EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Sood	**v**	SM Global Consultancy Limited

Heard: Via Cloud Video Platform in the Midlands (East) Region

On: 14 June 2022

Before: Employment Judge Ayre

Representatives:

Claimant: In person
Respondent: Mr J Sykes, consultant lawyer

JUDGMENT AT PRELIMINARY HEARING

1. The claim for holiday pay is dismissed on withdrawal.

2. The claim for unfair dismissal (referred to in the claim form as 'unlawful dismissal') is dismissed on withdrawal.

3. The claims for victimisation and direct discrimination are not struck out.

4. The claimant has leave to amend his claim to pursue a complaint of direct discrimination on the ground of marital status.

REASONS

Background

1. The claimant worked for the respondent from 17 June 2021 until 3 or 4 November 2021 as a Warehouse Operative. On 4 December 2021 he

issued proceedings in the Employment Tribunal following a period of Early Conciliation that started on 24 November 2021 and ended on 26 November 2021. The claimant alleges that he was an employee of the respondent, the respondent says that the claimant was engaged as an agency worker. It accepts that the claimant is a 'worker' for the purposes of the Equality Act 2010.

2. The claim, in essence, is about the termination of the claimant's employment / assignment. The claimant was supplied by the respondent to work as a picker at a warehouse operated by the Co-Op. On or around 3 or 4 November 2020 the respondent terminated the claimant's assignment / employment. The respondent says that the claimant's assignment was terminated because because of unsatisfactory and dangerous workplace conduct after he was involved in two dangerous accidents on consecutive days.

3. In the claim form the claimant sought to bring a claim for holiday pay and for: 'Gross Unlawful Discrimination', 'Gross Negligence', 'Unlawful Dismissal', 'Gross Victimisation', 'No Duty of Care', 'Gross Mismanagement', Gross Injury to Feelings' and 'Misrepresentation'.

4. The respondent defends the claim. Its position, in summary, is that the Tribunal does not have jurisdiction to hear any of the claims listed in the claim form except the claim for holiday pay.

5. On 4 March 2022 the claimant wrote to the Tribunal stating that he had received the holiday pay that he was owed by the respondent and asking that his holiday pay claim be dismissed.

6. On 7 April 2022 the respondent applied to strike out the remainder of the claim on the grounds that it has no reasonable prospects of success.

7. A private Preliminary Hearing took place before Employment Judge Fredericks on 22 April 2022. The claimant did not attend that hearing, which proceeded in his absence. Employment Judge Fredericks was, in the absence of the claimant, unable to determine the issues in the claim, and was understandably concerned that the claimant appeared not to be actively pursuing his claim.

8. Employment Judge Fredericks therefore decided to list the case for an open Preliminary Hearing to consider whether to strike out the claim under Rule 37 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the Rules**").

9. The claimant subsequently wrote to the Tribunal stating that he had been unable to attend the Preliminary Hearing on 22 April because he had been arrested and was in police custody at the time of the hearing. He contacted the Tribunal after his release from custody and provided evidence of his detention.

The Proceedings

10. I had before me at the hearing, a bundle of documents helpfully prepared by Mr Sykes and running to 69 pages. There were also a number of additional documents which the claimant had sent to Mr Sykes and which Mr Sykes had forwarded to the Tribunal, for which I am grateful. One of the additional documents was a claim form in proceedings issued by the claimant's wife against the respondent. That claim form appears to have been issued on 15 October 2020, a few weeks before the claimant ceased working for the respondent. The claim form appears to include a complaint of sex discrimination and names the claimant as the representative in the proceedings.

11. At the start of the Preliminary Hearing, I asked the claimant to identify the legal claims that he is seeking to bring against the respondent. This was in line with the guidance given by the EAT in ***Cox v Adecco and ors [2021] ICR 1307*** that a Tribunal should not strike out a claim where it does not know what the claim is. There should, therefore, be a reasonable attempt at identifying the claim and the issues before considering strike out.

12. The claimant is a litigant in person. He had not been able to clarify his claims at the previous Preliminary Hearing because he had not attended that hearing due to being in policy custody. It was, therefore, reasonable, in my view, to ask him to do so during today's hearing, which was the first time he had appeared before the Employment Tribunal in these proceedings. We discussed each of the potential claims listed in the claim form.

13. The claimant confirmed that he had withdrawn his complaint of holiday pay and asked for that claim to be dismissed. He also clarified that the reference in the claim form to 'unlawful dismissal' was a reference to unfair dismissal. He accepted that he does not have sufficient service to pursue a complaint of unfair dismissal (even if he was an employee of the respondent, which the respondent denies) and withdrew that claim also. Neither party objected to that claim being dismissed upon withdrawal.

