

Neutral Citation Number: [2022] EAT 39

Case No: EA-2020-000922-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: On 14 September 2021

Before :

JASON COPPEL QC
(sitting as a Deputy Judge of the High Court)

Between :

MR TAMER EL-TAWIL	<u>Appellant</u>
- and -	
ARCADIS HUMAN RESOURCES LIMITED	<u>Respondent</u>

Mr T El-Tawil the Appellant
Mr S Purnell (instructed by Pinsent Masons LLP Solicitors) for the **Respondent**

Hearing date: On 14 September 2021

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The appeal was against refusal of permission to amend the ET1. The appellant had been directed to serve particulars of allegations of discrimination he had made in the ET1 in the form of a Scott Schedule. The tribunal held that two paragraphs of the Scott Schedule sought to raise new claims which went beyond the claims already made in the ET1 and disallowed them.

The appeal was dismissed. The tribunal had been entitled to consider that the disputed paragraphs raised new claims. One of the paragraphs was expressly labelled as a new and different allegation of less favourable treatment. The other raised a fresh factual allegation when the appellant had only been directed to give particulars of alleged discrimination arising out of the factual allegations already made in the ET1. On that basis, the tribunal had a broad discretion whether or not to grant permission to amend and there was no basis for overturning the exercise of that discretion.

Jason Coppel QC, Deputy Judge of the High Court

1. This is an appeal against the order of Employment Judge Nicolle of 13 October 2020, in which he ruled at paragraph 2.1 that the appellant be refused leave to amend the particulars of claim so as to include two allegations numbered 5 and 10 in a Scott Schedule of allegations which had been served by the appellant. The original particulars of claim filed on 6 February 2020 were briefly expressed over three pages. The claimant complained in particular that his then current position with the respondent was a forced, detrimental career change, that he had been denied professional career development on grounds of his ethnicity or race, and in paragraph 11 of the particulars of claim, he said this in subparagraph (1):

"He was deprived from being promoted to an appropriate level of work by being misplaced in a job title/position/responsibilities, remuneration and packages by the respondents."

2. The appellant also set out allegations of discrimination on grounds of age and religion and belief, and although some details of the particular roles to which it was alleged that he should and should not have been appointed were given, it is clear that not all particulars had been given of the discrimination claims and that the claim was lacking in detail.
3. The respondent responded in kind with grounds of resistance covering four pages in which they denied all allegations but complained at paragraph 13.2 that the appellant had failed properly to particularise his claims of discrimination. They requested the tribunal to order that the appellant provide further particulars of his discrimination complaints and in particular (13.2.1) what the factual bases of these discrimination complaints was, including what he says happened, when, who was involved and how that is related to his age, race and religion or belief.

4. On 2 July 2020, following a preliminary hearing, Employment Judge Clark made case management orders including one which required the claimant to provide further particulars of his claim in the form of a Scott Schedule "setting out the allegations of less favourable treatment asserted, the relevant protected characteristic(s), what happened (including the gist of the words spoken), the date and time it is said to have occurred, who was involved and the identity of any comparator" (see paragraph 1 of Schedule A to Employment Judge Clark's order). The reasons for making the order for the Scott Schedule are set out in paragraph 3 of the discussion which is appended to Employment Judge Clark's order and which says as follows:

"There is a lack of clarity as to the precise nature and extent of the Claimant's claims. It appears that he is making allegations of direct discrimination in relation to his failure to be promoted, the requirement for him to work on a particular project, his failure to be relocated to the US and matters relating to the conduct of his grievance. However, the precise basis for the claims are unclear, including the racial grounds relied on, any detail concerning the religion or belief discrimination or the age groups to which he belongs and to which he compares himself and as to which allegations relate to which protected characteristic(s). Ms Pitt appreciates that further clarity is needed and suggested that further particulars by way of a Scott Schedule might be helpful. Ms Jones agreed."

