



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Arshad

**Respondent:** L Rowland & Co (Retail) Limited

**Heard at:** Manchester (by CVP) **On:** 8 October 2021

**Before:** Employment Judge Sharkett

## REPRESENTATION:

**Claimant:** Mr S Choudury - solicitor

**Respondent:** Mr Broomhead - Solicitor

# JUDGMENT ON PRELIMINARY HEARING

- (a) The respondent's application to strike out the claimant's claim pursuant to Rule 37 of the Employment Tribunal Rules of Procedure is refused.
- (b) The claimant has permission to amend her claim to rely on the ethnic origin of Pakistan descent
- (c) The claimant's application to amend her claim to include a claim under s103A Employment Rights Act is refused.

# REASONS

1. The Preliminary Hearing was listed to consider:-
  - (a) The respondent's strike out application pursuant to rule 37 of the Employment Tribunal Rules of Procedure;

- (b) In the event the strike out application does not succeed, the claimant's application to amend to include automatic unfair dismissal pursuant to s103A ERA 1996
2. The Claimant's ET1 was received at the Tribunal on 24<sup>th</sup> September 2020. The ET1 recorded that the claimant pursued claims of unlawful discrimination on the protected characteristic of race.
  3. In the claim form the claimant refers to the fact that she was dismissed by reason of gross misconduct and that her dismissal was unfair and discriminatory. The basis upon which she claimed it was unfair was that other employees had also breached the respondent code of conduct and harassment policy but were not subjected to the disciplinary process. As at the date of dismissal the claimant had less than two years continuous service and could not therefore pursue a claim of ordinary unfair dismissal.
  4. At the time the claim was submitted the claimant was represented by the Equality for Workers Union based in Leeds.
  5. A Preliminary Hearing (PH), by telephone was held on 27 January 2021. The agenda prepared by the respondent for that hearing specifically raises a query about whether a claim of unfair dismissal is pursued given the claimant's lack of continuity of service, and asks for further particulars of the claimant's claim as outlined in its grounds of response and repeated again in the agenda. By the date of the PH the claimant was represented by Mr Broomhead, who continues to represent the claimant.
  6. At the PH Employment Judge Ross confirmed that the Tribunal did not have jurisdiction to hear a claim for 'ordinary' unfair dismissal pursuant to section 95 and section 98 Employment Rights Act 1996 and recorded that the claimant considers her dismissal and the application of the disciplinary process were acts of direct race discrimination. The list of the claimant's complaints were set out in the Annex to the case management orders made and the parties were instructed to notify the Tribunal within 14 days of the date of the order if the list was not accurate. The claimant was also ordered to provide additional information about her claims of indirect discrimination by 24 February 2021, or to inform the respondent and Tribunal by that date if she did not intend to pursue such claims. Further case management orders were made and the case was listed for a final hearing over 4 days commencing 19 April 2022.
  7. By 20<sup>th</sup> April 2021 the claimant had not complied with the Order to produce further information or alternatively inform the respondent and the Tribunal of her intention in relation to complaints of indirect discrimination which should have been served on 24 February 2021. She had also failed to comply with the order to serve a schedule of loss by the same date. The respondent sought an order to strike out the claimant's claims for non-compliance with the Orders and on the basis that the claimant was not actively pursuing her claim. The claimant through her solicitor confirmed on 21 April 2021 that the claims of indirect discrimination were not being pursued and that she intended to

make an application to amend her claim for unfair dismissal. An application to amend the claim to one of automatic unfair dismissal under s103A Employment Rights Act, was received on 28 April 2021. The information disclosed by the claimant which was said to amount to a protected disclosure was that the claimant had informed the respondent about other employees breaching the respondent codes of conduct and harassment policy.

8. The claimant further sought to amend her claim to change her ethnic origin from British Asian to Pakistan descent.
9. In response to the Tribunal's request for comments on the claimant's application, the respondent set out its objection to the application to amend and repeated the application to have the claim struck out.
10. The PH today has been to consider the respondent's application pursuant to rule 37 of the Employment Tribunal Rules of Procedure, to strike the claim out and in the event that application does not succeed, to consider the claimant's application to amend her claim.
11. In preparation for the hearing I have been provided with a bundle of documents consisting of 67 pages.

