EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr M Qureshi & Ors	v	**Pakistan International Airlines Corporation Limited**

PRELIMINARY HEARING

Heard at: London South (by CVP) **On: 12 May 2023**

Before: Employment Judge Truscott KC

Appearances:

For the Claimant: **Mr M Humphreys barrister**
For the Respondent: **Ms E Mayhew-Hills consultant**

JUDGMENT on PRELIMINARY HEARING

1. The amendment sought by Ms A Javed is refused and her complaint of sex discrimination has no reasonable prospect of success and is struck out under Rule 37(1)(a).

2. The amendments by Miss Habib, and Mrs. Bhatti are allowed so far as providing further information in the redundancy dismissal claim. They are refused so far as adding a new ground of complaint of sex discrimination or harassment.

3. The amendments sought by Miss Habib and Mr Ahmed changing the statutory basis of their claims in respect of trade union activities to section 152 and 153 of the Trade Union and Labour Relations (Consolidation) Act 1992 is allowed by consent.

REASONS

Preliminary

1. This preliminary hearing was fixed to address the issues set out at a case management hearing on 17 February 2023 [293-306].

2. The claimants were asked to provide further Information of the specific acts of sex discrimination relied on by Miss Habib, Ms. Javed and Mrs. Bhatti. They did so [309-313 paras.10-19].

3. They also provided further information in relation to the age discrimination and other claims [307-313]. The respondent set out its position in a written submission [314-316].

4. There was a bundle of documents to which reference will be made where necessary.

5. During the course of this hearing, the issues were condensed to the claimants' application to amend and respondent's application to strike out the age discrimination claims and the sex discrimination claims.

6. The Tribunal had the benefit of oral arguments from the parties and a written Note by Counsel. Case Management matters are dealt with in a separate order.

Law

Amendment

7. In the case of **Selkent Bus Company Limited v. Moore** [1996] ICR 836 EAT, the Employment Appeal Tribunal set out the test to be applied by a Tribunal in deciding whether to exercise its discretion to grant an amendment at 843-844:

> "(4) 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 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 have 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, section 67 of the Employment Protection (Consolidation) Act 1978.
> (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 Regulations of 1993 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."

8. The focus is "not on questions of formal classification [e.g., "relabelling" etc] but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted". (**Abercrombie v. Aga Rangemaster Ltd** [2014] ICR 209 at [48]).

9. Time limits are "*a factor – albeit an important and potentially decisive one – in the exercise of the discretion*" whether or not to grant permission to amend (**Safeway Stores Ltd v. TGWU** UKEAT/0092/07 at [10] and [13]). Although **Selkent** says it is essential for the Tribunal to consider whether a complaint is made out of time and if so whether the time limit should be extended, in **Galilee v Commission of Police of the Metropolis** [2018] ICR 634 the EAT held it is not always necessary to determine time points as part of an amendment application. A Tribunal can decide to allow an amendment subject to limitation points being determined at a later stage in the proceedings, usually at the final hearing. That might be the most appropriate route in cases where there is alleged to be a continuing act and the Tribunal needs to make findings of fact on this issue.

10. Also relevant are: (1) the extent to which the amended claim would require the adducing of wholly different evidence from that required by the original claim; and (2) the nature of the explanation or excuse offered for the failure to plead the claim in the original ET1 Claim Form (**New Star Asset Management Holdings Ltd v**. **Evershed** at [16], [22] and [33]).

11. In the case of **Vaughan v Modality Partnership** [2021] IRLR 97 EAT**,** the Employment Appeal Tribunal reminded parties and Tribunals that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequences of allowing or refusing the amendment. That balancing exercise is fundamental. The Tribunal's focus generally should be on the: "real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding" The **Selkent** factors should not be treated as if they are a list to be checked off.

12. The assessment of the balance of injustice and hardship may include an examination of the merits but there is no point in allowing an amendment if it will subsequently be struck out. That extends to cases not only which are utterly hopeless but also to ones where the proposed claim has no reasonable prospect of success. The authority for that is **Gillett v Bridge 86 Limited** [2017] 6 WL UK 46.

Striking out

13. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all

or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially:-
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> "(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success…"
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> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
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> "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"
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> 56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

14. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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15. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

16. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

(i) Ordinarily, the claimant's case should be taken at its highest.

(ii) Strike out is available in the clearest cases – where it is plain and obvious.

(iii) Strike out is available if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

17. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

18. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, that:

> "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."

