



# EMPLOYMENT TRIBUNALS

**Claimant:** A Ebanks

**Respondent:** Sainsbury's Supermarkets Ltd

**Heard at:** London South (by CVP)

**On:** 22 December 2023

**Before:** Employment Judge Cox

## Appearances

For the claimant: in person

For the respondent: Mr M Gordon , Counsel

## REASONS

### Pursuant to Rule 62 of the Employment Tribunal Rules 2013

1. The Tribunal considered the claimant's application dated 2 October 2023 to amend her ET1/Particulars of claim. The application was granted in part as set out in the separate judgment of the same date.
2. The reasons for granting the application are set out below and were expressed orally at the hearing.

### Background

3. The Claimant commenced employment with the Respondent on 24 September 2021 as an online assistant. She worked at the respondent's store in Merton High Street. Her principal duties involved gathering goods for customer orders and handing them over to the online hub team who would then pass to delivery drivers or to staff handling online click and collect orders.
4. She complains about the conduct of her manager Zsofia Rozsa on 15 May 2022 as being the last straw in a series of actions by her which she claims left her feeling uncomfortable, harassed, racially discriminated against. She complains that Ms Rozsa had said that she had brought two strong men with her to act as security because she did not know the claimant and was scared of her. The claimant says that that conduct was inappropriate and following her shift on 15 May 2022, the Claimant commenced a period of unauthorised absence from work.
5. The respondent attempted to contact the claimant. Those contacts included a letter on 12

June inviting the claimant to attend a meeting on 19 June to discuss her absence. The claimant was invited to a disciplinary meeting on 27 June which she did not attend and the claimant was thereafter summarily dismissed on 4 July 2022.

6. Conciliation began on 7 June 2022 and ended on 7 July 2022. The ET1 was presented on 4 August 2022.
7. The Claimant makes the following claims in para 8.1:
  - a. Unfair dismissal
  - b. Discrimination on the grounds of race
  - c. Notice pay, holiday pay and other payments
8. She makes other claims including, so far as relevant:
  - a. Victimisation – disciplinary action was taken against me following filing a complaint about discrimination with ACAS
9. The Respondent disputes C's claims. Its ET3 was presented on 22 September 2022 and sought further particulars of the claimant's claims.
10. A Case Management PH was listed for 20 September 2023 before EJ Truscott KC. In advance of that CMPH the claimant sent an agenda on 30 August 2023 with a proposed list of issues. Amongst the matters set out in the agenda were a request to amend the claim:
  - a. To specify particulars regarding race, dates and relevant comparators;
  - b. To specify relevant details regarding victimization and harassment and post termination victimization and harassment;
  - c. To withdraw the claim for unfair dismissal.
11. In that document the claimant clarified her claims as being:-
  - a. Direct Race Discrimination s 13 EQA
  - b. Harassment s 26 EQA and
  - c. Victimisation s 27 EQA
12. EJ Truscott KC directed that a List of Issues be produced by the Respondent by 15 Nov 2023 to be used as a basis for discussion or agreement as to issues, subject to amendment in light of this hearing. Amongst other directions the question of amendment and any further Case Management directions were adjourned to the hearing before me.
13. In accordance with EJ Truscott KC's directions the Claimant produced a revised amendment application and a revised list of issues (to be agreed) subject to amendment in light of her application to amend. The Respondent provided a skeleton argument setting out the reasons why it opposed C's application to amend.
14. Before me the Claimant withdrew her claim for Unfair Dismissal because she lacked the qualifying period of continuous employment. This was not opposed by the Respondent. The Respondent also did not oppose amendments to the Claimant's claim form to the extent of adding particulars and dates.
15. However, the Respondent objected to the following remaining amendments, specifically at the following points of the tracked changes:
  - a. AE3: Claimant seeks to add a claim of harassment relating to alleged behaviour on 15 March 2022;
  - b. AE10: Claimant seeks to add a claim of victimisation relating to correspondence with HR;
  - c. AE11: The addition of harassment which is understood to refer to AE3;

- d. AE14: Claimant seeks to add claims of harassment and victimisation alleged to have occurred post termination.

