



EMPLOYMENT TRIBUNALS

Claimant: MR M ALAM

Respondent: COVENTRY UNIVERSITY

Heard at: Midlands West ET (via CVP)

On: 24 February 2023

Before: Employment Judge Ali

Representation

Claimant: In person

Respondent: Miss McGee (Counsel)

WRITTEN REASONS FOR DECISION ON AMENDMENT APPLICATION

The Order of the Tribunal is that:

1. The Claimant's application of 5 December 2022 to amend his unfair dismissal claim to bring claims of race and age discrimination is refused.

Preliminary matters

2. Upon reading the papers, I noted the Respondent's legal representatives in this case were DAS Law. I sit as a fee-paid Judge, and I also professionally practice as a Barrister. As a Barrister I have been instructed by DAS Law over the years and will likely be instructed in the future. I have had no instruction in this case from DAS Law or any sort of involvement with this case as a Barrister. The file handlers at DAS Law in this case as they appeared on the papers did not seem familiar (which is unsurprising given DAS Law are a large organisation) and I was conscious of my

Case No: 1305020/2021

professional duties as a practising Barrister and a Judge. In those circumstances I did not consider that a notional fair-minded and informed observer would consider there to be a risk of bias. Notwithstanding I raised this issue with the parties at the start of the hearing. I explained to the parties:

- (1) That I also practiced as a Barrister and have been instructed by DAS Law in different cases over the years and could again be instructed in the future.
 - (2) I have had no involvement in this case, and the name of the Respondent's Solicitor on record did not seem familiar.
 - (3) I apologised and explained that this issue had only come to light that morning as I had only been given the papers for the case that morning.
 - (4) That I had checked and there were no other available Judge's to switch the case to on that day, and therefore any recusal would result in an adjournment of the hearing. I explained the fact of an adjournment was not a reason to not recuse myself if appropriate to do so, and the likely delay in re-listing would not be substantial because this was only a 1 day hearing by CVP.
 - (5) I told the parties that they had two options: first, they could consent to me hearing the case but thereafter they would lose the right to object that I had done so; and second they could ask that I recuse myself and do not hear this case. They had the right to ask that I recuse myself.
 - (6) I explained that I would hear any recusal request with an open mind and would hear the views of both parties before making a decision.
3. I then adjourned the hearing for 10 minutes to enable the parties to consider how they wished to proceed. When the parties returned they both expressed in clear terms that they wished for me to proceed to hear the amendment application.
 4. Also at the start of the hearing, I discussed with the Claimant reasonable adjustments he might require during the course of the hearing on account of his health conditions. He requested regular breaks, and was told that these would be facilitated. Throughout the hearing he asked for breaks, was offered breaks, and regular breaks took place. I appreciated this litigation was a stressful and upsetting experience for the Claimant who had underlying health problems.

The amendment application

5. The preliminary hearing was listed to consider the Claimant's application of 5 December 2022 to amend his claim. His existing claim was one of unfair dismissal presented by way of an ET1 submitted on 30 November 2021. For the PH I was provide with a Bundle of 165 pages and I considered the salient documents I was directed to by the parties.
6. I was grateful to both parties for their assistance in this case.
7. The Claimant wished to amend his claim to bring race and age discrimination claims, as set out in his email application of 5 December 2022 (p 64 of the Bundle). I noted the reference in his amendment application to his witness statement at section C7 (pp 48-49 of that statement) which set out those discrimination claims, and I discussed them with the Claimant. It was not felt necessary or practical for the purposes of this application to identify the exact claims and the exact basis for making them, other than noting that they concerned acts of alleged race and age discrimination. It was unfortunate that the exact amendment claims were not clear, however I gave the Claimant some leeway bearing in mind he was unrepresented and he had health issues.

