Case Number: 2303146/2019

EMPLOYMENT TRIBUNALS
BETWEEN

Claimant		***Respondent***
Mr E Natty	**AND**	Serco Limited & Ors

OPEN PRELIMINARY HEARING

HELD BY CVP **ON** 7 April 2022

EMPLOYMENT JUDGE TRUSCOTT QC

Appearances

For the Claimant: Mr J Yetman of Counsel

For the Respondent: Mr A Ross of Counsel

For the Interested Party Ms V von Wachter of Counsel

JUDGMENT on PRELIMINARY HEARING

The claimant's application to amend his claim is granted in terms of paragraph 3 hereof, otherwise it is refused in terms of paragraph 4 hereof.

REASONS

Preliminary

1. At a case management preliminary hearing on 7 December 2021, it was decided that there should be an Open Preliminary Hearing to address:

a) The Claimant's application to amend his Claim as set out below
b) Cross applications for costs / wasted costs against the Claimant's former representatives.
c) Any other matters that are necessary to ensure that the final hearing is ready and effective.

2. There was a bundle of documents for the amendment hearing, a costs bundle and a claimant's bundle in relation to costs provided to the Tribunal which will be referred to where necessary.

3. The costs application by the respondent was settled and is dealt with in a separate judgment.

4. The costs application by the claimant is against the interested party (his former solicitors). It was noted by EJ Self that the basis for it was far from clear. It was not contained in a separate written application. It was apparent to the Tribunal that, whether separate or not, there might be an issue as to whether the application was competent under the Rules, further it did not appear to provide fair notice in that that it did not set out a basis for the claim and a calculation. Ms von Wachter for the interested party had a set of submissions for the Tribunal which it did not find it necessary to hear. The claimant withdrew the application. While this Tribunal has not adjudicated on the matter, any further application, if made, should not be heard before the merits hearing and must be compliant with Rules 74-84.

5. Other outstanding matters for the main hearing were that the 12 pages due to be sent by the claimant for the bundle had not been received by the respondent and the CCTV film had not been disclosed. The claimant confirmed that the 12 pages had now been sent. The respondent confirmed that it did not own the CCTV film and it had been deleted after 6 months under the Council retention policy. Accordingly, these matters were no longer outstanding and, subject to the amendment, the case was ready for the hearing. The respondent wished to make a final check of the issues in relation to the witness statements as the statements had been produced before the issues were settled.

6. In the light of the judgment, the respondent is permitted to lodge a supplementary statement of Mr Devan (Dewan) and amend its Grounds of Resistance if it so wishes. The issues may fall to be adjusted.

Chronology of claim

1. The ET1 was lodged on 7 August 2019.
2. On 8 August 2019, the claimant was dismissed.
3. There was an amendment on 7 November 2019 to add the dismissal into the claim. This was not opposed by the respondent.
4. There was a preliminary hearing on 22 January 2020.
5. On 18 August 2020, the claimant provided a revised Scott Schedule which was said to contain a full list of incidents upon which he relied [66 Costs]
6. There was a further preliminary hearing on 21 January 2022.
7. Witness statements were exchanged in July 2021.
8. The main hearing is listed for 4-12 July 2022.

The amendment proposed

8. The amendment which was proposed at the hearing on 21 January 2022 has been corrected so far as possible to remove transcription errors.

3.1.21 On or around 19 June 2019, Paul Best made comments about stereotypical and pejorative views about Jamaicans being “drug smugglers”. He also made similar remarks about Jamaicans associated with growing dreadlocks after hearing the claimant observed a black male on the CCTV camera with dreadlocks .17 of the Scott schedule
3.1.29 Ras Devan telling the claiming that he was too loud and telling the claimant to move away as he was too close in the meeting of the 8th of August 2019.
3.1.31 Ras Devan telling the Claimant that he needed to pass over his company property or else he would have him arrested
4.2.5 Ras June sending the claimant an email regarding the meeting on the 8th of August 2019, including attachments with untrue information relating to instances incidents that the claimant was previously unaware of.
4.2.7 Accusing the claimant of being aggressive and unfit for work in the meeting on the 8th of August 2019.
4.2.8 Ras Dewan dismissing the Claimant from his employment.
4.2.9 Ras Dewan telling the Claimant that he needed to pass over his company property or else he would have him arrested
4.2.10 Ras Dewan telling the Claimant he was too loud and telling the Claimant to move away in the meeting of 8 August
7.1.3 Paul Douda made a report to support R2 which was upon the instruction of the Second Respondent
7.1.4 By the Second and Third Respondent planning to make statements against him with Syed and Hassan

Amending the claim

7. The starting point must be the importance of what is actually set out within the ET1. In **Chandhok v. Tirkey** [2015] ICR 527, Langstaff J sitting alone in the EAT said the following at paragraph 16:

> “The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.”

8. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised ‘in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions’. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 NIRC. There is a distinction which requires to be drawn between:

(i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is

change the grounds on which that claim is based, i.e. re-labelling.

(ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim. As Harvey notes at paragraph 312.01 in relation to this type of amendment: *"*So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded.

(iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

9. More recently, the Court of Appeal in **Kuznetsov v Royal Bank of Scotland** [2017] EWCA Civ 43 also confirmed the factors identified in **Selkent** as being factors to take into account as well as approving **Chandhok**. At paragraph 25, Elias LJ (giving the only reasoned judgment) noted that in respect of the Claimant, 'His obligation was to put his claims before the ET when he lodged his application.' Elias LJ went on to quote Langstaff J's views in **Chandhok** that the ET1 was not something simply to set the ball rolling, before saying:

> It was not sufficient for the appellant simply to add these claims at a later date when he was asked to produce a list of issues. They ought to have been made from the beginning. HH Judge Eady observed that there was absolutely no reason why this claim could not have been advanced as part of the original claims. It did not emerge as a result of the receipt of late documents of anything like that. If the appellant had an explanation for not advancing this claim earlier it was for him to produce it. No explanation was given.

10. In essence, **Selkent** said that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]" before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it." This approach was approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201.

11. When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence. Although the allegations in the original claim and in the amendment were not identical, Rimer LJ, giving the only reasoned judgment of the Court, held that 'the thrust of the complaints in both is essentially the same'. The fact that the whistleblowing claim would require an investigation of the various component ingredients of such a case did not mean that 'wholly different evidence' would have to be adduced. **Evershed v. New Star Asset Management Holdings Ltd** [2010] EWCA Civ 870 at para 50.

12. In **Remploy Ltd. v. Abbott & Ors.** UKEAT/0405/14, the Employment Appeal Tribunal allowed an appeal against a Tribunal's decision to permit amendment to claims which had been professionally drafted by experienced solicitors and counsel confirming that, in deciding whether or not to allow an amendment to a claim, employment judges must consider issues such as the reason for delay and the impact that the amendment is likely to have on case management and preparation for

hearings, in the light of the prejudice to the parties. At paragraph 87, the EAT said that the amendment must be properly formulated and particularised.

13. One of the **Selkent** factors is time and whether the proposed amendment is out of time, and if so whether the time limit should be extended. In **Amey Services Ltd and another v. Aldridge and others** UKEATS/0007/16 the Scottish EAT held that an amendment cannot be allowed subject to time bar issues. However, shortly afterwards the EAT in England reached the opposite conclusion in **Galilee v. Commissioner of Police of the Metropolis** UKEAT/0207/16 and expressly held that **Amey** had been wrongly decided. The EAT in **Galilee** held at paragraph 109 that a Tribunal can decide to allow an amendment subject to limitation points, that an applicant need only demonstrate a prima facie case that the primary time limit or the just and equitable ground was satisfied, and also that amendments to pleadings which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend. The Presidential guidance on case management meanwhile aligns with the **Amey** line of authority in saying that time points must be decided at the point of amendment. The Court of Appeal has not as yet had the opportunity to clarify the position.

14. In **Vaughan v. Modality Partnership** [2021] ICR 535 EAT, Tribunals were reminded that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.

15. The position is also summarised in the Presidential Guidance issued under the provisions of Rule 7 of the Rules which the Tribunal has also considered.

CONCLUSION

1. It was agreed that 4.2.8 should not have been included in the list of disputed amendments.

2. The matters addressed in the proposed amendment either arose prior to dismissal or at the dismissal meeting. At the time of drafting of the particulars for the ET1, the claimant had the benefit of legal advice. The ET1 is extensive. In June 2020, the Respondent put the claimant on notice that he needed to amend his claim. On 18 August 2020, the claimant's solicitors provided a Scott Schedule which was said to contain a full list of the allegations made by the claimant. No application to amend the ET1 was made until the oral application in December 2021.The main hearing is listed for 7 days in early July 2022. Final case management orders have been complied with. The Tribunal noted that while a number of individuals had been cited as respondents neither Mr Best nor Mr Devan (Dewan) had. The former would not be a witness at the hearing, the latter would be.

3. Paragraphs 3.1.29, 3.1.31 4.2.7, 4.2.9, 4.2.10 relate to the dismissal meeting on 8 August and the activities of Mr Devan (Dewan). They give notice of what is alleged. They add detail to the existing allegations. The Tribunal was not put in a position where it might consider whether the new allegations had been omitted by the solicitors for the claimant or by the claimant. As the evidence of what took place at the dismissal meeting is likely to be highly significant for the main hearing, in all the circumstances, the Tribunal concluded

that the balance of injustice and hardship weighs in favour of the claimant and in granting the amendment in relation to these paragraphs.

4. The claim against Mr Best in 3.1.21. is now out of time and would add a further witness to the hearing, thus extending it. The Tribunal was not put in a position where it might consider whether the new allegations had been omitted by the solicitors for the claimant or by the claimant. It is not sufficient simply to blame the solicitors generally as very detailed pleadings had been provided by them. 7.1.3 is understood to relate to Mr Best, is not properly pleaded in that no date is given and it cannot readily be understood and no detailed explanation was given for its omission. 7.1.4 is not properly pleaded in that no date is given and it cannot readily be understood and no detailed explanation was given for its omission. Syed and Hassan are no longer employed by the respondent. Paragraph 4.2.5 is not properly pleaded in that no date is given and it cannot readily be understood. In all the circumstances, the Tribunal concluded that the balance of injustice and hardship weighs heavily in favour of the respondent and refused the amendment.

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Employment Judge Truscott QC

Date: 10 April 2022