EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr O Awe v Mondial Lighting Company Limited

Heard at: Sheffield (by CVP) **On**: 8 January 2024

Before: Employment Judge A James

Representation

For the Claimant: In person

For the Respondent: Mr M Small, Finance and Commercial Director

JUDGMENT

(1) The claimant's application to amend his claim to include allegations of race discrimination and harassment related to race is refused, for the reasons set out below (Rule 29, Employment Tribunal Rules of Procedure 2013).

(2) The claimant having accepted that he has received a payment from the respondent which exceeds the amount due for the remaining claims for notice pay, unpaid wages and holiday pay, there are no further issues before the employment tribunal to determine, and the file will be closed.

REASONS

Relevant background

1. The claimant has today, for the first time, made an application to amend his claim, to include three allegations of direct race discrimination, and one of harassment related to race, details of which are set out at paragraphs 34 to 44 of the case management order, prepared by Employment Judge McAvoy Newns, following the last preliminary hearing on 14 September 2023.
2. The order sent out following that hearing notes at paragraph 2.1 that the purpose of today's hearing will be to:

Consider and determine the Claimant's application for permission to amend his claim, should he decide to make one in accordance with the orders I have made below.

3. Paragraph 3.3 states:

   The Claimant explained, for the first time during this hearing, the basis of his claim for race discrimination. Although some of the factual allegations he made today can be found in the claim form, nowhere in his claim does he relate those allegations to his race. If those allegations are to proceed to a hearing, a successful application for permission to amend his claim, to include those allegations of race discrimination, will be required.

4. Paragraphs 8 to 10 stated, under the hearing 'Application to Amend':

   8. During the course of this hearing, when clarifying his claim, it transpired that the Claimant wishes to pursue claims for direct race discrimination and racial harassment which were not particularised in his claim. To assist the parties, the allegations that the Claimant made are set out in the Case Summary section of this document, at paragraphs 34-44. These are in draft form as they are subject to the Claimant making a successful application to amend.

   9. If the Claimant wishes to amend his claim to include these allegations, he should submit a written application to the Tribunal, copied to the Respondent. In doing so the Claimant should consider the relevant Presidential Guidance, which can be accessed here:

   https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf

   10. If the Claimant does intend to pursue such an application, he should do so by 27 October 2023. I refer the Claimant to paragraph 13 below which specifies other points that the Claimant should address in his application. If not, it will be assumed that the Claimant no longer wishes to do so and the Tribunal will consider, at the next preliminary hearing, whether the race discrimination should be struck out.

5. No such application was made before today's hearing. The claimant told the tribunal that he didn't think he needed to make an application to amend. On being asked whether he wanted to proceed with the claims of race discrimination, and harassment related to race, he confirmed that he did, and that he wanted to apply to amend his claims to include those matters set out in the Case Management Order following the last preliminary hearing (paragraphs 34 to 44).

6. Despite the claimant's failure to comply with the orders set out above, I nevertheless considered it necessary and appropriate to consider the application, it having been made formally today. I understood Mr Small's objection to that application being considered, in light of the claimant's failure to comply with the relevant orders. Nevertheless, as I pointed out to him, a party can apply to amend their pleaded case at any time up to and including the final hearing. As I also pointed out to the parties however, one of the potentially relevant factors to consider in relation to an amendment application, is the timing and manner of the application, which the parties were asked about and which is considered below.

The legal framework on amendments

7. The leading case in relation to the amendment of claims is *Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650* which confirms that when considering whether or not to allow an amendment, regard should be had to all the circumstances of the case and in particular, the Tribunal should:

> *consider any injustice or hardship which may be caused to any of the parties ... if the proposed amendment were allowed, or as the case may be, refused.*

8. The EAT in *Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore [1996] IRLR 661, ICR 836,* held that, when faced with an application to amend, there needs to be a careful balancing exercise of all the relevant circumstances. Discretion is to be exercised in a way that is consistent with the requirements of "*relevance, reason, justice and fairness inherent in all judicial discretions*". Factors relevant to the balancing exercise would usually include consideration of the nature of the amendment, the applicability of time limits (especially where the new claim is wholly different from the claim originally pleaded) and the timing and manner of the application.

9. Mummery J re-iterated at 844B of *Selkent*:

> *Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.*

This point has recently been re-emphasised by Tayler J in *Vaughan v Modality Partnership (UKEAT/0147/20/BA).*

10. In relation to the nature of the amendment, distinctions may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often referred to as 're-labelling'); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

11. In *McFarlane v Commissioner of police of the Metropolis [2023] WLR(D) 380*, Deputy Judge Michael Ford KC held at [44] and [46], in relation to the nature of the amendment, that the focus should be on the substance of the new case sought to be advanced by the amendment, not on its legal form. In other words, tribunals should not ask whether a cause of action is 'new'; rather, the focus should be the substance of the new case, whether it relies on new facts and if so how substantial the further factual enquiry needs to be.

