# THE EMPLOYMENT TRIBUNALS

## VIDEO PUBLIC PRELIMINARY HEARING

**Claimant:** **Mrs G Dunarintu**

**Respondent:** **Wolstenholme Machine Knives Limited**

**Heard at:** **Leeds (by video link)** **On: Tuesday 8 December 2020**

**Before:** **Employment Judge Shore**

**Claimant:** **In Person**
**Respondent:** **Mr M Warren-Jones, Solicitor**

# JUDGMENT

The judgment of the tribunal is that: -

1. The claimant's application to amend her claim to include additional allegations of race discrimination is refused. I find that the amendments were new allegations that were not presented within the period of three months less one day of the last act or omission complained of (plus early conciliation extension), as required by section 123 of the Equality Act 2010 and I do not find it would be just and equitable to extend the time limit.

# REASONS

BACKGROUND

1. The claimant was employed by the respondent, a company that makes machine knives, as a Sales Co-ordinator, from 16 April 2019 until 24 March 2020. Early conciliation started on 8 June 2020 and ended on 9 June 2020. The claim form was presented on 19 June 2020.

2. The claim originally seemed to be about the dismissal of the claimant. She says that she was dismissed because of her race (Romanian) and/or her sex (female).

The respondent's defence is that the claimant was dismissed because of misconduct and denies race or sex discrimination.

3. The case came before Employment Judge Little at Sheffield on 26 August 2020 by telephone, when he made a full and very useful note of the claims that appeared in the claimant's claim form. He noted that in its response, the respondent had volunteered the assertion that the claimant's race discrimination claim was out of time and referred to an incident that had taken place on 17 October 2019. The claimant had made no direct reference to that incident in her claim form.

4. The notice of hearing dated 7 August 2020 for the telephone preliminary hearing before EJ Little included the words:

> *"If there is any application to amend the claim to include any allegations of discrimination in respect of something other than the dismissal, that application must be made in writing before the hearing* [on 26 August 2020] *and it will then also be determined whether it should be granted or not."*

5. In response, the claimant submitted a document to the Tribunal on 24 August 2020 that consisted of a heavily annotated copy of the respondent's grounds of resistance. I agree with EJ Little's comment about the document that the vast majority of the claimant's annotations related to the alleged unfairness of her dismissal and were irrelevant as she had less than two years' continuous service and the Tribunal had no power (jurisdiction) to hear such a claim.

6. In her note at paragraph 17 of the grounds of resistance (which dealt with the incident on 17 October 2019), the claimant wrote "The company admits that I was discriminated by race by a colleague…" , but added no further detail.

7. She added allegations that she had been followed and harassed in the office by "various colleagues and persons even from other departments". She said that Kerry Barker of the respondent followed her into the car park once, but never followed anyone else into the car park. She says she reported this to a manager on 27 February 2020. As at 26 August 2020, that was the full extent of the additional allegations of race discrimination that the claimant had made, albeit somewhat circumspectly.

8. The case came before Employment Judge Little on 26 August 2020 in a telephone private preliminary hearing. He decided that the claimant may not have fully understood what had been asked of her in the notice of hearing about amending her claim, so set out a series of questions in a table and made an order that she answered the questions and returned the answers to the Tribunal by 18 September 2020 if she wished to amend her claim.

9. EJ Little also set up today's preliminary hearing to deal with any amendment application and make case management orders for the case, which included allegations of sex and race discrimination in the act of dismissing the claimant.

10. The claimant returned her answers to the questions set by EJ Little within the required time period. It runs to six pages and makes many allegations of discrimination against the respondent, some of which are very serious allegations of harassment related to the protected characteristic of race.

11. The parties had not prepared an agreed bundle or witness statements.

12. The hearing was conducted by video link on the CVP platform. We had no technical issues to speak of and we were able to proceed without interruption. I took the claimant through the history of her employment and the case and then asked her if she had anything to add. I then asked Mr Warren-Jones to make his submissions. I went back to the claimant to hear her closing remarks. I adjourned for just over 30 minutes to consider my decision and reasons before returning to deliver them. I then went on to make case management orders for the claims that remained.

13. At the start of the hearing, I went through the overriding objective of the Tribunal with the claimant and made sure that he understood the purpose of today's hearing.

