EMPLOYMENT TRIBUNALS

Claimant: Mr G Asiedu

Respondent: Reach Active Limited

Heard at: Bury St Edmunds Employment Tribunal

On: 22 March 2023

Before: Employment Judge K Welch (sitting alone)

Representation

Claimant: In person
Respondent: Ms K Taunton, Counsel

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The claimant's claim of unfair dismissal is dismissed upon withdrawal.
2. The claimant's application for leave to amend his claim is refused.
3. The respondent's application to strike out the race discrimination claim is refused.

REASONS

Background

1. This open preliminary hearing came before me on 22 March 2022. Oral reasons were given at the hearing, but following a request from the respondent during the hearing, written reasons are provided.

2. The hearing was listed to determine:
    a. whether to allow the claimant to amend his claim to include a claim for detriment for having made a protected disclosure; and
    b. the respondent's application to strike out any of the claims on the grounds that they have no reasonable prospects of success.
3. It was agreed that depending upon the outcome, further case management orders would be given; the ones ordered on 19 November 2022 having been stayed pending the outcome of the preliminary hearing. However, there was insufficient time in the hearing to do so. The case will therefore be listed for a further preliminary hearing for case management.
4. The hearing had been originally listed to consider case management issues, but was converted to an Open Preliminary Hearing (OPH) following the respondent's email of 9 December 2022 where it indicated that it was the "*respondent's intention to apply for a strike out of the claimant's unfair dismissal claim, as the claimant remains employed by the respondent*". The respondent confirmed that it wished to pursue an application to strike out the claimant's race discrimination.
5. On 17 January 2023, the parties were notified that the hearing was to be converted to an OPH and the claimant was ordered to "*file and serve within 14 days (31 January 2023) full details of the amendments he seeks to make and all facts relied on in support of it*." The claimant provided this information on 20 January 2023.
6. The respondent objects to the claimant's application to amend his claim.
7. The hearing was an in-person hearing at Bury St Edmunds Employment Tribunal. I was provided with an electronic bundle (of approximately 230 pages) with further annexes/ addendums. References to page numbers refer to pages within that main bundle. The claimant had also sent in documents although these had not reached the file, and so were printed out for my use in the hearing.

8. I was also provided with an opening skeleton argument from the respondent together with a file of authorities relied upon.

FINDINGS OF FACT FOR THE PURPOSES OF THE PRELIMINARY HEARING

9. ACAS early conciliation took place on 16 August 2022 to 1 September 2022.
10. The claimant's ET1 claim form and particulars of claim were presented on 19 September 2022. This included claims for unfair dismissal and race discrimination only.
11. There was no reference within the original claim form to any alleged protected disclosure. The claimant said this was because he had not thought sufficiently about his claims, had "*no legal label*" and did not know whether what happened to him "*fit the narrative of the claim*."
12. The claimant took advice from ACAS between 16 August 2022 and 1 September 2022. He honestly confirmed that he was fully aware of time limits. The claimant also confirmed that he had taken advice from Valla UK, both ACAS and Valla UK being referred to in his grievance letter dated 26 August 2022 [P107-111]. The claimant also confirmed that he undertook research on the internet about claims and time limits.
13. His claim included a claim for unfair dismissal, which he now accepts that he is unable to bring as his employment continues. Therefore, this was dismissed upon withdrawal by the claimant.
14. The claimant contacted the Tribunal by email on 29 November 2022 saying he would like to apply to add another legal jurisdiction to this claim. His email stated, "*I would like to add whistleblowing detriment. When submitting the original ET1 form, due to my inexperience with legal matters, I overlooked this element. As a direct result from raising a concern relating to Health & Safety I was told by my line manager to seek another job without justification or redress which constitutes whistleblowing detriment short of dismissal. Please can you advise me*." This was

said to have been chased by claimant on 19 December 2022, although the chaser did not appear on the Tribunal file. The respondent was not copied in to either of these emails.

