



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000403/2024

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Held in Edinburgh on 18 October 2024

Employment Judge R King

10 Mr Daniel Ukaenwe

Claimant
In Person

15 Sodexo Limited

Respondent
Represented by:
Mr D James -
Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that -

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- The claimant's race discrimination claim is permitted to proceed although presented late, on the ground that it is just and equitable to allow that.
 - The claimant's amendment application dated 2 September 2024 is allowed in relation to alleged bullying and intimidation but refused in all other respects.
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- The respondent has 21 days to respond to the claimant's amendment.
 - A further preliminary hearing for case management shall now be fixed on a date to be confirmed

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REASONS

The relevant procedural history

1. The claimant initially presented his claim on 4 April 2024, but that was rejected because of an incorrect Acas Early Conciliation Certificate number. A

corrected claim form was accepted upon reconsideration and the claim was treated as having been presented on 27 April 2024.

2. The claimant initially alleged unfair dismissal and discrimination on grounds of race. The claimant's unfair dismissal has now been dismissed by Order dated 25 September 2024.
3. The claim as originally presented alleged discrimination on grounds of race only in relation to the claimant's dismissal.
4. It was only at the case management preliminary hearing on 3 September 2024 that the claimant sought permission to amend his claim by adding allegations of intimidation and bullying arising from an alleged incident in August 2023 and of having received a lack of training and development – specifically about having been left out of a PAT training course on 24 May 2023 and a ladder training course on 28 June 2023.
5. At this case management preliminary hearing a further preliminary hearing was fixed in order to determine various matters, the following questions still being relevant to today's preliminary hearing:
 - a. whether the claimant's discrimination claim had been brought within the time limit specified by section 123 of the Equality Act 2010.
 - b. whether the claimant should have permission to amend this claim to bring additional allegations of direct race discrimination contrary to section 13 of the Equality Act, in respect of bullying and intimidation and denial of training and development opportunities.
6. At the 3 September 2024 preliminary hearing Employment Judge Whitcombe also ordered that the claimant provide by 17 September 2024 -

“the date, approximate date or period of each allegation of intimidation and bullying made against Mr McNamara, stating precisely what happened and the identities of any comparators relied on”.

7. The claimant did not comply with that order. However, in correspondence to the Tribunal dated 2 October 2024, the claimant then alleged that -

“my wages weren’t the same with colleagues of a different race, which I spoke mentioned and discussed with the head of facility Mr Ian Williams”.

- 5 He had previously sent an e-mail to the Tribunal on 6 September 2024 in which he provided a copy of an e-mail dated 30 October 2022 that now appears to be relevant to that allegation but had been sent without explanation.

8. On 3 October 2024 the Tribunal wrote to the parties advising that –

- 10 ... *the claimant was ordered to set out the details of any allegations of harassment on the ground of race he wished to include by way of amendment to his claim form.*

- The hearing on 18 October is to consider, amongst other matters, the claimant’s opposed application to amend his claim in this and other respects.*
- 15 *In order to determine whether the claimant’s application to amend his claim should be accepted, both the Respondent and the Tribunal require to know the exact detail of the proposed amendment.*

- If the claimant has not set out in writing the exact detail of the proposed amendment to his claim to include a claim of harassment, by setting out the*
- 20 *dates of any allegations and details of the exact conduct complained of by 4 p.m. on 10 October, then the Tribunal will proceed on the basis that he no longer wishes to pursue that application and the hearing on 18 October will not consider any further such application.*

9. By letter dated 10 October 2024, the claimant provided further details in
- 25 relation to the alleged bullying incident originally raised on 3 September, as follows –

“An incident occurred when job card came through to unblock female staff toilet in one of the wings. Upon completing the repair excrement while on the floor of the restroom, I advised one of the custodian officer to have the

5 restroom out of service until it's bio cleaned by trained personnel but Derek Carmichael bullied me to cleaning toilets. I mentioned to him for health and safety reasons it's best for trained personnel to clean it but he insisted and I told him I wasn't biohazard trained. This is also documented. I was bullied and discriminated against in doing this as when my caucasian colleague in my department have such jobs things are different to were biohazard personnel attend. Mr Derek Carmichael was acting as the key man as the head of facilities and technical manager had issues with management and left.

10 Secondly my wages weren't the same with my colleagues doing same job which I discussed with head of facilities at the time and brought it to the attention of human resources to rectify but it weren't acted upon.

I also reported to management (new head of facilities) that I was being bullied by Derek Carmichael but nothing was done about it other of my colleague Mr Andy McPhail witnessed this happening.”

