EMPLOYMENT TRIBUNALS

AT AN OPEN ATTENDED PRELIMINARY HEARING BY CLOUD VIDEO PLATFORM

Claimant: Mr C McDonald
Respondent: University of Derby

Heard at: Nottingham by CVP
On: 5 and 6 May 2021
Before: Employment Judge Victoria Butler (sitting alone)

Representation
Claimant: In person
Respondent: Mr N Smith, Counsel

Covid-19 statement:
This was 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 Covid-19 pandemic.

JUDGMENT having been sent to the parties on 18 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The Employment Judge gave judgment as follows:

1. The following amendments are allowed:

   Allegation 29 in the schedule of allegations
   Allegation 42(b) in the schedule of allegations

2. The following amendments are refused:

   Allegation 21 in schedule of allegations
   Allegation 24 in the schedule of allegations
   Allegation 48 (b) in the schedule of allegations

REASONS

Background

1. The Claimant is employed by the Respondent as a Senior Academic Counsellor and the employment relationship continues. The Claimant presented this claim alleging race discrimination to the Tribunal on 14 August 2020 following a period of early conciliation between 15 June 2020 and 10 July 2020.

2. Prior to this claim, the Claimant issued two claims in the Employment Tribunal, under case numbers 2601879/2008 and 2604179/2009. The first claim was dismissed after a determination that the claims were out of time and allegations in the second claim were either struck out as having no reasonable prospects of success or dismissed because they were out of time.

3. This case was subject to a closed preliminary hearing by telephone before me on 4 November 2020 after which I noted in my case management summary:

"*Further particulars*

At the outset of the litigation, the Respondent asked the Claimant to schedule his claims in order to clarify what allegations were relied on as acts of discrimination versus what was background information. The Claimant has made a valiant attempt at doing so, but some vital information is missing.

We discussed the best way of dealing with this to allow the Respondent and the Tribunal to understand the case advanced. The Claimant has agreed to update the existing schedule, being absolutely clear what the factual elements of each allegation are.

In relation to each allegation of direct discrimination he will confirm who the comparator(/s) is. In relation to allegations of indirect discrimination he will confirm (1) what the provision, criterion or practice ("PCP") is that put people with whom he shares the same protected characteristic at a particular disadvantage when compared with others who do not share it; (2) what the disadvantage is; and (3) that the Claimant himself was subject to that disadvantage.

The Claimant will also set out what his claim is in respect of unauthorised deductions of wages and quantify how much is claimed and why.

He will add an additional column to the existing schedule and cross-refer each allegation to the original claim form identifying in which paragraph/s that allegation is contained. He will also highlight new allegations not raised in the claim form.

Thereafter, the Respondent will add its own column containing a reply.

Application to amend?

If the Claimant wishes to rely on allegations that are not referred to in the originating claim and the Respondent objects to their inclusion, the Claimant will be required to make an application to amend his claim. He is referred to the Presidential Guidance on "General Case Management" which is mentioned below. The Respondent will also confirm its position in the reply to the schedule whether, in its view, an application to amend is required.

The Claimant has raised numerous grievances during his employment of which three are currently outstanding. If there are any new matters arising out of those grievances that the Claimant wishes to rely on, the Respondent sensibly agreed the best course of action would be for him to make an application to amend the existing claim. The Respondent will, of course, have opportunity to respond to those allegations but it seems disproportionate for the Claimant to issue an entirely new claim simply to add matters that are already referred to in this claim."

4. I ordered the Claimant to provide further and better particulars of his claim and a lengthy schedule of allegations ("the Schedule") was produced running to fifty-one discreet allegations of discrimination dating back to 1991. The Claimant accepted that he was required to make an application to amend in respect of allegations 1, 6, 8, 17, 18, 21, 24, 29, 42(b) and 48(b).

5. This hearing was listed by me to determine the following issues:

> *"15.1 Whether the Claimant is estopped from relying on events that were subject to previous litigation;*
>
> *15.2 Whether any allegations relied on by the Claimant are out of time and, if so, whether it is just and equitable to extend time;*
>
> *15.3 To hear the Claimant's application to amend (if necessary); and*
>
> *15.4 To make further case management orders and list the case for a final hearing."*

6. This judgment covers the application to amend only.

The estoppel judgment

7. I gave judgment on day one of this hearing that the Claimant was estopped from relying allegations 1 – 20 inclusive. This left allegations 21, 24, 29, 42(b) and 48(b) subject to the application to amend.

The application to amend

8. The Claimant's overarching case is that his experiences at the Respondent give rise to an inference that there is a policy to suppress his promotion, influence and pay because of his race.

9. Regrettably, the specific allegations of discrimination remain unclear and we

spent considerable time during the morning of day two of this hearing establishing what the complaints subject to the application to amend were, and why the Claimant says they amount to direct discrimination. The Respondent must know the specific facts of the allegations against it and the case it is required to answer, but there was insufficient time to deal with the remaining 26 allegations and I have made a separate order in this regard.

