



EMPLOYMENT TRIBUNALS

Claimant: Ms M Barcker

Respondent: Moorfields Eye Hospital NHS Foundation Trust

Heard at: London Central Employment Tribunal (by CVP)

On: 9th-11th May 2023

Before: Employment Judge Singh

Representation

Claimant: In person

Respondent: Ms E Skinner of Counsel

DECISION ON APPLICATION TO AMEND

The Claimant's application to amend her claim to include a complaint for Harassment on the grounds of disability is refused.

REASONS

1. Background to application

1.1 The Claimant presented a claim to the Tribunal on the 17th April 2022 for disability, age and race discrimination and "other payments".

At a case management hearing on the 5th July 2022, Employment Judge Walker went through the claims and issues with the Claimant and identified that the Claimant was pursuing the following claims

- i. Direct age, disability and race discrimination
- ii. Discrimination arising from disability
- iii. Unauthorised deduction from wages.

- 1.2 At that case management hearing, the Claimant explained that her claims related to an alleged failure by the Respondent to pay her normal wages during a period from August 2020 to February 2022.
- 1.3 During the discussion at the case management hearing, the Claimant also said that she had felt she was harassed at work due to her dyslexia. EJ Walker pointed out that this had not been set out in her claim form and that if the Claimant wished to amend her claim to include a claim for harassment on the grounds of disability, she would need to write the details of that claim down and send it to the Tribunal and the Respondent as soon as possible.
- 1.4 A copy of the order from that hearing was sent out to the parties on the 5th July 2022.
- 1.5 On the 29th July 2022 the Claimant wrote to the Tribunal only and stated she wished to amend her claim to include complaints of bullying and harassment as well as “fraud, exploitation and slavery”.
- 1.6 On the 9th September 2022, EJ Walker wrote to the Claimant to explain that out of the allegations raised in the Claimant’s email of the 29th July, the tribunal only had power to decide claims of harassment. EJ Walker went on to make case management orders about the application to amend the claim.
- 1.7 The Claimant was ordered to write to the tribunal and the Respondent by the 22nd September setting out full details of her claim for harassment. The Respondent was given until the 6th October 2022 to submit a response to the Claimant’s application to amend.
- 1.8 On the 26th September 2022, the Respondent’s representative wrote to the tribunal to say that the Claimant had failed to comply with the tribunal’s order that she provided further details of her claim for harassment. The Respondent requested an unless order.
- 1.9 No further detail was provided from the Claimant about the harassment claim. However, details about the allegations of harassment were included in her witness evidence.
- 1.10 As the Claimant’s application was still outstanding at the start of the final merits hearing on the 9th May 2023, Employment Judge Singh and the 2 other tribunal panel members, Tribunal Member Campbell and Tribunal Member Baber decided whether or not this needed to be dealt with as a preliminary issue at the start of the hearing or whether it was better determined after hearing all the evidence in the case.
- 1.11 Given the amount of detail in the allegations of harassment, the panel decided that it needed to be dealt with as a preliminary issue. If the issue was not considered until after hearing all the evidence and the application to amend was refused, significant time would have been wasted in the hearing questioning all the parties about the harassment allegations. If the application was determined at the start of the hearing, both parties would understand what questions they would need to ask during cross examination and know what issues they needed to focus on.

1.12 Employment Judge Singh therefore invited both the Claimant and the Respondent's representative to make submissions on the application to amend.

1.13 The Respondent objected to the application on the following grounds-

- The nature of the amendment was that it was a very high level amendment. It was not simply a re-labelling but a completely new claim being added.
- The claim for harassment was entirely unparticularised. The Claimant had not set out what the claim was about and therefore the Respondent had little idea what the actual substance of the claim was. The Respondent isn't able to understand what the actual claim is.
- There would be significant prejudice to the Respondent as they had prepared for the hearing based on the claims and issues set out in the preliminary hearing in July 2022.
- If the amendment was allowed, the Claimant would need to submit further particulars and the Respondent given time to submit an amended response which would mean the hearing today would have to be abandoned.
- Significant amounts of new evidence would need to be gathered in the form of witness statements and potentially other documents which again would mean the hearing today would need to be abandoned.
- The timing of the application would also need to be considered. Although the Claimant had made the application in July 2022, she had failed to flesh out her application until exchange of witness statements had taken place, less than a week before the trial.
- The Claimant had attended the preliminary hearing in July 2022 where it had been clearly explained to her what she needed to do and these instructions had again been repeated in the tribunal's correspondence in September 2022, but she had not complied with them.
- The Claimant had stated that she had been unable to comply with the tribunal's directions regarding providing further details of her claims because she had been unwell due to a thyroid problem, but there was inconsistent evidence in the bundle regarding that.