12. Support for that position was found by Deputy Judge Ford KC in the decisions of the EAT (UKEAT/0249/09/CEA) and the Court of Appeal in the case of *New Star Asset Management Holdings v Evershed*. Deputy Judge Ford KC noted at 48 and 49:

> *48. … In the EAT at §15, Underhill P (as he then was) was clear that it was "not a point of any significance" whether a section 103A claim was a new cause of action or not because the correct focus should be on whether the amendment is a "mere relabelling" or introduces "very substantial new areas of legal and factual inquiry" - echoing the approach based on substance not form in **Selkent**. Moreover, having decided to allow the appeal, with the agreement of the parties, Underhill P decided himself to allow the amendment, and he proceeded on the basis that the section 103A claim was out of time and so the time limits were relevant (though, as it turned out, not of sufficient weight to disallow the amendment): see §38(3). His approach to this question was endorsed by the Court of Appeal: see **New Star Asset Management Holdings Limited v Evershed** [2010] EWCA Civ 870, per Rimer LJ at §52.*
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> *49. The approach of the Court of Appeal in **Asset Management** also appears inconsistent with **Pruzhanskaya**. Before the Court of Appeal, counsel for the employer argued that the section 103A claim was a new cause of action and this was a factor which the judge was entitled to take into account: see §29. But the decision of Rimer LJ, with whom Sir Scott Baker and Sedley LJ agreed, was based on a comparison of the allegations in the amendment with the factual allegations in the original claim; he concluded the employment judge was wrong to conclude that the amendment would require "wholly different evidence": see §§50-51. Once again, Rimer LJ did not consider whether the judge was right or not to consider the allegation was a new cause of action: his focus was on the substance of the new allegations, not on the legal classification of the causes of action.*

13. The same point is made by Underhill LJ in *Abercrombie v Aga Rangemaster [2014] ICR 209* at 48:

> *… the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry 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. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted…..*

14. Time limits are potentially a more substantive issue in relation to a type (iii) amendment because they could amount to a jurisdictional bar. Whereas time limits are arguably just a factor to consider for amendments of type (i) or (ii). Indeed, in *Pereira v GFT Financial Services Ltd [2023] EAT 124* Deputy Judge Burns KC went so far as to suggest [at paragraph 30] that in the case of a re-labelling amendment, time limits '*would probably be irrelevant*'.

15. In *Galilee Commissioner of Police of the Metropolis [2018] ICR 634*, Hand J held (presumably, in those amendment cases where time limits are a potential jurisdictional bar) that time limits must be considered at the time that

the amendment application is decided, although the final question as to whether or not the claims were submitted in time can be deferred until the final hearing.

Decision on the application

16. From the case law above, it is noted that when considering an application to amend, the most important matter to consider is the balance of prejudice to the parties, if the application is allowed, compared to the prejudice to the parties, if the application is refused. Three factors are normally considered, the nature of the amendment, the question of time limits, and the timing and manner of the application. Whilst other factors may be relevant, the parties did not asked me to consider any other relevant factors, and none appeared to me to be relevant in the circumstances of this application.

Nature of amendment

17. As to the nature of the amendment, the claimant argues that he is simply 'changing the terminology'. He says the allegations are clear from the document attached to the claim form. I do not agree. It appears to me that the allegations set out at paragraphs 34 to 44 of the last Case Management Order (CMO 34 to 44), are much more than a mere 'relabelling' of existing facts.

18. If we take the allegation in relation to the request for holidays in January 2023 for example (CMO 35.1), the claimant does not allege that he was treated differently to anybody else, in relation to that allegation, let alone on the grounds of race. As to paragraph 35.2, the grounds of claim to not argue that the claimant was targeted and made a scapegoat and was threatened with dismissal if he didn't make everything right. As to paragraph 35.3, the failure to pay notice pay until the Acas early conciliation process started, although the claimant refers to the Acas early conciliation process in the grounds of claim, it is not alleged that he was treated less favourably in relation to that matter as a result of his race. As for the race-related harassment allegation, although reference is made to alleged telephone calls to the claimant's sister during her wedding in September 2022, the facts set out in the grounds of claim do not assert that this was related to race.

19. I take the view therefore that these are substantial amendments, providing important and substantial new factual details, in relation to allegations which are either not mentioned in the grounds of claim, or only mentioned in passing. Although the race discrimination box has been ticked in Box 8.1 of the claim form, no other specific allegations are made in the grounds of claim of less favourable treatment compared to others. Nor does the claimant assert in the grounds of claim, in relation to the single allegation of harassment dating back to September 2022, (the alleged telephone call to his sister during her wedding), that it is related to race.