15. The respondent made an application to postpone the Case Management Orders on 9 December 2022 [P56-57] and said that the claimant had recently indicated his intention to amend his claim. Therefore, the hearing was converted to an OPH to consider this.

16. I heard submissions from both parties before considering the applications.

17. Insofar as was necessary, I clarified the relevant claims with the claimant so that I understood those claims before I considered the strike out application.

18. The claimant claims direct race discrimination under section 13 Equality Act 2010 (EqA). His claim relates to one allegation, namely that he was told by Mr Daniels in a meeting on 1 August 2022 that he needed to "*find another job; this is coming from above*" as set out in his claim form. The claimant's race discrimination claim is about the allegation that either Mr Daniels or one of the Senior Managers within the respondent (possibly Mr John Gallagher) had treated him less favourably by requiring him to find another job. The claimant's case is that there was no apparent reason for being told this, having been told that it was not for his conduct or capability. The claimant provided further background information in his submissions before me, which he states led him to consider that he was told to find another job because of his race. I do not recite that information here, save that he stated that someone else raising health and safety matters had not been told that they needed to find another job.

RELEVANT LAW

19. The starting point in an application to amend is always the original pleading as set out in the ET1. In Chandok v Tirkey 2015 ICR 527, the EAT said:

"*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*."

20. In dealing with an application to amend, the Tribunal will take into consideration its duty under the overriding objective: to ensure that the parties are on an equal footing; to deal with the case in a way that is proportionate to the complexity and importance of the issues; to avoid unnecessary formality and seek flexibility in the proceedings; to avoid delay so far as compatible with proper consideration of the issues; and to save expense.

21. In Cocking v Sandhurst Stationers Ltd [1974] ICR 650 it was held that regard should be had to all the circumstances of the case and in particular the Tribunal should "*consider any injustice or hardship which may be caused to any of the parties if the proposed amendment was allowed or, as the case may, be refused*".

22. In Selkent Bus Company Limited v Moore [1996] IRLR 661 the EAT held that:

"…*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.*

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions 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) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, 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 e.g., in the case of unfair dismissal, [s67 of the 1978 Act].

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. 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. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

23. The Presidential Guidance on General Case Management ("the Guidance") incorporates the factors set out in Cocking and Selkent.

24. In respect of re-labelling, the Guidance provides: "*While there may be a flexibility of approach to applications to re-label facts already set out, there are limits. Claimants must set out the specific acts complained of, as Tribunals are only able to adjudicate on specific complaints. A general complaint in the claim form will not suffice. Further an employer is entitled to know the claim it has to meet*".

25. Under 'Time Limits' the Guidance provides: "*The Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Where for instance a claimant fails to provide a clear statement of a proposed amendment when given the opportunity through case management orders to do so, an application at the hearing may be refused because of the hardship that would accrue to the respondent*".

26. A Tribunal can allow an application to amend, but reserve any limitation points until the final hearing, which might be necessary in cases where it is not possible to make a determination without hearing the evidence – Galilee v Commissioner of the Metropolis UKEAT/0207/16.

27. In the recent EAT case of Chaudry v Cerebus Security and Monitoring Services Ltd EA-2020-000381, guidance was given on how to approach amendment applications. Namely:

    a. in express terms, identify the amendment sought; and

    b. balance the injustice and/or hardship of allowing or refusing the amendment taking account of all the relevant factors, including, to the extent appropriate, those referred to in Selkent.

Time limits

28. Section 48 of the ERA provides:

"48 Complaints to employment tribunals

(3) An employment tribunal shall not consider a complaint under this section unless it is presented –

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable for the complaint to be presented before the end of that period of three months."

29. I note that time limits should be strictly applied, and the exercise of the discretion is the exception rather than the rule. There is no presumption that the Tribunal should exercise its discretion.

30. The Tribunal is not legally required to, but may, consider the check list set out in section 33 of the Limitation Act 1980 in considering whether to exercise its discretion:

a) the length and reason for the delay;

b) the extent to which the cogency of the evidence is likely to be affected by the delay;

c) the extent to which the party sued had cooperated with any requests for information;

d) the promptness which the claimant acted once he knew the facts giving rise to the cause of action; and

e) the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

31. The most relevant factors are the length of, and reasons for, the delay, and whether the delay has prejudiced the respondent. The Tribunal will consider whether a fair trial is still possible. The Tribunal may consider the merits of the claimant's claims when deciding whether to extend time.

32. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal advised against following the Limitation Act factors as a checklist, but rather advised that a tribunal should take into account all relevant factors including the length of and reasons for the delay.

Strike out

33. Rule 37 of the Employment Tribunal Rules of Procedure 2013 ("the Rules") deals with striking out claims and states:

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it … has no reasonable prospect of success

"(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

34. Lord Steyn in the in the case of Anyanwu v South Bank Students' Union [2001] IRLR 305, Court of Appeal stated,

". … *For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.* …"

35. In the same case, Lord Hope (at paragraph 37) made the following observations:

".... I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law

that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the Claimant may be able to establish if given an opportunity to lead evidence."

36. In Ezsias v North Glamorgan NHS Trust (2007) ICR 1126 Court of Appeal, Maurice Kay LJ (at paragraph 29) said:

"*It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the Claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation*."

37. The case of Ahir v British Airways plc [2017]EWCA Civ 1392, confirms that it is possible to strike out discrimination claims even where there is a dispute of facts, relying on paragraph 16 which states,

"… *Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgement …"*

38. Paragraph 12 of this case refers to Lord Justice Clerk's Judgment in Tayside Public Transport Company Ltd v Reilly [2012], and says *"… where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for*

the Tribunal to conduct an impromptu trial of the facts... There may be cases where it is instantly demonstrable that the central facts in a claim are untrue; for example while the alleged facts are conclusively disproved by the productions…. But in the normal case where there is a "crucial core of disputed facts", it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out."

CONCLUSION

39. In respect of the amendment application, I have considered firstly whether the amendment is a wholly new cause of action or whether it is a re-labelling exercise. I am satisfied, having read the particulars of claim, that this is a completely new cause of action and is not merely a re-labelling exercise. The facts relied upon by the claimant did not appear in his original ET claim form or the "claim details" attached to it.

40. There is no reference in his claim form to the protected disclosure relied upon by the claimant. He relies upon what he said in a weekly conference call meeting on 27 May 2022 and this forms no part of his claim form. There is no reference in the claim form, even obliquely, to the claimant alleging that his need to look for another job was in any way linked to having made any such protected disclosure.

41. The time limits for bringing claims for detriment for making protected disclosures, mean that the claims were presented significantly out of time, by the time of the amendment application being received on 20 January 2023. Whilst I accept that the claimant contacted the Tribunal before then, on 29 November 2023 (which was not copied to the respondent) this was still out of time since the alleged detriment (being told to look for another job in the meeting with his line manager, Mr Daniels) took place on 1 August 2022. The discretion to extend time for this type of complaint provides a narrower discretion than that for discrimination complaints. The claim for detriment for making protected disclosures involve

tests of reasonable practicability, and there was little to suggest that it was not practicable for the whistleblowing claims to have been included in the original claim form. Nor any reason put forward as to why this could not have been presented within such further period as was reasonable, if it was not practicable to have presented it within time.

42. The claimant provided little explanation of his reason for it not being included in the original claim form save for not realising that this could have been the reason for what he alleges to have been told on 1 August 2022. Whilst I note that being out of time is not a bar to an amendment application, it is a factor which may be taken into account in considering whether to allow the amendment.

43. The nature and method of the application to amend: delay may be taken into account, but similar to the out of time point discussed above, is not a bar to allowing amendments. The claim was presented on 19 September 2022 and the first notification of any possible amendment was the email to the Tribunal dated 29 November 2022, over 2 months after the claim was presented. I note that the claimant was a litigant in person at the time, but was able to present a detailed claim for his unfair dismissal and race discrimination claim (although recognise that this was not properly particularised). Also, he had had the benefit of legal advice from at least 2 sources by that stage.