10. The five allegations subject to the application are:

Allegation 21

11. In 2010, the role of Acting Subject Head was deliberately not advertised because the Claimant was eligible to apply, thereby preventing him from applying. Sam Salt was appointed to the role, who is white, and the individual responsible for that appointment was the Head of Computing at the time. The Claimant is unsure who that individual was but no doubt the Respondent will be able to track him or her.

Allegation 24

12. The Respondent fabricated a restructure in January 2015 in an attempt to dismiss the Claimant and further, the policy in respect of redeployment was not applied in the same way as in previous redundancy exercises - albeit the Claimant acknowledges that the policy was applied equally in this exercise to his white contemporaries.

Allegation 29

13. In January 2017, the Claimant was not invited onto his College Executive Committee despite being told previously by Louise Pigeon that his role was an executive role. The Claimant's four contemporaries in different colleges were invited onto their Executive Committees.

Allegation 42(B)

14. The Claimant's line manager, Kim Smith, did not read the Claimant's email in respect of a student complaint and, thereafter, he lied in a grievance investigation claiming that he had not read the email when the Claimant believes that he actually did.

Allegation 48(B)

15. In February 2020, the Claimant's Associate Professor application was submitted but not considered due to lack of funding. The Claimant's white contemporaries' applications were also not considered but the Claimant avers this was to disguise direct discrimination against him and to prevent his appointment to the role.

The law

16. The starting point in an application to amend is always the original pleading set out in the ET1. In ***Chandok v Tirkey*** 2015 ICR 527, the EAT said:

"*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with the time limits but which is otherwise free to be augmented by whatever the parties choose to add or subject merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.*"

17. In dealing with an application to amend, the Tribunal will take into consideration its duty under the overriding objective: to ensure that the parties are on an equal footing; to deal with the case in a way that is proportionate to the complexity and importance of the issues; to avoid unnecessary formality and seek flexibility in the proceedings; to avoid delay so far as compatible with proper consideration of the issues; and to save expense.

18. In ***Cocking v Sandhurst Stationers Ltd*** **[1974] ICR 650** the President held that regard should be had to all the circumstances of the case and in particular the Tribunal should *"consider any injustice or hardship which may be caused to any of the parties if the proposed amendment was allowed or, as the case may, be refused*".

19. In ***Selkent Bus Company (trading as Stagecoach) v Moore [1996] IRLR*** the EAT held that relevant circumstances include:

> *"Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account <u>all</u> the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
>
> *(a) <u>The nature of the amendment</u>*
>
> *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) <u>The applicability of time limits</u>

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, S.67 of the 1978 Act.

(c) <u>The timing and manner of the application</u>

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."

20. The Presidential Guidance on General Case Management ("the Guidance") incorporates the factors set out in ***Cocking*** and ***Selkent.***

21. In respect of re-labelling, the Guidance provides: *"While there may be a flexibility of approach to applications to re-label facts already set out, there are limits. Claimants must set out the specific acts complained of, as Tribunals are only able to adjudicate on specific complaints. A general complaint in the claim form will not suffice. Further an employer is entitled to know the claim is has to meet".*

22. Under 'Time Limits' the Guidance provides: *"The Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Where for instance a claimant fails to provide a clear statement of a proposed amendment when given the opportunity through case management orders to do so, an application at the hearing may be refused because of the hardship that would accrue to the respondent".*

23. A Tribunal can allow an application to amend but reserve any limitation points until the final hearing which might be necessary in cases where it is not possible to make a determination without hearing the evidence – ***Galilee v Commissioner of the Metropolis UKEAT/0207/16.***

<u>Conclusions</u>

Time limits

24. The Claimant asserts that all the acts he relies on amount to conduct extending over a period. Accordingly, it was impossible for me to make a determination on this point without hearing the evidence and, therefore, the Respondent's limitation points are reserved until the final hearing.

The nature of the amendments

Allegation 21 - that in 2010, the role of Acting Subject Head was deliberately not advertised to suppress the Claimant's promotion

25. I am satisfied that this is an entirely new and discrete allegation not pleaded in the originating claim requiring a completely new factual enquiry dating back to 2010. The Respondent will be obliged to track down the relevant Head of Computing and obtain evidence on matters that occurred over a decade ago in order to respond to the allegation.

Allegation 24 - that the Respondent fabricated a restructure in January 2015 in an attempt to dismiss the Claimant and further, the policy in respect of redeployment was not applied in the same way as in previous redundancy exercises

26. Again, I am satisfied that this is a new allegation not already contained in the originating claim. It will require an entirely new factual enquiry which will go well beyond 2015 in order to examine whether this allegation can be substantiated.

27. The Claimant has not articulated why the application of the policy in January 2015 was different to previous exercises. The Respondent is therefore placed in a position where it might be required to produce evidence of numerous redundancy exercises, explaining how and why its redeployment policy was applied in respect of each, whilst not knowing the case it has to meet with any precision.

Allegation 29 - that in January 2017, the Claimant was not invited onto his College Executive Committee when his contemporaries in different colleges were

28. This is an entirely new allegation not pleaded in the originating claim. However, the scope of the factual enquiry is contained to a clearly defined incident within a specific time-frame.

