



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104791/2018

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Held in Glasgow on 4 March 2019

Employment Judge: W A Meiklejohn

10 **Mr Guangchao Xu**

Claimant
Represented by:
Ms L Bain -
Solicitor

15 **Culture and Sport Glasgow**

Respondent
Represented by:
Ms A Irvine -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that (a) the Claimant's application to amend his claim is allowed and (b) the claim is not out of time.

REASONS

1. This case came before me for an open Preliminary Hearing on 4 March 2019.
25 Ms Bain appeared for the Claimant and Ms Irvine for the Respondent.

Issues

2. The Preliminary Hearing was fixed to deal with –
- The Claimant's application to amend the ET1 form, and
 - Time bar.

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Background

3. This is set out in the Note by EJ Whitcombe following the Preliminary Hearing on 29 November 2018 (the “PH Note”) and I will not repeat what is stated there.
- 5 4. In terms of the Case Management Order of the same date the Claimant was ordered to produce a table of allegations of direct race discrimination. The provision of that table was to be treated as an application to amend to add allegations relating to the different stages of grievance outcome.
5. In or around July 2016 the Claimant had, according to the paper apart to his
10 ET1, “raised a grievance with the Respondent regarding unfair treatment and breaches of procedure connected to the Workforce Planning”.
6. Thereafter, according to the ET1, the chronology of this grievance was as follows –
 - 22 December 2016 – Claimant received stage one outcome, is not
15 satisfied and escalates his grievance to stage two.
 - 22 March 2017 – Claimant attended stage two grievance meeting.
 - 25 May 2017 – Claimant received stage two outcome.
 - June 2017 – Claimant proceeded to stage three of the grievance procedure.
 - 20 • 15 August 2017 – Claimant attended stage three grievance meeting.
 - 13 December 2017 – Claimant received stage three outcome.
7. It was common ground that if an act of unlawful discrimination had taken place on 13 December 2017, it was not time barred.
8. In relation to the time bar issue, paragraph 10 of the PH Note states –
25 “The sole but important issue is whether the allegations might be found to constitute “conduct extending over a period” for the purposes of section 123(3)(a) of the Equality Act 2010. The preliminary hearing will consider whether, taken at their highest, they might do. The final hearing will consider whether, in the light of additional findings on the merits, they did.”

Submissions

9. Ms Bain and Ms Irvine each provided helpful written submissions which were supplemented by oral submissions at the Preliminary Hearing. The written submissions are available in the case file and so I will not rehearse them here.

5 Authorities

10. Ms Bain referred to –

- Selkent Bus Co. Ltd v Moore [1996] ICR 836
- Ali v Office of National Statistics [2005] IRLR 201 CA
- Ladbrokes Racing Ltd v Traynor [2007] UKEAT 0067/06/0310

10 Ms Irvine referred to

- Selkent (i.e. supra)
- Abercrombie & others v Aga Rangemaster Ltd UKEAT/0099/12
- Mr B Herry v Dudley Metropolitan Borough Council & another UKEAT/0170/17

15 Application to amend

11. The Claimant's table of allegations of direct race discriminated was submitted on 13 December 2018. This included the dates of the various stages of grievance outcome, being 22 December 2016, 25 May 2017 and 13 December 2017. As mentioned in paragraph 4 above, this was treated as an application to amend the ET1.

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12. The ET1 made reference at paragraphs 7, 9 and 10 of the paper apart to the Claimant's grievance but did not allege that the Respondent's treatment of the Claimant in dealing with his grievance constituted unlawful discrimination.

13. The ET1 referred to various unsuccessful job applications made by the Claimant in 2013, 2014, 2015 and 2016 and asserted that the way in which

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the Respondent dealt with these applications constituted unlawful direct discrimination, the protected characteristic being the Claimant's race.

If the Claimant's application to amend was granted, the effect would be –

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- a) the alleged act of unlawful discrimination on 13 December 2017 would not be time barred, and
 - b) if the earlier alleged acts of unlawful discrimination were found to be capable of constituting conduct extending over a period then potentially all of those alleged acts would not be time barred.

10 14. By email dated 20 December 2018 the Respondent opposed the application to amend, arguing that –

- The additional acts relied upon were entirely new claims which had not been pled previously.
- The new complaints were out of time.
- The timing and manner of the application was relevant.

15 15. The proposed amendment had been foreshadowed in an email from Ms Bain to the Tribunal on 3 October 2018, to which Ms Irvine had responded by email dated 4 October 2018.