FINDINGS OF FACT

14. There were no facts that related to this hearing which were disputed. I therefore find that it was undisputed (or indisputable) that:

    14.1 The history of the case is as set out in paragraphs 1 to 10 above.

    14.2 The claimant had not raised a written grievance with the respondent about any alleged act of race or sex discrimination during her employment.

    14.3 The claimant had raised a single issue of race discrimination at her appeal hearing about her exclusion from the team.

    14.4 The claimant knew that what she now alleges was wrong at the time it happened to her.

    14.5 She was aware that there is a time limit for Employment Tribunal claims because she researched it online.

    14.6 She says that in her claim form, one paragraph in paragraph 8.2 of the ET1 refers to the claims that she wishes to amend her claim to include. That paragraph states:

> *"I believe that I have been discriminated against in the decision to terminate my contract without good reason as well as having been treated unfairly and prevented from continuing my employment."*

    14.7 When she completed he claim form, she had in mind feelings of being hurt about the fact that something was not right. She wanted to get an independent external opinion [from the Tribunal].

    14.8 When she completed the claim form, that was her case. The matters referred to in the application for amendment were "indicated between the

lines" of the claim form. She wanted to raise a signal that something had happened.

15. Mr Warren Jones summarised the respondent's objections. He accepted that the respondent's grounds of resistance had raised an issue that wasn't in the claim form about comments made to the claimant about her accent. She had raised that point in her appeal against dismissal and it had been dealt with. That was the only matter of discrimination raised at that time.

16. The claimant now raises many claims of discrimination, including some very offensive comments that she says were made to her. It is accepted by the respondent that the Tribunal has discretion to extend time when it is just and equitable to do so, but it was submitted that such an extension would not be just or equitable in this case for the following reasons:

    16.1. At least four of the people named by the claimant had either left the respondent's employment or were due to leave before Christmas. It was prejudicial to the respondent for it to have to approach them for statements. They may now be disgruntled because of the way their employments ended;
    16.2. There is no cogent explanation by the claimant as to why the large amount of information now produced was not in her ET1;
    16.3. She was given the opportunity to expand her claim when she saw the notice of hearing for the preliminary hearing on 26 August 2020, but did not take it;
    16.4. She has still not seized the opportunity with her latest document;
    16.5. She had never raised these new matters with the respondent;
    16.6. She raised one allegation of race discrimination at her dismissal appeal;
    16.7. The claimant only sought to expand her claim when EJ Little struck out her unfair dismissal claim;
    16.8. Extension is not automatic. A claimant has to produce a good reason why the claim was not submitted on time;
    16.9. The new clams are out of time, and;
    16.10. It would be extremely prejudicial to the respondent to allow the application.

<u>DECISION</u>

17. The case of **Selkent Bus Company Limited v Moore [1996] ICR 836** provides the test that has to be applied in cases of amendments. That test is:-

    17.1. The nature of the amendment – this can cover a variety of matters such as:

        17.1.1. the correction of clerical and typing errors;
        17.1.2. the additions of factual details to existing allegations;
        17.1.3. the addition or substitution of other labels for facts already pleaded;
        17.1.4. the making of entirely new factual allegations which change the basis of the existing claim.

18. So far as category 17.1.2. 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.

19. In **Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148**, Underhill LJ summarised the approach adopted by the EAT and Court of Appeal when considering applications to amend 'which arguably raise new causes of action' (para 48). This is:

> *" … to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."*

20. It is only in respect of amendments falling into category 17.1.3. — entirely new claims unconnected with the original claim as pleaded — that the time limits will require to be considered.

21. In order to determine whether the amendment amounts to a wholly new claim, as opposed to a change of label, I had to examine the case as set out in the original application to see if it provides a 'causative link' with the proposed amendment.

22. Although there may be an absence of a link between the case as pleaded in the original claim and the proposed amendment, this will not be conclusive against the amendment being allowed. In **Evershed v New Star Asset Management UKEAT/0249/09 (31 July 2009, unreported)**, Underhill J pointed out that it is no more than a factor, the weight to be given to it being a matter of judgment in each case (para 24). I had to analyse carefully the extent to which the amendment would extend the issues and the evidence.

23. One of the factors that may be taken into account when determining whether a new claim should be allowed by way of amendment is an assessment of the merits of the new claim but if the new claim cannot be said to have no reasonable prospect of success, and it is in time, and the balance of hardship/injustice is in favour of the claimant, then the amendment should be allowed. I had reservations about the strength of the claimant's amended claims, as they were so numerous and so serious that she said they had a major impact on her health, it seemed incongruous that this was the first time they had seen the light of day.

