EMPLOYMENT TRIBUNALS

Claimant: **Mr M Osemene**

Respondent: **Mitie Limited**

Heard at: **London South Employment Tribunal**

On: **11 September 2024**

Before: **Employment Judge Dyal**

Representation:
Claimant: **Ms Matharu, counsel**
Respondent: **Mr Harding, counsel**

WRITTEN REASONS FOR DECISION IN RESPECT OF CLAIMANT'S APPLICATION TO AMEND

Introduction

1. At the preliminary hearing of 11 September 2024 I allowed the Claimant's application to amend in part as set out in my Record of Preliminary Hearing. I gave detailed reasons orally. The Claimant was in attendance and so was his solicitor and counsel. I indicated that if they wanted the reasons in writing they could ask for them. They did so and I now provide them.

Background

2. The Claimant drafted the claim form himself and it was presented on 28 January 2024, following early conciliation between 29 December 2023 and 25 January 2024. The boxes for unfair dismissal, arrears of pay, other payments (but not holiday pay and notice) are checked. Box 8.1 also identifies: "victimisation, bullying, CCTV Stalking, Harassment, Physical Assault on work site, denial of Break relieve, conspiracy to frame me up, gang up". Details of the complaints were given in an attachment. It is drafted with a narrative style and in parts it is hard to follow what complaints are being made. However the emphasis is upon:

    a. The Claimant being paid less than a colleague by around £2.90 per hour;
    b. The Respondent seeking to cover this up when he questioned it;

c. The Respondent contriving a disciplinary situation by getting someone to allege the Claimant had been asleep on the job;
d. Being assaulted in the work place on the last day of work;
e. Being dismissed.

3. On 14 March 2024, the Claimant emailed the tribunal and applied to amend the claim. A covering letter stated that he had completed the claim form from a mobile device and accidentally overlooked ticking the race discrimination box. The proposed amendment was simply to tick the box for race discrimination in section 8.1 and to state *"for the avoidance of doubt, the facts stated in this box relates to the discrimination (ticket above) on the basis of race".* This application was not copied to the Respondent and the file shows that the tribunal did not do anything with it beyond putting it on file.

4. On 1 May 2024, the Respondent made an application for the Claimant to provide additional information.

5. The Claimant's solicitors came on record on 9 May 2024.

6. On 29 May 2024, the tribunal sent the parties a letter (as it happens from me) stating:

> *The claim form is difficult to follow in the sense that is hard to identify what the complaints are and under what legal heading each complaint falls. The Claimant is now legally represented.*
>
> > *Please can he provide proper particulars of his claim within 3 weeks of this letter. They should:*
> >
> > *• Be based on the facts pleaded in the claim form;*
> >
> > *• Make clear what is said to have happened, who is said to have done it, when, and what type of legal complaint is made in each case;*

7. Amended Particulars of Claim (APoC) dated 18 June 2024 were then served. They are lengthy and go beyond the facts pleaded in the claim form.

8. There was then a Preliminary Hearing before EJ Braganza KC, on 27 June 2024. Her record of the hearing states that Ms Matharu's position was that she had recently been instructed and that the plan was to narrow down the claims relied on and not to rely on the APoC of 18 June 2024. It was agreed that time would be allowed for a new draft of amended APoC, that were narrower than the old, to be produced and the application to amend deferred to today.

9. Further, APoC were then served dated 26 July 2024. The APoC of 26 July comprise an 18 page, sprawling document that (oddly) ranges of a variety of issues in addition to attempting to state the case. The statement of the case is hard to follow at times, including because it is often not possible to tell whether a

particular point is a complaint or background and because when complaint is made it is often made without adequate detail to be properly understood, e.g. it is stated in very generalised way. It is also fair to observe that far from narrowing the claim as the claimant indicated this document would at the PH of 27 June 2024, it expanded it. Worse, in many ways it confused it.

10. Curiously, at this hearing, when asked to clarify which APoC the Claimant sought permission for counsel was initially unaware there were two. I gave her time to take instructions and consider the position. On returning to the hearing, counsel's ultimate answer was 'both'. This confused the position yet further because the two APoCs overlap in many ways, but where they do so, they describe and characterise the events/complaints a bit differently, and also have other differences where they do not overlap.

11. During the submissions I ventured a preliminary view of what the real core of the Claimant's case was based on reading the various iterations of his claim:

    a. That he paid less salary than Mr Reginald Robins (a white man) and that this was because of race (from 2016 onwards);
    b. That he was victimised for raising a concern about this in that the Respondent manufactured his dismissal (by arranging for someone to falsely allege he had fallen asleep) and dismissing him for it;
    c. That he was assaulted on his last day at the workplace;
    d. That he was dismissed because of his race and for raising those concerns about his pay.

12. Ms Matharu indicated that having spoken to the Claimant about his claim my assessment was correct, save that the issue of assault had fallen away. The core complaints are therefore those identified above save for (c) the alleged assault.