8. However it was important to understand for the amendment claims the period over which the alleged discrimination took place. After much clarification and discussion with the Claimant, he explained that his discrimination claims covered a period from around September 2019 when Mr Philip Graham took over his line management from Mr Charles Webb who had become ill. And he explained the discrimination continued until the date of his dismissal on 26 August 2021.
9. Given the way the Claimant explained his discrimination allegations I was happy to presume (strictly for the purposes of this hearing only) that the alleged claims might be considered as part of a series of acts, or a continuing state of affairs, with the last act on or around 26 August 2021.
10. During the course of the preliminary hearing I explained to the Claimant the relevant legal considerations a Tribunal will take into account when deciding an application to amend. Having explained these legal considerations I allowed a break so that the Claimant had time to gather his thoughts before addressing me on his amendment application.
11. The leading authority of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 sets out a non-exhaustive list of principles to be taken into consideration by the Tribunal when considering amendment applications. Relevant consideration are also discussed in the Presidential Guidance, General Case Management (January 2018) at Guidance Note 1 particularly at paras 3-14.
12. All the circumstances of the case need to be taken into account, including factors such as:
 - (1) Is the proposed amendment minor (such as correcting typing errors) or a substantial amendment (such as adding new facts to existing claims, adding new claims to existing facts, adding entirely new claims).
 - (2) Is the complaint out of time, and if so, would time be likely extended in all the circumstances. Time limits are not a bar to an amendment application, but a relevant consideration to be given appropriate weight.
 - (3) Having regard to the timing and the manner of the application, namely why the application is being made at the said time and why it was not made earlier.
 - (4) Whether the Claimant failed to provide a clear statement of a proposed amendment when given the opportunity through case management.
 - (5) The relative hardship and injustice to the parties in allowing or refusing the amendment.
 - (6) The interests of justice and the overriding objective (saving expense, dealing with cases justly, proportionately and expeditiously, having regard to the Tribunal's resources, avoiding delay, etc).
13. I turn then to the Claimant's application to amend.
14. I am satisfied that the original ET1 claim form in this case did not include race and age discrimination claims and therefore the Claimant's application to amend was necessary.

What are the nature of the proposed amendments?

15. It is clear that the amendments sought by the Claimant are substantial in nature and not only involve a large number of new factual allegations which are not pleaded in the original ET1 claim form, but also involve new causes of action of race and age

Case No: 1305020/2021

discrimination not pleaded in the original ET1 claim form. This was obvious from the Claimant's witness statement (attached to his amendment application) setting out his discrimination allegations, and also obvious from the way he explained to me that the alleged discrimination complained of was continuing up until and including his dismissal.

Are the amended claims out of time, and should time be extended?

16. For the purposes of the amended claims (at the latest) time would start to run from 26 August 2021. The Claimant's amendment application was presented on 5 December 2022 (around 15 months later). Such claims ordinarily have a 3 month time limit with some extension for early conciliation with ACAS. It is therefore plain that these claims are very considerably out of time. The delay is not insubstantial.
17. I then turned to consider the reasons for any delay and whether time would likely be extended on just and equitable grounds bearing in mind the broad discretion Tribunals have to extend time in discrimination claims. I took particular account of the fact that the Claimant expressed he had been very seriously ill for a number of years including in the period August 2021 to December 2022.
18. I had sympathy for the Claimant's circumstances, albeit I had no specific medical evidence on how the Claimant's medical conditions might have prevented him from submitting his claims in time. Further, I took into account that during the period August 2021 to December 2022 the Claimant was able to conduct his unfair dismissal claim, attend preliminary hearings, and engage in detailed correspondence. Overall I found it unlikely to be the case that the Claimant's health conditions were of such severity that throughout this period they caused him difficulty with being able to present his discrimination claims. I considered it unlikely therefore that time limits would be extended on just and equitable grounds in the circumstances of this case in relation to the proposed amended claims.
19. I was of the view that the issue of time limits was an important factor weighing against allowing this amendment application.

The timing and manner of the application?

20. The Claimant's explanation for the timing of his amendment application was that he made a genuine mistake as to what was expected of him when presenting an ET1 claim form. He felt bringing his unfair dismissal claim would also allow him to raise discrimination allegations. To his credit he was candid in accepting that he had been mistaken in this regard. He also said that he was rushed at the time of completing his ET1 claim form as he was experiencing problems with submitting it online, albeit he did manage to submit it.
21. The Claimant explained that it was following the exchange of witness statements in November 2022 in which he had set out the discrimination allegations, and following an ADR hearing in November 2022, that he discussed matters with ACAS and realised he had to apply to amend his claims, which he then did so promptly on 5 December 2022.
22. I do not doubt the Claimant's explanation is genuine and honest. I accept he acted promptly when he became aware of the need to amend his claim in November 2022. However it does not seem to me to be a reasonable explanation that the Claimant was simply mistaken about the need to raise age and race discrimination

Case No: 1305020/2021

allegations in his original ET1 claim form. The Claimant will have essentially known about the facts of his discrimination claims when he submitted that claim form. And in his ET1 claim form the Claimant had ticked the box for an unfair dismissal claim, but had not ticked the boxes for race and age discrimination directly below. If the Claimant was mistaken as he says, I am not persuaded it was reasonable for him to be so mistaken.

