



EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Anderson

Respondents: Moy Park Limited

**At an attended Preliminary Hearing
at the Employment Tribunal**

Heard at: Nottingham

Heard on:

23 March 2023

Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: In person

Respondent: Lorna Scully, Solicitor

JUDGMENT

The Employment Judge gave judgment as follows:

1. The Claimant's application to amend his claim is refused.
2. The Tribunal does not have jurisdiction to hear the claims of harassment on grounds of age and race. The claims are dismissed.
3. The hearing due to commence on 19 February 2024 is cancelled

REASONS

BACKGROUND TO THIS HEARING

1. The Claimant presented his claim to the Tribunal on 19 May 2022 following a period of early conciliation. He had notified ACAS under the early conciliation procedure on 2 April 2022 and the certificate was issued on 13 May 2022.
2. He had been employed by the Respondent as a Social Distancing Marshall from 4 January 2021 until 1 April 2022.
3. The Claimant claims race and age discrimination saying that contractors and employees of the Respondent called him racist names and made frequent references to his age in derogatory terms.
4. He is of Indian heritage and 66 years old. He claimed that he had made frequent complaints and grievances about these matters which included threats of violence against him, and that the Respondent failed to act on them.
5. The Respondent is a supplier of poultry products. In their response they pointed out that any claim which related to an alleged discriminatory act or omission that took place prior to 2 January 2022 would, unless it formed part of the continuing act that continued beyond that date, be time barred under section 123 of the Equality Act 2010 (EqA).
6. They pointed out the Claimant had been suspended on Health and Safety grounds for reasons relating to his breakdown on 8 December 2021 and they submitted that all incidents to which the Claimant referred to in his claim form must have taken place prior to 8 December 2021.
7. At the first Telephone Case Management Preliminary Hearing conducted by my colleague Employment Judge Michael Butler on 5 October 2022 he identified that the claims appeared to be out of time. At this point the Claimant said that there were further incidents of discrimination as late as March 2022 which he had not referred to in his claim. It was explained to him that he would need to apply to amend his claim to include these further complaints.
8. Employment Judge Butler ordered the Claimant to provide further particulars of his claim and listed the matter for a further Case Management Preliminary Hearing.
9. That Case Management Preliminary Hearing was conducted by me on 12 January 2023.
10. The Claimant had by then (on 29 October 2022) had provided further particulars of his allegations and it can be seen from that document that he added complaints relating to incidents he says took place in March 2022.

11. I decided there should be an Open Preliminary Hearing having identified the precise allegations that he was making.
12. The Preliminary Hearing would consider whether the Tribunal had jurisdiction to hear the claim because they appeared to be out of time.
13. I did not make mention of dealing at the hearing with the preliminary matter of whether the amendment application should be considered but my colleague Employment Judge Ahmed confirmed to the parties that this would be considered as the first issue of the day. Clearly that is right. So, as we agreed at the start of this hearing I would consider matters in the following order:
 - I would deal with the application to amend the Claimant's claim.
 - I would then consider whether the claims or any of them should be dismissed on the basis of them being out of time.
 - I would then further consider whether the claim should be struck out on the basis that the claims have no reasonable prospect of success.
 - Alternatively, whether I should make a deposit order on the basis that any of the allegations had little prospect of success.

THE HEARING TODAY

14. I had the benefit of a witness statement from the Claimant, and I also heard submissions from him and from the Respondent via their Solicitor, Lorna Scully. I also had a bundle of documents and where I refer to page numbers it is from that bundle.

THE APPLICATION TO AMEND

15. The claim was submitted on 19 May 2022 and in his claim form there were two specified incidents which the Claimant alleged took place in June 2021. Only one of these was against the Respondent's other employees, the other was against a third-party contractor. He said simply that there were four more occasions when he alleged, he was threatened with violence but no details of those incidents were provided.
16. He referred to two other matters. The first relating to a report of a contractor's drug use in July 2021 and the second relating to an undated refused request for a body cam. Neither of these matters appeared to amount to an allegation of discrimination.
17. The Respondents filed their ET3 on 28 June 2022 (page 24-37). They applied for a strike out of the claim on the basis that it was out of time. This was on the basis that anything pre-3 January 2022 would be outside the 3 month time limit and it appeared that all the allegations related to the time before he was suspended on medical grounds on 8 December 2021.

18. It was only at the Preliminary Hearing with Employment Judge Butler on 5 October 2022 (page 40) when he was told that the claim appeared to be out of time that he mentioned further incidents of discrimination as late as March 2022 which were not referred to in his claim. Employment Judge Butler ordered him to provide further particulars of these allegations and told him would have to apply to amend his claim.
19. On 29 October 2022 Mr Anderson submitted his summary of allegations (pages 43-46). He repeated the earlier allegations and for the first time referred to two new incidents which he said took place on unspecified dates in March 2022. The first of these does not appear to be an allegation of age or race discrimination but the second incident does.
20. At the hearing I conducted on 12 January 2023 I went through the various allegations that he was making, and these are set out at 6.1 to 6.15 of my Case Management Summary (pages 55-56).
21. Those matters set out at 6.1. to 6.5 were the ones mentioned in the original claim and the Respondents accept they do not require any application to amend. The allegations at 6.6 to 6.9 appear to be the “*four more occasions*” referred to in his ET1 and these could be regarded as being a clarification rather than an amendment.
22. 6.10 is not an allegation but the allegations at 6.11 to 6.15 clearly were not detailed in his original claim and not mentioned at all. It is in respect of these that the Claimant makes his application to amend, which the Respondent object to.

