



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Hussain

**Respondent:** BMW Hams Hall Motoren GMBH

**Heard at:** Birmingham (West) Employment Tribunal **On:** 16.02.2024

**Before:** Judge L Mensah

## Representation

**Claimant:** In person (supported by his brother Mr Hussain)

**Respondent:** Mr T Dracass (Counsel)

# JUDGMENT

## Application to amend claim.

1. The Claimant has filed an application to amend his claim. He has identified the amendment to provide the following additional allegations,

- (a) *Claimant was not invited to attend any investigation meetings from the date he was suspended 4th January 2023 so the respondent could carry out their investigations.*
- (b) *Claimant was not made fully aware of the case against him from the date he was suspended 4th January 2023 up until he was dismissed on the 3rd October 2023.*
- (c) *Claimant was not offered any mental health or wellbeing support from the*
- (d) *respondent during his suspension from the 4th January 2023 up until he was*
- (e) *dismissed 3rd October 2023.*
- (f) *Claimant was not relocated to a different area within the business and was instead suspended on the 4th January 2023. (The Claimant clarified those that made the allegations had been moved and he was suspended)*
- (g) *Claimant was dismissed due to his race.*
- (h) *Respondent failed to investigate the Claimants grievance he raised to HR around the 23rd January 2023.*
- (i) *Respondent delayed and prolonged the investigation from when the allegations.*

2. The Claimant has also identified an actual comparator and alleges the comparator was not suspended or dismissed.

3. Mr Dracass accepted the last allegation (i) is already pleaded as so does not require an amendment. In terms of the rest, he accepts most, if not all, are in the factual detail of the claim form

but don't appear in paragraph 98 which effectively refers to dismissal. He argued they were not minor amendments but substantial and add a further six discrete allegations in addition to the ones pleaded. He argued not just a correct but a significant addition to the previously pleaded case. In terms of timing the Claimant identified his application before the previously adjourned hearing in December 2023 and this was held over for consideration today. He argued before December 2023 there was no indication between the submission of the ET1 and December 2023. Further, the new allegations relate to matters that pre-date the three months prior to early conciliation. He entered the ACAS period 02.05.2023 and so he argued would cover anything after 02.02.2023 but all points he seeks to add on the face pre-date the decisions. The suspension is the 04.01.2023 and the concept of delay and prolonging the allegations going back one year previously. He asked me to take that into account.

4. Mr Dracass also argued there appears a lack of merit, as he is simply saying there is a difference of treatment and difference of characteristic and not enough for a race claim to be established and the more must be the reason is race. On the face saying Mr Barber (The comparator) is treated differently without more, is weak.

5. He argued the addition of six allegations will increase the scope of the enquiry and issues and complexity of the hearing. It will widen the scope of disclosure and may require additional witnesses. However, he was not able to advance any details about that. He argued it is likely the Respondent would need more witnesses than if dealing with just dismissal decision.

6. Mr Dracass submitted the prejudice to the Claimant limited as he is still able to pursue his principal complaint of unfair dismissal and discriminatory dismissal and the bulk of compensation would flow from those matters. He argued these earlier allegations might give rise to modest injury to feelings award, but the Claimant can still pursue his case. He argued the prejudice to the Respondent outweighed the prejudice to the Claimant.

7. The Claimant told me his father passed away on the 25.10.2022, his mother (for whom he has caring responsibilities) had a stroke and has been in and out of Hospital since his father passed away and he (the Claimant) started taking anti-depressants but couldn't recall when. He told me this is why he didn't go into further details in paragraph 98. This is why he didn't make application between July and December for the same reasons and finding it difficult to deal with the claim. In December he had time to think, and these matters came back to him and so he applied to amend. The Claimant said he sought advice about making an amendment.

#### The Law and reasoning

8. An application may be made at any time to amend the claim under rules 29 and 30. I have addressed my findings in bullet point italics below and the law and issues as agreed and summarised with Mr Dracass.

- *The Claimant indicated he was seeking an amendment in or around December 2023. I note this is before the first case management hearing, which was postponed and held over until today.*

9. An application to amend should not usually be allowed unless the Claimant has properly formulated and particularised the amendment sought, so the Respondent can make submissions and know the case it is required to meet: *British Gas Services Ltd v Basra* UKEAT/0194/14 (2014, unreported); *Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge* [2016] UKEAT 0007\_16\_1208.

- *I am satisfied the Claimant has clearly particularised his amendments so as to enable the Respondent to know the case it is required to meet.*

10. In *Vaughan v Modality Partnership* UKEAT/0147/20 (9 November 2020, unreported), Judge James Tayler reviewed the authorities and described the approach a Tribunal should adopt when considering an application to amend.