## **Submissions - summary**

16. **Respondent.** The Respondent's objections to the above amendments were made in writing in their skeleton and supplemented by Mr Gordon orally at the hearing.
17. Nature of the amendment.
18. Mr Gordon submitted that the amendments would constitute an amendment adding discrete and new causes of action. Alternatively, it is adding completely new facts and allegations. It is not a relabelling exercise:-
  - a. AE 3 /AE11 a new factual allegation with a new head of claim.
  - b. AE 10 The ET1 included a reference to 'Victimisation – disciplinary action was taken against me following filing a complaint about discrimination with ACAS'. That is wholly different to what is included at AE10.
  - c. AE14 raises new facts and a new allegation of victimisation that the Claimant was seemingly aware of since 6 March 2023
19. Real and practical consequences of allowing the amendments
20. Mr Gordon 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.
21. Timing and manner of the application.
22. The Claimant asserted in her application the following reasons for the timing and manner of application:
  - a. New information has come to my attention:
  - b. I had issues gaining legal advice
  - c. Legal advice gained since drafting the original claim
  - d. She now understands there is a requirement to provide further clarification.
23. In response Mr Gordon submitted that
  - a. The Claimant C has not made clear what steps were taken to obtain legal advice, or attempt to do so, and when.
  - b. In any event, C was always aware of the factual information that forms the amendments, save for the point arising in March 2023.
  - c. It is clear that the Claimant has at all times been aware of her legal rights as she has set out a detailed claim in relation to other matters. Any lack of legal advice, the timing of which C needs to explain to the Tribunal, is not a good reason for the extensive delay in bringing such an amendment;
  - d. Re AE 14 : The new information the Claimant refers to is inferred to be the alleged harassment and victimisation relating to overpayment and letters she received but she provided no explanation as to why she waited until 31 August 2023 to raise the amendment.
24. Time Limits

25. Mr Gordon submitted that The Claimant is well out of time for bringing any of the claims added by the amendments.
26. He reminded the Tribunal that time limits are an important and potentially decisive factor in determining applications to amend and 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.
27. Amendments to pleadings in the ET which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend'. See *Galilee v Commissioners of Police of the Metropolis* [2018] ICR 634, EAT HHJ Hand QC at para 109(a).
28. The time limit is three months after the act complained of – or the last act in a series.
29. In connection with the discretion to extend time he reminded me that this is a broader discretion than the reasonably practicable test. However, the burden still rests on the Claimant to persuade the Tribunal to exercise its discretion. This was made clear by the Court of Appeal in *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, CA, that when employment tribunals consider exercising the discretion:
30. 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'
31. 16. As considered by the EAT in *British Coal Corporation v Keeble* and *ors* 1997 IRLR 336, EAT, it can assist to consider the factors listed in suggested that in section 33(3) of the Limitation Act 1980. In particular:
  32. a. The length of, and reasons for, the delay;
  33. b. The extent to which the cogency of the evidence is likely to be affected by the delay;
  34. c. The extent to which the party sued has cooperated with any requests for information;
  35. d. The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;
  36. e. The steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
37. 17. This is however not an exhaustive or mandatory list to be followed as long as the significant factors of each case are considered; *Southwark London Borough Council v Afolabi* 2003 ICR 800, CA.
38. 18. The strength of a claim may be a relevant factor also, but if considered the parties should be invited to make submissions; *Lupetti v Wrens Old House Ltd* 1984 ICR 348, EAT.
39. 13. Mr Gordon referred to the Presidential Guidance for General Case Management – in particular paragraph 5.3 which states that for an application to
40. amend a claim, the applicant will need to show why the application was not [Text Wrapping Break]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 [Text Wrapping Break]submitted that the claimant must have had all the information he needed to [Text Wrapping Break]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.

41. 14. **Balance of prejudice**

42. MR Gordon submitted that the balance of prejudice and hardship was clearly in favour of the respondent and that the amendments should be refused.

43. C will not suffer significant hardship if the application is dismissed C can continue with the other existing claims.

44. By contrast because C seeks to introduce a new causes of action, R requires to consider new legal issues well out of time. R will have to incur further costs of amending its Grounds of Response and after the passage of time may require the Respondent to seek out further witnesses. The passage of time will have had an impact on the cogency of the evidence to be considered.

45. 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.

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

47. written reasons reflect the oral reasons claim is amended as set out in the attached annex for the reasons set out in the separate judgment of the same date.

48. The Respondent has permission to make consequential amendments to its Grounds of Resistance. The Amended Grounds of Resistance are to be sent to Claimant and copied to the Tribunal and by 4pm on 26 January 2024.

49. In relation to the inserted paragraph AE3 (Commencing "On 15 March 2022...." By no later than 12 January 2024 the claimant must provide the following further information to the Claimant:-

- a. The names of each white colleague referred to in the paragraph;
- b. Whether the claimant is relying on those named white colleagues as actual comparators; and if not
- c. Confirmation that she is relying upon a hypothetical comparator, and the characteristics of that comparator.

If the claimant fails to provide the information above by that date she will not be permitted to rely upon an actual white comparator unless the Tribunal gives permission.

## **Issues**

50. The Respondent must send an updated list of Issues to the claimant. The claimant and the Respondent are to agree the updated list of issues by 4pm on 26 January 2024.

## **Mediation**

51. The parties should write to the Tribunal as soon as practicable giving their dates to avoid between 26 January 2024 and 24 April 2024.
52. The Tribunal will write to the parties in connection with arrangements for the holding of a judicial mediation.

## **Case Management**

53. The case management directions set out in the suggested case management directions as varied by the Order of EJ Truscott KC on 20 September 2023 are adopted.

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Employment Judge N Cox

Date: 22 December 2023