



EMPLOYMENT TRIBUNALS

Claimant: Mr D Beech

Respondent: Avon Fire and Rescue Authority

Heard at: Southampton

On: 22 March 2023

Before: Employment Judge Rayner

Representation

Claimant: Mr A Ismail, Counsel

Respondent: Mr A Roberts, Counsel

JUDGMENT on Reconsideration

1. The Claimant's application to amend his claim by adding a claim of direct discrimination is granted.
2. The case is listed for a two-day final hearing, before a Judge sitting with members at the Bristol Tribunal, on **16 and 17 October 2023**. Case management orders are set out in an attached order.

Reasons

3. The Claimant brought a claim to the employment tribunal of sex discrimination. His claim arises from an application he made to become a fire fighter with the Respondent authority on 24 May 2019.
4. The Claimant did not succeed in his application following attendance at the test day on 8 July 2019, when he was failed in respect of his ability to climb a ladder.
5. Following his unsuccessful progress in the application process, the Claimant requested information from the Respondent as to why he had been unsuccessful. he made a claim to the employment tribunal his claim made reference to direct and indirect discrimination under the Equality Act 2010. Whilst his claim form was ambiguous, he had made reference to a claim of direct discrimination

6. The basis of his claim was that he had been unsuccessful in the selection process and had been provided with some statistics which showed that more women were successful than men.
7. A case management hearing took place on 23 July 2020 and at that hearing it was confirmed that the only claim the claimant was pursuing was one of indirect discrimination. This was recorded in the list of issues.
8. On 24 August 2020, he was provided with information by the Respondent, about the NFS test, including comments and scores for both the claimant and somebody called Lauren who the Claimant says is a female applicant, and a comparator.
9. He says that this information led him to believe that he may have been the victim of unlawful sex discrimination and four days later on 28 August 2020 he made an application to amend his claim to include a claim of direct discrimination. This was set out in further and better particulars.
10. The Respondent defended the claim and continues to defend it. The Respondent provided responses about the selection procedure that had been followed. It also explained in correspondence that there had been some attempts to recruit using positive action because of an underrepresentation of women within the service.
11. Whilst positive action in recruitment can be lawful, the Claimant considered that the information he was provided with pointed towards unlawful discrimination.
12. The Claimant 's application to amend his claim was considered at a preliminary hearing and refused by me, Employment Judge Rayner and part of the result of that hearing was that the Claimant 's remaining claims were struck out.
13. Written reasons were provided to the parties following the hearing.
14. The Claimant appealed the decision to the EAT and the EAT upheld the appeal, but on one ground only. That is the ground that has been remitted to me to reconsider.
15. There has been some discussion before me today about the nature and extent of the remission back, but there is no disagreement that the matter which I have been asked to reconsider on remission is my refusal of leave to the Claimant to amend his claim, by adding a claim of direct discrimination, arising from disclosure that the Respondent provided to him on the 24 August 2020.
16. The EAT noted that there had been an error made in the judgement as to the date on which this information had been provided to the Claimant.

