EMPLOYMENT TRIBUNALS

Claimant: Nevin Batra

Respondent: Secretary of State for Health and Social Care

Heard at: London South (by CVC/telephone]) **On:** 4 October 2023

Before: Employment Judge G Phillips

Appearances

For the claimant: in person

For the respondent: Mr S Crawford

PRELIMINARY HEARING JUDGMENT

1. The judgment of the Tribunal is that the claimant is given permission to amend the ET1/Particulars as per the marked-up version provided to the Tribunal and the respondent on 2 October.

REASONS

2. The claimant applied via email dated 2 October to amend his ET1/Particulars.

Background

3. The claimant was employed by Public Health England ("PHE"), an Executive Agency of the Department of Health and Social Care ("DHSC"), on a series of fixed term contracts from 15.10.2018 in the Place and Regions directorate as an Evidence and Evaluation Lead. PHE extended the Claimant's fixed term contract by one year, to 14 October 2020. The fixed term contract was then further extended on three more occasions, until 30 June 2021. The claimant was then offered a temporary role within Adult Social Care ("ASC") as a Principal Intelligence Analyst, starting on 21 June 2021. His fixed term contract was extended to allow for this temporary role until 30 September 2021, when his fixed term contract ended. The claimant in his claim form, which was presented

on 1 December 2021, initially brought claims for a redundancy payment, unfair dismissal, unpaid London weighting, holiday pay and less favourable treatment as a part time worker. On 31 March 2022, the claimant withdrew his redundancy pay and London weighting claims; on 27 September 2023, the claimant confirmed that he was withdrawing his holiday pay claim. As at the date of this CMC, there were two extant claims, of unfair dismissal and less favourable treatment because he was a fixed term worker under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

4. In July 2022, Case Management Orders were given in the case and it was listed for a 3 day full merits hearing, in February 2024. Nothing much appears to have happened in the intervening period.

5. On 28th September the respondent's solicitor sent to the Tribunal in preparation for the Preliminary Hearing on 4 October, a completed Case Management Agenda (CMA) and List of Issues. These documents were prepared by the respondent but the claimant's comments had been incorporated into them. They were therefore agreed between the parties, unless it was stated otherwise on the documents. These documents reflect that there were a number of matters where further information was sought from the Claimant – for example in the CMA at 2.2, which asks the Question "Is there any application to amend the claim or response? If yes, write out what you want it to say. Any amendment should be resolved at the PH, not later." the respondent has written: "At 2.1(b) of his particulars of claim, the Claimant says he received unfavourable treatment, but he has failed to particularise this. The Claimant is asked to clarify what alleged treatment he refers to. Subject to the further information from the Claimant, the Respondent may wish to amend its response to this allegation."

6. Further, in the draft List of Issues which the respondent sent to the claimant on 28 September, at 2.1 "Was the Claimant treated less favourably than a comparable permanent employee?" The respondent has stated: "Claimant to identify which actual comparator he relies on". Likewise, at 2.2 (ii), with regard to "the alleged unfavourable treatment" the respondent has stated "Claimant to particularise." The claimant explained that it because of in response to these statements that he felt it necessary to expand the factual information in his ET1/Particulars.

7. The claimant made a number of additions to the draft List of issues, particularly with regard to giving particulars of the allegedly less favourable treatment, which were added in red. The respondent has noted after these "(Note items A-E above are not agreed issues by the Respondent. These are new allegations which was not pleaded in the Claimant's ET1. The Claimant has not made an application to amend his claim.)"

8. On 2 October, the Claimant applied to amend his claim and attached a marked-up version for comparison. The Claimant stated that his application to amend was to particularise the unfavourable treatment of a fixed term worker allegation, and to improve the ET1's coherence and clarity.

9. The respondent objected to the Claimant's application to amend his claim by email and letter dated 3 October. The respondent submitted that the claimant was expanding his less favourable treatment of a fixed term worker allegations by relying on a number of further acts of less favourable treatment.

