



EMPLOYMENT TRIBUNALS

Claimant: Miss R N Kwakye
Respondent: Pantos Logistics UK Limited
Decision on the papers On: 7 May 2020
Before: Employment Judge Flood (sitting alone)

RESERVED DECISION

The claimant's application for permission to amend her claim to add the additional allegations of direct race discrimination (section 13 Equality Act 2010) as set out below is allowed.

REASONS

Background

- (1) The claimant was employed by the respondent from 25 September 2017 until dismissal with effect on 8 July 2019. By a claim form presented on 10 September 2019, following a period of early conciliation from 24 July 2019 to 22 August 2019, the claimant brought complaints of race discrimination and victimisation. The discrimination complaints are pursued on the protected characteristics of race. The claimant is African British. She alleges that she was dismissed because of her race. The claimant confirmed on 9 April 2020 that she was withdrawing her complaint of victimisation so this has been dismissed on withdrawal – see separate Judgment.
- (2) During the preliminary hearing held on 7 February 2020, the claimant indicated that as well as claiming that she had been dismissed because of her race, that she also wanted to complain about events that took place before her dismissal in particular involving the respondent's HR Manager. The respondent objected to the claimant being permitted to make additional allegations in this manner and submitted that if the claimant wished to do so, an application to amend would be necessary. I ordered that if the claimant wished to amend her claim, an application to amend should be made by 28 February 2020.
- (3) The claimant wrote to the Tribunal on 24 February 2020 and indicated that she wished to "*apply for an amendment of my initial witness statement*". The respondent provided its objections in a letter dated 13 March 2020. The matter was referred to me and a letter was sent to the parties on 31

March 2020 indicating that if the claimant wanted to make an amendment application, this needed to be done in a way that the Tribunal can properly consider, rather than just adding more narrative by way of a witness statement. I made an order setting out how the claimant had to set out any application to amend and that this had to be done by 10 April 2020 (with the respondent being permitted to respond by 24 April 2020).

- (4) The claimant submitted her amendment application on 9 April 2020 and the respondent submitted its response on 15 April 2020. The matter came before me for consideration today.
- (5) The claimant is a litigant in person and is not legally represented. The respondent has pointed out that the claimant's application to amend is unclear and does not comply with the Orders I made as set out in the letter of 31 March 2020. In accordance with the overriding objective, and to avoid further delay, I have considered the application in its current form. I have extrapolated from the correspondence that the claimant wishes to amend her claim to add the following four allegations of less favourable treatment (which I have set out in chronological order):
 - (i) Mr J Lee failed to deal with the claimant's verbal complaint about Ms O'Sullivan made on 8 May 2019 (and followed up verbally on 6 June and 18 July 2019). The claimant relies on the comparator of Ms O'Sullivan who she contends complained about the claimant which complaint led to the claimant's dismissal.
 - (ii) On 29 May 2019 Ms O'Sullivan did not allow the claimant to self certify after taking six days sick leave. The claimant relies on comparators of Mr Horishny, Mr M Harris and Ms K Lampard who are white British colleagues who she says are permitted by her to self certify whenever they take 7 days or less sick leave.
 - (iii) On 4 June 2019 Ms O'Sullivan denied the claimant's request to take half a day off having worked from 9am until 11.15pm on 3 June. The claimant relies on comparators of Mr R Arnold and Ms Lampard who are white British colleagues who she says are permitted by her to take half days off or start later when they stay the night to work.
 - (iv) On 21 June 2019 that Ms O'Sullivan suspended the claimant for not following reasonable instructions. The claimant relies on Mr N Horishny as a comparator and says that Mr Horishny a white British colleague was not suspended or dismissed having not followed instructions from the Finance Manager, Ms Boowun Byun.
- (6) I note in her application to amend, the claimant sets out comments and statements she says were made by Ms O'Sullivan in particular, in relation to the above acts. I have assumed that such assertions are made by way of supporting evidence and not specific allegations of themselves. These would be a matter for the witness statements and fact finding of the Tribunal more generally when making its decision.

