EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mr J Alton

Respondent: Carnival PLC t/a/ Carnival UK

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Southampton (via VHS) **ON 7 February 2023**

EMPLOYMENT JUDGE Cuthbert

Representation

For the Claimant: Ms Tulloch (lay representative)
For the Respondent: Mr Moore (solicitor)

JUDGMENT ON APPLICATION TO AMEND

The claimant's application to amend the ET1 is refused.

REASONS

Summary oral reasons were given at the hearing and these written reasons are provided following a request for written reasons from both parties at the end of the hearing.

1. In this case the Claimant sought leave to amend his claim which is currently before the Tribunal, and the Respondent opposed that application. I heard oral submissions from the representatives of both parties. There was no witness evidence from either side.

2. The hearing took place by video (VHS) and lasted for three hours including deliberation and a decision with oral reasons. Submissions were paused briefly on two occasions to allow Ms Tulloch to check certain details relating to the application. The Claimant was in attendance with Ms Tulloch and a representative from the Respondent was also present for some of the hearing.

Background to the application to amend

3. The Claimant's existing claim was submitted by way of an ET1 dated 13 July 2022. It related specifically to the withdrawal of a job offer/alleged dismissal of the Claimant by the Respondent on 9 June 2022. His legal complaints were subsequently clarified as being for direct disability discrimination and victimisation at a Case Management PH on 17 November 2022, presided over by EJ Gray. The case was listed for a three-day final hearing from 1 – 3 March 2023 and remained so listed when the application to amend was heard by me.

The Claimant's application

4. The application to amend was made by email on 16 December 2022 by Ms Tulloch. It was based upon the response to a subject access request, which had been provided to the Claimant in early October 2022. It was said that 284 internal emails dating back to 2017 were provided. The Claimant was evidently known to the Respondent before the issues giving rise to the present claim.

5. I was told that there was some discussion about a possible amendment application being made at the hearing on 17 November, although the fact or detail of this discussion was not recorded in the CMO itself. No application to amend was made at hearing. Mr Moore said that he had noted the Claimant clearly voicing his opposition to any amendment application when this prospect was raised by Ms Tulloch at that hearing. The issues in the present claim were therefore properly identified in the CMO based only on the specific claim as originally made.

6. The amendment sought was loosely identified in the email of 16 December 2022 as follows (sic):

> *It is evident that there has been continuous victimisation and Discrimination and Unfair Process's since 2017 till present, due to emails exchanged between 20 employees, namely...*
>
> *[the application then listed 20 names and roles, which are not repeated here]*

> *There are emails (around 284) which show the extent of discrimination in various forms, across many departments by Employees that work or have worked for Carnival UK (PLC). In the Claimant's original Claim, I feel he does set out in the background but not in detail the following; Victimisation due to previous and ongoing other employment tribunals. Defamation due to vexatious, slanderous and malicious communications shared between departments within CUK and beyond. Thus causing discrimination, harassment and injury to feelings, unfair recruitment processes, and employment past present and future.*

7. The underlying factual basis of the proposed amendments were not set out in detail within the email of 16 December but in her oral submissions Ms Tulloch read out some of the internal emails and explained what the Claimant's case was in respect of them. This was essentially that the emails were said to demonstrate that the Claimant had been blacklisted by the Respondent because of his disability and/or because he had brought previous Tribunal proceedings, and that had in turn resulted in the eventual outcome of his application for employment in June 2022. That specific application forms the basis of the present claim, and he was rejected for reasons which it was said were disability-related or victimisation. Ms Tulloch made broader reference to documents from 2019 and 2022 which she said demonstrated this blacklisting.

8. It appeared to be the understanding of the Claimant's side, apparent from the oral submissions, that they could **only** rely on documents in the present claim from after April 2022, in respect of the decision to reject the claimant in June 2022. This understanding appeared to arise at least in part from the fact that the Claimant had applied for the role in April 2022 and been rejected and so they had come to understand, possibly at the previous hearing in some way, that earlier emails were not permitted to be relied upon. There was also an apparent unwillingness on the part of the Respondent to include any earlier emails within the bundle for the final hearing. I explained when I gave my oral decision that reliance on earlier documents **was** potentially permissible.

9. I said that it would be open to the Claimant, in seeking to prove his current claim about the June 2022 decision, to rely on documents from before that time (and afterwards for the avoidance of doubt), if the Claimant wished to argue that he had been blacklisted when he made his 2022 application. This documentation (depending on what it contained) may be potentially relevant to the *"reason why"* question, as set out in the Issues at para 3.4 and 4.4 of the previous CMO. I stressed that I was making no findings today about any of the underlying evidence which both sides mentioned or read from in their oral submissions, evidence which was not before me.

