EMPLOYMENT TRIBUNALS

Claimant: K Donovan

Respondent: London Borough of Hillingdon

JUDGMENT GIVEN AT AN OPEN PRELIMINARY HEARING

Heard at: Watford (by CVP) **On:** 8 August 2023
Before: Employment Judge Bloch KC

Appearances
For the claimant: In person
For the respondent: Jalal Farhat (solicitor advocate)

JUDGMENT

1. The claimant's application to amend his claim is allowed in respect of his claims of race discrimination or harassment only and limited to the amendments referred to below (paragraphs 4,5,8,11,13,14 and 20 of his amendment application dated 30 June 2023) as more fully described below:

    1.1 Paragraph 4 - The claims regarding alleged statements on 16 November 2022 by Thema Jahli by which the claimant was allegedly accused of being a racist based on the amount of pigment in his skin and that the claimant would fit into a racist country like France.

    1.2 Paragraph 5 – The enquiries by Anne Marie Bellamy Nolan seeking to obtain the claimant's views on the sums of money being paid to persons seeking asylum.

    1.3 Paragraph 8 – Instruction by London Borough of Hillingdon that all workers should state their race on their staff profile.

    1.4 Paragraph 11 – The incident on 16 January 2023 when a colleague allegedly told the claimant that he could not go to Somalia because of the colour of his skin - they would murder him.

1.5 Paragraph 13 – In relation to an anti-racist week, on about 6 February 2023, the claimant being required to read information informing those with less skin pigment that they should assume that they were racist or responsible for racism and that not being racist was insufficient and/or that they lacked skin pigment when compared to their colleagues of colour.

1.6 Paragraph 14 – The email received by the claimant on 16 February from Vicky Trott referring to "Global majority" being (according to the claimant) used by extremist left wing organisations – and which is linked to "critical race theory".

1.7 Paragraph 20 – A note by Rendani Rembulawani. The essence of this complaint (as explained more fully by the claimant at the preliminary hearing) was that he and a woman from Thailand by the name of Nucharejee Fisher were both responsible for the service provided to an autistic person and that the service allegedly fell short of what was required but only the claimant and not Miss Fisher was blamed for this.

2 The nature of the race claims in respect of the above are:

2.1 Paragraph 4 – Harassment.
2.2 Paragraph 5 – Harassment.
2.3 Paragraph 8 – Harassment
2.4 Paragraph 11– Harassment.
2.5 Paragraph 13 – Harassment and/or direct discrimination
2.6 Paragraph 14 – Harassment.
2.7 Paragraph 20 – Harassment and/or direct discrimination

3 All of the claimant's amendments set out in his amendment application relating to age discrimination are rejected except for that contained in paragraph 10 relating to the AMI course which the claimant was unable to attend. The claimant alleges that the course was not offered to him on grounds of his age.

4 The claimant's existing age discrimination claims set out in Paragraph 1.2 of the Record of a Preliminary Hearing held on 2 June 2023 are struck out on the basis that they have no reasonable prospect of success. The claims remain in so far as relating to direct race discrimination.

5 No deposit orders(as requested by the respondent) were made.

6. The respondent has permission (as soon as reasonably practicable) to amend the response consequentially to the amendments referred to above.

REASONS

7. At a preliminary hearing held on 2 June 2023 before Employment Judge Margo, the judge listed the preliminary hearing which came before me today. At paragraph 2 the judge stated that the claimant was to submit any application to amend his claim so as to include any matters that were not within the ET1. The claimant should focus only

on those claims that he wished to be included by way of amendment rather than providing a detailed narrative account of the background facts that he says support those claims. I comment that no doubt faced with the difficulties which a litigant in person faces in this regard, the claimant's application to amend was a discursive and narrative kind of document and I spent some considerable time with the claimant seeking to distil what the new claims were in essence as opposed to evidence in support of existing claims or evidence in support of the new claims. That resulted in the list of amendments referred to above.

8. At paragraph 8 of the case management orders the judge said that, given that there was at least one allegation that is in time, he decided it would not be appropriate for the limitation point to be determined as a preliminary issue. It would be necessary for all facts to be considered at a full hearing before it could be established whether the claimant could rely on a continuing act. In the submissions made on behalf of the respondent it seemed to me that there was an attempt, notwithstanding this decision, to reargue the question of whether the claims and especially those in the application to amend were continuing acts. In relation to the latter, I adopt the same approach as Employment Judge Margo in that it seemed to me to be inappropriate at this stage given the complexity of the matter and the shortness of time to seek to determine which, if any, of the acts were part of a string of continuing acts That must be a matter for the full merits hearing.