23. Further the Claimant's amendment application is very late in the day. It came after disclosure had taken place, a trial bundle had been prepared, and witness statements had been exchanged for the purposes of trial. The timing of this application and the reason for its delay, I consider are weighty reasons to refuse this application.

Whether the Claimant failed to provide a clear statement of a proposed amendment when given the opportunity through case management?

24. Related to the above consideration, I am also mindful that there have been two preliminary hearings in this case before Employment Judge Harding on 21 April 2022 (p 33 of the Bundle) and 12 October 2022 (p 43 of the Bundle). Particularly at the 21 April 2022 preliminary hearing there was a discussion about the claims the Claimant wished to bring and he actively participated in that discussions by requesting changes to the List of Issues.

25. I am therefore of the view that the Claimant does not appear to have taken opportunities presented to him earlier in the course of this litigation to rise the claims he now seeks to bring by way of amendment.

The relative hardship and injustice to the parties in allowing or refusing the amendment?

26. The issue of hardship and injustice to the parties is recognised as a particularly important consideration.

27. I took into account that the Claimant, who is a litigant in person with health conditions, would lose the opportunity to bring race and age discrimination claims if his amendment application was refused. I accept the Claimant feels very strongly about these claims. He would be clearly prejudiced if this application was refused (notwithstanding that I have taken no view either way on the merits of the discrimination claims).

28. I also took account of the Claimant's submission that the race and age discrimination claims would not take the Respondent by surprise as he had been raising "discrimination" issues in internal correspondence with the Respondent's Vice-Chancellor and with HR department in emails (for example, on 10 June 2021, 28 June 2021 and 8 October 2021). The Claimant referred to these emails orally and they appeared to reference "discrimination" generally, rather than make specific allegations of race and age discrimination.

29. The Respondent was not able to direct me to any specific prejudice if this amendment application was allowed (such as a witness or certain documents no longer being available). But Miss McGee did submit that the focus of this litigation has throughout been on the unfair dismissal claim, and that if this amendment was allowed the Respondent's witnesses would be prejudiced in having to recall and deal with events going back as far as September 2019 concerning altogether different issues of discrimination. I accepted there was some force in this submission. This was especially so as allowing this amendment would realistically involve the current 8 day

Case No: 1305020/2021

trial date between 27 March 2023 and 5 April 2023 being lost, and a new trial date for a similar or longer period being set some time into the future. Delay undoubtedly affects the recall and memories of parties. And I take into account that although the Claimant did raise general discrimination concerns with his employer in 2021, no investigation took place into these at the time, and so, if the amendment application was allowed the Respondent would effectively have to be looking into these matters in detail sometime after the event.

30. I have carefully weighed up the respective prejudice to both parties in making my decision on this amendment application.

The interests of justice and the overriding objective?

31. Finally I have had regard to the interests of justice and the overriding objective. I have found that overall these matters weigh against allowing this amendment application. The ET1 claim form was issued on 30 November 2021. There have been PH and ADR hearings already. This case is ready for trial. Trial bundles have been prepared and witness statements have been exchanged. An 8 day trial date between 27 March 2023 and 5 April 2023 has been listed for some time. Indeed the trial is now only a matter of weeks away.
32. If I allowed this amendment application there would realistically need to be another preliminary hearing to clarify what the amended claims were (which cover a considerable period of time, are considerable in number and relate to age and race discrimination) and to case manage those claims. Further disclosure and witness evidence would be required, particularly from the Respondent. The current trial date would almost certainly be lost. There would likely be considerable delay before a new trial date could be offered. There would likely be significant inconvenience and additional costs for the parties and witnesses. I also had in mind the demands on the Tribunal's resources. This would all be disproportionate in the circumstances.

Conclusion

33. Having considered the evidence and submissions from the parties, and standing back and weighing up all the relevant considerations discussed above, the Claimant's application of 5 December 2022 to amend his unfair dismissal claim to bring claims of race and age discrimination is therefore refused.

Employment Judge Ali

Date 25 February 2023