Law

13. In *Chandok v Tirkey [2015] IRLR 195,* Langstaff P said:

> *The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so … I readily accept that tribunals should provide straightforward, accessible, and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication … However, all that said the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it … In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suite the moment from their perspective … That is why there is a system of claim and response, and*

why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

14. In situations of the kind that have arisen in this case it is necessary start by determining what complaints a claim form contains, as precursor to the exercise of determining whether permission to amend is required and if so whether to give it.

15. In *Ali v Office of National Statistics* [2005] IRLR 201, Waller LJ said this:

> *In my view the question whether an originating application contains a claim has to be judged by reference to the whole document. That means that although box 1 may contain a very general description of the complaint and a bare reference in the particulars to an event (as in Dodd), particularisation may make it clear that a particular claim for example for indirect discrimination is not being pursued. That may at first sight seem to favour the less particularised claim as in Dodd , but such a general claim cries out for particulars and those are particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states. I would for my part think that in so far as Quacoopome suggests to the contrary it should not be followed. Therefore I would hold that paragraph 25A seeks to bring into the proceedings a new claim.*

16. The tribunal has a discretion to allow applications to amend. In *Selkent Bus Co Ltd v Moore [1996] ICR 836,* Mummery J, gave guidance as to the main factors that need to be considered when considering an application to amend. This guidance, which has itself been explained in subsequent case-law identifies the following key-factors:

    (a) Nature of the proposed amendment;
    (b) Timing and manner of the application to amend;
    (c) Time limits and whether time should be extended pursuant to the applicable statutory test;
    (d) The balance of hardship.

17. In *Abercrombie and others v Aga Rangemaster Ltd [2014] ICR 209* Underhill LJ, with whom the rest of the Court agreed, said:

> *…It is perhaps worth emphasising that head (5) of Mummery J's guidance in Selkent's case was not intended as prescribing some kind of a tick-box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4)…*

"…the approach of both the Employment Appeal Tribunal 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 inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and the old, the less likely it is that it will be permitted. It is thus well recognized 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."

[…]

"Mummery LJ says in his guidance in Selkent Bus Co Ltd v Moore [1996] ICR 836 that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a relabeling case – justice does not require the same approach."

18. In *Vaughan v Modality Partnership* [2021] IRLR 97, HHJ Tayler said this:

14. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the 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. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis 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. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. 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. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

19. In *Galilee v Commissioner of the Polce of the Metropolis* [2018] ICR 634: HHJ Hand held that amendments to pleadings in the employment tribunal which introduce new claims or causes of action take effect when the application is allowed. He rejected the 'relation back' doctrine. Further, he held that, while it was necessary to know whether a new claim is out of time in order properly to exercise the discretion as to whether to permit such an amendment, it is not always possible to determine the point prior to or at the same time as the application to amend. That may be because an evidential investigation is necessary, particularly in discrimination cases. Further he held that that, to proceed with such a claim when the issue of limitation turns on whether there is a continuing act of discrimination, the claimant has to establish a prima facie case of a continuing act.

Discussion and conclusion

Nature of proposed amendment

20. In my view the ET1 as originally drafted does not included any of the following heads of complaint:

    a. Race discrimination: there is no averment express or implied that the Claimant was treated as he was because or partly because of race;
    b. Victimisation within the meaning of s.27 Equality Act 2010: there is no averment that the matters complained of or any of them happened because the Claimant had done a protected act. The word victimised is indeed used and it is clear that the Claimant is saying he was mistreated because he raised complaints. What is missing is any averment, express or implied, that the complaint was a protected act.
    c. PID detriment/dismissal: there is no averment that the Claimant made a protected disclosure. There is a reference to raising concerns about pay and grievances, but they fall far short of averring, even for a lay person, making a protected disclosure.
    d. Harassment within the meaning of s.26 Equality Act 2010. The word harassment is indeed used but missing is any suggestion it was related to a protected characteristic;
    e. Holiday pay: there is a box for this and it is not checked nor is holiday pay otherwise referred to;
    f. Site bonus: the pay complaint is about hourly rate not the annual site bonus;
    g. Equal pay: there is no equality of terms complaint, i.e., a complaint of unequal pay for reasons relating to sex;
    h. Wrongful dismissal: no complaint about this is raised and the box for notice pay is not checked.

21. The proposed amended PoCs raise complaints under these headings and they therefore seek to raise new causes of action. In some cases they are closely related to what is already pleaded but in others they are not.

Balance of prejudice

22. If I allowed the application to amend in full, or almost in full, the respondent and the tribunal would be faced with an enormous, sprawling and somewhat incoherent piece of litigation. The proposed APoCs are not even set out in a single place but instead split between two documents in a confused and confusing way.

