EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr K Badham		**Unite the Union**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON A PRELIMINARY HEARING

HELD AT Birmingham **ON** 3 December 2021

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For the Respondent: **Mr D Patel (Counsel)**

JUDGMENT
(Issued to the Parties on 3 December 2021)

1 Pursuant to Rule 34 of the Employment Tribunals Rules of Procedure 2013, the claimant's application dated 15 September 2021 for permission to amend his claim to add GMB Union as a second respondent and to add a claim for disability discrimination is refused.
2 Pursuant to Rule 37 of the Employment Tribunals Rules of Procedure 2013, this claim is struck-out as having no reasonable prospect of success.

REASONS

Introduction

1 An oral judgment with full reasons was delivered to the parties at the conclusion of the Open Preliminary Hearing on 3 December 2021. By an email received later that day the claimant requested written reasons.

2 The claimant has been employed by Jaguar Land Rover Limited (JLR) since 19 January 2013. He has been a member of the respondent, Unite the Union, since January 2012. The claimant has long-standing grievances against JLR which resulted in the presentation of a claim form on 19 October 2020 (Case Number 1309749/2020). In that claim form against JLR, the claimant raises complaints of race and disability discrimination. Throughout the internal processes the claimant was advised and represented by the respondent, his trade union.

3 On 11 December 2020, the claimant presented this claim against the respondent. The claim is for race discrimination only.

4 Although the two claims have not been consolidated, they were case managed together at a Closed Preliminary Hearing before Employment Judge Coghlin QC on 8 September 2021. At that hearing, the claimant confirmed that his claim against the respondent related to race discrimination or alternatively racial harassment which he suffered at a meeting on 29 September 2020. Present at that meeting were the claimant, Mr Mick Graham - the Unite convener at the relevant JLR plant, and Mr Steve Evans of GMB.

5 The claimant identifies himself as White British. He says that he has dark coloured skin due to a skin condition. His complaint is that, during the meeting, he was ridiculed by Mr Evans for using "*fake hair dye*"; "*fake sun-tan*" and driving a "*flash Jaguar car*". His case is that these comments were racially offensive against him as a White British individual.

6 It is the respondent's case that the claim is wholly misconceived and has no reasonable prospect of success. It should accordingly be struck-out. The respondent advances this argument onto bases: -

(a) That the conduct which is complained of was Mr Evans conduct: he is not an employee or a representative of the respondent but of GMB.
(b) That in any event the words allegedly used by Mr Evans cannot reasonably be related to "race" as defined in Section 9 of the Equality Act 2010.

7 Accordingly, Judge Coghlin listed the case today for Open Preliminary Hearing to determine whether, pursuant Rule 37 of the Employment Tribunals Rules of Procedure, the claim should be struck-out as having no reasonable prospect of success. Or whether, in the alternative, and as a condition of proceeding with any element of the claim, pursuant to Rule 39, the claimant should be ordered to pay a deposit on the basis that the claim has little reasonable prospect of success.

8 Judge Coghlin strongly encouraged the claimant to take advice on the way forward with regard to this claim. He mentioned the possibility that the claimant may wish to apply to amend the claim in some way or other.

9 In response, on 8 September 2021, the claimant applied to amend his claim in two ways: -

(a) He applied to add GMB as a second respondent to this claim. This amendment would take account of Mr Evans' conduct towards him, and it is the claimant's case that the respondent is in some unspecified way

liable for Mr Evans' conduct.

(b) He applied to add claim against both the respondent and GMB for disability discrimination both at the time of the meeting held on 29 September 2020 and due to the poor way that he was represented in his grievances against JLR. The claimant has provided no details as to the nature of his disability - simply stating that both the respondent and GMB had pre-knowledge of the disability at the time. Neither has the claimant set out any details of the basis on which he claims to have been discriminated against or the nature of that discrimination.

10 The respondent objects to the claimant having permission to amend the claim. Although today's hearing was listed to deal with the strike-out/deposit applications only, both parties agree that I should also determine the claimant's amendment application.

The Law

Amendment

11 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order: Rule 29. Although there is no specific reference to amendment in the Rules, no doubt such an order may include one for the amendment of a claim or response.

12 ***Harvey v Port of Tilbury (London) Limited*** **[1999] ICR 1030** articulated the following obligation on a party seeking permission to amend: -

> "*As a matter of guidance going beyond the facts of this particular case we cannot over emphasise that where an amendment is sought it behoves the applicant for such an amendment clearly to set out verbatim the terms and explain the intended effect if the amendment which he seeks.*"

13 In ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836 (EAT)** the EAT gave the following general guidance as to the exercise of the Employment Tribunal's discretion and the factors which might be taken into account: -

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition 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 have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits. 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 application is out of time, and, if so, whether the time limit should be extended under the applicable statutory provisions.

(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down … for the making of amendments. The amendments may be made at any time – before, at, or 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.

14 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.

15 Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form were presented to the tribunal out of time, the tribunal would consider whether time should be extended, either on the basis of the “not reasonably practicable” test (for example, for unfair dismissal) or on the basis of the “just and equitable” test (for example, for unlawful discrimination). If time were not so extended, the tribunal would lack jurisdiction to entertain the complaint, and it would fail. However, this does not mean that the mere fact that a claim would be out of time should automatically prevent it being added by amendment. The relevant time limits are an important factor in the exercise of discretion but they are not decisive.