Submissions - summary

10. **Respondent.** The respondent set out a number of objections to the application to amend. These were made in writing by them in their letter of 3rd October and supplemented by Mr Crawford orally at the hearing. These are summarised below.

11. **Nature of the amendment.** Mr Crawford submitted that the application to amend included the addition of new facts, which were substantial in nature and would create entirely new and extended areas of enquiry for the respondent, which would require the respondent to provide an amended response to the claim and seek evidence on a number of new matters. This would require new documents and further individuals to be called as witnesses.

12. **Timing and manner of the application.** The respondent reminded the Tribunal tha**t** time limits were an important and potentially decisive factor in determining applications to amend. The respondent submitted that the fact the application to amend has been brought out of time is a factor which should weigh heavily against granting the application. The application to amend the claim was presented to the Tribunal on 2 October 2023 but relates to acts which are said to have occurred between April 2021 and February 2022. Regulation 7 of the relevant Regulations (Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2022) requires that complaints of less favourable treatment be brought to the Tribunal within 3 months of the act complained of. The amendments have been submitted some 22 months after the claim was issued and they are predominantly events which allegedly occurred before he issued his claim in December 2021. The events between December 2021 and February 2022 are, at best, over 18 months out of time.

13. Mr Crawford referred to the Presidential Guidance for General Case Management – in particular paragraph 5.3 which states that for an application to amend a claim, the applicant will need to show why the application was not made earlier and why it is now being made. He said the claimant had not provided any explanation as to why these new allegations were not included in the original ET1 or why they have not been raised in the past 22 months. The respondent's Grounds of Resistance, which were submitted on 5 January 2022, stated that the Claimant had not particularised the general 'unfavourable treatment' allegation at paragraph 37(b) of its grounds of resistance, but he said it was not until now, some 22 months later, with the hearing fast approaching, that the claimant has sought to expand and amend his claim. Mr Crawford submitted that the claimant must have had all the information he needed to plead these allegations long ago and said there was no reasonable explanation why the claimant had waited until this time to request amendments. The respondent submitted that it would not be just and equitable to extend time for these allegations.

14. **Balance of prejudice** Mr Crawford submitted that the balance of prejudice and hardship was clearly in favour of the respondent and that the amendments should be refused. Not only are these new factual matters, but they would cause significant prejudice to the respondent in that they require it to respond to materially new factual allegations and consideration of a comparator over 18 months after the events alleged to have happened. The respondent was going to have to find individuals who have not been contacted about this at all. The respondent did not know who was still employed, or how, if at all, such people might be located. Their evidence would not have been preserved. This significantly prejudices the respondent, he said. Further, the amendments would require further documents to be disclosed, and new witnesses to be identified. He pointed out that the final hearing was not now far away, the time table was tight and allowed little flexibility: if the application was granted, it might mean the hearing would need to be extended, and so relisted, which would cause a further delay, possibly until 2025.

15. Mr Crawford therefore submitted that for all of these reasons, the Tribunal should reject the claimant's amendments.

16. **Claimant.** Mr Batra said there was no real hardship or prejudice caused to the respondent by his amendments. He said that the respondent had asked for a comparator and details of his less favourable treatment and that's what he had done in the amended ET1, just with more detail. He explained that the history of his application was that it was made in response to the raising of questions by the respondent's solicitors in the CMA and the List of issues. He said he was concerned that his claim would be struck out of he did not provide more details. As he said in his email of 2 October he was making the amendments to particularise the unfavourable treatment of a fixed term worker allegation, and to improve the ET1's coherence and clarity. He said that no queries had been raised with him about his ET1 until the CMA/List of Issues.

17. Mr Batra discounted the respondent's concerns about the difficulties there might be with locating information and witnesses. He said such difficulties were nothing like they once might have been. All the individuals he had named were permanent staff who would have had electronic staff records, which would be easy to check and extract information from. On documents he said they had document management system and he did not believe any difficulties would be caused by having to look for some further information. He also said that he had included the long list of comparators out of an abundance of caution, but was happy for the respondent to focus on the first three named. Only if there were problems with them, might it be necessary to locate others on his list.