5. Provision was also made for the respondent to respond to the particulars provided by the appellant.
6. It seems to me that the premise for this order of Employment Judge Clark is that paragraph 11 of the particulars of claim, to which I have already referred, stands as a summary of what has gone before it in the pleading rather than containing a new freestanding allegation which the appellant was free to particularise in whatever manner he wished. I say that for three reasons: first, because Employment Judge Clark had been able to identify the core allegations made in the particulars of claim, apparently with reference to paragraphs 2 to 10 of that document, and did not regard the subject matter of the claim as being to some extent at large because of

paragraph 11; second, because the particulars ordered appear to relate to the substantive allegations in paragraphs 2 to 10 rather than being expressed as an invitation to expand upon paragraph 11; third, because Employment Judge Clark will have been well aware of the caselaw including the judgment of the President of the EAT, Langstaff J, in **Chandok v Tirkey** [2015] ICR 527 at paragraph 17, emphasising that the ET1 was not to be treated as merely an initial document which is free to be augmented as the parties wish. She should not be read as having given the appellant carte blanche to expand upon paragraph 11 as he wished.

7. A Scott Schedule was duly provided, and it contained a range of allegations, some of which dated from well before the claim was made and some from after the claim had been made. The latter category of allegation gave rise to concern on the appellant's part as to whether he should be making a new claim or whether these allegations should proceed by way of amendment of his existing claim; see his letter dated 28 July 2020. The respondent responded by email of 3 August 2020 complaining that the Scott Schedule did not provide the details required by Employment Judge Clark, that it included out-of-time allegations which should be struck out as well as post-claim allegations which should not be permitted to be added. An application was made to strike out the paragraphs of the original claim and certain paragraphs of the Scott Schedule, including paragraph 5 although not paragraph 10. The claimant countered in a letter of 7 August 2020 that paragraphs of the Scott Schedule should not be struck out as they formed part of a chain of continuous conduct of discrimination dating back over three years. By the time that the parties reached the preliminary hearing, positions had been modified and the only points argued were in relation to paragraphs 5 and 10 of the Scott Schedule, where the respondents contended that the appellant required permission to amend and should not have it and the appellant for his part contended that he did not require permission to amend but that if he did, he should have it.

8. The decision of Employment Judge Nicolle was that the claimant did require permission to amend to add paragraphs 5 and 10 of the Scott Schedule and that permission to amend should be refused. The key reasoning of the judge is set out in three paragraphs, 18 to 20, of the statement of reasons:

"18. I have carefully considered all the arguments advanced and carefully read the original claim form. Whilst it would always be possible to say that generic references to matters as set out in paragraphs 7 and 11.1 are capable of being regarded as including all possible specific matters, for example, denied professional career development without any dates being referred to I am mindful of the fact that this approach would provide a claimant with an almost unlimited ability to add additional specific complaints which were not originally referred to and go beyond simply providing particulars as to the basis of the claim.

19. Whilst this is not necessarily a prohibition on adding additional matters that occurred substantially earlier, I do take this into account, not so much because the cogency of evidence would have been compromised, I do not believe that it would have been, but on the basis that these matters were known to the Claimant at the time he issued his claim.

20. They go beyond matters of clarification as to the basis of the claim. They in my opinion constitute individual complaints which go beyond that which was in the claim. They are sought to be added many months after that claim was issued despite the existence of professional representation. I consider that the addition of these further grounds of complaint would on balance give rise to unnecessary additional time, cost and prejudice to the Respondent and therefore I do not allow leave for these matters to be included within the claim as pleaded."

9. The legal principles to be applied on applications to amend and on appeal from amendment decisions are well established. The Employment Tribunal has a broad discretion in deciding whether or not to permit amendments, and a decision of this nature can only be overturned on appeal if the tribunal erred in legal principle in the exercise of its discretion or failed to take into account relevant considerations or took irrelevant considerations into account or that no reasonable tribunal properly directed could have refused the amendments. The appeal seems to me to turn on whether by the paragraphs in question the claimant was seeking to add new complaints to his claim or simply providing particulars of the existing claim as he had been required to do by Employment Judge Clark. If Employment Judge Nicolle was entitled to

regard this as a case of adding new complaints, then there is no basis on which I can overturn his discretionary decision. His reasons, that the claimant had known of these matters at the time of his claim but failed to include them and that to do so now would cause unacceptable prejudice to the respondent, could not be impeached, and the appellant did not make any serious attempt to do so at the hearing before me. In particular, he expressly disavowed an argument that the Employment Judge's application of the principles was perverse. If on the other hand paragraphs 5 and 10 are properly to be regarded as particulars of the existing claim, then Employment Judge Nicolle would have misdirected himself on a critical matter and the appeal would have considerable traction. The appellant would merely have done what he had been required to do by Employment Judge Clark and particularised his claim. In those circumstances, either he did not require permission to do this or, if he did, permission should have been granted.