16 Under the general power of case management a Judge may at any time, on the application of a party or on his own initiative, make an order (among other things) that any person who he considers has an interest in the outcome of the proceedings be joined as a party to them. This power is often used where the claimant’s employer has been wrongly identified or where, in a complaint of unlawful discrimination, a named individual against whom allegations are made is added as a respondent in addition to the employer.

Strike Out / Deposit

17 **The Employment Tribunals Rules of Procedure**

Rule 37: Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) That it is scandalous or vexatious or has no reasonable prospect of success.
(b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious.
(c) For non-compliance with any of these Rules or with an order of the Tribunal.
(d) That it has not been actively pursued.
(e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in Rule 21 above.

Rule 39 Deposit orders

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

18 **Decided Cases**

Anyanwu –v- South Bank Students' Union **[2001] ICR 391 (HL)**
Highlighted the importance of not striking out discrimination claims except in the most obvious cases - as they are generally fact sensitive and require a formal examination of the evidence to make a proper determination.

Ezsias –v- North Glamorgan NHS Trust **[2007] ICR 1126 (CA)**
A similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why employer took a particular step. It will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when central facts are in dispute.

Shestak –v- RCN **EAT 0270/08**
An example of an exception may be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The tribunal was upheld when undisputed documentary evidence in the form of emails which could not, taken at their highest, support the claimant's interpretation of events. This justified a departure from the usual approach that discrimination claims should not be struck out at a preliminary stage

Balls –v- Downham Market High School and College **[2011] IRLR 217 (EAT)**
The test is not whether the claim is "likely to fail".
The test is not whether it is "possible that the claim will fail".
The test cannot be satisfied by consideration of the respondent's case.
The tribunal must take the claimant's case at its highest.

Analysis

Amendment Application

19 I have firstly considered the claimant's amendment application applying the principles set out in ***Harvey*** and ***Selkent***.

20 Considering ***Harvey***, the claimant's case against GMB who he seeks to add as a respondent, so far as it relates to race discrimination, is sufficiently discernible from the claim as originally pleaded notwithstanding that the claimant has not condescended to any particulars of the required amendment. However, the claimant has provided no particulars of his case for disability discrimination against either the respondent or GMB.

21 Considering the ***Selkent*** principles: -

(a) These are certainly not minor amendments or relabelling exercises. In the case of the application to amend to join GMB as a party, this is an entirely new claim against GMB which has not previously been made. The claim form in this case was presented on 11 December 2020, it was not until nine months later that the claimant made his application to amend. The application to add a claim for disability discrimination is also a major amendment against the current respondent - a claim not previously made

or even intimated. The claimant was clearly aware of the potential for a disability discrimination claim having presented such a claim against JLR on 19 October 2020.

(b) Whilst applicable time limits are not determinative of an amendment application they are relevant to the balancing exercise. The race discrimination claim purported to be brought against GMB relates to a meeting held on 29 September 2020: it was not until 8 September 2021 that the claimant applied to amend his claim to include a claim against GMB - this is nine months after the expiry of the primary time limit. The claimant has offered no basis upon which the tribunal might conclude that it is just and equitable to extend time. GMB is not currently a party and has not had an opportunity to respond to this application. It strikes me as inevitable that, if I allowed the application to amend, GMB would immediately be in a position to apply for the claim to be struck out for want of jurisdiction.

(c) Similar considerations apply with regard to the proposed disability discrimination claim: the claimant has provided no information as to when the discrimination took place but from information available to the tribunal it appears to be concurrent with the disability discrimination alleged against JLR. The claim form against JLR was presented on 19 October 2020, and so again it appears that the purported claim is presented many months out of time. This is a claim against both GMB and the current respondent of which they have had no prior notice. Again, the claimant has provided no basis upon which the tribunal could reasonably conclude that it was just and equitable for time to be extended.

(d) Finally, I consider the matter of the manner and timing of the application: this appears to have come in direct response to the claimant's realisation that his race discrimination claim against the respondent might be regarded as misconceived. If it is the claimant's case that he has a viable claim against GMB he has been aware of the relevant facts since at least the presentation of his claim form in December 2020. The appropriate manner in which he should bring such a claim would be to have presented (or even now to present late) a claim form naming GMB as respondent. Similarly, the claimant has clearly been aware of the potential for disability discrimination claim since he presented his claim against JLR on 19 October 2020. If he believed he had a viable disability discrimination claim against the current respondent, he has provided no explanation as to why such a claim was not presented in his claim form in December 2020 - rather than appearing as an afterthought to sure-up a claim which it now appears could be misconceived.

22 Applying the principles set out in Paragraphs 20 and 21 above, my conclusion is that the interests of justice require that the application to amend the claim should be refused.

Strike-out/Deposit

23 This then leaves me with the respondent's application for the existing race discrimination claim to be struck-out. I have considered the decided cases referred to in Paragraph 18 above. I am aware that it is rare that discrimination cases should be struck out in advance of trial, but, in my judgement, this case is one of the exceptions. I reach that conclusion for the following reasons: -

(a) No viable claim against the current respondent is advanced on the pleadings - the complaint is against Mr Evans of GMB.

(b) I also accept the respondent's submission that there is nothing to link the comments made by Mr Evans to the claimant's race - accepting the definition of race as set out in Section 9 of the Equality Act 2010.

Conclusion

24 Accordingly, and for these reasons, the claimant's application to amend his claim is refused, and his existing claim against the respondent is struck-out as having no reasonable prospect of success.

Employment Judge Gaskell
14 February 2022