17. The judgement in respect of the refusal of the application to amend was partly based on an assumption that all the information that the Claimant referred to at that hearing, as having the potential to found a claim of direct discrimination, had been disclosed to him at the much earlier date, when he was provided with the initial statistical data, and that therefore he had had the information available to him when his claims were initially considered discussed at the case management hearing on the 23 July 2020 when it was confirmed through his representative that the claim he was bringing was one of indirect discrimination.
18. Part of the reason for refusing the application to amend was that no good explanation was given as to why those matters had not been identified as being claims of direct discrimination at the earlier date.
19. , it is now clear that this date was incorrect, and in fact the Claimant had not received the specific information about the female applicant until the later date. This was the information which included the score sheets and the comment on the score sheet of the female applicant, which stated that she had been stopped and told to reset (that is change the way she was descending), the ladder.
20. The claimant did not have this information at that earlier date, and therefore could not have considered it, or set out any claim of direct discrimination based on it.
21. The Claimant says that he was treated differently, because he failed the ladder test, but was not given the opportunity to reset his feet in the same way that the female applicant was.
22. The question remitted to me therefore is whether I would have made a different decision and, crucially, whether I would have allowed the application to amend, had I been aware of the correct date that this information was received and known to the Claimant.
23. I have received helpful and detailed written skeleton arguments from both counsel in advance of the hearing and I also heard detailed and forceful submissions from both Counsel. I am grateful to both of them for the care and thought they have put into their written and oral submissions.
24. Both parties have identified the key legal principles to be taken into account when considering an application to amend and I have considered them.
25. I have reminded myself of those principles and in particular take into account the recent guidance from the Employment Appeal Tribunal set out in the case of ***Vaughn v Modality 2021 ICR 535***. I remind myself that there are a range of factors which I may take into account when considering whether or not to grant application to amend and remind myself that I must consider the balance of prejudice in each case, and

should consider submissions in respect of the real practical consequences of allowing or refusing the amendment.

26. I have also taken into account the decision made in the case of ***Ali v Office for National Statistics, [2005] IRLR 201, Court of Appeal.***
27. Whilst the factual background in that case was different, a key point made was in respect of the stage in the proceedings that an individual becomes aware of information that might form the basis of a claim for discrimination.
28. As a matter of logic, a Claimant cannot bring a claim for direct discrimination unless they have some information which points to a difference of treatment between themselves and another individual. Claimants are often at a disadvantage in discrimination claims in the context of appointments and promotions because they do not necessarily know how others have been treated. They do not necessarily know whether they have been treated differently than others have been treated.
29. The Respondents in contrast ought to have a clear understanding of why they appoint some individuals and do not appoint others.
30. In ***Ali*** the point was made that strict time limits may be extended, so that a claim that would be out of time, could be brought within time, where it was just and equitable to do so. Circumstances where it may be just and equitable to exercise the discretion, is where a claimant does not discover the information which suggests discrimination until well after the time limit has expired.
31. In the context of an application to amend a claim by adding a claim of discrimination, after the expiry of the primary time limit, one of the matters which a tribunal must consider is the timing of the application, and the reason for the timing of the application.
32. If, as in this case, an application to amend is made outside of the primary three-month time limit, the delay and the reason for it, will be one of the factors that the ET must take into account in determining the application.
33. In ***Vaughan v Modality Partnership UKEAT /0147/20/BA*** His Honour Judge Tayler reviewed the factors set out in the case of ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836. These are, the nature of the amendment; the timing and manner of the application; the applicability of time limits. However, he also reminds us that they are not the only factors that may be relevant and that it is of key importance that the factors set out in the second case are considered in the context of the balance of justice.
34. This requires an assessment of the prejudice that might be caused to the respective parties. A minor amendment might cause a claimant great prejudice if it were refused because a vital component of the claim would be missing. For the respondent an amendment may result in the respondents suffering prejudice because they have to face the cause of

action that would have been dismissed as out of time had it been brought as a new claim. Alternatively light amendment may cause prejudice to a respondent because it is more difficult to respond to and results in unnecessary wasted costs. No one factor is likely to be decisive and I remind myself that what I must focus on is the balance of justice.

35. This requires me to consider expressly any prejudice to the claimant and any prejudice to the respondent.
36. It is my judgement that when originally making the decision, the error over the date on which the information became available to the Claimant, meant that whilst the time factors were assessed, they were given undue weight. It is therefore appropriate for me to carry out the exercise of considering whether or not to grant the amendment, taking into account the correct date, and looking at it in the context of the balance of prejudice to the parties, as well as all other factors.

