EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr Paul Thompson	AND	Devon and Somerset Fire and Rescue Service

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY VIDEO (CVP) ON 28 July 2023

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr J Allsop of Counsel
For the Respondent: Mr S Keen of Counsel

JUDGMENT ON APPLICATION TO AMEND

The claimant's application to amend the originating application is refused.

RESERVED REASONS

1. In this case the claimant seeks leave to amend the claim which is currently before the Tribunal, and the respondent opposes that application. I have also heard factual and legal submissions from Counsel on behalf of the respective parties.
2. The claim as it currently stands:
3. The general background and procedural history of the claim as it stands before the determination of this application is as follows.
4. The claimant is employed by the respondent Fire and Rescue Authority as a Watch Manager, and he remains in their employment. The claimant has presented two claims to this Tribunal. The First Claim under reference 1401578/2022 was presented on 9 May 2022 and alleges disability discrimination and sex discrimination. The Second Claim under reference 6000574/2023 was presented on 31 March 2023 and alleges victimisation and further discrimination.
5. The claimant is a litigant in person, save that he has been able to seek advice and obtain representation from Counsel under the direct access scheme. The respondent complains that the claimant has presented a number of conflicting "iterations" of his claim and that it has incurred unnecessary time and expense in seeking to reconcile the various versions. Its complaint in more detail is as follows.

6. The respondent asserts that the ET1 originating application of the First Claim is the commencement point because it is the claim as presented. Some five months later on 14 October 2022 the claimant sent to the tribunal a schedule which set out a number of allegations of disability and sex discrimination. It was different to, and it did not include, any cross references to the originating application and is the Second Iteration of the claimant's claims. There was then a case management preliminary hearing listed on 9 February 2023, and on the afternoon before on 8 February 2023 the claimant sent a draft list of issues to the Tribunal setting out a third description of his complaints which did not match either the originating application or his earlier schedule (the Third Iteration). It was noted by Employment Judge Cadney at the preliminary hearing that a number of the claimant's claims related to events which either post-dated the originating application and/or did not derive from claims set out in that originating application (and would therefore need an application to amend). The claimant was ordered to notify the respondent and the Tribunal which of his claims he sought permission to amend.
7. On 2 March 2023 the claimant then provided an email setting out his required changes and additions to his list of issues. This was the Fourth Iteration of the First Claim. He withdrew some claims and made a formal application to amend the claim to add two new allegations. The respondent argues that this Fourth Iteration failed to comply with the earlier Tribunal order because it did not indicate which claims in the originating application should be amended and whether the claimant was applying to include claims which post-dated it or were not included in it. Instead, the Fourth Iteration sought to make its amendments by reference to the Third Iteration (which had never been an agreed version of the claimant's claims). On 23 March 2023 the claimant then produced a second draft of the second list of issues (the Fifth Iteration). This did not include any claims of victimisation which had been suggested as a possible amendment (and which formed the subject of the Second Claim which was presented shortly thereafter on 31 March 2023).
8. There was then a further case management preliminary hearing on 3 April 2023 before Employment Judge Goraj. She ordered that the claimant should serve proposed Amended Particulars of Claim in a single document setting out what amendments were applied for by reference to the originating application and the ET1. On 5 May 2023 the claimant then served on the respondent proposed particulars of claim which the respondent asserts is the claimant's Sixth Iteration.
9. The respondent argues that the claimant has failed to comply with both the spirit and the letter of the relevant order because the new proposed Amended Particulars of Claim have the ET1 added as an appendix, and it is effectively a blanket proposed amendment to the originating application. The original ET1 is attached as a separate document, and it is unamended (save for its paragraph references). The claimant's allegations in the new particulars of claim (which are included in paragraphs 7 to 48) contain no references to the original ET1. The respondent argues that the effect of this Sixth Iteration (which does not comply with the relevant order) is that the respondent and the tribunal "are again left to laboriously identify whether new factual allegations are being raised and how this might affect the case and the balance of prejudice. This is not a straightforward exercise. It is neither possible nor fair for the respondent to have to do that on the claimant's behalf."
10. On the other hand, the claimant argues that the new proposed Amended Particulars of Claim have been served in compliance with the earlier case management order, not least because the order requires the filing and service of "proposed Amended Particulars of Claim" with a requirement to cross refer to

allegations. Given that there were no paragraph numbers in the original it had to be reformatted.