9. I refer to the judge's case summary which is helpful in understanding what follows below:

10. The claimant has been employed by the respondent since 12 June 2013. Most recently he has been employed as a Personal Advisor.

11. The claim relates primarily to treatment to which the claimant alleged he was subjected in relation to his attempts to secure a place on a subsidised undergraduate course in social work provided by the respondent.

12. The claimant applied for the course in 2021 but his interview in May 2021 was not completed due to a technical problem with Teams (over which the interview was being conducted).

13. The claimant was reinterviewed on 2 July 2021 but he says he was told at that point that it was too late for him to be included on the course for September 2021 and he would be entered into the 2022 process automatically and would not need to be re-interviewed.

14. In the event the claimant says he was told in May 2022 that he would have to apply and be re-interviewed for a place on the course. The claimant sought to obtain the documents from his first interview but they were not provided to him. As a result, as well as because of the fact that the claimant had to undergo an operation, the claimant decided not to go through the interview process again and instead raised a grievance. Employment Judge Margo referred to the claimant having submitted two further documents setting out "further particulars of the claim" which largely focussed on events that post-date the presentation of the ET1. The question of

whether the claimant would be allowed to amend his ET1 to include those claims was to be determined at the preliminary hearing today.

15. Given the uncertainty of the scope of any claim that would proceed to a final hearing the judge did not consider it appropriate to list the claim for a final hearing at this time.

16. The judge then summarised the complaints as being:

16.1 Direct age discrimination
16.2 Direct race discrimination, and
16.3 Harassment relating to race and age.

17 The judge went on to consider the protected characteristic. In respect of the claim of race the claimant relied on his ethnic origin which he described as a combination of German and Swiss. There were times in the course of that preliminary hearing where it appeared that the claimant might also be relying on his skin colour which he described as fair but in the event he confirmed that he relied on his ethnic origin. I took up this point with the claimant particularly in relation to the amended allegations regarding comments about skin pigmentation but the claimant nonetheless considered that these type of comments were related to his ethnic origin given that people of German and/or Swiss origin are likely to be "fair". The judge also referred to the claimant having ticked the boxes on the ET1 indicating that he had a claim for discrimination relating to his sex or religion and belief but no such claim was set out in the particulars. The claimant confirmed that he has no claim based on those protected characteristics in the claim form as currently pleaded.

18 The judge then set out the issues between the parties. These now fall to be extended by adding to paragraph 1.2 the additional claims of direct race discrimination and to paragraph 2, additional particulars of harassment related to race. (I comment that it would be helpful if the respondent produced a consolidated document containing all the allegations 7 days before the final hearing).

The amendment application

19 The respondent resisted the application to amend the claim on a number of grounds, in particular, The claims being "out of time" or in any event made late; the nature of the claims being vaguely set out in all but paragraph 10 of the amendment application (the AMI sub paragraph (c)), the prejudice to the respondent in having to deal with these new claims and, in particular, the costs of investigating them, in particular, in one case where one of the witnesses had left the employ of the respondent.

20 By way of clarification of the strike out application, Mr Farhat explained that the strike out application was limited to paragraphs 1.2.2 (selection process twice) and 1.2.3 (Helen Smith refusing to provide the claimant with document relating to the July 2021 interview process). In the alternative, a deposit order was sought in relation to these two paragraphs. In relation to paragraph 1.2.1 (the request to stand down from the Employment Forum Committee) there was no strike out application, only an application for a deposit order.

21 There was no strike out order sought in relation to the harassment claims at paragraphs 2.1. and 2.2.2 of the case management order, only a deposit order being sought in this regard.

22 Mr Farhat referred me to the Presidential Guidance and in particular paragraph 5.2 and 5.3 relating to time limits and the timing and manner of the application and I have taken these into consideration.

23 The leading authority in relation to amendments is of course the case of Selkent Bus Co Ltd v Moore [1996] ICR 836 in which the Employment Appeal Tribunal (President Mummery J) said at page 12 (paragraph 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 amendments against the injustice and hardship of refusing."

24 He went on to say (at para 5): "What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

24.1 *The nature of the amendment*. Applications to amend are of many different times 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.

24.2 *The applicability of time limits.* If a new complaint or cause of action is proposed to the 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……..

24.3 *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 [tribunal regulations] 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….. 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".