Relevant Legal Framework

- (7) The general case management power in rule 29 of **First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (amended and reissued on 22 January 2018) (“**the Rules**”) together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments.
- (8) In the case of **Selkent Bus Co Limited v Moore [1996] ICR 836**, the Employment Appeal Tribunal gave useful guidance, namely:
- (4) Whenever a 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 has 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, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.
- (c) The Timing and The 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 Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay 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 factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question 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.”
- (9) I have also considered the case of **Transport and General Workers Union v Safeway Stores Limited UKEAT/0092/07/LA** on the issue of considering the balance of prejudice.

- (10) The position on amendment is also summarised in the Presidential Guidance issued under the provisions of **Rule 7** of the Rules which I have also considered.

Submissions

- (11) In support of the claimant's applications to amend, she submits that the further acts she now wishes to rely on had been identified during the first preliminary hearing as missing information. She says that these incidents that took place before the incident on 17 June 2019 (that led to her dismissal) led to or were connected with her subsequent dismissal. She says that she made reference to actions of Ms O'Sullivan's actions at the third page of her particulars of complaint in the claim form where she refers to "*An intervention by the HR manager (who have shown gross dislike for me due to her actions and inactions) was one to find fault, a practice she has been engaging in for reasons best known to herself.*" She contends that this is the allegation that she now wished to add further particulars to by way of the amendment application.
- (12) The respondent objects and makes a number of submissions. It first states that this is more than a relabelling exercise, her original claim being in respect of her dismissal only, she was seeking to significantly widen the scope of the claim. It is pointed out that the claims have "morphed" since the preliminary hearing and are inconsistent. It is pointed out that the new claims are substantially out of time and a number were out of time when the claim was submitted. It submits that the claimant has provided no explanation or evidence why her application to amend was not made earlier. The respondent points out that the additional claims are all in respect of verbal discussions where there is unlikely to be any contemporaneous evidence. The respondent's witnesses will therefore have to rely on memory on matters it was not previously on notice were significant matters. This the respondent submits puts the respondent to significant hardship defending the claim. The respondent says that the claimant is seeking to add historic claims of race discrimination in attempt to bolster her inherently weak claim. It points out that the significantly widened scope of the claim may put the 4 day hearing currently listed at risk of going part heard.

Conclusions

- (13) In deciding this application, I have considered the factors identified by **Selkent** before addressing the balance of prejudice and hardship. I set out the analysis on each of these points below:

Nature of the amendment

- (14) The amendment requested here is a substantial one, rather than the addition of factual details to an existing allegation, or a re-labelling exercise. Although Ms O'Sullivan is named in the claim form as having been involved or present at the incident that led to the claimant's dismissal, there is nothing in the claim form which specifically says or alleges that she had been acting in a discriminatory fashion prior to this. The claimant does reference the actions of the HR Manager being engaged in a practice of finding fault and intervening. Nothing specific is

said about the particular allegations mentioned for the first time in the proceedings at the preliminary hearing and then clarified in the later correspondence. This was therefore more in the nature of “*entirely new factual allegations which change the basis of the existing claim*” as identified in the **Selkent** case above. It is an attempt to add further allegations of less favourable treatment but based on facts that were not mentioned in the claim form. The first time such facts were set out in these proceedings was at the hearing on 8 February 2020. However this is only one factor for me to consider in exercising my discretion and is not decisive. I also note that the amendment does not seek to add another type of prohibited conduct (all are allegations of direct discrimination) or a new cause of action.

Applicability of time limits

- (15) The allegations that the claimant seeks to add date from 8 May 2019. These allegations therefore do not relate to factual matters in the distant past of the claimant’s employment. They are relatively recent and given that the claimant was dismissed on 8 July 2019 are not historic as regards to matters already before the Tribunal. The claimant commenced ACAS early conciliation on 24 July 2019, so counting back 3 months less a day before this date, anything that took place before 25 April 2019 is potentially out of time as regards presentation of the claim form. Had these allegations been specifically set out in the claim form, they would all be in time. It is correct that if the date such allegations were first made on 8 February 2020 is taken (or the dates the amendment applications were made) the complaints would be of course out of time.
- (16) Whether the amendment sought relates to acts that are potentially out of time is of course one relevant factor identified by the Selkent decision above but it is only one of the factors to consider. I bear in mind that the claimant here is not seeking to add a new cause of action but to add to her claim for direct race discrimination by (she says) particularising further acts that were not specifically mentioned in the claim form but are part of the broader allegation of discrimination. Therefore whether the amendment requested relates to acts that would otherwise be out of time is a factor that is broadly neutral. It does not alter the balance significantly one way or the other. The factual allegations should have been mentioned earlier, but the claimant does complain of discrimination because of her race from the outset and the time issue here is a relatively short one which is unlikely to cause significant prejudice.