14. The claimant accepted, quite sensibly, that many of the potential claims listed in the claim form are not ones that the Tribunal has jurisdiction to hear. He confirmed that he did not wish to pursue, and was therefore withdrawing, the following complaints:

    a. "Gross negligence";
    b. "No duty of care";
    c. "Gross Mismanagement"
    d. Personal Injury; and
    e. "Misrepresentation".

15. He also told me that he has now received his P45 and does not wish to pursue a complaint about that.

16. In relation to the complaint of "Gross Injury to Feelings" the claimant acknowledged that this is not a separate type of claim, but rather is a potential remedy should he succeed in his complaints of discrimination.

17. In relation to the complaint of "Gross Unlawful Discrimination" the claimant clarified that he was bringing a complaint of direct discrimination on the grounds of marital status. The alleged act of discrimination is his "dismissal" which he says was because he is married.

18. The claimant also clarified that the reference to "Gross Victimisation" is to a complaint of victimisation. He says that he was dismissed for supporting his wife in her Employment Tribunal claim.

19. Having clarified with the claimant that the only claims he is pursuing in the Employment Tribunal are for direct discrimination and victimisation, I then went on to consider whether to strike out those claims and invited the parties to address me on the question of whether they should be struck out.

20. For the reasons set out below, I concluded that the complaint of victimisation should not be struck out and that the complaint of direct discrimination on the grounds of marital status required an application to amend. I asked the parties to address me on the question of whether the claimant should be allowed to amend his claim.

21. Having decided the question of amendment, I went on to conduct a case management hearing during which I made Orders for preparing the case for Final Hearing and listed that Final Hearing. Those Orders and the Notice of Final Hearing are set out in a separate document.

The Issue

22. The issue for determination at today's hearing was whether the claim should be struck out under Rule 37 of the Rules on the ground that it has no reasonable prospect of success.

23. I also considered whether the claimant should be allowed to amend his claim to include a complaint of direct discrimination on the grounds of marital status.

The Law

Strike out

24. Rule 37 of the Rules provides that:

> *"(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 respondent (as the case may be) has been scandalous, unreasonable or vexatious; …*
> *(e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response…"*

25. Strike out is a draconian sanction and not one that should be applied lightly. Tribunals should be particularly cautious about exercising their power to strike out badly pleaded claims brought by litigants in person who are not familiar with articulating complex arguments in written form on the ground that they have no reasonable prospect of success (***Mbuisa v Cygnet Healthcare Ltd EAT 0119/18).***

26. The Employment Appeal Tribunal, in ***Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108*** commented that whilst in some cases strike out may save time, expense and anxiety, in cases that are fact sensitive, including discrimination claims, the circumstances in which a claim is likely to be struck out are rare.

27. In ***Cox v Adecco and ors [2021] ICR 1307*** the Employment Appeal Tribunal gave guidance to Tribunals dealing with strike-out applications against litigants in person. It held that when considering strike out of claims brought against litigants in person, the claimant's case should be taken at its highest and the Tribunal must consider, in reasonable detail, what the claims and issues are. A Tribunal should not strike out a claim where it does not know what the claim is. There should, therefore, be a reasonable attempt at identifying the claim and the issues before considering strike out. The EAT also said that, if the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual tests that apply to amendments.

28. In ***Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391*** the House of Lords stressed the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and can only be determined after evidence has been heard.

29. This approach was adopted also in ***Kwele-Siakam v Co-Operative Group Ltd EAT 0039/17*** in which the EAT found that an Employment Judge was wrong to strike out claims for race discrimination and victimisation when the central issue in the case was the reason for the respondent's behaviour towards the claimant, which would require a Tribunal to make findings of fact after a full hearing.

Applications to amend

30. The Tribunal has the power to allow the parties to amend a claim or response as part of its general powers of case management set out in Rule 29 of the Rules which provides that:

"*The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."*

31. Rule 41 of the Rules also states that: "*The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."*

32. The Tribunal has a broad discretion to allow amendments at any stage of the proceedings, either on the Tribunal's own initiative or if a party applies for leave to amend. The Tribunal must carry out a balancing exercise taking account of all of the relevant factors, of the overriding objective and the interests of justice, and of the relative hardship that would be caused to the parties by granting or refusing the application to amend.

33. When deciding whether to give a party leave to amend its pleaded case, the Tribunal should take account of the guidance given by Mr Justice Mummery in ***Selkent Bus Co Ltd v Moore [1996] ICR 836***. He set out relevant factors which include:

    22.1 The nature of the amendment: is the amendment the correction of clerical and typographical errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded, or the making of entirely new factual allegations?