44. The most important factor is to weigh the relative prejudice between the parties in allowing or not allowing the amendment sought and the balance of injustice. As far as the whistleblowing complaint is concerned, I accept, that in not being allowed to advance a claim for detriment for making a protected disclosure, this will cause prejudice to the claimant. I note the respondent's argument that there is little prejudice as the Tribunal does not have jurisdiction to consider the complaint as it was presented out of time.

45. The refusal of the amendment will not prevent the claimant from pursuing claims for race discrimination, which appeared to me to be the claim in the forefront of the claimant's mind when presenting his claim form, but I accept that prejudice to the claimant will follow any refusal to allow the amendments.

46. The respondent will be prejudiced if the amendment is allowed in having the additional costs and expense of investigating and defending the whistleblowing claim and the likely impact on the lengthening of the hearing. Whilst I note that an award of costs may mitigate this prejudice, it would not fully ameliorate them.

47. Also, in considering the amendment application, I have reservations about whether the alleged protected disclosure by the claimant in the meeting on 27 May 2022 is sufficient to satisfy the test within section 43B ERA. However, this did not form part of my reasoning for refusing the application to amend.

48. I take the above factors into account in weighing the injustice caused by allowing or refusing the amendment. In light of this, I consider that the balance of prejudice and injustice weighs in favour of the respondent so that I do not allow the claimant's application to amend his claim to include a claim of detriment for having made a protected disclosures (the whistleblowing complaint). Therefore, the amendment sought relating to section 47B ERA is not allowed.

49. I note that should the whistleblowing claim have been brought on 20 January 2023 and I were asked to rule on whether to allow the claim to be presented out of time, I would not have accepted jurisdiction for the reasons set out above. Therefore, the prejudice to the claimant is less than would otherwise have been the case.

Strike out

50. I have carefully considered what the claimant stated was his claim for race discrimination. Namely, that he alleges that he had been told in a meeting with his line manager, Mr Daniels, on 1 August 2022 that he needed to find another

job. This is the less favourable treatment relied upon and which, he now says was because of his race. His case is therefore a claim for direct race discrimination under section 13 EqA 2010. The claimant provided much background during the OPH which I do not intend to recite here, since no evidence was given, and evidence will be required to consider whether the claimant is able to prove facts, so as to shift the burden of proof on to the respondent under section 136 EqA.

51. Therefore, in light of the information provided by the claimant in today's hearing and considering the caselaw which suggests that it is only in the clearest of cases that a discrimination claim should be struck out at an early stage, I considered, taking the claimant's case at its highest, the prospects of him succeeding in his claim for race discrimination against the respondent.

52. Whilst I understand why the respondent made the application in this case, I am satisfied that only once a Tribunal has heard evidence from both parties, will a proper decision be able to be made on whether the claimant succeeds in his direct race discrimination complaint. There may be sufficient evidence of facts found at the hearing, which in the absence of any other explanation, shift the burden of proof onto the respondent under section 136 EqA.

53. In order to strike out a claim, I must consider that the claimant has no reasonable prospects of succeeding in his direct race discrimination complaint. I note that this is a high threshold, particularly for discrimination claims, considering the case law referred to above. Although, I acknowledge that it is still possible to strike out claims in cases where there are exceptional circumstances.

54. However, I do not consider that this case passes the high threshold for striking out the race discrimination complaint. Therefore, I do not strike out the claim for race discrimination on the basis that it has no reasonable prospects of success.

55. The case will be listed for a case management preliminary hearing in due course.

Employment Judge Welch

Date 24 March 2023

JUDGMENT SENT TO THE PARTIES ON
1 April 2023
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T Cadman

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FOR THE TRIBUNAL OFFICE

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