EMPLOYMENT TRIBUNALS

Claimant: Mrs I Neata

Respondent: Genting International Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by CVP)

On: 2 November 2022

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: In person
For the respondent: Miss Smeaton of counsel

REASONS

1) By a Judgment of 2 November 2022, the claimant's claim was dismissed. By email of 15 Nov 2022, the claimant requested written reasons.

2) By a claim of 5 Aug 2020, the claimant claimed unfair dismissal. She also said she was making another type of claim which the Tribunal could deal with and described it as 'Offensive allegations, humiliated and victimisation at my address.' The rest of the contents of the claim form and the contents of the response are a matter of record and we do not now describe their contents.

3) The Tribunal had no jurisdiction to hear the claim of unfair dismissal because the claimant remained in employment. In a preliminary hearing on 26 Jul 2022, the claimant applied to amend her claim to add a claim of race discrimination and it was provided that there would be a further preliminary hearing to determine the application. The claimant was ordered to provide further information about this new claim by 9 Aug 2022. The claimant provided it on 8 Aug 2022.

4) There was a further preliminary hearing on 22 Sep 2022. The claimant's information provided on 8 Aug 2022 was not adequate to allow the Tribunal and respondent to understand the amended case which the claimant wished to bring

and the hearing was almost entirely taken up with establishing what facts the claimant wished to rely on in relation to her claim of race discrimination. These facts are identified at section 7 of the Case Management Summary 22 Sep 2022 ('Section 7') which also identifies whether the factual matters the claimant wished to include in her claim as amended were referred to in the claim form or in some later document.

5) A further hearing was arranged to consider the amendment application and the parties were referred to the case of *Selkent Bus Company v Moore EAT* as setting out the principles on which the decision as to whether or not to allow the claimant to amend her claim would be based. The claimant was also warned that, if the Tribunal did not allow any of the amendments, the claim would be struck out because there would be no claims for the Tribunal to consider.

6) The claimant did not tick the race discrimination box in the claim form. She did not cite race discrimination in the claim form or make any link between the factual matters of which she complained and her race. The claimant did not assert that she suffered any detriment because of her race until the preliminary hearing on 26 Jul 2022 when the Tribunal identified that she could not bring a claim of unfair dismissal. In that preliminary hearing, the claimant, for first time, identified that the bullying and harassment of which she complained in the claim form were likely to be because of her race.

7) Prior to the July 2022 hearing, the claimant had sent the Tribunal three emails with further information of her claim, none of which referred to race discrimination or her race. These emails were dated 4 Sep 2020, 11 Oct 2020 and 5 Dec 2020 ('Further Information Emails'). Her email of 11 Oct 20 referred to her and her husband being treated differently and she used the work 'discriminated', but she did not refer to race discrimination. The apparent meaning of the word in its context was different treatment, not unlawful discrimination under the Equality Act 2010.

8) The claimant explained her failure to refer to race discrimination until July 2022 by saying that she had anxiety and depression which she said meant she could not think clearly. She produced medical certificates from August 2020 and September 2020 (and also from the latter part of 2021 and 2022) specifying anxiety and depression. These did not explain the effect of this medical condition on her ability to frame a Tribunal claim. She also relied on her lack of legal knowledge and on her belief that she must simply put down the facts and that the Tribunal would frame her legal case. She also said that ACAS had advised her to claim UD and some other claim. She asserted that she made her application for amendment in the time allowed by the Tribunal on 26 Jul 2022.

Relevant law

9) The leading case on amendment applications is *Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT* in which Mummery P identified key factors for the Tribunal to take into account as follows:

   a) The nature of the amendment; it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from 'relabelling' the existing claim. Mummery P

observed that 'applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal [has] to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.'

b) Time limits: if a new complaint is sought to be added, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions. This factor only applies where the proposed amendment raises what is effectively a brand new cause of action (whether or not it arises out of the same facts as the original claim).

c) The extent to which the applicant has delayed making the application to amend. In *Martin v Microgen Wealth Management Systems Ltd EAT 0505/06* the EAT noted that while obviously later amendments would be permitted in an appropriate case, the later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings.

10) In *Selkent,* the EAT also stated: 'Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.' Other relevant factors include whether the claim, as amended, has a reasonable prospect of success.

11) In *Vaughan v Modality Partnership 2021 ICR 535, EAT,* the EAT confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. What will be the real, practical consequences of allowing or refusing the amendment?

12) The respondent relied on *The Housing Corporation v Bryant CA [1999] ICR 123, Foxtons Ltd v Ms C Ruwiel UKEAT/0056/08/DA and Reuters Ltd v Mr R Cole UKEAT/0258/17/BA* as authority for the claimant's application not being a mere relabelling exercise when, although the factual matters relied on were set out in the claim form, the link between race and the matters complained of was not made.