10. Turning then to paragraph 5 of the Scott Schedule, this incorporated an allegation that the appellant should have been appointed as lead on the Aruba Airport project. That is the less favourable treatment that is alleged, and the details given state that the appellant applied for this role on 6 February 2019 and was informed that he was unsuccessful. The allegation in relation to the Aruba Airport project was presented by the appellant in the Scott Schedule as a new allegation of less favourable treatment, being described as I have indicated as "appointment as lead on the Aruba Airport project" as opposed to an incidence of the respondent's failure to relocate him to the United States, which had been expressly included in the original particulars of claim; see for example paragraph 5. The appellant proceeded to argue and maintains that the allegation pertains to his relocation to the US, but that was a departure from the Scott Schedule and there were obvious reasons why Employment Judge Nicolle might not regard the allegation as an incidence of the relocation argument, for example because Aruba is not in the United States. In those circumstances, it seems to me that Employment Judge Nicolle was entitled to regard paragraph 5 as seeking to institute a new head of complaint and therefore as

requiring permission to amend.

11. Paragraph 10 of the Scott Schedule contains an allegation of less favourable treatment under the head "Moving claimant to a role which was deskilling him, altering his career path and changing specialism". The details given are that "two attempts at moving claimant to digital rail signal upgrade and pharmaceuticals while successfully delivering multiple projects on Manchester Airport, changing the claimant's career path". This allegation appears to be presented as an incidence of the general plea in paragraph 11.1 that the appellant had been deprived of being promoted to an appropriate level of work and misplaced by way of job title, position, responsibilities etc.. So, it follows therefore that paragraph 10 of the Scott Schedule squarely raised the issue of whether the appellant had been required, and had permission, to expand upon paragraph 11.1 with new factual allegations or had merely been invited to particularise paragraphs 2 to 10 of the particulars of claim with paragraph 11.1 being regarded as a summary of those paragraphs. For the reasons I have given, I regard the order requiring him to produce the Scott Schedule as an order that the appellant particularise his existing factual allegations in paragraphs 2 to 10 rather than that he make new ones in support of paragraph 11.1. It is most unlikely that Employment Judge Clark intended to give him permission to add new allegations regarding matters which were already known to him when the ET1 was presented and which he had chosen not to include in his pleaded case whilst including other analogous allegations.

12. The appellant also argues that paragraph 10 of the Scott Schedule goes to the handling of his grievance allegation, as referred to in paragraph 10 of the particulars of claim, but again that is not how it is presented in the Scott Schedule. Paragraph 10 is presented as particulars of an allegation regarding his professional development, not of an allegation relating to the handling of his grievances. Again, therefore, it seems to me that Employment Judge Nicolle was entitled

to regard this paragraph as containing a new claim which required permission to amend. From the starting point that both paragraphs 5 and 10 required permission to amend, there is no basis on which I can say that Employment Judge Nicolle's application of the well-established principles regarding amendments was flawed so as to be liable to be overturned on appeal.

13. Having informed the parties of my decision and reasoning above, it became apparent at the hearing that there remained an issue in relation to paragraph 1 of the Scott Schedule which is featured in the appellant's notice of appeal but upon which no oral submissions were made. The position as I understand it (and I have seen documents to support this) is that paragraph 1 was removed from the Scott Schedule following the hearing before Employment Judge Nicolle on the basis that the appellant's representative had indicated to the tribunal that it was withdrawn as a discrete allegation of discriminatory conduct but that, as is accepted by the respondent, it would be open to the appellant to rely upon the allegation as background evidence in his witness statement to the tribunal for the final hearing. There is no basis on which I can overturn the removal of paragraph 1 from the Scott Schedule in circumstances where this was agreed to by the appellant's representative before the tribunal and Employment Judge Nicolle was not invited to make a ruling on it. The appellant is not prejudiced by this to the extent that he remains entitled to refer to the allegation in question in his witness evidence for the final hearing.

14. For those reasons, I dismiss the appeal.