#### Respondent's submission

12. For the respondent Mr Choudhury reminded the Tribunal of the extent of the claimant's failure to comply with the case management orders made by Employment Judge Ross and referred me to the correspondence from the respondent seeking the claimant's compliance with the orders. He reminds the Tribunal of Mr Broomhead's written admission of his neglect in dealing with the matter and submits that although the claimant has now confirmed that she does not pursue a claim of indirect discrimination, the order to serve a schedule of loss remains outstanding.
13. In respect of the claimant's application to amend, I heard Mr Choudhury's submissions after I had delivered my Judgment on the Rule 37 application and after I had heard Mr Broomhead's application to amend.
14. Mr Choudhury submits that there is clearly no public interest in this claim which by itself should be sufficient not to allow the amendment. He submits that this is an application that was unexpected given that Mr Broomhead was at the last PH where the question of unfair dismissal was specifically addressed by Employment Judge Ross, and it was established that there was no claim of unfair dismissal pursued by the claimant. The allegation of whistleblowing he submits, has not been investigated and given it is now well over a year since the alleged disclosure are said to have occurred, recollection of events are bound to have faded and the respondent will be placed at a disadvantage.

15. Mr Choudhury reminds the Tribunal that the claimant has been represented throughout and has had formal legal representation from Mr Broomhead since, at the latest 19 January 2021. He submits that following the hearing on 27 January 2021 the parties were instructed to advise the Tribunal if the list of complaints that had been identified was incorrect, yet that did not happen and it has not been until some three months later that an application to amend has been made. He submits that there has been no explanation offered for the reason why it has not been made until now. The amendment he submits lacks detail and the claim is significantly out of time.
16. In respect of the claimant's claim to change her ethnic origin from the one relied on at the last hearing from British Asian, to Pakistan descent, Mr Choudhury confirmed he did not object to this application although he failed to understand why it was being made.

#### Claimant's submissions

17. For the claimant Mr Broomhead submits that there is no basis on which a strike out can be made because a fair trial is still possible in this matter.
18. In respect of the application to amend Mr Broomhead submits, that he did not draft the ET1 and that there is a whistleblowing case to answer which should be included. He submits that the claimant's complaint about the fact that other employees were also in breach of the respondent's code of conduct and harassment policy tended to show a failure to comply with a legal obligation under s43(b)(i) in that it is subject to its own policies. He submits that the disclosure is in the public interest because the respondent is a large company. He was unable to expand further on what information was disclosed and to who as he had difficulty obtaining his client's instructions. He did not offer an explanation for why the amendment was now being made but submits that the respondent was aware of an unfair dismissal claim from the claim form and there would be no hardship to the respondent. He submits the claimant has a claim and that she should be allowed to bring it.

#### The Law

19. The employment tribunal has a broad discretion to allow amendments at any stage of the proceedings under rule 29 of the Tribunal Rules. The discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly in accordance with rule 2.
20. In the case of **Selkent Bus Company Limited -v- Moore 1996 ICR 836**, the Employment Appeal Tribunal endorsed the key principle that when exercising its discretion in an amendment application, Tribunals must have regard to all the circumstances and in particular, any injustice or hardship which would result from the amendment or refusal to make it.
21. In that case, Mr Justice Mummery outlined that a Tribunal will need to consider: -

- (i) The nature of the amendment: is it minor or substantial;
  - (ii) The applicability of time limits – if a new claim is proposed by way of amendment, whether the new course of action is in time or whether time limits should be extended;
  - (iii) The timing and manner of the application.
22. Guidance Note one of the Presidential Guidance on general case management, at paragraph 12 states “if the claimant seeks to bring a new claim, the Tribunal must consider whether the new claim is in time”.
23. However, at paragraph 11.2 Tribunals are reminded that even if no new facts are pleaded, the Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
24. Before any time limit issues are considered, it is incumbent on the Tribunal to consider the nature of the proposed amendment.
25. In the case of **Abercrombie and Others -v- Aqa Range Master Limited 2013 IRLR 953** the Court of Appeal determined that when considering a new allegation amendment, Tribunals should focus on:
26. **“not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry 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”.**
27. It is relevant for the tribunal to consider why the application was not made earlier and why it has now been made. In ***Martin v Microgen Wealth Management Systems Ltd [EAT/0505/06]***, the EAT stressed that the overriding objective requires, amongst other matters, that cases are dealt with expeditiously and in a way which saves expense; undue delay may well be inconsistent with these aims.

## Discussion and Conclusion

### Strike out application under Rule 37

28. The application to strike out the claimant's claim is made primarily on the basis that she has failed to comply with the case management orders of the Tribunal. Mr Broomhead, in correspondence to the Tribunal apologised for the delay and confirmed that pressure of work had resulted in his failure to comply with the orders made. In submissions today he strongly opposed the application and maintained that a fair trial is still possible. I agree that a fair trial remains possible and on that basis refuse the application. However, parties are reminded that they are expected to comply with the orders of the Tribunal and they are clearly informed of the sanctions that can be imposed on a parties failure to comply without reasonable excuse. The parties are reminded of their obligation to the tribunal and that if circumstances arise where parties experience difficulty in compliance with orders they should

apply to the Tribunal for the order to be varied under Rule 29 of the Employment Tribunal Rules of Procedure.