THE LAW

23. I was referred to the following case law:

- ***Chandok v Tirkey [2015] ICR527***
- ***Selkent Bus Company Limited (T/A Stagecoach Selkent) v Moore [1996] IRLR 661***
- ***Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT132***

24. It is well established that when considering an application to amend I must carry out a balancing exercise of all the relevant circumstances. This includes:

- The nature of the amendment.
- The applicability of time limits.
- The timing and manner of the application.
- The likely prejudice to the parties.

MY CONCLUSION ON THE AMENDMENT APPLICATION

25. I am satisfied that the application to amend is not simply a minor amendment of typographical error or relabelling of facts already pleaded. It is an application to add entirely new allegations which were not mentioned in the original claim.
26. There was no reference made in any of the allegations in the original claim beyond the Claimant's period of absence which started on 8 December 2021 and the new allegations postdate that period of absence and were only raised by him after it had been pointed out that his claim as pleaded was out of time.
27. I am satisfied that these new allegations were only added to make it appear that the claim was in time.
28. I note that these claims at paragraph 6.11 to 6.15 of the summary of allegations was only sent to the Tribunal on 29 October 2022 some 7 months after the incidents were alleged to have happened. The allegations are therefore significantly out of time. I note that the Respondent first raised the out of time point on 28 June 2022 when it submitted its ET3 and the Claimant did not apply to amend the claim for another 4 months.
29. The Claimant might rely on the just and equitable extension, but I am reminded that time limits should be applied strictly and there is no presumption in favour of extending time. In fact, the Tribunals should not extend time unless the Claimant satisfies it that it is just and equitable to do so.
30. I note in this case that no medical evidence has been produced to me to show that he was not able to present his new allegations in time and I also note that when he submitted his grievance in April 2022 (page 107-109) his mental health did not prevent him doing so.
31. Whilst dealing with his grievance I would also point out that he did not mention any of these matters in March 2022 when he raised that grievance other than perhaps the mentioning of that in paragraph 6.15.
32. When considering the application, I can also consider the merits of the proposed claim/amendment.
33. I am satisfied that the additional claims have little prospect of success. In respect of the incidents in March 2022. The Claimant has not been able to specify the exact date of when it happened nor, who was responsible for the alleged discrimination.
34. I am bound to take into account prejudice that this might cause to the Respondent who would have great difficulty at this late stage in carrying out any investigation into the allegations that he now makes.
35. In the circumstances of this case, I am therefore satisfied that the application to amend should be refused.

Whether the claims remaining are out of time and whether time should be extended.

36. In this case the Claimant notified ACAS under the early conciliation procedure on 2 April 2022 (page 4). As Miss Scully pointed out any alleged acts of discrimination that pre-date 3 January 2022 would unless they form part of a continuing act be out of time.
37. All the alleged acts of discrimination in the claim form pre-date the Claimant's absence from work which commenced on 8 December 2021 and therefore they are all out of time.
38. In deciding whether to extend time the burden of proof is on the Claimant to establish that it would indeed be just and equitable to do so. As I have already said time limits in Employment Tribunals are applied strictly and there is no presumption in favour of extending time. In the extension the time is the exception not the rule.
39. I note in respect of allegations 6.1 and 6.2 that these incidents took place in May 2021 and so these claims are well out of time.
40. In respect of allegations 6.3, 6.6, 6.7, 6.8 and 6.9 these all relate to third party contractors for which the Respondent are not liable and therefore cannot form part of any continuing act of discrimination. That leaves allegation 6.4 and 6.5 which do not appear to relate to either race or age harassment.
41. I note that whilst the Claimant has told me about health issues, although he has not produced any medical evidence in respect of that, he was well enough to raise an internal grievance in May 2021 in respect of which he received a response in August 2021 and did not become ill again until November 2021. There is therefore no good reason why he could not have raised an application in respect of those allegations at that time.
42. In respect of these allegations many of them relate to third party contractors and therefore have no prospect of success and other claims in particular paragraphs 6.4 and 6.5 do not relate to race or age harassment. In all the circumstances of the case I am satisfied that it would not be just and equitable to extend time and the claims of harassment on grounds of age and race are dismissed.
43. The hearing of the case which was due to commence on 19 February 2024 is cancelled.

CASE NO: 22601256/2022

Employment Judge Hutchinson

Date: 3 May 2023

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