



**EMPLOYMENT TRIBUNALS**

**Claimant**  
**Mr I Lee**

v

**Respondent**  
**London Ambulance Service**

**OPEN PRELIMINARY HEARING**

**Heard at: London South**

**On:**

**11 March 2020**

**Before: Employment Judge Truscott QC**

**Appearances:**

**For the Claimant: Mr B Toner of Counsel**

**For the Respondent: Ms A Beale of Counsel**

**JUDGMENT on PRELIMINARY HEARING**

1. The claimant's application to amend his claim to add a claim of perceived disability discrimination is permitted. The detail of the amendment is set out in the marked passages on pages 20-23 of the bundle.
2. The respondent is permitted to answer the amended claim within 28 days hereof.

**REASONS**

**Preliminary**

1. This preliminary hearing was fixed in order to consider the claimant's application to amend his ET1,
2. There was a bundle of documents to which reference will be made where necessary.

**Chronology**

<b>Date</b>	<b>Event</b>
16/04/2018	C is dismissed

16/05/2018	C's appeal against dismissal.
21/05/2018	Written confirmation of the dismissal of C's appeal which states: "Whilst Mr Lee's symptoms would appear to have been resolved following injection, the considerable length of Mr Lee's absence after two relatively minor incidents, together with Mr Lee's own evidence, indicates an underlying issue and a clear susceptibility to further injury."
13/07/2018	Early Conciliation Certificate issued.
09/08/2018	ET1 lodged containing the narrative "My contract termination was upheld with the Service stating the reason behind this decision was due to the fact they believed the injuries would return."
12/11/2018	ET3
30/11/2018	"Additional Information on Claims" document provided by C's representative. There was no disability claim.
4/12/2018	The Respondent submitted a "holding" response and applied for (1) an extension to file a more detailed response and (2) for the PH listed for 14.12.18 to be postponed. The Respondent's application was granted.
5/12/2018	R serves amended Grounds of Resistance.
24/05/2019	PH at which List of Issues is agreed (with no disability discrimination claim).
02/07/2019	C's representative applies to amend his claim to include an additional complaint of perceived disability discrimination.

### Submissions

3. The Tribunal heard oral submissions and considered written submissions from both parties. The arguments were extremely well presented and no disrespect is intended in not repeating them.

### Law

#### Amending the claim

4. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst**

**(Stationers) Ltd** [1974] ICR 650 NIRC. There is a distinction which requires to be drawn between:

- (i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, i.e. re-labelling.
- (ii) 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. As Harvey notes at paragraph 312.01 in relation to this type of amendment: "So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded.
- (iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

5. At paragraph 4 of **Selkent**, it was stated:

"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.” (also **Reuters Ltd v. Cole** EAT, 16 February 2018 at paragraph 15.

6. This approach was approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201 CA

7. At this stage of proceedings, the Tribunal is not required definitively to determine any time points, but rather to consider whether the Claimant has established a prima facie case that the claim has been brought within time or that it is just and equitable to extend time for bringing the claim; see **Galilee v. The Commissioner of Police of the Metropolis** [2018] ICR 634, as followed in **Reuters v. Cole** (paragraph 31).

8. There is also Guidance issued by the President of the Employment Tribunals which contains a section on amending a claim or response, explaining the factors the Tribunal may consider [pages 31-37]. Paragraph 2 [page 31] states – “Whilst the Employment Tribunals in England & Wales must have regard to such Presidential Guidance, they will not be bound by it and they have the discretion available to them as set out in the Rules as to how to apply the various case management provisions.”

9. 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. Although the allegations in the original claim and in the amendment were not identical, Rimer LJ, giving the only reasoned judgment of the Court, held that ‘the thrust of the complaints in both is essentially the same’. The fact that the whistleblowing claim would require an investigation of the various component ingredients of such a case did not mean that ‘wholly different evidence’ would have to be adduced. **Evershed v. New Star Asset Management Holdings Ltd** [2010] EWCA Civ 870 at para 50.

10. Any application should be considered in the light of the overriding objective set out in Rule 2:

**Overriding objective**

2. 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.

## Time limits and extension

### Just and equitable extension

11. The Equality Act permits the Tribunal to grant an extension of time 'if, in all the circumstances of the case, it considers that it is just and equitable to do so'. They entitle the [employment] tribunal to take into account anything which it judges to be relevant': **Hutchison v. Westward Television Ltd** [1977] ICR 279, EAT. Notwithstanding the breadth of the discretion, it has been held that 'the time limits are exercised strictly in employment cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ).

## DISCUSSION and DECISION

12. The Tribunal considered the amendment in this case to fall within category (ii) of **Selkent** in that it seeks to add a new cause of action (disability discrimination) to the same facts as the original claim (age discrimination). The ET1 states "*My contract termination was upheld with the Service stating the reason behind this decision was due to the fact they believed the injuries would return.*". This statement is based on the wording of the appeal rejection letter set out in the chronology.

13. The Tribunal recognised that if the amendment was allowed, the respondent would have to spend additional time in dealing with the new case, that they may have to submit an amended response, and the new issue will have to be addressed with the appeal officer who is already being called as a witness. His statement will have to address, in any event, the reason why he dismissed the appeal. The respondent does have time to address these matters and the length of the hearing will not be affected. There would be no new medical evidence. The Tribunal considered the extent to which each party would be prejudiced and concluded that the claimant would suffer greater prejudice than the respondent who made the statement upon which the claim is based.

14. The Tribunal considered it necessary to consider the time limits. The new claim is out of time by over 10 months. The question then is whether it is just and equitable to allow the claim to proceed. While the Claimant was a litigant in person at the time of submitting his claim, he had legal advice from his barrister by 30 November 2018, when the "Additional Information on Claims" document was prepared. The amendment could have been included in that document. The timing of the Application came from new Court of Appeal authority, in **Chief Constable of Norfolk v Coffey** [2019] EWCA Civ 1061. The Court noted at paragraph 11 that this is the first case of perception

discrimination to reach the Court. The Tribunal accepted that the prompt for the Application was the promulgation of the Court of Appeal judgment although it was a confirmation of a judgment of the Employment Appeal Tribunal which was available from 19 December 2017 ([2018] ICR 812 paras 54-55). The Tribunal accepted the reason for the delay put forward by the claimant and considers that it is just and equitable to extend the time for lodging the amended claim and exercised its discretion to do so.

15. It would in accordance with the overriding objective to permit the claimant to advance to a hearing on the merits with all claims included, particularly when there is time to deal with the additional claim which does not increase the length / complexity of the hearing accordingly, weighing everything in the balance, the amendment is allowed.

**Employment Judge Truscott QC**

**Date 18 March 2020**