EMPLOYMENT TRIBUNALS

Claimant: Mr Jay Shimano

Respondent: Flight Transport Association Ltd t/a Logistics UK

JUDGMENT

The claimant's application for leave to amend his claim is refused.

REASONS

Introduction

1. At the preliminary hearing on case management which I conducted on 4 June 2021, the claimant's then counsel, Mr Flood, indicated that the claimant would be making an application for leave to amend his claim to include a complaint of ordinary unfair dismissal under section 98 of the Employment Rights Act 1996 ("ERA"). I made a number of case management orders allowing for presentation of the application by 18 June 2021, a reply from the respondent by 2 July 2021 and I indicated that I would deal with the application on the papers without a hearing and would endeavour to do so by 16 August 2021. I apologise for the slippage in this time indication.

2. The claimant's solicitors sent the claimant's application by email dated 18 June 2021 along with amended particulars of claim and the respondent's response. The respondent's solicitors sent the respondent's reply to the application along with relevant authorities by email dated 2 July 2021. The attached documents were too lengthy for the Tribunal's administration to justify printing out and so the respondent's solicitors were advised to re-send the documents by post. In the event, the respondent's solicitors re-sent a reduced version of the documents by email dated 5 July 2021.

Background

3. For the detailed background to this claim I would refer to the Case Summary set out within the record of the preliminary hearing which took place on 4 June 2021.

4. In essence, the claimant brought two claims, the first against his ex-employer, Flight Transport Association and two named individuals, and the second against

Flight Transport Association alone. The first claim raises complaints of sexual orientation discrimination and harassment. The complaint against the two named individuals was dismissed on withdrawal at the hearing on 4 June 2021. The second claim raises complaints of unfair dismissal and failure to consult under the collective redundancy provisions of the Trade Union & Labour Relations (Consolidation) Act 1992.

5. At the hearing on 4 June 2021, I identified the complaints and issues arising from the first claim set dates for the full hearing of the claim as well as various case management orders. With regard to the second claim, Mr Flood conceded that this had been presented one day out of time and that given the high bar presented by the test of reasonable practicability, the claimant did not have an argument. He further indicated that as a result the claimant accepted that the second claim was out of time and that the Tribunal had no jurisdiction to deal with it. I therefore dismissed the second claim on withdrawal by the claimant. Mr Flood advised that the claimant proposed to make an application for leave to amend the first claim to include a complaint of ordinary unfair dismissal. He requested that the matter be dealt with on the papers without a hearing, to save costs, after allowing the respondent the opportunity to reply to the application. The respondent agreed. I did query whether this would get round the issue of the time-limit. Mr Flood was of the view that it did not, but a consideration of the application under the Selkent principles possibly gave the claimant more chance of success.

The claimant's application

6. In essence, the claimant's application is as follows:

   a. He seeks to add a new complaint of unfair dismissal to his claim and to introduce new facts in support. He accepts that the amendment sought is on the face of it out of time, the limitation period in respect of the unfair dismissal complaint having expired on 2 November 2020;

   b. The Early Conciliation certificate was issued on 3 December 2020. The second claim was presented to the Tribunal on 31 December 2020 with an application for it to be consolidated with the first claim;

   c. The second claim was accepted by the Tribunal notwithstanding the jurisdiction issue. In answer to that, I would make the point here that whilst that is indeed the case, acceptance of a claim form does not denote presentation within the requisite time limits, simply that the claim form complies with the requirements under rules 8 to 14 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules of Procedure"). Any jurisdictional matters still have to be determined by the Tribunal;

   d. The proceedings were served on the respondent on 11 January 2021 without the Early Conciliation certificate, the respondent replied raising the time issue, whilst there was a discussion of the matter at an earlier preliminary hearing before Employment Judge Martin, held on 2 March 2021, the matter could not be taken any further because at that point the Tribunal's administration had not yet processed the second claim;

e. The second claim was accepted on 31 March 2021 and an acknowledgement was sent to the parties. The respondent presented its response to that claim on 21 May 2021 in which it fully pleaded all of the allegations in the particulars of claim and did not raise any jurisdictional point. However, the respondent did raise the jurisdictional point in its agenda for the preliminary hearing which took place on 4 June 2021;

f. Whilst the unfair dismissal claim is out of time, there has been no delay. The previous claim of unfair dismissal was extant until the concession on jurisdiction was made at the hearing on 4 June 2021 and its application to amend was indicated immediately after that concession and made within the timeframe which I set my case management orders;

g. There is no prejudice to the respondent other than having to meet the claimant's claim for unfair dismissal. In addition, the claimant submits that prejudice is diminished by dint of the fact that the respondent had notice of the claim and the substance of the amendment on 11 January 2021 and has already considered and fully pleaded to it within its grounds of resistance;

h. The claimant seeks an amendment to the first claim in exactly the same terms as the particulars of claim which accompanied the withdrawn second claim, so as to ensure that the respondent is put to no further work or expense in responding to the amendment. I have considered this document which is annex 3 to the application.

The respondent's written submissions

7. The respondent presented written submissions in response to the claimant's application for leave to amend.

8. The submissions set out the history to the matter, the relevant law and then address the claimant's application itself.