24. In **Ali v Office of National Statistics [2004] EWCA Civ 1363**, the Court of Appeal decided that direct and indirect discrimination are different types of unlawful act, so that where a claim of direct racial discrimination was made in time, a subsequent claim of indirect discrimination made out of time could not be considered within the rubric of the original claim but required an application for leave to amend under the 'just and equitable' provisions of the legislation at the time.

25. The principles on extensions of time on a just and equitable basis are best set out in **Robertson v Bexley Community Centre [2003] EWCA Civ 576**. In paragraph 25 of that judgment Auld LJ stated that:

> *"It is also of importance to know that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an appeal tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the appeal tribunal if it were deciding the issue of first instance would have formed a different view. As I have already indicated, such an appeal should only succeed where the appeal tribunal can identify an error or principle of law making the decision of the tribunal below plainly in this respect."*

26. In the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13**, it was noted that a litigant can hardly hope to satisfy the burden on him to show that time should be extended unless he provides an answer to two questions (§52):

> *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."*

27. There is no requirement on me to hear the full merits of the case before determining whether the Tribunal has jurisdiction to hear it.

28. The discretion to grant an extension of time under the "just and equitable formula" had been held to be as wide as that given to the civil courts by section 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions. Under that section, the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

    28.1. the length of and reasons for the delay;
    28.2. the extent to which the cogency of the evidence is likely to be affected by the delay;
    28.3. the extent to which the party sued had co-operated with any requests for information (this is not relevant in this case);
    28.4. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action, and;
    28.5. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

29. I find that the claimant was well aware of her potential claims for race discrimination that she now seeks to add because she complained about one instance whilst still employed, made a substantive claim for discrimination

(although it was limited to discrimination related to her dismissal) and was aware that what she said had happened to her was unlawful.

30. I do not find that the claimant's lack of knowledge was reasonable. The reason I make this finding is that she used the internet to research the possibility of a claim. She is an intelligent woman.

31. The same principles apply in the just and equitable arena to those in the reasonably practicable arena in respect of the claimant's ignorance of the law.

32. When considering whether to grant an extension of time under the 'just and equitable' principles, the fault of the claimant is a relevant factor to be taken into account. I find that the claimant was at fault.

33. It is necessary for me, when exercising my discretion, to identify the cause of the claimant's failure to bring the claim in time. In **Accurist Watches Ltd v Wadher UKEAT/0102/09/MAA**, Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form.

34. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents (§16). What a tribunal is not entitled to do, however, is to make assumptions in the claimant's favour on contentious factual matters that are relevant to the exercise of the discretion; as the burden is on the claimant to show that it would be just and equitable to extend time, where a contentious matter is relied on there must be some evidential basis for it. In this case, the claimant's only stated reason for delay was that she was ignorant of the law.

35. When balancing the factors for and against the exercise of my discretion in the claimant's favour, I find:

    35.1. The claimant did not refer to the claims she now seeks to add in her original ET1. I find that the single paragraph in paragraph 8.2 of her ET that I have reproduced above has no causal link to the matters she now seeks to add. Those matters are new, not a 'rebadging' of facts already pleaded.
    35.2. The length of delay in making the application was unreasonable and the reason for delay was not reasonable.
    35.3. There is a risk that the cogency of the evidence available to the respondent may be adversely affected because of the delay in adding new matters and the fact that many of those accused of malfeasance no longer work for the respondent.
    35.4. The claimant did not act particularly quickly when she realised the true position. Her first attempt to set out her amended claim did not come until

August 2020 and was a very limited attempt to set out the matters that now consist of six pages of text.

35.5. The claimant has sought no professional help.

35.6. I am mindful of the requirement to ensure a just and fair hearing. I am conscious that the claimant is a litigant in person and would suffer the prejudice of not being able to continue with the proposed amended claims, but she has the originals claims and I find the prejudice caused to the respondent in defending a claim that was not indicated until so long after the alleged acts tips the balance in its favour.

36. I therefore find that the claimant has not shown that the new claims were part of her original ET1 and I find that the new claims are out of time. The application to amend is therefore refused.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

**EMPLOYMENT JUDGE SHORE**

**8 December 2020**