10. I heard oral submissions from Ms Tulloch in support of the amendment application, the thrust of which was that it would be unfair on the Claimant to exclude the evidence which had come to light via the subject access request. Mr Moore in his submissions pointed to the potential need to adjourn the hearing and relist for a longer period and the costs implications for the Respondent of having to respond at a later date to a much broader claim.

11. As indicated above, the application to amend the claim was broad, not clearly limited in scope nor specific. There were no draft amended grounds of claim before me. It **was** sufficiently clear that the Claimant sought to complain about historical matters of alleged discrimination and victimisation dating back to 2017, of which he had seemingly been unaware at the time when they occurred (as I understood the matters complained of were based on the content of internal emails at the Respondent which he only saw in October 2022). 20 different named individuals were mentioned in the application as being potentially responsible for the content of documents/emails, about which the claimant now wished to complain. The Respondent argued that some of the documents in question related to a different company, Princess Cruise Lines, rather than the current respondent. It was a very broad amendment to the scope of the current legal claim, which was based on a single specific decision (albeit one now said to be tainted by earlier matters).

12. It emerged during the hearing before me that a further Tribunal claim was potentially pending (it was within Acas EC) which was said to be based on the same underlying facts as the application to amend. Mention was made of a draft claim but the draft was not before me and that potential claim had not yet been submitted as at 7 February 2023 (the date of this hearing). Whether it is submitted in due course is for the Claimant to decide, but as at the date of the application before me, the Tribunal plainly had no jurisdiction over a claim which was not yet made. I make my decision on the application based upon the present claim and not the possibility of a future claim. I returned to the further potential claim later in my decision (below).

The applicable law

13. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of *Chapman v Simon* [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.

14. In *Cocking v Sandhurst (Stationers) Ltd and anor* [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key

principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, **in particular any injustice or hardship** which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in *Selkent Bus Company Ltd v Moore* [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in *Ali v Office of National Statistics* [2005] IRLR 201 CA.

15. The EAT held in *Selkent* that, in determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:

    a. The nature of the proposed amendment

        Applications to amend range, 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 a substantial alteration pleading a new cause of action.

    b. The applicability of time limits

        If a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended [the word “essential” is considered further below]; and

    c. The timing and manner of the application

        An application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

16. These factors are not exhaustive and there may be additional factors to consider, for example, the merits of the claim.

17. In *Vaughan v Modality Partnership* UKEAT 0147/20, 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. The factors identified in *Selkent* are not a tick box exercise, they are the kind of factors likely to be relevant in striking the balance. The EAT said that representatives would be well advised to start by considering what the **real practical consequences** would be of allowing or refusing the amendment, if the application is refused how severe would the consequences be and if permitted what are the practical problems in responding. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition and they should not allege prejudice if it does not really exist. This requires a focus on reality, rather than assumptions. It will often be appropriate to consent to an amendment that causes no real prejudice. A balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice Where the prejudice of allowing the amendment is additional cost, consideration should be given as to whether it can be ameliorated by an award of costs, provided the paying party can meet it.

18. More recently still, in *Chaudhry v Cerberus Security and Monitoring Services Ltd* [2022] EAT 172, the EAT suggested a two-point checklist that Tribunals might find helpful when considering applications to amend:

    a. First, identify the amendment or amendments sought, which should be in writing. It is important to clarify the specific amendments that are sought because otherwise it will not be possible to balance the injustice and/or hardship of allowing the amendment(s) against that of refusing them. Often there need not be an all or nothing decision because some amendments may be clearly identified and the case for allowing them may be compelling while others may be nebulous and the arguments for permitting them insufficient. Tribunals face real difficulty where a litigant in person is seeking to amend an unclear pleading with an equally opaque document, or documents. Where amendments are permitted the end result should, whenever possible, be a single document that sets out as clearly as possible the claims that are being brought. These general points apply to both claims and responses.

    b. Second, in express terms, balance the injustice and/or hardship of allowing or refusing the amendment or amendments, taking account

of all the relevant factors, including, to the extent appropriate, those referred to in *Selkent*.

19. The Employment Tribunal Presidential guidance, General case management, issued by the President of the Employment Tribunals in England and Wales in January 2018, contains a section on amending a claim or response, explaining the factors the tribunal will take into account when considering an application. The guidance provides that the tribunal will generally grant leave to make minor amendments, such as to correct a typographical error or incorrect date, without further investigation. More substantial amendments will, however, require regard to be had to all the circumstances. In particular, the tribunal will consider whether making or not making the amendment will result in any injustice or hardship to a party. In this respect, the Presidential guidance sets out the test established in *Cocking* above. The guidance also sets out the relevant circumstances established by the EAT in *Selkent* above.