1.14 The Claimant was asked if she wished to make any points as to why her application to amend should be accepted. The Claimant stated that she was very sorry if she had not done what she needed to but this was because she was a lay person and didn't know what she needed to do. She also said that the amendment was very important to her and a significant part of her claim. She stated that the harassment was still ongoing.

2. The Law

- 2.1 The relevant legal principles to be applied, when considering amendment, are well known and can be stated briefly. The leading authority is **Selkent Bus Company Limited v Moore** 1996 ICR 836.
- 2.2 The tribunal must carry out a careful balancing exercise of all the relevant circumstances. It must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
- 2.3 When considering the balance of injustice and hardship, **Selkent** states that all the relevant circumstances must be taken into account, and those circumstances include the following: the nature of the amendment (is it minor or substantial); the applicability of time limits; and the timing and manner of the application.
- 2.4 **Selkent** states minor amendments include the following: the correction of clerical errors; the addition of incidental factual details to support existing allegations; and the relabelling of existing factual allegations as a different cause of action. Substantial amendments may include pleading new factual allegations, whether as a fresh cause of action or new allegations for an existing cause of action.
- 2.5 **Selkent** confirms substantial amendment will require a consideration of the applicable time limit.
- (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, s.67 of the 1978 Act.
- 2.6 Whilst it is clear that a tribunal must consider whether a complaint is out of time, the nature and scope of that enquiry is less clear. No specific guidance is given in **Selkent**; it is not considered or addressed in the EAT's conclusions. There are two broad possibilities: first, the fact the claim is out of time as at the date of the amendment is an absolute bar to the claim being added by amendment, unless time is specifically extended having regard to the applicable test, be it a test of reasonable practicability, or an exercise of a just and equitable discretion; second, the fact the claim is out of time as at the date of the amendment is simply one factor to be taken into account when exercising the tribunal's discretion.
- 2.7 The reference in **Selkent** to considering whether time "should be extended under the applicable statutory provisions" could suggest that the first approach is correct. However, it is now generally accepted that when considering amendment, time is simply one factor to be taken into account, and it does not operate as an absolute bar.
- 2.8 It is not necessary for me to review the case law in detail. The correct approach was considered by Underhill J, as he was then, sitting in the EAT in the case of **Transport and General Workers Union v Safeway Stores Limited** 2007 UK EAT 92. The EAT considered how to interpret **Selkent** quoted above

Point (b) might, if taken out of context, be read as implying that if the fresh claim is out of time, and time does not fall to be extended, the application must necessarily be refused. But that was clearly not what Mummery P. meant. As Waller LJ observed in *Ali v. Office of National Statistics* [2005] IRLR 201, at para. 3, point (b) is presented only as a circumstance relevant to the exercise of the discretion; and the reasoning of the Appeal Tribunal on the actual facts of the case clearly turns on the exercise of a "Cocking discretion" rather than the application of an absolute rule (see in particular points (3) and (4) at pp. 844-5)... Thus the reason why it is "essential" that a tribunal consider whether the fresh claim in question is in time is simply that that is a factor – albeit an important and potentially decisive one - in the exercise of the discretion.

