



Case Number: 1305075/2023
Type V

EMPLOYMENT TRIBUNALS

BETWEEN
AND

Claimant
Mr M Toure

Respondent
Martin-Bower UK
Limited

ORDER OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING

HELD AT Birmingham ON 14 March 2024

EMPLOYMENT JUDGE GASKELL

Representation

For the Claimant: Dr R Ibakakombo (Lay Representative)
For the Respondent: Mr M Harrop (Solicitor)

ORDER

Issued to the parties on 14 March 2024.
Set out below for ease of reference

- 1 The claimant's application dated 27 November 2023 for permission to amend his claim is refused.
- 2 The case is listed for final hearing before a full panel sitting face to face in Birmingham on **28, 29, 30 & 31 May 2024** with a time allocation of 4 days commencing at 10am each day.
- 3 Five copies of the hearing bundle and five copies of all witness statements shall be brought to the tribunal in paper format on the first day of the hearing. In addition, copies of the bundle and the witness statements shall be filed with the tribunal in electronic format not earlier than 9am on **20 May 2024** nor later than 4pm on **22 May 2024**.

REASONS

Reasons for the Order made at Paragraph 1 above were given orally on 14 March 2024. These written reasons are provided pursuant to a request made by the claimant under the provisions of Rule 62(3) of the Employment Tribunals Rules of Procedure 2023

- 1 The claimant in this case is Mr Mohamed Toure has been employed by the first respondent, Martin-Brower UK Limited, as a Warehouse Operative since 25 February 2022. The claimant's employment is continuing but he has not in fact worked since 29 December 2022 - he has been absent due to ill-health.

2 By a claim form presented to the tribunal on 18 July 2023, the claimant brings a claim for direct race discrimination. In the claim form, the claimant names three respondents: his employer, the first respondent, together with the second respondent, Mr Wayne Davis, and the third respondent, Mr Michael Fisher. The second and third respondents were employed by the first respondent and were the claimant's line managers at different times. The race discrimination claims are largely centred on decisions taken by those managers.

3 There was a case management preliminary hearing conducted by Employment Judge Algazy KC on 23 November 2023. Judge Algazy listed the case for final hearing with a time allocation of four days due to commence today. And he made appropriate case management orders for the proper preparation for the hearing by the parties. Before Judge Algazy, there was an agreed list of issues setting out the acts/omissions by the respondents which was said to be acts of direct race discrimination. The respondents raised jurisdictional issues claiming that the claim form had been presented out of time. The jurisdictional issues are to be determined by the panel at the final hearing.

4 At the hearing before Judge Algazy, the claimant indicated that he wished to make an application to amend his claim. Judge Algazy directed that such an application should be made in writing. On 27 November 2023, the claimant made his application to amend the claim to include two further instances of alleged direct race discrimination - this time involving a manager not previously identified in the claim and relating to recruitment decisions to a post involving Admin Quality and Stock Control. The proposed amendment refers to the claimant making an application for such a role in June 2022 when the role was eventually given to a white woman - and then an application for a similar position "a few months later" when the position was given to a white man.

5 On 29 November 2023 and the respondent filed a detailed opposition to the application to amend.

6 The case management orders made by Judge Algazy have been fully complied with and the claim in its unamended form is ready for hearing. It is unclear to me why the tribunal did not respond to the application for amendment earlier. It is only because of this outstanding application that the final hearing cannot proceed today.

The Law

7 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a Case Management Order: Rule 29 Employment Tribunals Rules of Procedure 2013. Although there is no specific reference to amendment

in the Rules, no doubt such an order may include one for the amendment of a claim or response.

8 **Harvey v Port of Tilbury (London) Limited [1999] ICR 1030 (EAT)**

Where an amendment is sought, it behoves the applicant for such an amendment clearly to set out verbatim the terms and explain the intended effect if the amendment which he seeks.