25 I was not persuaded by the timing points made on behalf of the respondent. It seems to me that, given in particular the claimant's status as a litigant in person, he acted with reasonable promptitude in referring to the new matters (arising since the filing of the claim). He told me that he had written to the tribunal during March and April 2023 and had been told that the matter would be dealt with at the case management hearing or variously told that a new claim form might need to be issued or amendments made to the existing claim. All or some of those matters eventually found their way into further and better particulars which were served in March 2023 and these eventually, in accordance with the provisions of the case management orders to which I have referred, found their way in whole or in part in

the amendment application. This is not a case where months or years after the event a new claim emerged wholly unrelated to existing claims. They all appear (at least judge from the claimant's perspective) to be part and parcel of detrimental treatment to him which (he alleges) were connected with his ethnic origin. I was not persuaded by any suggestion that the respondent was somehow seriously prejudiced or would be prejudiced by the late introduction of these claims into the case, particularly limited (as I have limited them) to race rather than age discrimination .

26 I was more impressed by the contention that these claims are somewhat vaguely set out. They are certainly not of the minor nature referred to in the Selkent case nor are they at the other end of the scale being entirely new factual allegations which change the basis of the existing claim. The allegations might each be new but they do not appear to be substantially different in character from the existing claims. I also have to take into account the difficulties which a litigant in person would have in crisply formulating these claims. I am satisfied that after the collaborative exercise which I undertook with the claimant resulting in the limited list of claims referred to above, that the claims are understandable and no particular prejudice arises in this regard. Of course the counter-prejudice would very considerable given that if the amendment were not allowed the claimant will not be able to bring these additional claims at all.

27 As to the applicability of time limits (referred to above in the Selkent decision) there was a discussion between myself and Mr Farhat regarding the level of the hurdle to be surmounted. Given that the claim arises in respect of matters which occurred after the issue of the claim form, it may be said that it is the just and equitable test that should apply. Alternatively, given that it is an amendment to an existing claim it may simply be discretionary factor to be considered under paragraph 5 of the Selkent decision. That said, I should note that it was the decision of the tribunal on 2 June 2023 (to which apparently no objection was made) that the mater should proceed by way of an amendment to the ET1, although it was well understood by the judge and the parties that this amendment would relate to matters which occurred after the issue of the ET1. That said, I am not sure that the decision would depend on which particular test is to be applied. In my view, for the reasons I have indicated above, I do not regard the lateness of the application to amend as being a sufficient reason or even a powerful discretionary reason for not allowing the amendments.

28 Accordingly, I allowed the amendments to the limited extent referred to above and, in particular, any age discrimination allegations being limited to that referred to in paragraph 10 of the case amendment application.

29 As to the strike out application the underlying complaint as I understood from Mr Farhat was the lack of any pleaded facts supporting the bare allegations that the matters referred to in paragraph 1.2.1 to 1.2.3 (in particular the matters relating to the selection process in June 2022) occurred because of the claimant's ethnic origin. I had some considerable sympathy with this approach given that the matters pleaded would appear to be equally consistent with some other reason (personality clash or whatever) for their occurrence. The matters were even more serious in regard to the allegations of age discrimination. As indicated above, the claimant appears to have ticked almost every conceivable box in relation to the kinds of

discrimination alleged by him in the ET1 so that some of them had to be withdrawn. I could find no pleaded or other basis for the claim that these or the other matters referred to in the amendment application (apart from paragraph 10 of that application) were anything to do with the claimant's age. Nor was anything to this effect explained by the claimant at the preliminary hearing.

30 I considered however that the respondent's point in this regard as to race discrimination was less powerful. It would be wrong of me to conclude at this early stage (before eg disclosure of documents by the respondent) that the claimant has no reasonable prospect of success in this regard. I have regard in particular to well-known case law warning of the dangers of striking out such discrimination claims without a hearing (given the notorious difficulties of claimant's proving such claims – as recognised by the legislature in reversing of the burden of proof, where appropriate, to assist claimants in this regard). This is not a tick-box exercise as appears to be the position in regard to the age discrimination claims which I have struck out. The claimant pleads (and plainly believes that) there was an underlying ethnic reason for the less favourable treatment he alleges. Further, the amendments which I have allowed, appear on their face (to a greater or lesser extent) to have an ethnic aspect to them.

31 Accordingly, while I do regard the claimant's existing claims of race discrimination as weak, I did not regard them as being so weak that a deposit order should be made. Even if I had gone that far it was apparent to me from discussion with the claimant that given his current financial status it would not have been appropriate to make a deposit order against him. He is currently on occupational sickness benefit and apparently the respondents are threatening in the near future to have that benefit withdrawn in which case the claimant will be on statutory sick pay. Whether or not that that is correct, it came as no surprise to me that the claimant told me that in the current financial situation he has virtually no money left at the end of the month ie no substantial disposable income. Therefore even if I had thought that a deposit order was in principle appropriate I would not have made such an order.

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Employment Judge Bloch KC

Date:4 September 2023

Sent to the parties on:

20/9/2023

For the Tribunal:

N Gotecha