



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant** **Respondent**  
Mr S Dance AND Royal Devon University Healthcare NHS Foundation Trust

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY ON 6 June 2024  
By VHS Video

EMPLOYMENT JUDGE N J Roper

### Representation

For the Claimant: In person  
For the Respondent: Mr S Wyeth of Counsel

## JUDGMENT ON APPLICATION TO AMEND

1. The claimant's application to amend the originating application is refused; and
2. For the avoidance of doubt the claimant's claims are all now dismissed.

### REASONS

1. In this case the claimant seeks leave to amend the claim which is currently before the Tribunal, and the respondent opposes that application. I have heard from the claimant, and I have also heard factual and legal submissions from counsel on behalf of the respondent.
2. The claim as it currently stands:
3. The general background and procedural history of the claim as it stands before the determination of this application is as follows.
4. The claimant presented these proceedings on 21 February 2023. He had commenced the Early Conciliation process with ACAS on 13 February 2023 (Day A), and the Early Conciliation Certificate was issued on 16 February 2023 (Day B). The claimant's claims were for unfair dismissal; discrimination; and for breach of contract in respect of his notice period. The claimant had insufficient continuity of service for the tribunal to have jurisdiction to hear the unfair dismissal claim and this claim was struck out by Employment Judge Livesey by judgment dated 24 May

2023. The claimant sought reconsideration of that judgment, but his application for reconsideration was refused by further judgment dated 17 July 2023.
5. There was then a case management preliminary hearing on 13 September 2023 and Employment Judge Matthews prepared an Order which was sent to the parties on 25 September 2023. The Judge recorded the background to this claim in paragraphs 20 to 29 of that Order. It is worthwhile setting them out and they are as follows:
  6. “[20] The claimant was employed by the respondent between 10 October 2021 on 16 January 2023 as a Volunteer Coordinator for the respondent’s Covid 19 vaccination programme in North Devon. [21] In this hearing, when asked by the Employment Judge, the claimant described herself as a gay man and asserted that he has mental health issues that amount to a disability. [22] The claimant was dismissed with pay in lieu of notice on 16 January 2023. The respondent says that the reason for the dismissal (in summary) was that serious allegations of sexual assault made against the claimant outside the workplace amounted to a substantial reason for dismissing him. [23] The respondent defends the discrimination and notice pay claims. [24] The Employment Judge discussed the issues with the parties. [25] As far as the Employment Judge can see, the claim is really about the fairness of the dismissal. That is not an issue that can be tried, as the claim of unfair dismissal has been struck out. [26] It seems that the claimant has been paid any notice pay due to him. [27] Having discussed the discrimination claims with the claimant, the Employment Judge was unable to identify any factual circumstance relied on by the claimant as founding any claim for discrimination by reference to the protected characteristic of disability or by reference to the protected characteristic of sexual orientation. [28] In the circumstances, the Employment Judge asked the claimant if he wished to withdraw his claim. The claimant did not. [29] It is reasonable for the claimant to have a period to reflect. The Employment Judge has dealt with this by setting down the hearing as above and allowing the claimant, in the meantime to articulate his claim in the form of further information. If, on reflection, the claimant decides not to pursue his claim, he should inform the Bristol office of the Employment Tribunals by email or otherwise in writing. The hearing will not then take place.” The Order also listed a preliminary hearing to determine whether the claimant’s claims should be struck out, or alternatively made subject to a Deposit Order under Rules 37 and/or 39.
  7. The claimant then took advice from Citizens Advice. By email dated 18 September 2023 the claimant made an application “to add further claims to my case: discrimination by association, discrimination by perception, injury to feelings, psychological injuries and anxiety, and defamation in the workplace.”
  8. By email dated 7 November 2023 the claimant then wrote to the tribunal to say: “I have made the painful decision to withdraw my claim of discrimination against Royal Devon Healthcare NHS Trust”. He then went on to explain what his claims consisted of and finished the email by stating: “having not had a response to my email of 18 September 2023, should the judge allow me to continue with these claims I would like the opportunity to do this.”
  9. The claimant subsequently confirmed that he had received his notice pay, and that this claim was not being pursued. By email to the parties dated 8 January 2024 Employment Judge Cadney confirmed the then current position, namely that the claimant’s discrimination claims had been withdrawn, that the notice pay claim was not being pursued, but that the claimant did wish to pursue his amendment application. That application was then listed to be determined at this hearing.