Application to amend

29. In considering this application I have regard to the overriding objective to deal with cases justly and fairly. At the time of the original ET1 the claimant was represented by the Equality for Workers Union who were on record as her representatives. In the ET1 there is clear reference to the fact that the claimant considers that her dismissal was unfair. The fact that the unfair dismissal box is not ticked would of course not be fatal but it is reasonable to assume that it was not ticked because the claimant did not have sufficient continuity of service to bring a claim of ordinary unfair dismissal. In the grounds of resistance the respondent sought clarification about the reference to unfair dismissal and repeated this query in the agenda prepared for the PH of 27 January 2021. At the PH in January the claimant's claims were clarified with Mr Broomhead, who had been instructed by the claimant since no later than 19 January 2021. All claims were identified save for the outstanding uncertainty about whether the claimant intended to pursue a claim of indirect discrimination. In submissions and correspondence copied to the claimant Mr Choudhury told the Tribunal that Mr Broomhead had confirmed at the January PH that there was no claim of unfair dismissal. The record of that hearing makes clear reference to the fact that the Tribunal does not have jurisdiction to hear the claimant's claim of unfair dismissal and there is no reference to any potential automatically unfair dismissal claim. The parties were then given a further 14 days from the date of the record of the hearing sent to them, to contact the Tribunal if the list of claims was not accurate. The claimant did not inform the Tribunal of any inaccuracy in the list of claims identified at the hearing or make an application to amend her claim at that time.
30. I have not had the opportunity of hearing from the claimant about why it is that she now seeks to amend her claim to include one of whistleblowing or why it is that the application was only submitted some three months after her claims had been clarified at the previous PH. Unfortunately, Mr Broomhead was unable to assist me with this save to say that he had not drafted the original claim form but that he had now set matters out. It is clear however that this is not a case where new information came to light, or the claimant's memory was jogged when discussing her claim with new advisors. The reference to the claimant complaining that others had breached the respondent's policies is referenced in the ET1 but is not pleaded as a whistleblowing claim or an unfair dismissal. An opportunity to clarify this as a whistleblowing claim was available to the claimant at the PH in January 2021, but at that hearing Mr Broomhead confirmed that there was no claim of unfair dismissal. At the hearing today he was also unable to provide any detail of the information that had been disclosed, who it was disclosed to and when, and how it tended to show a finding under s43(b)(i) or was in the public interest.
31. Following the PH of 28 January 2021 the respondent quite reasonably understood that there was no claim of unfair dismissal to answer. The application today does not set out in detail the claimant's claim which if

allowed would require further information to be provided by the claimant and further delay in the respondent knowing the claim it has to answer and obtain witness evidence from witnesses not yet identified to events not yet particularised, that occurred over a year ago.

32. In considering the balance of injustice in allowing or refusing this application, Mr Broomhead has not addressed me on hardship or injustice to the claimant but submits that the respondent was aware of an unfair dismissal claim and the claimant should be allowed to bring it. Mr Choudhury submits that the claim is now significantly out of time and that the respondent would have difficulty obtaining evidence. In addition he submits that the respondent is entitled to finality of litigation and believed the matter relating to unfair dismissal had been confirmed at the last PH.
33. It is clear that in refusing or allowing applications of this nature one party will suffer some hardship. Therefore it is necessary to have careful regard to all the circumstances when deciding where the hardship falls more heavily. Whilst the merits of a claim are not always clear and decisions of this nature should not be based on perceived merits alone, I have regard to the lack of particularisation of this amendment and the identification of the failing under s43(b) and how that would meet the public interest test. At one point during our discussions Mr Broomhead suggested it would be met because the respondent is a PLC. When it was confirmed that the respondent is not a PLC Mr Broomhead did not offer a further explanation of how the claimant would meet the public interest test.
34. Allowing the application would result in the respondent being required to respond to a claim it had already been told was not pursued and being required to make enquiry of witnesses not yet identified into events not yet clear, that happened over 18 months ago and were not the subject of an investigation at the time. I find that this would cause the respondent considerable difficulty and would significantly increase the level of enquiry needed in the matter. Having considered all the circumstances in the round I find for the reasons set out above that the hardship to the respondent would be significantly greater to the respondent and refuse the application to amend.

---

Employment Judge Sharkett  
Date 10 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES  
Date 16 November 2021

.....  
FOR THE TRIBUNAL OFFICE