Allegation 42(B) - that the Claimant's line manager, Kim Smith, did not read the Claimant's email in respect of a student complaint and, thereafter, he lied in a grievance investigation claiming that he had not read the email when the Claimant believes that he did

29. I am satisfied that whilst the allegation itself it new, it arises out of the same set of circumstances as those set out in allegation 42 (that the Claimant was not aware that one of his students was given a refund following their complaint). It is a discrete point which will require Mr Smith to address that particular matter.

Allegation 48(B) - that in February 2020, the Claimant's Associate Professor application was submitted but not considered. His contemporaries' applications were also not considered to disguise direct discrimination against him.

30. I am satisfied that this is a new allegation not pleaded in the originating claim requiring the Respondent to defend an allegation which, on the face of it, is one that the Claimant's contemporaries were also treated less favourably to disguise direct discrimination against the him.

31. The allegation is purely in relation to the Associate Professor applications last year, but the Claimant explained at the hearing that in previous years, individuals have been appointed to those roles even in the absence of funding. However, he failed to identify which individuals he says were appointed and when. Absent this information, the Respondent would be required to undertake vast enquiry without knowing with any precision what it is looking for.

The timing and manner of the application

32. The Claimant is well versed in raising issues about his treatment at the Respondent; he has raised circa twelve internal grievances to date with possibly another one on the way. The Claimant has litigated twice prior to this litigation and the current case is extensive, running to 137 paragraphs and raising matters going back to 1991. I am satisfied the Claimant is clear when he feels he has been treated unfairly and is able to articulate that by means of grievance and/or litigation.

33. The Claimant explained that he has not relied on the matters that are subject to this application in his originating claim because they '*slipped his mind'*. He also said that when he was drafting his claim, he took a conscious view on what to include and what not to include. He said he could have included further allegations of bullying and harassment but chose to focus on the three broad headings of promotion, pay and influence. Accordingly, he has made an active choice about which allegations to include and exclude. Given the Claimant's history of grievances and litigation, I do not accept that if the Claimant held a belief that they amounted to discrimination that they would have slipped his mind and he would have included them in this extensive claim.

Conclusions

34. Considering everything in the round, including the furtherance of the overriding objective, I made the following judgment:

Allegation 21

35. This is an entirely new factual allegation requiring evidence dating back to 2010. The Respondent would be required to track down the previous Head of Computing (if s/he still works for the Respondent) and the necessary evidence, if it indeed still exists. The enquiry would involve examining the facts

surrounding the appointment of one individual circa twelve years ago and the knowledge of the Head of Computing as to why the role was not advertised. Naturally, memories fade with a substantial passage of time. Accordingly, the balance of injustice and hardship would fall against the Respondent if the amendment is allowed and it is, therefore, refused.

Allegation 24

36. This is an entirely new factual allegation and the Claimant has failed to explain why the policy was applied differently to previous exercises and to which previous exercises in particular he relies on. Accordingly, the Respondent does not know the case it is required to meet, and it would be disproportionate for it to obtain a vast amount of evidence over many years to include how the policy was applied on each occasion and why, without precise details of the case it is required to answer. It would also necessitate an indeterminate number of witnesses. Accordingly, the balance of injustice and hardship would fall against the Respondent in allowing the amendment and it is therefore refused.

Allegation 29

37. Whilst I accept that this allegation is a new factual allegation, it is contained to a specific incident in 2017 and the scope of evidence required to deal with it is limited and proportionate. Given the overarching thrust of the Claimant's case, that the allegation is clear and limited and the final hearing does not commence until September 2022, I am satisfied that the Respondent will not be put to great hardship in responding to the allegation and the balance of injustice and hardship would fall against the Claimant if he were not allowed to rely on it. Accordingly, the application is allowed.

Allegation 42(B)

38. Whilst this too is a new factual allegation, it is clearly linked to the allegation 42 which the Respondent accepts was pleaded in the originating claim. In considering the balance of injustice and hardship, the grievance will form a part of the evidence in the claim in any event and the only additional burden on the Respondent will be the likely requirement for Mr Smith to give evidence, albeit contained to a very small point. He is still employed by the Respondent so I do not consider that it is put to too much hardship in me allowing that amendment and the balance of injustice and hardship would fall against the Claimant in refusing it. Accordingly, the amendment is allowed.

Allegation 48(B)

39. This is an entirely new factual allegation which lacks the requisite detail to allow the Respondent to investigate it with any precision. Given that the Claimant has failed to name those who he says were appointed in the same circumstances, the Respondent would be required to investigate any Associate Professor recruitment rounds where individuals were appointed in the face of lack of funding. The scope of investigation would be disproportionately wide involving

an indeterminate number of witnesses, and therefore, the balance of injustice and hardship would fall against the Respondent if the application were allowed. Accordingly, it is refused.

40. To conclude for the reasons set out above:

- Allegation 21 is refused
- Allegation 24 is refused
- Allegation 29 is allowed
- Allegation 42(B) is allowed
- Allegations 48(B) is refused.

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Employment Judge Victoria Butler

Date: 21 June 2021

JUDGMENT SENT TO THE PARTIES ON

24 June 2021
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FOR THE TRIBUNAL OFFICE

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