The parties representations

37. I accept the Claimant's assertion that once he became aware of the information which he now relies upon as direct discrimination, he made an application to amend in a timely manner.
38. The Claimant had made a Freedom of Information request on 2 August 2019, but did not receive all the information in response to his request.
39. He was provided with the information on and made his application to amend his claim very shortly afterwards.
40. The Respondent was aware from the point of the Claimant's initial claim to the tribunal that the Claimant was raising a claim of discrimination in respect of his failure to be selected. The Claimant had asked in his Freedom of Information request why he had not been selected.
41. The Respondents knew the reason why the Claimant was not selected but they also knew the reason why other individuals were not selected.
42. The information provided to the Claimant and the fact that the Claimant sought to rely upon it in order to make a claim of direct discrimination, was a fact known to the Respondent since 2019
43. I conclude from the chronology, that the Respondent would not be prejudiced simply because the application to amend was made at a later stage in the process.
44. The Claimant on the other hand, is significantly disadvantaged if he is not able to pursue the claim of direct sex discrimination before the employment tribunal. He will not be able to challenge a fundamental part of his argument.

45. Mr. Roberts has argued very forcefully that I should not allow an amendment of claim because of the observations I had made in respect of the merits of the claim in my previous judgment. He argues that if I considered that the merits were poor when I refused the application then I must also consider them poor today, and therefore that should lead to a refusal of an application to amend.
46. I accept that where an application to amend out of time is made, the merits of the claim can be one of the factors to be taken into account and I agree that it would not be appropriate for me to revisit my view of the merits at this point.
47. However, I do not agree that that is the beginning and end of my reconsideration today. The merits of the claim are only one factor to be taken into account, and my view of the merits is not that there was no reasonable prospects of succeeding. In such a case there would be no prejudice to the claimant. Here, the case is at least arguable, and must have some prospects of success. My view of the merits is a factor, but it is only one factor.
48. Here, if the amendment is allowed, the Respondent may of course apply to strike out, or a deposit order, but that is a separate step.
49. I have therefore considered the practical consequences of allowing the amendment. First, the claim will need to be listed for a hearing and the claim case managed.
50. The majority of the documentation which the tribunal will need to consider in order to determine the direct discrimination claim has been disclosed. The respondents are clear about what their response to the claim will be and do not suggest that they will be prejudiced by not being able to call witnesses to explain that defence.
51. The point is a discreet one and can be dealt with in a relatively short hearing which can be listed relatively quickly.
52. If the respondent considers that the merits of the claim are poor, then it may make an application in that respect.
53. There is I conclude no prejudice to the respondent other than having to deal with a claim that they had expected not to have to deal with.
54. In contrast, the prejudice to the claimant is that a refusal of the amendment will bring his claim to an end.
55. The application I am asked to reconsider on remission is one in which the significant difference is the time frame within which information was known to the claimant.

56. On the basis of the correct information, this is an application to amend made within a very short time of the Claimant becoming aware of crucial information.
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57. It is my judgement that had I been fully aware of that information when I considered the application on the first occasion, that it would have been a far more persuasive factor, which would have outweighed my views on the merits of the claim.
58. Taking into account the balance of prejudice to the parties, the prejudice to the Respondent of having to deal with a further allegation of direct discrimination is, in my judgment outweighed by the prejudice to the Claimant of not being able to pursue his claim at all.
59. I remind myself that he had taken all steps in order to find out why he had been unsuccessful and that it was information disclosed to him at a late stage, that had been in the control of the Respondent all along, which necessitated an application to amend out of time.
60. On that basis I determine that, had the correct dates of disclosure been clear at the first hearing, that I would have allowed the Claimant's application to amend, in spite of my observations about the merits of the claim.

Next Steps and Case Management Orders

61. The claim will now be listed for a 2-day hearing in person before an Employment Judge sitting with members at the **Bristol Employment Tribunal, Bristol Civil and Family Justice Centre, 2 Redcliff Street, Bristol BS1 6GR.**

Employment Judge **Rayner**
Dated 12 June 2023

Judgment sent to the Parties on 27 June 2023

For the Tribunal Office