11. The nature and detail of the application to amend:
12. The claimant's application is as follows, namely to allow the proposed Amended Particulars of Claim to stand as the amended version of the claimant's First Claim. The respondent opposes that application for the reasons set out above
13. The applicable law:
14. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.
15. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.
16. In Transport and General Workers' Union v Safeway Stores Limited EAT 0092/07 Underhill P as he then was overturned a Tribunal's refusal to allow an amendment because there was no attempt to apply the Cocking test, and, specifically, no review of all the circumstances including the relative balance of injustice.
17. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:
18. 1 - The nature of the proposed amendment - applications to amend range, 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 has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and
19. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended. (Whether this is still "essential" is considered further below); and
20. 3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. 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.
21. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim).
22. The Balance of Prejudice: per HHJ Tayler in Vaughan v Modality Partnership UKEAT/0147/20/BA(V): [21] "… Representatives have a duty to advance

arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice … [26] a balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice. [27] Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it. [28] An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional costs; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."

23. Langstaff P made the following observations in Chandhok v Tirkey [2015] IRLR 195 EAT from paragraph 16: "The claim, as set out in the ET1, is not something 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 … the claim as set out in the ET1. [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."
24. As for clarity, a key requirement in any application to amend is that the amendment is made clear: (see Scottish Opera Ltd v Winning UKEAT/0047/09 at para 5). Clear and accurate details of the proposed amended claim are required, not only so that the Tribunal can identify and record the claims that are legitimately before it (Chapman v Simon [1994] IRLR 124) but also that a proper balancing exercise of the relevant Selkent factors can occur – see Ladbrokes Racing Ltd v Traynor EATS 0067/06: at para 39
25. This Judgment:

26. Applying these legal principles above to the current application, I find as follows.
27. The very significant difficulty which I face with this application is the lack of clarity as to the proposed amendments. In my judgment the claimant has not complied with the earlier case management order which was effectively to prepare a single document making it clear, by reference to the first originating application, exactly what claims are proposed to be amended or added by reference to the original ET1 originating application.
28. I agree with the respondent's observation that the approach deprecated by the EAT in Chandhok is the approach which has been taken by the claimant in this case. He has treated the original claim as something "to set the ball rolling" and has expected the Tribunal merely to take the repeatedly redrafted list of issues as a legitimate replacement for the original originating application.
29. This case has already had allocated to it a disproportionate amount of judicial resource by way of case management. In short, the claimant was ordered by the tribunal to make his proposed changes in a single document which easily identified the original claim, the amendments sought, and their consequences. In failing to do so the claimant has placed the onus on both the respondent and the Tribunal to work through the proposed changes laboriously in order to identify exactly what applications are being made. This is against the background of the claimant treating his claim as a movable feast.
30. I therefore refuse the claimant's application to amend his claim for the following reasons. In the first place I agree with the respondent that the claimant has failed to meet the terms of the earlier order to include the proposed amendments in a single document showing, by reference to the starting point of the originating application, exactly what amendments are proposed. Secondly, for this reason, the application lacks sufficient clarity in this respect. I am not able to identify and record the claims that are legitimately before the Tribunal and I am also not able to conduct a proper balancing exercise of the relevant Selkent factors, particularly with regard to the relative injustice and hardship for each proposed amendment.
31. Against this background in my judgment the balance of prejudice favours the respondent, and favours refusing the application. It is not in the interests of justice to allow the amendments as sought. The claimant is still free to pursue the allegations raised in his first originating application, together with the subsequent claims of discrimination contained in his Second Claim, and separate case management orders have been made so that both claims can now proceed to hearing.

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Employment Judge N J Roper
Dated 28 July 2023

Judgment sent to Parties on 14 August 2023

For the Employment Tribunal