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10. On 11 October 2024, the Tribunal wrote to the claimant in the following terms:

“Employment Judge Jones has directed the Tribunal to write to parties indicating that the issue of whether the claimant has particularised his amendment application sufficiently to allow the Tribunal to consider whether it should be allowed, will be discussed at preliminary hearing on 18 October.

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It is noted however that the claimant has failed to provide any dates in relation to the issues raised or specification of comparators or in relation to the question of pay, the difference in pay or why it is alleged that related to race.”

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The preliminary hearing

11. At the hearing the claimant gave evidence in respect of the issues in relation to the determination of the time bar issue. The respondent produced a bundle of papers for the purposes of the preliminary hearing and the claimant referred to documents he produced (without objection by the respondent) during his evidence and submissions.

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12. The claimant's documents included (1) an e-mail he had sent to the respondent on 30 October 2022 alleging he was being paid less than his colleagues on site doing the same job and (2) his dismissal letter dated 13 December 2023, which (it was accepted by Mr James) showed that the alleged incident that had given rise to the claimant's allegation of bullying had also been, at allegation 6, one of the reasons for his dismissal.

Findings in fact in relation to time bar

13. The respondent employed the claimant between 18 October 2022 and 8 December 2023. The claimant began Acas early conciliation on 3 April 2024, concluded on 8 April 2024.

14. Following his dismissal on 8 December 2023 the claimant initially appealed against his dismissal and also made a subject access request. He could not accept the respondent saying he was unqualified for the job given his experience, so he asked them to produce any evidence of prior warnings about his performance.

15. The claimant felt shocked at his dismissal and that he was "*put through a ringer*" by the respondent because of the time it took them to deal with his subject access request. He told the respondent that he believed the appeal hearing should not take place until he had received that information.

16. Although the claimant remained in correspondence with the respondent about his subject access request until 6 March 2024, he had by 12 February 2024 commenced employment with a new employer, by which time he had also decided that he would not attend an appeal hearing.

17. He decided sometime in March 2024 that he would pursue a claim at the tribunal, having consulted the Gov.UK website and ascertained that he had a right to do so.

18. When he first contacted Acas on 3 April 2024 the claimant was aware of his right to bring a claim to the Tribunal, but he was unaware of the relevant time limit until he found out about this during the case management preliminary hearing on 3 September 2024.

19. The claimant did not take any legal advice at all following his dismissal, and he has taken no legal advice since then.

Claimant's submissions in relation to amendment

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20. The claimant submitted that at the time when he presented his ET1 he believed that he had been discriminated on grounds of race in relation to his dismissal, pay and training and that he had also been bullied because of his race. He also believed that his general assertion of discrimination in the ET1 by ticking the relevant box was sufficient to cover all the elements of his claim and he could provide the details of the allegations at a later stage in the procedure. The requirement to do so had *"escaped him at the time"*. He accepted he had not taken any advice about whether his belief reflected what was actually required to be set out in his ET1.

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21. In relation to the alleged bullying, he now confirmed that the incident had taken place in September 2023 and that he had raised his concern with management at the time when it had happened.

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Respondent's submissions

22. On behalf of the respondent, Mr James submitted that the original claim, which alleged that only the dismissal was discriminatory, should be dismissed as being out of time. and that the amendment application should be refused. If the Tribunal accepted the respondent's argument in relation to time bar, that was effectively the end of the matter because there was no claim to amend.

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23. So far as the delay in presenting the claim was concerned the claimant had relied on ignorance of the time limit and also the existence of the ongoing internal procedure. However, it was clear that the claimant had been able to apply for jobs throughout January and February and indeed had been interviewed for and started a new job in February 2024.

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24. He had accepted he had been aware of the general concept of having employment rights and of the right to bring a Tribunal claim to enforce those

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rights, even if he had been unaware of time limits. He had felt shaken and aggrieved by his dismissal. He had become aware in March 2023 of his ability to bring a claim when he had searched on Gov.UK. In those circumstances he could and should have made his claim in time and he should take the consequence of having failed to do so.

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25. If the claimant had delayed because he was awaiting the outcome of a subject access report, that was not a basis for extending time. The claimant knew he had been dismissed and he did not discover that fact through a subject access request. He was not lacking any material knowledge. In the circumstances, it was not appropriate to extend time simply to allow him to dig for further evidence on events of which he would have already been aware.