10. By email to the tribunal dated 3 June 2024 the claimant then gave further information of the proposed amended claims. There are four aspects to this, which are described as being: Discrimination by Association; Discrimination by Perception; Injury to feelings; and Psychological Damage. I explained to the claimant that the third and fourth aspects were potential remedies in the event that any discrimination claim was successful, and there is no need to amend the claim to include these as potential remedies and they cannot form part of any new amended head of claim. All that remains to be determined therefore is whether the claimant is permitted to amend the claim to include claims of Discrimination by Association and Discrimination by Perception. In this respect the claimant relies upon the act of dismissal as being the less favourable treatment.
11. The Discrimination by Association claim is described as follows. The claimant asserts that he was dismissed “for meeting someone who may have had a protected characteristic. The information shared by myself and the Police to the Trust suggested that my accuser had a support worker. However, at the time of sharing this information neither myself nor the Trust knew the reasons why he had a support worker. I presume the Trust made assumptions that he was disabled. The Trust went on to use this information against me when dismissing me.”
12. Secondly, the Discrimination by Perception is explained as follows: “I was treated less favourably by the Trust because the Trust made a perception of what was wrong with my accuser ... They went on to deem me a safeguarding risk based on a bail condition which had been removed before I informed them of it. So they incorrectly used information against me. The Trust used someone’s assumed disability to dismiss me and call me a safeguarding risk. I was not dismissed because of the allegation of rape. I was dismissed because they were thought to be vulnerable/disabled by the Trust ...”
13. The Respondent’s Opposition to the Application:
14. The respondent opposes the application to amend. In short it asserts that these further claims are misconceived and vexatious and have absolutely no prospect of success. The respondent dismissed the claimant because of the serious allegations of sexual assault against him, in circumstances where his role brought him into contact with members of the public including vulnerable people, and this created potential safeguarding issues. This included members of the public who were not vulnerable, but also members of the public who were vulnerable. This can include the elderly, and children, regardless of any protected characteristic, and including, but not limited to, those with the protected characteristic of disability. It is wholly fallacious to assert that the respondent dismissed the claimant because of an assumption that the claimant’s accuser was disabled, and that the act of dismissal was in any way an act of discrimination because of the claimant’s association with someone who is now said to be disabled. Similarly, it is wholly fallacious to assert that the respondent dismissed the claimant because it must have perceived that the claimant’s accuser was a disabled person. The respondent asserts that the claimant is trying to rerun his unfair dismissal claim (which has already been dismissed) by seeking to “shoehorn” his complaint about the act of dismissal into a potential discrimination claim which simply has no prospect of success.
15. I agree with the respondent’s submissions in this respect, and in my judgment the proposed amended claims have no prospect of success. This is simply because the reason for the claimant’s dismissal was because the respondent was concerned that he might be a safeguarding risk to people in the respondent’s care, irrespective of any of their protected characteristics. The respondent did not

- dismiss the claimant because he was associated with somebody might be disabled, or because they perceived that his accuser might have been disabled.
16. The applicable law:
  17. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.
  18. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.
  19. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:
    20. 1 - The nature of the proposed amendment - applications to amend range, 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 has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and
    21. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended. (Whether this is still “essential” is considered further below); and
    22. 3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. 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.
  23. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim).
  24. The Balance of Prejudice: per HHJ Tayler in Vaughan v Modality Partnership UKEAT/0147/20/BA(V): [21] “... Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice ... [26] a balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.”

25. The more detailed position with regard to the relevant elements is as follows, dealing with each of them in turn:
26. The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting 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 called “relabelling”); 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.
27. In my judgment the claimant’s application to amend is a relabelling of his existing claim in that it is an attempt to present a claim relating to his dismissal following the dismissal of his unfair dismissal claim, and the withdrawal of his earlier (largely unspecified) claim for discrimination.
28. The Merits of the Claim: It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal’s decision to refuse the application to amend was that it would have required further factual matters to be investigated “if this new and implausible case was to get off the ground”. However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are: the EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.
29. In Kumari v Greater Manchester Mental Health NHS Foundation Trust EAT [2022] 132 the EAT held that, when considering whether it was just and equitable to extend the time limit for presenting discrimination complaints, and whether to grant an application to add a further out of time discrimination claim by way of amendment, an employment tribunal was entitled to weigh in the balance its assessment that the merits of the proposed complaints were weak. The potential merits of a complaint are not necessarily an irrelevant consideration, even if, as in this case, the tribunal is not in a position to say that the merits are so weak as to have no reasonable prospect of success. The tribunal’s assessment of the merits was properly reached by reference to identifiable factors that were apparent at the preliminary hearing, and it took proper account of the fact that it did not have all the evidence before it.
30. This Judgment:
31. Applying these legal principles above to the current application, I find as follows.
32. The claimant’s unfair dismissal claim has been dismissed, and he has withdrawn the discrimination claims under which he originally presented these proceedings. His application to amend amounts to an attempt to relabel the discrimination claims with two new heads of claim relating to the act of dismissal, described as Discrimination by Association and Discrimination by Perception. However, for the reasons set out above, in my judgment these claims are misconceived and have no merit.
33. I have to balance the potential prejudice to be suffered by both parties. To deny the claimant the right to amend his claim will effectively deny him the right to argue about the fairness or otherwise of his dismissal, when that claim has already been struck out because of his lack of qualifying service for that claim. For the reasons explained above his complaints cannot be sensibly pursued as claims of discrimination. On the other hand, to allow the claimant to amend his claim and for these claims to proceed, would involve the respondent, which is a public body with

limited funds, in further time and expense in having to meet claims which have no merit. In my judgment the balance of prejudice lies in favour of the respondent, and I refuse the claimant's application to amend his claim as sought.  
34. In conclusion therefore all of the claimant claims now stand dismissed.

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Employment Judge N J Roper  
Dated 6 June 2024

Judgment sent to Parties on  
26 June 2024 By Mr J McCormick

For the Tribunal Office