Timing and manner of the application

- (17) The claimant first indicated that she may wish to amend her claim at the preliminary hearing held on 8 February 2020. This hearing was listed shortly after receipt of the claim form by the Tribunal in September 2019 and one purpose of the hearing was to identify the issues. This was the first hearing on the claim and the first opportunity for the parties to be in front of an Employment Tribunal Judge to discuss the claim. The respondent had identified in its response submitted on 17 October 2019 that the claims for race discrimination were not particularised. During the hearing the claimant was asked to set out what her claims for race discrimination related to and it is at this point that she identified the

matters now being considered. It is correct that a formal application to amend was not made until later and there were some problems with how that was made which are referenced in the background set out above. However, I note (as does the respondent in correspondence) that the claimant is a litigant in person without access to legal representation. She has to date acted as best she can in accordance with the Orders made and timescales identified for seeking the amendment she wishes to make. Therefore I do not consider that the way in which the amendment has been made or the timing has prejudiced the respondent in any specific way (over and above having to deal with allegations it did not previously have to) or can weigh significantly against the claimant.

Balance of prejudice

- (18) Putting these factors together I concluded that the balance of prejudice and hardship favoured allowing the claimant to amend her claim as indicated above. In these proceedings the claimant raised the factual incidents now relied upon at the first opportunity she had before the Tribunal to explain what her claim was about. I very much take note of the comments of the respondent that none of these matters appear to have been raised by the claimant at an earlier stage directly with them and are not in the claim form. That may well be a matter they wish to deal with at the final hearing of this claim and ask the claimant for an explanation in cross examination. This may be a matter for credibility. The issues the respondent raises about inconsistency and also what they say is the weakness of the claimant's claim, will no doubt be matters to be raised at final hearing too. However the claimant would be greatly prejudiced in not being permitted to raise these issues at all.
- (19) I accept that the respondent will be put to some additional work in seeking to adduce evidence on the matters now part of the claim. However such matters would be likely to have been raised as "background" to the claim and indeed the claimant has sent a copy of her Witness Statement to the respondent on 24 February 2020 where she mentions the facts that she says were connected to the incident which ultimately led to her being dismissed. The incidents were first mentioned on 8 February 2020 at the hearing and the respondent had the opportunity from that point to investigate matters. The respondent would likely have to obtain a witness statement from Ms O'Sullivan (as she was present during the incident that led to dismissal and was named as such in the claim form). These matters may well relate to verbal conversations only but that is not an unusual element of Employment Tribunal claims. Much of the evidence in this and many other claims may involve evidence about verbal conversations.
- (20) I note that the time set out in the original Case Management Order for disclosure has only recently passed. The additional disclosure that might be required to deal with the new allegations may not be significant in any event but I will make Orders to provide for additional time for such matters to be addressed. As the respondent notes, much of this is a matter of verbal evidence, and the time for exchange of witness statements has not yet been reached. Both parties should have sufficient time before August to seek the additional evidence required to deal with such matters if required and update witness statements already started to be prepared.

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- (21) I have considered the respondent's submissions on this point, but it would not appear to me to add significantly to the length of the hearing to deal with these additional matters. The time allocated in the timetable for the hearing outlined at the last case management hearing for remedy can perhaps be utilized for any additional matters that need to be dealt with arising from the amended claim. A separate remedy hearing can be listed at a later date should this be required.

- (22) For all of these reasons the claimant's application to amend her claim to the extent permitted above is allowed.

Employment Judge Flood

7 May 2020