    22.2 The applicability of time limits: if a new claim is introduced by the amendment, is that claim out of time and, if so, should the time limit be extended?

    22.3 The timing and manner of the application: an application should not be refused just because there has been a delay in making it, although delay is a relevant factor.

34. More recently, in ***Vaughan v Modality Partnership [2021] ICR 535*** the EAT confirmed that the most important question when deciding applications to amend is the balance of injustice and hardship of allowing or refusing the application. The Tribunal may consider what the real, practical consequences of allowing or refusing the amendment will be.

35. In ***Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07*** the EAT held that the Employment Judge had erred when refusing an application to amend a claim because there had been no attempt to apply the test in ***Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650*** by failing to consider all of the circumstances and in particular the injustice or hardship which might result to the parties from the decision.

36. The Employment Tribunals (England & Wales) Presidential Guidance – General Case Management (2018) states, at paragraph 5.3 that "*An application can be made at any time, as can an amendment even after Judgment has been promulgated. Allowing an application is an exercise of a judicial discretion. A party will need to show why the application was not made earlier and why it is being made at that time. An example which may justify a late application is the discovery of new facts or information from disclosure of documents.*

37. The Presidential Guidance also provides guidance on relabelling of existing claims in paragraphs 8, 9 and 10. The relevant section includes the following:

"*Labelling is the term used for the type of claim in relation to a set of facts (for example, "unfair dismissal"). Usually, mislabelling does not prevent the re-labelled claim being introduced by amendment. Seeking to change the nature of the claim may seem significant, but very often all that is happening is a change of label. For instance, a claimant may describe his or her claim as for a redundancy payment when, in reality, he or she may be claiming that they were unfairly dismissed.*

If the claim form includes facts from which such a claim can be identified, the Tribunal as a rule adopts a flexible approach and grants amendments that only change the nature of the remedy claimed. There is a fine distinction between raising a claim which is linked to an existing claim and raising a new claim for the first time…

While there may be a flexibility of approach to applications to re-label facts already set out, there are limits. Claimants must set out the specific acts complained of, as Tribunals are only able to adjudicate on specific complaints. A general complaint in the claim form will not suffice. Further, an employer is entitled to know the claim it has to meet."

Conclusions

38. In reaching the following conclusions I have carefully considered the evidence before me, the legal principles summarised above, and the submissions of both parties.

Strike out

39. The claim form clearly refers to 'gross unlawful discrimination' and to 'gross victimisation' as being complaints that the claimant wishes to make. It is, in my view, clear from the use of these words that the claimant intended, when he filed the claim, to bring claims of discrimination and victimisation. The inclusion of the words 'gross' before the words 'discrimination' and 'victimisation' does not detract from that.

40. The claimant, who is a litigant in person, did not mention in the claim form either his wife or his marital status. It is, however, apparent from

the information contained in his answers to questions 8.2 and 9.2, that what he is complaining about is his "dismissal".

41. In his answer to question 9.2 of the claim form the claimant specifically refers to the respondent having inflicted cruelty on him "*as punishment and revenge, for representing another in a separate claim made to the Employment tribunal, against them.*"

42. The information in the claim form in my view is sufficient to make clear that the claimant is complaining that he was dismissed for representing someone else in an Employment Tribunal claim.

43. The claimant told me today that the person he was referring to is his wife. His wife's claim form, which was in evidence before me, contains a reference to a complaint of discrimination, and names the claimant as the representative in the claim. It appears that the wife's claim was presented to the Tribunal on 15th October, before the claimant was "dismissed" on 3rd or 4th November.

44. For the purposes of a victimisation claim under section 27 of the Equality Act 2010, 'protected act' is defined as:

> "(*a) bringing proceedings under this Act;*
> *(c) Giving evidence or information in connection with proceedings under this Act;*
> *(d) Doing any other thing for the purposes of or in connection with this Act;*
> *(e) Making an allegation (whether or not express) that A or another person has contravened this Act."*

45. Acting as a representative for someone else who is bringing a complaint of discrimination under the Equality Act 2010 is, in my view, capable of amounting to a protected act under section 27. I am not making any finding to that effect however, as the question of whether the claimant did a protected act will need to be decided at the Final Hearing of this claim. I am merely putting the claimant's case at its highest, for the purposes of deciding whether to strike out the complaint of victimisation, as I am required to do.

46. There is clearly an important factual dispute in this case about the reasons why the claimant's engagement or employment with the respondent was brought to an end. The claimant says that it was because he supported his wife in bringing a claim of discrimination against the respondent and / or because of his marital status. The respondent says that it was because of unsatisfactory and dangerous workplace conduct after he was involved in two dangerous accidents on consecutive days.

