



THE EMPLOYMENT TRIBUNAL

Claimant: Mr Utere
Respondent: Huxlow Academy
Heard at: Watford Employment Tribunal (video hearing)
On: 10 November 2022
Before: Employment Judge Robinson

Representation
Claimant: Mr Egan-Ronayne (Solicitor)
Respondent: Mr Scott (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The name of the Respondent is amended to Huxlow Academy.
2. The Claimant's claim of race discrimination is dismissed upon withdrawal by the Claimant.
3. The Claimant's 4 July 2022 application to amend the claim to one of discrimination on the basis of a philosophical belief and sex, is refused.

WRITTEN REASONS

4. I gave the above Judgment at the 10 November 2022 hearing, together with oral reasons. The Claimant has requested written reasons under Rule 62 of the Employment Tribunals Rules of Procedure. My reasons were as follows.

Preliminary issue – the name of the Respondent

5. It was agreed by the parties at the outset that the correct name of the Respondent is Huxlow Academy and the judgment therefore amends the name of the Respondent accordingly.

Background and introduction

6. The Claimant filed his claim form on 28 February 2021, following early conciliation with ACAS commencing on 17 January 2021 and concluding on 18 February 2021.
7. The Claimant, in his claim form, ticked the box for race discrimination followed by a short narrative which read,

“Although other newly qualified teachers have been assessed to have met the Teacher’s Standards, it is still unclear why in my case there was a reason for quality assurance issues with respect to the same assessor or processes that were used to assess those successful or newly qualified teachers.”
8. There was Preliminary Hearing on 14 December 2021 and another on 17 March 2022 at which set out to determine the nature of the claim and whether it was in time. The second of those decided that the claim was in time.
9. The matter was then set down for another Preliminary Hearing on 20 June 2022.
10. At that hearing, Employment Judge Postle tried to establish from the Claimant’s representative precisely the nature of the less favourable treatment. There was a document in the Bundle referring to direct discrimination based on race or disability and specific dates were referred to.
11. Employment Judge Postle questioned whether in reality the case was about the Claimant being adversely assessed, and then suspended and dismissed, because of his race.
12. The Claimant’s representative informed Employment Judge Postle it was *not* about race; it was about the Claimant’s beliefs in the way he taught had a positive effect on the pupils. This was explored to try and determine the exact nature of what appeared to be a philosophical belief and if that was being pursued, what was the less favourable treatment. The Claimant’s representative was unable to provide that information at that Hearing.
13. Information was then provided in an application to amend dated 4 July 2022 which referred not only to discrimination on grounds of philosophical belief but also raised, for the first time, a new ground of discrimination - sex.
14. Firstly, given the Claimant’s representative has confirmed again today that the claim of race discrimination is not pursued, I have issued judgment dismissing that claim on withdrawal.

Unless Order

15. On the Tribunal’s own initiative, Employment Judge Postle ordered that unless by 23 July 2022 the Claimant provided the following further

particulars:

- a. the nature of the less favourable treatment;
- b. whom was responsible for it;
- c. the dates of each allegation;
- d. if witnessed by a third party, the name; and
- e. to whom does the Claimant compare himself with as having more favourable treatment.

the complaint under the Equality Act 2010 for the protected characteristic of philosophical belief would stand dismissed without further Order, Notice or Hearing.

16. The Claimant submitted an application to amend dated 4 July 2022 which on the face of it complied with the requirements of the Unless Order. The Claim does not, therefore, stand dismissed *automatically* in response to that Unless Order.
17. However, I have now separately considered the terms of that application to amend, and the fact it also seeks to include a new head of claim of sex discrimination.