13) In *Foxtons* the EAT cited *Bryant* as making clear that, for an amendment to allow a new victimisation claim to be a mere relabelling exercise, there must be a causative link between the making of the allegation of discrimination and the dismissal, on the claim form. 'The linkage must be demonstrated, at least in some way, in the document.' The EAT stated that 'it is not enough to make certain observations in the claim form which might indicate that certain forms of discrimination have taken place; in order for the exercise to be truly a re-labelling one, the claim form must demonstrate the causal link between the unlawful act and the alleged reason for it. In other words, it would have to identify not merely that

there had been some discrimination but that the dismissal was by reason of sex discrimination.'

14) S123 EQA states that a claim may be considered out of time provided that it is presented within 'such other period as the employment tribunal thinks just and equitable'.

15) In *British Coal Corporation v Keeble and ors EAT, 1997 IRLR 336*, the EAT suggested that in considering whether a 'just and equitable' extension should be allowed, the tribunal might be assisted by the factors mentioned in S.33 of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

16) In *Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23*, the Court of Appeal cautioned against relying on the S33 factors as a checklist for making such decisions, although they may illuminate the Tribunal's task.

Conclusion

17) The claimant's application raises a new claim which would require a different enquiry from the original unfair dismissal claim, because it will involve an enquiry about (1) various incidents before and after the redundancy exercise, which formed the basis of the unfair dismissal claim, and whether there was less favourable treatment (2) and, if so, whether it was because of race.

18) Following the guidance in *Foxtons*, the amendment sought by the claimant is not merely a relabelling. The claim form did not identify that there was race discrimination or that race discrimination was the reason for the matters complained of. Therefore, we must consider whether the race discrimination claim is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.

19) By the time the claimant indicated she wanted to amend her claim, on 26 Jul 2022, the matters she was complaining about, as set out Section 7, were all about 2 years old or more. The most recent event complained of was Mr Woodford's email of 11 Sep 2020.

20) When considering if it would be just and equitable to extend time, the same sort of factors should be considered as when determining if an amendment should be allowed, in particular the prejudice which each party would suffer as a result of the decision reached

21) The Claimant relied on her ignorance and illness to explain her delay in bringing her race discrimination claim. We do not consider that the claimant can successfully rely on ill health to explain the omission. She produced no medical evidence other than medical certificates, as referred to above, specifying anxiety and depression, but not explaining the effect of this. She did manage to send in the Further Information Emails, starting in Sep 2020; any medical condition did not prevent her doing so.

22) The claimant said she made her application in the time allowed by the Tribunal on 26 Jul 2022. This is true but the Tribunal did not say that the amendment application would then be allowed. It merely said that she must apply to amend her claim by a given date.

23) The claimant relied on her lack of legal knowledge. We do not consider that giving the reason of race discrimination for alleged unfavourable treatment is a technical matter requiring legal knowledge, particularly when the claim form offers the option of ticking a box for race discrimination. Many unrepresented claimants are able to identify that they believe the treatment they complain of is due to their race.

24) In short, the claimant has not provided any good reason for the lateness of her introduction of a race discrimination claim and we cannot see that it would be just and equitable to extend time. However, the mere fact that the amendment sought is out of time is not enough for a Tribunal to dismiss the application.

25) We have concerns about the merits of the claim if the amendment is allowed.

a) The fact that the claimant did not mention her race or that she considered the matters she complained of were because of her race in the claim form and the Further Information Emails suggests that she did not think the treatment she complained of was due to her race.

b) Many of the comparators whom the claimant relied on, identified in Section 7, were Romanian, which is the race the claimant identifies herself as. This suggests that race is not the reason for the alleged detrimental treatment.

c) The respondent's position is that the handling of the redundancy situation, of which the claimant complains, followed collective consultation with an independent trade union. The claimant did not challenge this.

d) The claimant did not bring a grievance complaining of race discrimination.

e) Apart from Mr Woodford asking the claimant if she was in Romania, in an email of 11 Sep 2020, there is nothing on the face of the claims which the claimant wishes to add which link the treatment complained of to the claimant's race.

26) Turning to the balance of hardship and injustice: On the one hand the claimant will have no claims before the Tribunal if the amendment is not allowed which will be a severe hardship for her. Given our concerns about whether the claimant will succeed in her claim, however, the claimant may not ultimately be disadvantaged if she cannot bring the race discrimination claim. On the other hand, to defend the claim, the respondent will be required to give evidence about matters arising about two years or more prior to them being identified as race discrimination claims.

Although the respondent knew the incidents were being raised, it did not know that it was suggested they were because of race. To investigate that issue so long after the event, would be very difficult for it.

27) Taking these factors into account and balancing them, we consider that the amendments sought should not be allowed. The amendments introduce claims which would require a new line of enquiry, the amendments raise claims which are substantially out of time and the claimant has not shown good reason for the lateness. The respondent would be substantially prejudiced by being expected to investigate a racial motive so long after the events. Although the claimant will suffer hardship from having her claim dismissed, this is mitigated by the fact that its merits are not at all clear cut.

28) For these reasons, we do not allow the amendment. Accordingly, the claimant's claim must be dismissed because no claims remain.

19 November 2022

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Employment Judge Kelly