18. Mr Batra said that much of the additional information he put in regarding the less favourable treatment was tied up with his unfair dismissal claim and would have come out in that anyway.

Discussion

19. There is nothing in the Tribunal Rules of Procedure dealing specifically with amendments. The ultimate legal sources of the power to amend are contained in Rule 29, by which tribunals may make case management orders, and Rule 40, by which they may regulate their own procedure, but always against the background of the overriding objective of dealing with cases justly in Rule 2. Ultimately, it is a matter that lies in the Tribunal's discretion.

20. Case law, especially recent case law – see for example *Vaughan v Modality Partnership* [2021] IRLR 97 and *Chaudhry v Cerberus Security and Monitoring Services Ltd* [2022] EAT 172 – has emphasised that the paramount considerations when deciding whether or not to allow an application to amend are the relative injustice and hardship involved in refusing or granting an amendment. While the EAT in *Selkent Bus Co v Moore* [1996] IRLR 661 stated a number of general principles which it said were applicable to the amendment of tribunal claims, including those mentioned by the respondent and Mr Crawford, appellate courts have repeatedly warned against using the *Selken*t "factors" as a checklist (see for example *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209 and more recently, *Chaudhry*).

21. Stepping back and considering what will be the "real practical consequences of allowing or refusing the amendments", (to quote HH Judge James Tayler in *Vaughan*), it seems to me that if the application to amend is refused this will have a significant potential impact on how the claimant can evidence his claim. These are all relevant matters on which he relies – it is likely in my judgment that if they had not come to light now, they would most likely have been included – much later – in his witness statement, as often happens. Preventing the claimant from relying on these amendments, would potentially impact on his claim and its prospects of success. On the respondent's side the hardships are essentially ones of a practical nature, which the respondent should in my view be able to manage. This is, it seems to me, a case where the balance of justice favours the claimant, on the basis that he will otherwise not be able to articulate his claim as fully as he would like. The respondent is now aware – with four months to go before the hearing - of the nature of the matter and so is unlikely in my judgment to be materially prejudiced, albeit that it may have an expanded evidential task to undertake.

22. In terms of relevant circumstances, in my assessment, what was being proposed by the claimant amounted to the addition of factual details to existing allegations and while they were new and detailed factual allegations, I did not assess them as substantially changing the basis of the existing claim or as adding a new claim. As I did not regard the amendments as amounting to a new complaint or cause of action, I did not regard time limits as being a relevant consideration here.

23. In terms of delay, this is a case which started in December 2021 and is listed for hearing on 7 February 2024; as the respondent accepted, not much has happened in this case since the parties' pleadings were filed. In terms of the timetable to trial, this has not yet started and there is still some four months until

the final hearing. Further, as the claimant explained, the trigger for him making the application was in response to requests from the respondent for more particularisation of his case. There are no time limits laid down in the Rules for the making of amendments. Amendments may be made at any time before, at, even after the hearing of the case. Mr Batra has explained why the application was not made earlier and why it is has been made now.

24. In terms of the possible new and significant areas of enquiry for the respondent, I took account of Mr Batra's knowledge of the respondent's HR and document systems. It did not seem to me that the amendments were in reality likely to be over burdensome for the respondent to manage, or for it ultimately to have any significant effect on the hearing. If it was the respondent's view, having carried out its disclosure exercise that there would be a significant impact on the length of the hearing, then it would still be open to them to apply for a re-listing.

Conclusion

25. Clearly there is the potential for some additional new and extended areas of enquiry for the respondent because of the new facts contained in the amendments. However, for the reasons set out in the discussion above, taking into account all the circumstances and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, in my judgment, the balance of injustice and hardship would lie with the claimant if I refused his application. I therefore gave the claimant permission to amend the ET1/Particulars as per the marked-up version provided to the Tribunal and the respondent on 2 October. In consequence, the respondent has permission to serve an Amended Response, if so advised, on or before **31 October 2023.**

Employment Judge Phillips

5 October 2023