- 2.9 **Safeway** acknowledges that there is some contrary case law in support of the proposition that if a case is out of time as at the date of amendment, time operates as an absolute bar to amendment. This is dealt with at paragraph 12, but Underhill J, found in that time does not operate as an absolute bar.
- 2.10 Granting an amendment does not determine whether the tribunal has jurisdiction to hear a claim. It had been the accepted position that granting the amendment would lead to the final tribunal being constrained to consider whether the amended claim was in time at the date of the ET1. Thus, a respondent may have been denied the possibility of arguing that the claim should be treated as presented at the date of amendment, and that is when time should run.
- 2.11 The position has been complicated by **Galilee v The Commissioner of Police of the Metropolis** EAT/0207/16. HHJ Hand decided that the relation back principle does not apply, and section 35(1) of the Limitation Act 1980, which provides for a statutory deeming of a relation back, does not apply to employment tribunals.
- 2.12 I should say some more about the approach the tribunal should take when considering whether an amendment should be granted and the importance of the time point. A proposed amendment may contain a claim that was either in time or out of time at the date of the original ET1. There are four possibilities. First, the new claim sought to be added by way of amendment may have been out of time when the original ET1 was presented. Second, it may have been in time at the date of the ET1. Third, time may have begun to run at some time after the presentation of the original ET1. Fourth, time may not have started to run.
- 2.13 If the relation back principle applies, and the claim is in time as at the date of the ET1, no time issue can arise. If the relation back principle does not apply, time remains a jurisdictional issue. If a claim is out of time, a tribunal must formally extend time or dismiss the claim. Granting an amendment does not extend time, as time is merely a factor to be considered as part of the exercise of discretion. It follows that granting an amendment may lead to a claim that is out of time being included. Time could be considered at a further preliminary hearing or it could be left to the final tribunal. If left to the final tribunal, there is a real risk that significant costs will be incurred in pursuing and defending a claim that may well be dismissed if it was presented out of time.

- 2.14 When considering any application to amend, it is vital that the tribunal must identify the specific amendment sought. This involves identifying any relevant factual allegation, and the associated cause of action. It is necessary to do this because the tribunal must consider whether the amendment is substantial and whether the claim is out of time. If the allegation is unclear, it may be impossible for the tribunal to determine whether the claim is substantial and whether it is in time as at the date of the application, or indeed at the date of the ET1.
- 2.15 If a claimant wishes to amend the claim, there is considerable onus placed on that party to make the application clear. The Court of Appeal's decision in **Housing Corporation v Bryant** 1999 ICR 123 emphasises the importance of clarity of pleading. In that case, the claimant alleged unfair dismissal and sex discrimination. The dismissal was not said to be an act of sex discrimination. All the claims of sex discrimination predated the dismissal and were out of time. Later, the claimant sought to allege the dismissal amounted to victimisation. It was clear that the fact of dismissal was pleaded, there was reference to sex discrimination, and there was reference to victimisation. However, the claim form did not specifically refer to the causal link of retaliatory victimisation as a reason for the dismissal. The mere fact that elements existed within the claim form did not mean the claim had been sufficiently identified; there needed to be the statement of causal connection. Buxton LJ put it as follows:
- ...it is not enough to say that the document reveals some grounds for a claim of victimisation, or indicates that there is a question to be asked as to the linkage between the alleged sex discrimination and the dismissal. That linkage must be demonstrated, at least in some way, in the document itself.**
- ..the words making the necessary causative link between the making of the complaint of discrimination and the dismissal were absent from the application. But if this is to be taken as a question of construction, as a matter of law, and not merely of the judgment and assessment of the Chairman, the absence from the document of any such linkage must be fatal: because the issue of construction is whether the document makes a claim in respect of victimisation.**
- 2.16 This demonstrates that on amendment, it is important to carefully identify the specific claim that is to be added. It also stresses the need for clarity and accuracy on the part of the claimant in pleading the case. It may not be enough for a claimant to simply say there is general reference to discrimination, general reference to victimisation, and general reference to dismissal. If the claim requires a necessary causational link, there should be some wording which alleges it. If that wording is absent, the claim has not been brought.
- 2.17 I remind myself of the three points **Selkent** says should normally be considered: the nature of the amendment (is it minor or substantial); the applicability of time limits; and the timing and manner of the application.
- 2.18 It is important for a claimant to identify with clarity the amendments because, if the claimant fails to do so, the tribunal cannot determine whether the amendment is minor or substantial. Further, it is necessary

for the amendment to be clear to identify whether there is any issue with time at all.