Conclusions

20. I had regard to the parties' oral submissions and considered the overriding balance of hardship test as set out in *Chaudhury* and the other authorities above and the Presidential Guidance.

21. The first and most obvious consequence for both parties is that if the claim were to be amended to include further complaints of discrimination and victimisation dating back to 2017, this would lead to the inevitable postponement of the three-day hearing in March 2023 and likely a considerable delay in resolving matters. This would result in significant additional time and cost to the Respondent.

22. The complaints about earlier matters dating back to 2017 are likely to be out of time on their face (subject to any continuing act arguments or just and equitable extension arguments around date of knowledge) although there was insufficient detail of what the precise complaints would be (in the absence of a draft amended claim or its equivalent) to weigh this as a significant factor either way.

23. The main concern of Ms Tulloch on behalf of the Claimant, in making the amendment application, seemed to be the potential exclusion of the earlier matters within the emails, if the amendment were not granted. However, it was clear to me that if the hearing in March proceeded on the basis of the existing complaint, as explained above, some the historical matters of evidence could potentially, within reason and on a proportionate basis, be relied upon by the Claimant. That would be in seeking to prove his complaint about why he was not employed by the Respondent in June 2022, i.e. as

evidence as to the *"reason why"* question which is often at the heart of discrimination and victimisation claims.

24. The March 2023 hearing is listed for three days and there should be ample time for the Tribunal hearing it to read and consider a **proportionate** selection of the earlier background material, generated from within the Respondent's business, which the Claimant wishes to rely upon, as to what happened to him later on between April and June 2022 and the reasons for it. The Claimant will suffer no apparent hardship in this regard and the argument that he was blacklisted can be properly advanced and examined by the Tribunal within the scope of the "*reason why"* question.

25. I did also consider the timing of the application to amend. The documents came to light in October 2022, and there was a reasonable opportunity to formally amend the case at the previous PH but that was not taken up and the case was set down for a three-day hearing. The application to amend was made around a month later, so there was some delay.

26. Weighing up the balance of hardship and mindful of Rule 2 and the overriding objective, **I decided on balance to refuse the application to amend** but in so doing I made clear to both parties (in view of the indications at the hearing that the Respondent was refusing to include earlier documents in the bundle), that the Claimant was perfectly entitled, within reason and on a proportionate basis, to rely at the hearing in March 2023 on earlier documents arising from the DSAR which may be relevant to the later decision in issue in the present claim. This would be to seek to prove the underlying reason for his treatment in June 2022 and whether that related to his disability and/or to earlier complaints of discrimination about other cruise lines. In saying this, I emphasised that I had not seen any of the documents in question and matters of relevance would ultimately be for the Tribunal hearing the claim in March to assess.

27. In saying that other evidence could be relied upon by way of background to a discrimination claim such as the present one, I pointed out that issues of proportionality must to be kept in mind, particularly by the Claimant's side in seeking to adduce the material, given the overriding objective in Rule 2 and Rule 41.

28. Documents are likely to be relevant if they go to the *"reason why"* the decision about the Claimant was made in 2022 by those who made that decision or had input into it. Mention has been made of 284 emails and over 300 pages of documents obtained via the DSAR and it seems highly likely (given the typically broad nature of DSAR responses in my experience) that only a small number of such documents might be argued as being in any way relevant to the decision made in 2022. As such, I would expect that a **small and proportionate** selection of **relevant** documents from the DSAR

would be made by or on behalf of the Claimant and included in the bundle. I caveated the attempted guidance in the previous sentence on the basis that I had not seen the documents in question and the most important aspect of it was the term *"proportionate"* rather than *"small"*. I also reminded that parties of the requirement in Rule 2 that they will cooperate in preparing the case for the hearing next month.

29. At the end of my oral decision, I returned to the issue of the possible further potential Tribunal claim which had been mentioned. I could not reasonably factor this into my decision or make any other directions predicated upon it. The Claimant may or may not decide to put in this claim, given that I had made clear that earlier evidence may be relied upon to seek to prove his present claim.

30. If the Claimant did decide to put in a new claim following the hearing before me today (7 February 2023), a response would not be due until after the presently listed hearing (1 – 3 March 2023). Only if/when the Claimant has presented a further claim and the Respondent has responded, can the Tribunal be expected to make case management decisions based on that claim.

31. At present, this claim remains listed for 1 – 3 March 2023 and the previous directions stand. A decision to postpone cannot be made on the basis of a possible claim which has not been seen by either the Tribunal or the Respondent.

32. As indicated above, for the reasons given, the Claimant's amendment application was refused.

Employment Judge Cuthbert
Dated: 7 February 2023

Judgment sent to Parties: 8 February 2023

FOR THE TRIBUNAL OFFICE