considered they did not. I do not consider they give rise to an indirect discrimination claim either. Further, it was not at all easy to see what the provision, criterion or practice might be;

    ii. *the applicability of time limits*: this has already been considered by me above, applying the Section 123 Equality Act test. I did not consider it to be just and equitable to extend the time limit under the applicable statutory provision. Under *Selkent*, even if a claim is out of time under the Section 123 test, that may not be an absolute bar. There are no time limits laid down in the rules for the making of amendments;

    iii. *the timing and manner of the application*: I acknowledge that the Claimant is a litigant in person and further that the person who has been advising him has been unwell, but no evidence or explanation has been advanced for the late timing.

17. Stepping back and looking at the application in the context of the case as a whole, in terms of the relative injustice and hardship involved in refusing or granting an amendment, on the facts here in my judgment that balance falls in favour of the Respondent:

    1. if the application for the amendment was permitted, it would in my judgment be necessary for the Claimant to articulate what the claim was, and in particular, what the provision, criterion or practice was. I am not convinced that can be done, even if it could, there would probably need to be a further Preliminary Hearing to tease out the individual factors and issues;

    2. the case has been proceeding since the Preliminary Hearing in June and disclosure has been given and completed. There would need to be a further round of discovery, with the additional costs and time that that would involve;

3. I acknowledge that the Full Hearing is some time away but that is not the only other factor to consider. There is no suggestion, for example, that new facts have been discovered or of new information appearing from documents disclosed on discovery;

4. the factual matters relied upon are already being considered with regard to the direct race discrimination claim;

5. I am not convinced in any event the facts relied upon give rise to an indirect discrimination claim;

6. the claim was raised and dismissed at the April Preliminary Hearing.

18. Taking all these circumstances into consideration, and balancing the relative injustice and hardship to the parties, and for the reasons set out above, I was not minded to allow the Claimant's application to add a claim of indirect discrimination.

Employment Judge Phillips
20 November 2017