Discussion and decision

The claims as they stand

19. The claims for each claimant appear to be fully pled with the assistance of a solicitor. In relation to Ms Habib, paragraph 6 of her ET1 sets out her narrative of why she was wrongly included in the pool for selection for redundancy. As part of that narrative, she says that she was told that she had been marked by Mr Imran Khan. Later in the paragraph, she sets out her case that she was wrongly marked by Mr Khan because of her sex. Paragraph 14 links the actions of the respondent to her gender. The claim by Mrs Bhatti is set out in similar terms. The claim by Ms Javed is different to the other two, although the box in the ET1 is ticked sex discrimination and there are references to gender in paragraphs 14 and 15, there is no notice in the ET1 of what the claim actually is.

20. The age discrimination claims for each claimant arise from similar narratives in the ET1 which says:

> "The redundancy selection procedure was simply a sham exercise and a vile

to get rid of older employees on the pretext of redundancy. “

The proposed amendment

21. Miss Habib, and Mrs. Bhatti have provided further details of claims already set out in the ET1 against Mr Khan. This gives the respondent fair notice of the basis of the claim. The respondent accepted that the amendments should be allowed so far as relating to the dismissal claim.

22. Counsel for the pursuer went further and sought the inclusion of the additional material as new free standing claims. The Tribunal noted that the issues in the case addressed at a previous case management hearing are related to the dismissal with the exception of a failure to promote one claimant in 2018 on the grounds of race.

23. The Tribunal was not prepared to expand the scope of the claims by Ms Habib and Mrs Bhatti. Their claims are plainly directed at the reason for dismissal and were prepared with the assistance of a solicitor. The claims made by each claimant are complex so far as they are directed at dismissal. It is prejudicial to the respondent that they have to meet free standing claims against Mr Khan for earlier period in respect of which time bar issues may arise. The Tribunal also considers that the main claim should not spawn satellite litigation which could give rise to an even more extended hearing.

24. The claim by Ms Javed is absent any basis in the ET1. A basis is provided in the further information and seeks to make a claim against Mrs Khan. Her original claim was prepared by a solicitor and no explanation was given as to why the details of the claim were being added at this stage and in the manner of further information. Even if it had been provided, the events except dismissal were out of time. Whether freestanding or as an attack on the reason for dismissal, the balance of prejudice favours the respondent. The allegations will require a significant increase in the scope of the enquiry to be undertaken. It should not have to defend an additional claim arising in 2021 at this stage of proceedings. The Tribunal also considers that the main claim should not spawn satellite litigation which could give rise to an even more extended hearing.

25. The claimants provided further information about the basis of their age discrimination claims which did not seem to add anything to an understanding of what was being alleged which could be answered by the respondent.

Strike out

26. The Tribunal took the claimant’s claims at their highest and considered all the material in the round.

27. The basis for the age discrimination claims is hard to understand in that even taking into account the further information supplied by the claimants, the respondent does not seem to have fair notice of the basis of the claim made against it. The respondent submitted that the group for the purposes of age discrimination is so broad as to weaken the claim for age discrimination. The claimants are aged at the date of termination from Ambreen Javed at 41 to 73 in the case of the eldest Nusrat Bano

Bhatti. The fact there is such a broad age range dismissed indicates there was no age discrimination. The respondent may well be correct in that submission. However, the claimants' cases should be taken at their highest. They have all claimed age discrimination and it may be that one or other might have been subjected to age discrimination in the selection process. The Tribunal is not in a position to know and cannot strike all the claims without knowing that there is no validity in any of the claims. With considerable hesitation, the Tribunal decided not to strike out the age discrimination claims. The Tribunal considered a deposit order but considered that the issue of the reason for dismissal should be addressed by the fact finding Tribunal which would have available to it all the possible pled alleged grounds of discrimination.

28. The Tribunal decided to strike out the claim by Ms Javed as it lacked any basis in the ET1. Accordingly, it was struck out as having no reasonable prospects of success. On the basis of the guidance set out earlier and weighing all the relevant factors, the Tribunal considered that it is not proportionate for the claim to proceed to a full hearing as it has no reasonable prospects of success.

29. The Tribunal allowed the amendment sought by Miss Habib and Mr Ahmed changing the statutory basis of their claims to section 152 and 153 of the Trade Union and Labour Relations (Consolidation) Act 1992 by consent

EMPLOYMENT JUDGE TRUSCOTT QC

Date 16 May 2023