EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr Mallakin		(1) Designer M&E Services UK Limited
		(2) Matthew Dyer
	v	(3) Nicholas Baish

Heard at: Watford **On**: 25 January 2022
Before: Employment Judge Cowen

Appearances
For the Claimant: Mr Mallakin (In Person)
For the Respondent: Mr Hobbs (counsel)

RESERVED JUDGMENT

1. The claimant's claims for race discrimination and victimisation are dismissed upon withdrawal.
2. The Second and Third respondents are removed from the remaining proceedings.
3. The claimant's application to amend the particulars of claim to include allegations 9-12 is permitted.
4. The respondent's application for costs is dismissed.

REASONS

Background

5. The claim arises from the claimant's employment with the first respondent 2020 (and now the only remaining respondent and therefore referred to as the respondent throughout), between 4 September 2017 and 17 August as a Mechanical Design Engineer.

6. The claimant issued a claim on 8 October 2020 claiming direct race discrimination, victimisation and unfair dismissal.

7. By an application dated 7 December 2020 the respondent applied to strike out the claimant's claims, or to place a deposit order on the claimant's claims.

8. On 20 October 2021 the claimant applied to amend his particulars of claim. This was opposed by the respondent.

9. The claimant subsequently served a race discrimination questionnaire on the respondent, who responded to it and provided some policy documents. As a result of this, the claimant withdrew the race and victimisation claims which have been dismissed upon withdrawal.

10. At a preliminary hearing on 21 June 2021, Employment Judge Quill listed the case for a hearing to consider:-
    a. Any amendment requests
    b. Clarify the issues
    c. Deal with any application to strike out
    d. Deal with any application for a deposit
    e. Deal with any other case management issues.

11. The hearing before the Tribunal today was to deal with all those points. The respondent withdrew the application for strike out during the hearing and therefore this is not addressed. The deposit order application is dealt with in a separate order as is the case management. Below is a reserved judgment in respect of the remaining amendment application by the claimant and costs application by the respondent.

THE LAW

12. Amendment application

The Tribunal must take into account the test set out in *Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT* and must consider the following;

a. **nature of the amendment —** The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action

b. **applicability of time limits —** the tribunal must consider whether the proposed claim/cause of action is out of time and, if so, whether the time limit should be extended

c. **timing and manner of the application —** although amendments may be made at any stage of the proceedings, a delay in making the application is a discretionary factor which ought to be considered. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the identification of new facts or new information from documents disclosed on discovery.

Costs

13. Rule 75.— Costs orders and preparation time orders

"(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while

represented by a lay representative;"

14. Rule 76.— When a costs order or a preparation time order may or shall be made
(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

15. The Tribunal must consider whether a party's conduct falls within rule 76(1)(a). If so, it must also ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. See *Beat v Devon County Council and anor EAT 0534/05* where the EAT held that an employment tribunal had erred in jumping from its finding that the bringing of proceedings had been unreasonable and misconceived to awarding costs of £10,000 against the claimant, without going through the process of exercising its discretion as to whether that order was appropriate. It was said that the ET should have balanced the amount of costs incurred by the unreasonableness of the conduct or the misconceived part of the claim against the other parts of the claim, and considering whether there was a need for the respondent to be compensated in costs.

16. When considering whether the behaviour of the party was 'unreasonable' the Tribunal should consider the 'nature, gravity and effect' of a party's conduct; see *McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA*

DECISION

17. Amendment applications
Having heard from the claimant with regard to his application to amend, the respondent acknowledged that they did not contest the addition of allegations 9-12 as proposed by the claimant, to the extent that they amount to further information in relation to the previously pleaded allegations 1-8. In relation to each of the proposed amendments, I considered the following:-

18. Allegation 9 – the claimant submitted that he was not aware at the time he issued his claim that the respondent had provided him with false information. It had come to his attention that those who were employed as temporary Revit Coordinators, were still in post at March 2021.

19. The respondent said that this amounted to further information in relation to allegation 3. It did not amount to a separate claim and hence was not

opposed on the basis that it was a footnote.

20. I consider that as the claimant's original claim included the fact that the claimant was not offered the role of Revit Coordinator this does not amount to an additional claim, but further and better particulars of his existing claim. The additional information about those who carried out the role was not available at the time the ET1 was issued.

21. The amendment does not place the respondent at any prejudice and therefore the amendment is allowed. It comes within issue 3.3 and 3.9 of the list of issues.

22. Allegation 10 -this too involved the claimant adding further evidence to an existing claim. He asserts that the respondents have recruited during the period of the redundancy and after – indicating that the redundancy was not genuine and that other positions were available for which the claimant could have applied.