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26. In any event, if he was under any misapprehension as to applicable time limits, that misapprehension was not reasonable. There was no suggestion that he was limited in his ability to find information to bring his claim. He started a new job on 12 February 2024, and he was therefore presumably able to look for and apply for jobs and attend interviews prior to this date. He had access to the internet, and he could have carried out basic research. He ought to have done so. If he had done so, he would have been fully apprised of the applicable time limits.

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20 27. In all the circumstances, Mr James submitted that it would not be just and equitable to extend time, and the claim ought to be dismissed as time barred.

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28. In respect of the amendment, Mr James submitted that the only allegation of discrimination in the ET1 concerned the claimant's dismissal. He had only, at the 3 September 2024 case management preliminary hearing, sought to amend his claim to include allegations relating to an alleged bullying incident while cleaning a toilet in 2023 and an alleged lack of training and development in respect of training and development.

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29. In the respondent's submission the claimant had failed to respond adequately to the order made at that preliminary hearing and none of the additional allegations he had sought to add by way of amendment had been sufficiently particularised. There was still inadequate specification of the alleged bullying

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incident in 2023, despite the clear terms of the order made. So far as pay was concerned, there were no details that provided fair notice of such a claim, no details of comparators, and no basis as to why race was allegedly a relevant factor in relation to pay. The allegations remained largely, if not wholly, unspecified. The claimant had adopted a “scattergun” approach to his claim.

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30. Further the proposed amendments sought to introduce significant new areas of factual enquiry involving new witnesses and new allegations relating to events that took place in 2023, prior to his dismissal, and were therefore significantly time barred.

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31. If the claim was allowed to proceed, the respondent would be prejudiced by the claimant being allowed to amend the claim. The scope of any final hearing would be widened significantly. It would involve far more factual enquiries and far more witnesses. It was also unclear if the witness Derek Carmichael, named by the claimant in relation to the alleged bullying allegation, was still employed by the respondent.

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32. In any event, given the unspecified nature of the proposed amendments, a final hearing still could not be fixed on the terms of the amendments as they stood and therefore, for that reason also, allowing the amendment would not be proportionate or in accordance with the overriding objective.

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33. In all the circumstances, an assessment of the relative hardship and injustice favoured the amendments being refused.

Discussion and decision

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Time bar

34. Section 123 (1) of the Equality Act 2010 provides that:

“Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of –

(a) *the period of three months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the employment tribunal thinks just and equitable.”*

5 35. The Tribunal therefore has discretion to accept a claim if it is presented within “such other period as it considers just and equitable”. It is established that this is a wide and unfettered discretion – ***Bexley Community Centre v Robertson [2003] EWCA Civ 576.***

10 36. Although the Tribunal’s discretion in extending time is wide – ***British Coal Corporation v Keeble [1997] IRLR 336*** and ***DPP v Marshall [1998] IRLR 494*** provide some guidance as to certain relevant factors that may be relevant to the prejudice each party would suffer if an extension were refused. These include:

- the length of and reasons for the delay;
- 15 • the extent to which cogency of the evidence is likely to be affected by the delay;
- the extent to which the parties had cooperated with any requests for information;
- the promptness with which the claimant acted once they knew of the possibility of taking action;
- 20 • the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

25 37. ***DPP v Marshall [1998] IRLR 494*** also makes it plain that the emphasis should be on whether the delay has affected the ability to conduct a fair hearing.

“The answer is that in some cases it will be fair to extend time and in others it will not. The industrial tribunal must balance all the factors which are relevant, including, importantly and perhaps crucially, whether it is now

*possible to have a fair trial of the issues raised by the complaint.
Reasonable awareness of the right to sue is but one factor.”*

- 5 38. Having been dismissed on 8 December 2023, the claimant ought to have started proceedings by commencing Acas early conciliation no later than 7 March 2024. The claimant was initially in correspondence with the respondent about his appeal and about his subject access request. He only became aware of his right to bring a Tribunal claim sometime in March 2023, albeit he waited until 4 April 2024 to begin early conciliation, at which point he was still unaware about the statutory time limit that applied.
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39. Mr James' submission was focussed on the claimant having unreasonably waited for the outcome of the internal appeal and subject access request and his alleged unreasonable ignorance of his right to bring a claim and the time limit that applied. It was notable that the respondent was not relying on the unavailability of witnesses or documentation in relation to the claimant's dismissal. There was therefore no suggestion that the cogency of the respondent's evidence would be materially affected by that delay or that a fair hearing would not still be possible. It simply relied on the claimant's alleged unreasonable delay.
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- 20 40. The Tribunal was therefore able to conclude that the claimant's delay had not caused any genuine prejudice to the respondent, whereas the claimant would be deprived of the ability to pursue any remedy if his case was dismissed. Further the claimant had presented his complaint within a reasonable time after he acquired the knowledge of his right to bring a discrimination claim. In those circumstances the Tribunal finds that a fair hearing on the amendment would be possible and that it would be just and equitable to extend time.
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Amendment application

- 30 41. When faced with an amendment application, a Tribunal should consider the principles established in the cases of ***Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650*** and ***Selkent Bus Company Ltd (trading as Stagecoach Selkent) vs Moore [1996] IRLR.***

42. In **Cocking**, the EAT held that 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.”*
- 5 43. In **Selkent**, the EAT held that when faced with an application to amend, the Tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of *“relevance, reason, justice and fairness inherent in all judicial discretions”*. In that case, the EAT considered that relevant circumstances would include the nature of the amendment, the applicability of time limits and the timing and manner of the application – often now referred to as “the Selkent factors”.
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44. At the preliminary hearing on 3 September 2024, the Tribunal ordered that *“by no later than 17 September 2024, the claimant must send to the respondent and the Tribunal the date, approximate date or period of each allegation of intimidation and bullying made against Mr Mcnamara, stating precisely what happened and the identity of any comparators relied upon.”*
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45. Although he did not comply with that order by 17 September he did eventually write to the Tribunal on 10 October 2024 in the following terms:
- 20 *“An incident occurred when job card came through to unblock female staff toilet in one of the wings. Upon completing the repair excrement while on the floor of the restroom, I advised one of the custodian officer to have the restroom out of service until it’s bio cleaned by trained personnel but Derek Carmichael bullied me to cleaning toilets. I mentioned to him for health and safety reasons it’s best for trained personnel to clean it but he insisted and I*
- 25 *told him I wasn’t biohazard trained. This is also documented. I was bullied and discriminated against in doing this as when my caucasian colleague in my department have such jobs things are different to were biohazard personnel attend. Mr Derek Carmichael was acting as the key man as the head of*
- 30 *facilities and technical manager had issues with management and left.*

Secondly my wages weren't the same with my colleagues doing same job which I discussed with head of facilities at the time and brought it to the attention of human resources to rectify but it weren't acted upon.

I also reported to management (new head of facilities) that I was being bullied by Derek Carmichael but nothing was done about it other of my colleague Mr Andy McPhail witnessed this happening."

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46. Taking account of the terms of the claimant's 10 October 2024 e-mail explaining the alleged different treatment, his confirmation of the relevant date and the respondent's admission that the incident in question was one of the reasons for his dismissal (in which case it should be relatively straightforward for them to identify and investigate the allegation) the Tribunal was satisfied that the claimant had provided sufficient detail about this allegation to provide fair notice of it.
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47. In those circumstances the prejudice to the claimant of refusing the amendment would be far greater than the prejudice to the respondent of allowing it, and therefore the balance of prejudice favours the claimant. His amendment in that respect is therefore allowed.
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48. In relation to pay the claimant has failed to provide any details whatsoever about the alleged difference in pay, failed to identify any comparators, and failed to explain why he believes any asserted difference in pay is related to his race.
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49. In relation to an alleged lack of training the claimant has provided some details of the training courses in questions but has failed to explain the alleged difference in treatment relative to those courses, failed to identify any comparators, and failed to explain why he believes any asserted difference in his treatment in this regard is related to his race.
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50. It is significant that the Employment Judge made plain at the 3 September 2024 preliminary hearing that further information was required in respect of the proposed amendment raised there and that a detailed order was made setting out precisely what was required.
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51. The claimant should by then have been left in no doubt about the necessity of setting out the terms of any proposed amendment in the same level of detail. Yet he has failed to do so in respect of his proposed amendments in relation to pay and access to training. As a result, there remains inadequate specification about those allegations about which the claimant would still require to provide further information. It is also relevant that both allegations are entirely new allegations that were not foreshadowed in the ET1 and that both are now significantly out of time.

52. In those circumstances there would be more prejudice and hardship to the respondent in allowing such amendments than would be caused to the claimant in refusing them. His amendment applications related to an alleged difference in pay on grounds of race and an alleged difference in relation to access to training on grounds of race are therefore refused.

Further procedure and next hearing

53. The respondent should be allowed a period of 21 days to answer the allowed amendment. After that period has elapsed a further preliminary hearing for case management should be fixed with a view to fixing and making directions for the preparation of a final hearing.

Employment Judge: R King
Date of Judgment: 5 December 2024

Date sent to parties

09/12/2024