9. In essence, the respondent submits as follows:

a. The claimant seeks to add an entirely new claim without nexus to his first claim and unsupported by any of the facts contained therein. Whilst paragraph 18 of the particulars of the first claim makes reference to the respondent's proposed restructuring, this is in the context of discrediting his line manager and implying that she was not conducting his performance review correctly. It is not included for the purpose of bringing a claim of unfair dismissal. The proposed amendments at paragraphs 38 to 65 of his amended particulars of claim focus on his redundancy and do not feature whatsoever in the first claim;

b. The second claim was presented out of time and the time-limit should not be extended under the reasonably practicable test. The claimant's effective date of termination was 3 August 2020, the time-limit within which to bring a complaint of unfair dismissal expired on 2 November 2020, the claimant did not consult ACAS until 3 November 2020 and his second claim in respect of unfair dismissal was presented to the Tribunal on 31 December 2020. The claimant

commenced ACAS Early Conciliation out of time and as such the limitation period is not extended by operation of section 207 ERA;

c. The claimant cannot satisfy the Tribunal that it was not reasonably practicable to present the claim in time. He has confirmed in his application that he *"had no grounds on which to argue that it was not reasonably practicable to present the second claim within the time limit"*. Therefore the time limit should not be extended under section 111(1)(b) ERA 1996;

d. The application ought to have been made earlier. The claimant instructed solicitors at the time of submitting his first claim, he had also complied with the requirements of Early Conciliation respect of that claim, in respect of Freight Transport Association only. His effective date of termination was confirmed to him following the conclusion of the respondent's appeal process on 15 June 2020;

e. The claimant, whether on past experience or the professional advice of his solicitor, should have complied with the Early Conciliation requirements and the statutory time limits in respect of the second claim. Alternatively, the claimant should have made his application to amend his claim at the same time as the application to amend the first claim (sic);

f. Given the claimant's own admission that there is no good reason why the second claim is not filed in time, there can be no injustice to the claimant in not granting the application;

g. The respondent has complied with all time limits thus far and will be prejudiced if this application is granted;

h. Granting the application would not deal with the case fairly and justly since it is contrary to the principles of Selkent and the Presidential Guidance.

Relevant Law

10. In considering whether to allow or disallow an amendment, the Tribunal has to consider the law relating to amendments to claims and time limits in which to bring claims.

11. A claim can be amended at any time, but the claimant needs the Tribunal's permission. The Tribunal has a broad discretion to consider amendments under Rules 29 and 30 of the Rules of Procedure.

12. In deciding whether to allow an amendment, the Tribunal must take account of all the circumstances and balance the hardship and injustice of refusing the amendment against that of allowing it (Selkent Bus Co Ltd v Moore [1996] IRLR 661, EAT; Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07).

13. Where the amendment is to add new facts and grounds, the Tribunal must decide if the new claim is in time and, if not, whether the amendment should now be allowed. If the claim arises out of the same facts as the original claim but simply

adds factual details or attaches a new legal label, the Tribunal should more very readily allow the amendment even outside the time limit.

14. On the other hand, if the amendment is to introduce an entirely new cause of action dependent on quite different facts, it is more difficult. The greater the difference between the factual and legal issues raised by the new claim and the old, the less likely it is that an amendment will be allowed, but it is always a matter for the Tribunal's discretion.

15. Factors to consider include, whether the new claim would be out of time if it were a free-standing claim (including whether the test for extending time for the relevant claim would be satisfied; why the new claim was not originally included; how late in the day the amendment is now sought; whether the respondent would be surprised by the new allegation or prejudiced by its late addition and, the balance of hardship to each party.

16. In Vaughan v Modality Partnership UKEAT/0147/20/BA, the Employment Appeal Tribunal recently reminded Tribunals that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The EAT gave the following guidance. The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise an Employment Judge for failing to conduct the balancing exercise properly. The balancing exercise is fundamental. The Selkent factors should not be treated as if they are a list to be checked off.

17. Section 111(2) ERA states that:

> *"… [Subject to the following provisions of this section] an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal –*
> *(a) before the end of the period of three months beginning with the effective date of termination, or*
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
> *[(2A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) [and section 207B (extension of time-limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2)(a).]"*

18. There are two limbs to this formula. First, the claimant must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the claimant (Porter v Bandridge Ltd [1978] IRLR 271, CA). Second, if he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

19. Whether it was reasonably practicable for the claimant submit his claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the claimant's reasons.

20. The Court of Appeal in Palmer & Anor v Southend on Sea Council [1984] IRLR 119 considered the meaning of the words 'reasonably practicable' and concluded that this does not mean "reasonable", which would be too favourable to employers and does not mean "physically possible", which would be too favourable to

employees, but means something like “reasonably feasible”, ie “was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?”

21. May LJ, in Palmer, stated that the factors affecting a claimant’s ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the Employee's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the Employee knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the employee had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the Employee or his adviser which led to the failure to present the complaint in time.

22. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the Tribunal to answer this question “against the background of the surrounding circumstances and the aim to be achieved”. This is what the “injection of the qualification of reasonableness requires” (Schultz v Esso Petroleum Ltd [1999] IRLR 488, CA).

23. Where the claimant satisfies the Tribunal that it was not reasonably practicable to present his claim in time, the Tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. The Tribunal must exercise its discretion reasonably with due regard to the circumstances of the delay.

24. I also had regard to the Presidential Guidance on General Case Management, Guidance Note 1: Amendment of the Claim and Response Including Adding and Removing Parties, and to the Tribunal’s overriding objective within rule 2 of the Rules of Procedure.

Conclusions

25. The claimant seeks to add an entirely new complaint of unfair dismissal which was pleaded within a second claim that was presented to the Employment Tribunal out of time and has been dismissed on withdrawal. This is conceded within the claimant’s application.

26. In addition, the particulars of his first claim contain a passing reference at paragraph 18 to the restructuring exercise, which ultimately led to his dismissal, but in the context of complaints of sexual orientation discrimination and harassment, originally brought against an individual respondent, although that complaint was subsequently withdrawn against that individual. However, those complaints continue against the respondent employer.

27. The amendment he seeks is in effect to add paragraphs 3 to 30 of the particulars of the second claim as paragraphs 38 to 65 of his amended particulars of his first claim.

28. It is clear to me that the amendment sought is an entirely new claim with but a fleeting reference to a matter that has but a tangential connection, albeit in a different context to the claimant's later dismissal and unfair dismissal complaint and based on particulars set out in 27 new paragraphs.

29. Whilst I accept that the amendment is based almost entirely upon the out of time second claim which was subsequently dismissed on withdrawal, no explanation has been provided as to why that claim was presented out of time and why the application for leave to amend was not made sooner. Indeed, the claimant even concedes that there are no grounds on which to argue that it was not reasonably practicable to present the second claim within the time limit. Even if I take into account that the proposed amendment application was raised before me at the preliminary hearing held on 4 June 2021, that was still eight months after expiry of the original limitation period for the second claim.

30. Of course, I take into account and acknowledge that the amended particulars of claim are in fact an amalgam of both claims and that the respondent has had the opportunity to respond, and that the respondent was sent a copy of the second claim with those original particulars on 11 January 2021.

31. However, what is presented is an entirely new cause of action and so I do need to consider whether the new complaint is in time by reference to the test within section 111 ERA. Indeed, the overriding objective, as well as Selkent, emphasise the need for Tribunals to deal with cases fairly and justly and to exercise a discretion in a judicial manner, which satisfies the requirements of relevance, reason, justice and fairness (respectively at rule 2 of the Rules of Procedure and page 8 of the judgment in Selkent). This is reinforced by elements of Guidance Note 1 of the Presidential Guidance (highlighted at paragraph 9 of the respondent's written submissions), which in essence, as applicable to this case, states that regard should be had to all the circumstances, in particular any injustice or hardship that would result, and that relevant factors include, the amendment to be made, time limits and the timing and manner of the application. Also specifically, in cases where the claimant is seeking to add a new claim, that the Tribunal must consider whether the new claim is in time taking into account the relevant test.

32. The claimant's effective date of termination was 3 August 2020 and the original limitation period under section 111 ERA expired on 2 November 2020. The claimant did not commence Early Conciliation until 3 November 2020. As the respondent points out, because the claimant did not commence Early Conciliation within the original three month time limit, he cannot take advantage of any extension of the time limit under section 207B ERA. As far as I have been made aware this application was first mooted at the preliminary hearing on 4 June 2021.

33. The claimant has offered no explanation as to why the claim was not presented in time or why the amendment application was not made sooner than it was. As a result it is simply not possible for me to exercise my discretion to extend the time limit. There are no grounds on which to find that it was not reasonably practicable for the complaint to be presented before the end of the period of three months from the claimant's effective date of termination or even move on to determine whether it was then presented within a further reasonable period. I take into account that the claimant has been represented by solicitors throughout these proceedings and

that the claimant accepts that he has no basis on which to argue that it was not reasonably practicable to have presented the second claim in time.

34. On an analysis of the circumstances and in applying the test within Selkent, the guidance from the President of the Employment Tribunals and the overriding objective, I conclude that the balance of hardship and injustice is greater for the respondent than the claimant, in facing a new claim presented outside the relevant time limit, for what is blandly conceded to be for no acceptable reason and in a way that would in effect bypass any need to consider the requirements and considerations applying to time limits.

35. I therefore refuse the claimant's application.

Further direction

36. This case was listed for 12 days on the basis that it could potentially have included a complaint of unfair dismissal as well as of sexual orientation discrimination and harassment.

37. At the previous hearing I did urge the parties to revisit this time estimate after determination of the claimant's amendment application because it does appear disproportionately high for the matters involved and the weight of evidence.

38. I would ask the parties to write into the Tribunal within 14 days of the date on which this judgment is sent to them indicating whether 12 days still required and, if it is not, by providing a revised time estimate. It may be that the Tribunal administration is able to offer earlier dates for a shorter hearing.

Employment Judge Tsamados
Date: 31 August 2021