23. The respondent acknowledged that this amounted to an additional note to allegation 1 and therefore did not object.

24. I consider that this amendment does not place the respondent at any prejudice and the evidence could otherwise be contained in disclosure and witness statements and therefore the amendment is allowed. This lies within issues 3.5,3.8 and 3.11 of the list of issues.

25. Allegation 11- The claimant asserts that the respondent did not follow ACAS guidance on how to avoid redundancies. His assertion is that the respondent ought to have considered bumping, so that the claimant could replace others. He also asserts that to avoid redundancy he could have remained on furlough.

26. The respondent opposes this amendment saying that it lacks specification as to which part of the ACAS guidance has been breached.

27. I consider that the amendment refers to the respondent's failure to offer suitable alternative employment, to consider bumping, or to continue furlough. All of these assertions are clear from the proposed amendment.

28. The respondent is not placed at any significant prejudice by the addition of these points. They are clearly outlined in the proposed amendment. The claimant already claims both that the redundancy was not genuine and that there was a lack of consideration of suitable alternative employment and therefore this amendment is an extension of that claim. Whilst it could have been included more clearly in the initial ET1 or further and better particulars, there is no prejudice to the parties, who still have time to prepare for the final hearing to include these points. The amendment is allowed. This is within 3.2 and 3.3 of the list of issues.

29. Allegation 12 – This is a discrete point on the number of redundancies made within a 90 day period. The claimant says that the respondent, in their reply to a discrimination questionnaire indicated that it was more than 20 people. This was new information to him and gives rise to an issue about whether a collective consultation should have taken place.

30. The respondent opposes this application, saying that the claimant knew of the number of redundancies and this ought to have been included in an earlier pleading.

31. The claimant asserts that he did not know of the number of redundancies at the respondent at the time of his own redundancy. He raised the issue at his own grievance to which he was given a reassurance that they hoped it would not be beyond the threshold for collective redundancy. It does not therefore seem that the information was available to the claimant at the time.

32. This is a relatively discrete point which is related to the over all fairness of the redundancy procedure and therefore could be considered to be part of the existing claim. The respondent has time to address this both in disclosure and witness statements and will not be placed at prejudice in doing so. As for all these amendments, if they were not to be allowed, then the claimant's case would not be able to be considered in full and all aspects of the redundancy procedure considered. This amendment is allowed. This also lies within 3.2 of the list of issues.

Costs

33. The respondent made an application for costs associated with the withdrawn claims of discrimination and victimisation. The respondent set out a chronology of the litigation, including the fact that the claim was issued on 8 October 2020 and that a questionnaire was sent to the respondent on 3 December 2020. The respondent had made an application for strike out on 7 December 2020. In short the respondent asserted that the claimant's claim for discrimination and victimisation was inappropriate and misconceived and that it had taken until EJ Quill's preliminary hearing for the claimant to realise this.

34. The claimant asserted that he had sufficient evidence to pursue his race claims but chose to withdraw them in an attempt to be reasonable. He had sent his discrimination questionnaire as a further attempt to be reasonable. Once he had received those answers and attended before EJ Quill he decided to withdraw his claim.

35. I considered first whether there was conduct on the part of the claimant which was vexatious, abusive, disruptive or otherwise unreasonable. The respondent had submitted that this related only to the withdrawal of the discrimination and victimisation claims. It appeared that the claimant did have legal advice at the time he started his claim and referred to having had advice from a number of counsel.

36. Whilst neither party went into detail about the content of the discrimination claims, it appeared from the face of the ET1 and ET3 that the claimant had asserted that his treatment through the redundancy process as well as a failure to promote had been on grounds of race and that his grievances amounted to protected acts, for which he had suffered victimisation.

37. I was not provided with detailed submissions on the reasons why the respondent asserted that it was unreasonable for the claimant to have brought his claim at all. It was submitted that a questionnaire should have been sent prior to issuing the claim. However, I was not referred to any legal requirement to issue such a questionnaire prior to issue, nor is there an obligation for the respondent to reply to it. Such a request cannot be considered unreasonable when it was of clear assistance to the parties.

38. In considering the nature, gravity and effect of bringing the claim I take into account the fact that at the point where the claimant was asked to provide further and better particulars of his claim, he chose to withdraw it entirely. To suggest that issuing a claim which is within the jurisdiction of the Tribunal could be unreasonable, is to potentially prevent access to justice. The claimant did not pursue the claim beyond the point where it became clear to him that it may not be successful.

39. I remind myself that the bar for the award of costs in the Tribunal is not the same as it is in the County Court. The behaviour of the claimant in making his claim and withdrawing it upon being asked to provide details of it, was not unreasonable. There is therefore no justification for an award of costs on this occasion.

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Employment Judge

Date: 18/2/2022

Sent to the parties on:23/2/2022

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For the Tribunal Office

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