Application to amend

18. In considering the application to amend, I have considered and applied the principles of the case of Selkent Bus Co Ltd v Moore [1996] I.C.R. 836.
19. The key principle I must have in mind in exercising discretion, is to have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it.
20. Looking firstly at the nature of the amendment, it seeks to replace the race discrimination claim (which was pleaded for more than a year and a half) with two new heads of claim. It is certainly a relevant factor that points against granting the amendment that this is not a minor or relabelling exercise – sex discrimination is a completely new ground of claim never before mentioned. As for the philosophical belief claim, this was only mentioned at the Preliminary Hearing in June.
21. However, as the Court of Appeal in Abercrombie and ors v Aqa Rangemaster Ltd 2014 ICR 209, CA, stressed, I must not be too formulaic in my assessment of classification of a claim. Nevertheless, it seems to me that the Respondent would need to reconsider entirely how it treated the Claimant at the time; not by defending allegations of race discrimination, but by seeking to show:
 - a. that the Claimant did not have a philosophical belief (failing which that it did not discriminate on the basis of such a belief),

- b. it did not treat the female members of staff going through the NQT training more favourably.
22. I therefore do consider that this is a considerable difference in the factual and legal considerations that would need to be made, between the old claim and the new ones. And that points towards not allowing the amendment.
23. Secondly, these new claims are well out of time. The Tribunal and, more importantly the Respondent, were not aware of allegations of discrimination on the basis of a philosophical belief related to teaching nor on the grounds of sex until the June Preliminary Hearing and the 4 July 2022 application respectively. I have weighed up whether it would be just and equitable to extend the time limits.
24. Although delay in making the application is not determinative in itself, it is a factor I have taken into account. The Claimant's representative did not give a cogent explanation for why in the preceding months the Claimant had not raised these types of alleged discrimination. It seems to me that there is an attempt to try and retrospectively attach new labels to conduct without any proper basis. Indeed there was no new evidence or documentary evidence from the Respondent that prompted the Claimant to reassess his claim; it seemed to be down to the Claimant's representative trying a new tack very late in the day.
25. In Martin v Microgen Wealth Management Systems Ltd EAT 0505/06, the Employment Appeal Tribunal stressed that the overriding objective requires, among other things, that cases are dealt with expeditiously and in a way which saves expense and undue delay (which there clearly has been in this case). The later the application to amend, the more inclined a Tribunal will be to reject it.
26. Sex discrimination is not mentioned at all in the Claim Form, or at any of the 3 previous Preliminary Hearings before 3 different employment judges, all of whom probed the Claimant and his representative in relation to what the claim was about.
27. I acknowledge that the Claimant was unrepresented in the early stages of making his claim. However, he did have support from a friend who was a Trade Union official. The Claimant then had legal representation from March 2022 onwards.
28. I note that between March 2022 and the 22 June 2022 Preliminary Hearing (and at that hearing itself) sex discrimination was never mentioned. It was only mentioned for the first time in the 4 July 2022 application to amend.
29. I consider that the Claimant had ample opportunity to clarify his claim given how much time has passed and how much Tribunal time has been allocated to trying to get to the bottom of what his claim was about.
30. I am conscious that the Selkent factors are not a tick box exercise and I have therefore considered the guidance of the Employment Appeal

Tribunal in Vaughan v Modality Partnership: UKEAT 0147 20 BA (V) that Tribunals must consider the practical consequences of allowing or refusing the amendment.

31. I am of course aware that in refusing the amendment the Claimant's claim falls, given he has chosen to withdraw his race discrimination claim. I heard from the Claimant during the hearing that he is suffering adverse consequences as a result of his time working for the Respondent; both emotionally and financially. However, I reiterate that there have been 3 previous Preliminary Hearings (and a period of more than 1.5 years) for the Claimant to properly set out in writing or at a hearing what his claim is based upon. None of the previous Employment Judges at the Preliminary Hearings were able to bottom that out.
32. I also heard from the Respondent's representative that the consequences of allowing the amendment would be significant. Essentially, they would be seeking to defend two new claims having, up until this point, prepared all of their documents and evidence on the basis that the claim was one of race discrimination.
33. Finally, and although not determinative, I do weigh into the balance the merits of the claim. The question of whether the Claimant had a genuine philosophical belief in the 3 pillars of teaching (teacher-subject, teacher-student and student-subject), and whether he was discriminated against on that basis, as being one that has little prospect of success.
34. It is for all of these reasons that I have considered carefully that, on balance, the application to amend is rejected and the claims are dismissed.

Employment Judge Robinson

Date 8 December 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16/12/2022

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FOR THE TRIBUNAL OFFICE