20 16. The fact that the Claimant had made no claim in respect of the grievance process was identified in the Respondent's grounds of resistance at paragraph 9 –

“The circumstances detailed at paragraphs 6 to 10 of the Claimant's paper apart are alleged to have occurred in 2016 and 2017. The Claimant had not formulated or particularised a claim in respect to paragraphs 6 to 10 of the Claimant's paper apart.”

25 **Guidance in Selkent**

17. In Cocking v Sandhurst (Stationers) Ltd 1974 ICR 650 the NIRC laid down a general procedure for Tribunals to follow when deciding whether to allow

amendments to claim forms involving changing the basis of the claim or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it.

18. This was followed in Selkent where the Employment Appeal Tribunal explained that relevant factors would include –

- the nature of the amendment
- the applicability of time limits
- the timing and manner of the application.

Circumstances in present case

19. I took account of the following –

- the factual background to the proposed amendment had been set out in the paper apart to the Claimant's ET1 and so the Respondent had notice of it.
- that fact that no claim based on that factual background was set out in the ET1 was picked up by the Respondent in their ET3.
- dates of the various grievance outcomes and identification of the persons who dealt with the grievance at its various stages were provided in the ET1.
- it was in my view more likely than not that documentation relating to the various stages of the Claimant's grievance would be available.
- the grievance process had taken place in 2016 and 2017 and accordingly, even if the relevant witnesses remained available, the passage of time might well have dimmed their recollection of events.
- there would be prejudice to the Claimant if the amendment was refused as the rest of his claim would be out of time.

- there would be prejudice to the Respondent as they would require to answer a further allegation of unlawful discrimination involving additional witnesses, additional preparation time, potentially a longer Final Hearing and additional cost.
 - 5 • there had been delay between the Claimant being alerted to the fact that no claim was being made in relation to the grievance process (see paragraph 16 above) and the submission of the application to amend on 13 December 2018 for which no explanation was provided (although I reminded myself that an application to amend should not
10 be refused simply because it would be out of time).
 - the merits of the proposed amendment – while I had little more than the Claimant’s assertion that the grievance process had been discriminatory and the Respondent’s denial of this and the matter would not be capable of determination without evidence being led, I
15 did consider that the amendment disclosed a prima facie discrimination claim.
 - the application to amend was not a re-labelling of an existing complaint but it was also not, in my view, an entirely new head of claim given that
20 (a) the nature of the claim under section 13 EqA was the same as the existing claim and (b) the factual background was contained within the ET1. As such it fell between the two extremes as set out at paragraph 5(a) on page 843 of the decision in Selkent.
 - if pursued as a separate claim the application to amend would be out of time.
- 25 20. Approaching the matter on the basis of the guidance in Selkent I came to the following views –
- a) The nature of the amendment – this was neither a re-labelling of an existing claim nor an entirely new head of claim (i.e. one not foreshadowed at all in the ET1). It was however towards

the substantial end of the amendment spectrum than the minor end.

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- b) The applicability of time limits – the effect of allowing the amendment would be to allow the Claimant to pursue a head of claim which would otherwise be out of time.
 - c) The timing and manner of the application – there had been unexplained delay by the Claimant and this was not a case where new facts or information had become available after the submission of the ET1.

10 **Disposal**

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21. The paramount consideration was the relative injustice and hardship in refusing or granting the amendment. If the amendment was refused the Claimant would be unable to proceed with any part of his claim as it would all be out of time (and no application was being made to extend time on the basis that it was just and equitable to do so.)
22. If the amendment was granted the Respondent would have to face a new head of claim and would face the difficulties highlighted above (i.e. additional witnesses etc).
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23. I decided that the balance of injustice and hardship favoured the Claimant in this case. Losing the opportunity to pursue his claim at all in my view outweighed the prejudice to the Respondent in facing an additional head of claim with the consequent difficulties regard additional witnesses etc. The fact that the background to this head of claim had been set out in the ET1 was in my view a factor in favour of allowing the amendment because it meant that
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24. Accordingly the amendment is allowed and the claim is not out of time.
25. I considered finally whether the matters complained of by the Claimant could be said to be conduct extending over a period. He was alleging less favourable treatment in relation to various job applications because he was

Chinese. His grievance related to his treatment by the Respondent in relation to Workforce Planning. There was a common thread running through the Claimant's complaint in respect of what he was complaining about. In my view, stating the Claimant's case at its highest, there was some prospect that he might be able to establish that there had been conduct extending over a period rather than a series of unrelated incidents. This matter could only be determined after the leading of evidence at a Final Hearing.

10	Employment Judge:	W A Meiklejohn
	Date of Judgement:	19 March 2019
	Entered in Register, Copied to Parties:	20 March 2019