- 2.19 The timing and the manner of the application must also be considered. It is necessary to consider all of the relevant circumstances. Those circumstances may include those taken into account in *Safeway*: how closely related are the new and old claims; are all the relevant facts already in issue and must be proved; was the claim omitted by mistake on the part of the lawyers; should the respondent be surprised that the new claim has been brought; and how promptly has the application been made. These examples are merely illustrative. All the relevant circumstances must be taken into account.
- 2.20 As part of the balancing exercise, it is important to identify to what extent the amendment will lead to a different factual enquiry. In ***Evershed v New Star Asset Management*** EAT 0249/09, Underhill P, as he was then, found it was necessary to consider with some care the areas of factual enquiry raised by the proposed amendment and whether they were already raised in the previous pleading. In that case he concluded that the new evidence would be substantially the same as to be given in the original claim; he allowed the amendment and overturned the original tribunal decision. This approach was approved by the Court of Appeal in ***Evershed V New Star Asset Management Holding Limited*** [2010] EWCA Civ 870 at paragraph 50 where Rimer LJ stated:

...A comparison of the allegations in the amendment... shows that the amendment raises no materially new factual allegations... the thrust of the complaints in both is essentially the same...

- 2.21 There was no suggestion that it was necessary to determine whether it was reasonably practicable to bring the claim within the limitation period.
- 2.22 In summary, the following propositions can be distilled:
- a. First, the overarching consideration is the balance of injustice of hardship of allowing the amendment against the injustice and hardship of refusing it.
 - b. Second, it is necessary to identify whether the amendment is minor or substantial in that it involves a substantial addition of fact and a new cause of action.
 - c. Third, the timing of the application may always be relevant, but if the amendment involves a substantial alteration, it is necessary to consider whether the claim would be out of time at the date of the amendment. This is a factor to be considered in the general exercise of discretion.
 - d. Fourth, the balance of hardship is not an abstract concept. The tribunal should consider whether there is evidence of real hardship, and it must give supporting reasons having regard to all the relevant circumstances.

3. Consideration

3.1 The panel took into account the law, as set out below and considered the balance of injustice and hardship on the Claimant if the application was refused against the injustice and hardship on the Respondent if the application was allowed. They also considered the practical consequences of allowing the amendment.

3.2 The panel accepted that the claim for harassment was important to the Claimant and that she would not be able to pursue it or have the claim determined if the application was refused.

3.3 However, the panel found that the weight of the prejudice and injustice to the Respondent was much heavier.

3.3 As the Respondent had made clear, they had very little understanding of the claim at present and it was accepted by the panel that they would find it difficult to properly respond to the claim during the current hearing. None of the witness evidence addressed any of the allegations of harassment and there was no documentary evidence in the bundle that would assist the tribunal in making a decision about the claim either.

3.4 The panel agreed that if the application was allowed, it would be impractical to continue with the hearing at present and it would need to be abandoned in order that the Claimant can be given time to submit further particulars about the claim and for the Respondent to be able to submit grounds of resistance. The Respondent would also need to be given time to prepare witness evidence and collate documents to respond to that claim.

3.5 The panel also took into account the Claimant's failure to provide details of the claim when directed by the tribunal in July and September 2022. The Claimant said that she didn't know what she had to do but the orders from EJ Walker make it quite plain as to what the Claimant needed to do to particularise the claim.

3.6 The Claimant had had since July 2022 to set out the details of her claim but had chosen to wait until exchange of witness statements in May 2023, one week before the hearing.

3.7 The nature of the application was to add in a completely new claim that spanned back several years, at least until 2019 and this would completely change the focus of the claim and the hearing. This would significantly increase the time of the hearing, which would lead to additional costs being incurred by both parties and the tribunal.

3.8 On those grounds, the panel decided that the balance of hardship on the Respondent greatly outweighed the hardship on the Claimant and therefore the application was refused.

Employment Judge **Singh**

Date 23rd June 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/06/2023

FOR THE TRIBUNAL OFFICE