9 **Selkent Bus Co Limited v Moore [1996] ICR 836 (EAT)**

The EAT gave the following general guidance as to the exercise of the Employment Tribunal's discretion and the factors which might be taken into account: -

- (a) The nature of the amendment. Applications to amend are of many different kinds, 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.
- (b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that application is out of time, and, if so, whether the time limit should be extended under the applicable statutory provisions.
- (c) 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 ... for the making of amendments. The amendments may be made at any time – before, at, or 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: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

10 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.

11 Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form were presented to the tribunal out of time, the tribunal would consider whether time should be extended,

either on the basis of the “not reasonably practicable” test (for example, for unfair dismissal) or on the basis of the “just and equitable” test (for example, for unlawful discrimination). If time were not so extended, the tribunal would lack jurisdiction to entertain the complaint, and it would fail. However, this does not mean that the mere fact that a claim would be out of time should automatically prevent it being added by amendment. The relevant time limits are an important factor in the exercise of discretion, but they are not decisive.

12 **Vaughan v Modality Partnership UKEAT/0147/20/BA (EAT)**

The practical consequences of allowing an amendment which should underpin the balancing exercise a tribunal needs to conduct in weighing the prejudice to each party.

13 In considering whether or not to permit an amendment, the tribunal may take into account the merits of a claim. There is no point in allowing an amendment to add an utterly hopeless case. (**Woodhouse v Hampshire Hospitals NHS Trust UKEAT/0132.12/DM (EAT)** Similarly: “nothing is lost in not being able to pursue a claim which cannot succeed on the merits”. (**Herry -v- Dudley MBC and anor EAT 0170/17**)

Discussion

14 The amendment application is lacking in detailed particulars. The claimant has given no information as to the requirements of the post applied for, or his qualifications or suitability for such a post, or those of the successful applicant. The claim goes no further than to allege that he is a black man who was unsuccessful where the successful candidate was white. Clearly, if the claimant establishes these facts it will be wholly insufficient to ground a claim for race discrimination - it is not even sufficient to reverse the burden of proof under Section 136 of the Equality Act 2010. It follows that in my judgement taking the pleaded proposed amendment at its height it appears to have no prospect of success. If there are further facts which may improve the prospects of success, then the obligation was clearly on the claimant to plead those facts when making the application.

15 The claims are clearly out of time: it is unlikely to be arguable that they form part of a continuing act bearing in mind that an entirely different manager appears to be identified. The claimant has provided a partial explanation for failing to include these allegations in the original claim (I deal with this below) but has provided no explanation for failing to bring the claims within the original time limit which was before the onset of his current illness.

16 The original claim form was presented to the tribunal on 18 July 2023 and contains considerable detail as to the original allegations. The claimant's

explanation for not including these additional allegations at that time is that his health has affected his memory - and he has produced a brief letter from his GP dated 12 March 2024 which confirms that he has had memory problems. However, it is difficult to understand how he can remember so much, but completely omit these two potentially serious allegations. The claimant did have assistance from Dr Ibakakombo at the time that the claim was first presented. Further, in his submissions today Dr Ibakakombo has referred to documentation supporting these additional allegations - of course the claimant had an obligation to produce all relevant documents to Dr Ibakakombo when the claim was first presented. These additional allegations come very late: after a list of issues had been agreed between the parties and a preliminary hearing had taken place.

17 As to the balance of hardship, the simple fact is that the time limits in Section 123 of the Equality Act 2010 are there for a reason - to prevent claims being made at a time significantly after the facts upon which they are based. A late claim inevitably presents hardship to a respondent who must then respond to it at a time when evidence may be more difficult to collate. If this amendment is permitted the respondent will firstly need to seek further particulars of claim; will then need to identify and disclose any additional documents; and will be seeking to interview witnesses about events which happened as long as two years ago. The hardship to the claimant would be that he would be prevented from pursuing claims which he could have pursued in time before the onset of his current illness.

18 The proposed amendment is not merely a relabelling exercise or the presentation of additional facts relating to claims already brought. These are entirely new claims; they are different in nature and involve different managers to the claims already presented.

19 In all of these circumstances, applying the principles from ***Selkent***, my judgement is that the amendment should not be permitted. The application is therefore refused.

Employment Judge Gaskell
28 March 2024