23. Even if permission were only given in relation to one or other APoC much the same prejudice would arise: the tribunal and respondent would be left with a still sprawling and still confused and confusing piece of litigation. The APoCs are each in places hard to follow and the reality is that a huge amount of further case management would be needed just to try and make sense of the complaints being raised and to identify them all with enough specificity for them to be understood. I think this would be wholly disproportionate because in my view the additional claims add little of any real value – financial or otherwise - to the Claimant's core complaints as identified above.

24. Further, if the application were allowed in full or almost in full, once the exercise of making sense of the pleadings was completed, the litigation would undoubtedly have swollen in size from a small to medium sized claim to a big one. The time estimate for the final hearing in my view would grow from a few days to a couple of weeks or so.

25. Looking at the matter from the Claimant's perspective, my view is that if he is held to the existing claim plus the core complaints that would occasion him limited prejudice. In fact, it may even actually be in his interests given the enormous benefits of litigating in a streamlined way.

26. If I did not allow the application at all, not even in relation to the core complaints, I think the Claimant would be significantly prejudiced. The core complaints I have identified are just that: they are the core of what he is really complaining about. Further, I think some amendment to the claim form is needed in order for the essential factual narrative that is given in the claim form as originally presented to be given expression in justiciable complaints. For example, the claim form says a great deal about the pay differential between the Claimant and Mr Robins, but without identifying any justiciable claim about the pay differential itself. On the other hand if this is put as race discrimination those pleaded facts are given expression in a justiciable complaint.

27. I do acknowledge that if I allow an application to amend in whole or in part there will be some prejudice to the Respondent. If I allowed the application in full the prejudice would be severe for the reasons I have already identified and additionally the difficulties that arise in dealing with historical complaints. I do also accept that even if the application were allowed only to the extent of the core complaints there would be some prejudice to the Respondent. Most significantly, if a complaint about

a race based pay disparity with Mr Robins is added and goes back to 2016 as the Claimant requests, there may be challenges in defending that not only because of the passage of time but also because the Claimant's employment has been the subject of TUPE transferred since 2016. That said, that prejudice may be mitigated to some extent at least, by the fact that the Claimant has, I am told without demur from the Respondent, raised the pay difference internally for some years. Indeed it was the subject of an internal grievance process.

28. On balance, in my view the balance of prejudice favours allowing amendment but only to include the core complaints.

29. Finally, dealing with the core complaint about being victimised for raising concerns about pay, I limit this to a claim under s.27 Equality Act 2010. I do not see any material additional value to the Claimant of me allowing an amendment for him to complain of the same matters by reference to s.47B/103A Employment Rights Act 1996. Such a complaint would bring the prejudice of adding a lot of additional complexity (whether a complaint amounts to a protected disclosure, particularly where it is about something like the employee's own pay, raises a lot of complexity) but without any significant benefit beyond what might be achieved with a s.27 Equality Act 2010 and ordinary unfair dismissal claim.

Timing and manner of the application

30. I have described this above. In some respects this is a factor that favours the Claimant in that he sought to add race discrimination in March 2024 at early stage. In others it favours the respondent in that the way in which the application has been made, relying on two different APoCs as described is chaotic and confusing.

31. Overall, I do not think this is a strong factor either way.

Time limits

32. The complaints are now out of time. My conclusions about this in the context of the application to amend are:

    a. In relation to the core complaints it is just and equitable to extend time, with one exception – the complaint about pay differential that goes back to 2016. The decisive factor is the balance of prejudice which outweighs all other conceivable factors here.
    b. In relation to the core complaint of pay differential going back to 2016, I am satisfied that there is a *prima facie* case of a continuing act. The Claimant appears to be complaining of a situation in which the pay differential came to light and that it was decided several times it should continue despite his protestations on several occasions. This is an instance in which limitation should be deferred to the final hearing because evidential investigation is required to actually determine whether there was a continuing act or not. That in turn will enable the tribunal to know how far out of time this complaint is, and thus, together with all other relevant factors, whether it is just and equitable to extend time.
    c. In relation to all other complaints there is no basis to extend time. It is not

just and equitable to extend time. The decisive factor is the balance of prejudice which outweighs all other conceivable factors here, even noting that the Claimant was a litigant in person when he presented the claim and sought legal advice fairly shortly thereafter. For the complaints to which the 'not reasonably practicable test' applies no case has been advance that that test has been met nor can I see any basis for one.

33. As noted in my summary of the law, I do appreciate that in the right case, an application to amend can be allowed even if the statutory test for extending time is not met.

Conclusion

34. Standing back and considering matters in the round, I allow the application to amend but only to the extent of the core claims. The application is otherwise rejected. The decisive factor which outweighs all others is the balance of prejudice. The core claims are formally set out in the list of issues that forms part of my Record of the Preliminary Hearing.

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Employment Judge Dyal
Date: 19 September 2024

Sent to the parties on
Date: 23 September 2024