Time limits

20. As to the question of time limits, the application to amend has been made today. This is despite the clear guidance given by the Judge at the last preliminary hearing on 14 September 2023. The last of the allegations of race discrimination relate to the alleged failure to pay him notice pay until the Acas Early Conciliation process had been commenced, the payment being made to him on or about 9 June 2023. Even if the claimant can argue that

there is a continuing course of conduct, the last day of such conduct would be, at the absolute latest, 9 June - meaning that the application to amend has been made some seven months after, exactly four months after the usual three month time limit has expired.

21. The claimant argued today that it was not until he received some documentation from the respondent just before the last hearing in September, that he had sufficient factual detail to be able to argue that he been subjected to race discrimination/race-related harassment. No details have been provided of that documentation, nor of how it provides evidence of discrimination. In any event however, even if that were the case, it is about seven months since that documentation was received.

Timing and manner of application

22. As to the timing and manner of the application, clear guidance was provided to the claimant in the case management order, following the 14 September 2023 hearing - see above. This clearly set out the need for the claimant to amend the claim, if he wanted to pursue the allegations set out at CMO 34 to 44; and how the claimant needed to go about that. The claimant says he misunderstood the order and what was said at the hearing.

23. I note in passing that this appears to contradict what the claimant said to Acas in an email dated 5 January 2024, which has been sent to the tribunal, in which he states:

> *What I understood from the preliminary hearing was that I need to pay a fee to pursue a race discrimination claim but all other claims were free for me to pursue. This is why no charge/ fee was attached to remaining claims.*
>
> *It was also made clear to my understanding that I had no requirement to make a further claim for modern slavery as it is already covered based on the details in my claim form.*

24. Notwithstanding that, and even accepting at face value the claimant's statement to me today that he misunderstood what was said at the last hearing and in the order which followed, that error is still hard to understand in the light of the clear wording of the order. I can detect no ambiguity in the words used by the Employment Judge McAvoy Newns in the order.

Decision

25. Bearing in mind all of the above, I have decided decision to refuse the application to amend. Were the application to be allowed today, the question of time limits would need to be decided at a later date after hearing evidence. The respondent will be put to the continuing time and expense of defending the claims of race discrimination/race-related harassment, in a situation where I consider it unlikely, in the circumstances of this case, as set out above, that the Employment Tribunal would consider it just and equitable to extend the usual three month time limit. In my judgment, the record from the last hearing on 14 September 2023 was clear, and at best, the claimant has failed both to properly consider the record of the hearing, and to comply with the orders made in relation to an amendment application.

26. Whilst the claimant has been given the right to make an application to amend today, for the reasons set out above, the fact that it is only being made today

is also a factor in my decision. The respondent was entitled to assume, no application to amend having been made by 27 October 2023, that the claimant had decided not to pursue his claims of race discrimination or harassment just as he had decided not to pursue any allegations of age discrimination, although that box was also ticked in section 8.1 of the claim form. There is also therefore potential prejudice to the respondent in defending claims that the respondent is only now aware the claimant still wants to pursue.

27. For these reasons, the application to amend is refused.

The remaining claims

28. As a result of the decision to refuse the claimant's amendment application, the only claims which are before the Employment Tribunal are claims for notice pay, unpaid wages, and holiday pay. (I note that the claimant did argue today that he should be allowed to pursue claims under the Modern Slavery Act, which was discussed at the last hearing. There is no record of any discussion of any such claims at the last hearing; and had there been any such discussion, I have no doubt that the Employment Judge would have informed the claimant, as I have today, that the tribunal has no jurisdiction to deal with any claims under the Modern Slavery Act.)

29. As for the claim for notice pay, the claimant accepts that he was only entitled to one week's notice. That is apparent from the claimant's contract of employment which has been sent to the tribunal and which I have considered. Based on the claimant's annual salary of £26,000 per annum, his weekly pay is £500; the daily rate is £100. A week's notice therefore amounts to £500.

30. As for the unpaid wages claim, this relates to the period 24-28 April, and 1 May 2023, the day that the claimant's employment was terminated, a total of £600.

31. As for the holiday pay claim, the claimant accepts that the holiday year ran from 1 September to 31 August the following year. He accepts he took 17 days holiday during the holiday year 2022/2023. By the date of termination of his employment, 243 days of that year had elapsed. 243/365 x 28 days equals 18.64 days. So the claimant is entitled to 1.64 days holiday pay, or £164.

32. The total due for notice pay, wages and holiday pay is therefore £1,264.

33. The claimant accepts that he received a payment of £1,600 from the respondent, on or about 9 June 2023. This payment was based on an error by the respondent, who worked out the claimant's holiday entitlement as being 28 days, i.e. the whole amount due for the holiday year 2022/2023. It therefore paid the claimant for 11 days (£1100), when only 1.64 days pay was due, plus 5 days notice pay (£500), a total of £1600. On that basis, no further payment is due to the claimant from the respondent in relation to the remaining claims. There is therefore nothing further for the tribunal to determine and no further hearing is necessary. The file will be closed.

Employment Judge A James

Dated 8 January 2024