11. The Tribunal should have regard to all the circumstances of the case but the paramount consideration is the relative injustice and hardship involved in refusing or granting an amendment: *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650 (NIRC); *Selkent Bus Co Ltd v Moore* [1996] ICR 836 (EAT); *Transport and General Workers Union v Safeway Stores Ltd* [2007] All ER (D) 14 (Jun); *Abercrombie v Aga Rangemaster Ltd* [2013] IRLR 953, [2014] ICR 209.

12. In *Selkent*, Mummery J identified three particular factors that may be relevant in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment:

(a) the nature of the amendment;

*"on the one hand, from the correction of clerical and typing errors, the additions 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": Selkent*

- *I consider the amendment to be more than minor in nature and are facts pleaded but now being identified and labelled as part of an existing claim for Direct Discrimination. They do therefore add new allegations the Respondent will have to meet.*

(b) the applicability of time limits; and

- *I have considered what Mr Dracass has said about the potential time limit points pre issuing of the claim. There are some of the allegations which may be outside the three months minus 1 day plus the ACAS period. On the face of the dates therefore there are some which are historical. However, I am of the view in a case of this nature it is not possible to determine whether the alleged behaviour is part of a course of conduct ending in the dismissal (given there is a factual dispute as to the effective date of termination) and so I cannot say the claims are out of time or that a Tribunal would not consider it just and equitable to extend time.*

(c) the timing and manner of the application. With regard to the first of those factors, Mummery J observed that amendments range:

- *I accept the Claimant is a litigant in person who included much, if not all of what he now seeks to alleged in his ET1 as part of the factual history. I accept his father passing, his mother suffering health problems and his own apparent health problems do provide some mitigation as to any delay between the lodging of the claim and him making the application. I make no findings as to jurisdictional time and nothing I say here should be construed as such.*

13. Although Mummery J said that the Tribunal '*will have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action*', more recent cases, *Abercrombie* and *Vaughan*, have stressed that the focus should not be on questions of formal classification but on the extent to which the proposed amended claim is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted.

14. Expanding on this point in *Vaughan*, Judge James Tayler made the following points. The focus should be on the practical consequences of allowing, or not allowing, an amendment: if the application to amend is refused, how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding?

- *I find there are practical consequences for the Respondent to address these matters, but Mr Dracass was not able to provide any details as to how many witnesses may be additionally called and I am satisfied the matters can be addressed by witness evidence.*

15. This requires a focus on reality rather than assumptions or supposition; parties should tell the Tribunal about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment.

- *There is no suggestion the witnesses will not be able to address such recent history. Mr Dracass was not able to set out any real detail as to the extent to which the Respondent will have to call additional witnesses beyond indicating they might have to ask someone from Human Resources to give evidence.*

16. A party's submissions in favour of an application to amend 'should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence'.

- *However, I don't accept the main thrust of the claimant's case is addressed by the complaint of dismissal. I am satisfied the balance falls in favour of the amendment being allowed given they do in my view appear important to his direct discrimination claim and may well feed into the reason he says his dismissal was both unfair and due to his race.*

17. Where the prejudice of allowing an amendment is additional expense, consideration should be given to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

- *I am not satisfied the Respondent has shown what additional cost would look like and this can be addressed if appropriate at the final hearing.*

18. While maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.

19. In conducting the balance of injustice and hardship test, if the Tribunal can be sure the proposed amendment asserts an utterly hopeless case, this can be a reason for not allowing the amendment, since to allow it in such circumstances would be pointless. However, if the Tribunal cannot be sure that the case is hopeless then the apparent merits of the claim should not be taken into account.

- *I do not consider it safe on the limited evidence before me, to say the case is hopeless or weak albeit the Claimant will have to prove the reason for the allegation is due to his race.*

20. Furthermore, the EAT has held that a tribunal need not determine, conclusively, the time point before deciding whether to exercise its discretion to allow the amendment: see *Galilee v The*

Commissioner of Police of The Metropolis UKEAT/0207/16, [2018] ICR 634 in which Judge Hand ruled that earlier EAT cases to the contrary were wrongly decided.

- *I make no determination in relation to any time points and leave that matter for the final Tribunal to decide. As I have said I am satisfied much of what is proposed is already in the ET1 and is clearly particularised in the chronology of facts therein.*

21. See *Galilee v The Commissioner of Police of The Metropolis* UKEAT/0207/16, [2018] ICR 634, and *Transport and General Workers Union v Safeway Stores Ltd* [2007] All ER (D) 14 (Jun).

22. Based on all of the above I allow the amendment.

Employment Judge **Mensah**

Date 16.02.2024

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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