47. The question of why the claimant was "dismissed" cannot, in my view, be determined without the hearing of evidence. In these circumstances and given that claims of victimisation and discrimination were contained in the claim form, that the claimant is a litigant in person and that the claims are of discrimination, it would not in my view

be appropriate for the victimisation or the direct discrimination claim to be struck out. The application for strike out therefore fails.

48. In relation to the allegation of direct discrimination on the grounds of marital status, I accept Mr Sykes' submission that there is no mention of marital status or of the claimant's wife in the claim form. Although it is clear that the claimant intended to bring a complaint of discrimination, it is not clear from the claim form what type of discrimination the claimant is alleging. The claimant therefore needs leave to amend his claim to pursue a complaint of direct discrimination on the grounds of marital status.

Application to amend

49. In deciding whether to allow the claimant to amend his claim to pursue a complaint of direct discrimination on the grounds of marital status, I have considered carefully the balance of injustice and hardship to each party of either allowing or refusing the amendment.

50. I have also considered the ***Selkent*** factors and set out my conclusions on each of these below:

    a. The nature of the amendment: It is clear from the claim form that the claimant is seeking to bring a complaint of discrimination and that his claim is about his "dismissal". What he has done today is to clarify the nature of the type of discrimination he is claiming. He is not seeking to introduce new facts or new heads of claim, but rather he is labelling his discrimination complaint as one of direct discrimination because of marital status. The nature of the amendment in my view falls into the category of the relabelling of an existing claim.

    b. The applicability of time limits: Mr Sykes accepted in his submissions that the claim form was presented in time. The original claim of discrimination was therefore made within the appropriate time limit and what the claimant is seeking to do today is to relabel it. The amendment is being sought at an early stage in the proceedings, and at the first hearing that the claimant has attended. He has not, in my view, delayed unnecessarily in clarifying his claim.

    c. The timing and manner of the application: the application is being made at the first preliminary hearing that the claimant has been able to attend and in response to questions from the Employment Judge as to the nature of his claims. The claimant has, quite sensibly, indicated that he is not pursuing most of the potential claims listed in the claim form, and is limiting his complaint of direct discrimination to his "dismissal".

51. Mr Sykes submitted on behalf of the respondent that the respondent would be put to considerable additional work and expense should the claimant be allowed to amend his claim to include a complaint of direct discrimination on the grounds of marital status. He suggested that the respondent would have to investigate and gather evidence of the

treatment of married couples generally within its organisation and would have to consider 'every interaction between the claimant and his wife' in the workplace.

52. Mr Sykes referred me to the case of ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 209*** as authority for the proposition that when considering an application to amend, the focus should be on the extent to which the amended case would require substantially different areas of enquiry, and that the greater the difference between the amended case and the original case, the lower the likelihood that the amendment would be allowed.

53. I do not accept Mr Sykes' submissions on this point. Whilst in some discrimination cases evidence as to how others who share the claimant's characteristic may be helpful background evidence, or relevant to the question of whether the Tribunal should draw an inference as to the real reason for the treatment of the claimant, this does not appear to me to be such a case.

54. The allegation of direct discrimination is a discrete and simple one: the claimant says he was "dismissed" because of his marital status. The respondent says his assignment was terminated because the claimant was involved in dangerous and unsatisfactory behaviour in the workplace. That is a simple factual dispute that will need to be resolved through the hearing of evidence.

55. As the claimant is also alleging that his "dismissal" was an act of victimisation, the focus of the enquiry in the existing claim (pre-amendment) will be on the termination of the claimant's assignment and the reasons for that. The focus of the enquiry in the amended case, were I to allow the amendment, would be the same. I do not, therefore accept that different areas of enquiry would be required were I to allow the amendment.

56. The only prejudice and hardship that I can see to the respondent, should I allow the amendment, would be that they would have to address the question of direct discrimination in submissions at the Final Hearing. No additional evidence will be required, as the key evidence in this case is that showing why the claimant's assignment was terminated, which is required in any event in the victimisation claim. Allowing the amendment would not lengthen the hearing substantially, if at all.

57. There would in my view be greater prejudice to the claimant if I were not to allow the amendment, as he would be prevented from pursuing a complaint of discrimination that he made in time in the claim form, albeit without clarifying that it was a complaint of direct discrimination on the grounds of marital status. The claimant is a litigant in person, and I accept his submission that the reason he did not specifically refer to his wife or to marital status discrimination in the claim form was due to his lack of understanding and knowledge of employment law.

58. The balance of injustice and hardship, together with the ***Selkent*** factors favour allowing the amendment. The claimant is therefore permitted to amend the claim to pursue a complaint that his "dismissal" was an act of direct discrimination on the ground of marital status.

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Employment Judge Ayre

15 June 2022

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JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE