Case Number: 6013790/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr. O Olubori

Respondent: Jet2.com Limited

Heard at: Birmingham by CVP **On:** 14 April 2025

Before: Employment Judge Power

Representation
Claimant: in person
Respondent: Mr. A Francis, Counsel

PRELIMINARY HEARING IN PUBLIC
RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's application to amend his claim to add claims of direct race discrimination and indirect race discrimination is refused.

2. The claimant's remaining complaints are struck out under Rule 38(1)(a) of the Employment Tribunal Rules of Procedure 2024 because they have no reasonable prospect of success. The claim is therefore struck out in its entirety.

REASONS

Background, Claims and Issues

1. The claimant was dismissed on 24 April 2024 and submitted his claim form on 3 October 2024. In that, he ticked the box to say that he was discriminated against on the grounds of race and provided some information about his claim at box 8.2. The claimant attached a number of emails he had exchanged with the respondent to his claim form. The claim form and accompanying emails appear at pages 3-27 of the bundle before me today.

2. The respondent submitted its response on 4 November 2024, noting that, whilst the claimant's claim was not sufficiently particularised, the respondent denied discriminating against the claimant on the grounds of race or at all.
3. A private preliminary hearing for case management took place before Employment Judge Edmonds on 17 March 2025. The Case Summary which accompanies the Case Management Order records at paragraph 23 that "*a considerable amount of time was spent during the hearing trying to ascertain what the complaint of race discrimination is: when taking about his claim the claimant often talked in terms of general unfairness rather than linking the treatment to his race*". A draft list of issues was drawn up during that hearing, which were the points that Judge Edmonds had ultimately been able to ascertain that the claimant was seeking to argue. Paragraph 24 of the Case Management Order records that there was a discussion about whether these allegations formed part of the pleaded claim. It appears that the claimant initially accepted that they did not. The respondent's position was that they did not. I asked the claimant to clarify this point at the start of today's hearing. He said that his position today is that his claim does include these claims.
4. The claimant had provided details of comparators for his direct race discrimination claim on 24 March 2025. He had also provided a witness statement on 28 March 2025, although had not included in this the corresponding page reference numbers of the bundle. As there were a number of documents in the bundle which the claimant had added for the purposes of today's hearing, some time was taken at the start for the claimant to identify the page numbers of the documents which he referred to in his statement, ahead of giving evidence.
5. The respondent's representative had sent a skeleton argument to the Tribunal and to the claimant on the afternoon of Friday 11 April. This reached me shortly before the hearing today started. The claimant said that he had not received a copy, although it had been sent to the email address used by the Tribunal for correspondence with him. I arranged for the claimant to be sent this. Although I provided the claimant with some time at the start to read the document, when the hearing resumed he said he had had insufficient time to consider it, at the same time as checking the page numbers in the bundle, which I had also asked him to do. Considerable time had already been taken up at the start and I therefore directed that I would adjourn after hearing the claimant's evidence to give him time to read the respondent's skeleton argument and to prepare his submissions.
6. Noting paragraph 3 of the Case Management Order of Judge Edmonds, the matter was before me to consider:
    a. Whether the allegations set out in the draft list of issues formed part of the claimant's pleaded claim (i.e. were they contained in his claim form)?
    b. If not, whether the claimant should be permitted to amend his claim to bring those allegations.
    c. Whether all or any part of the claimant's claim should be struck out on the basis that it has no reasonable prospect of success because the claimant has no reasonable prospect of showing facts from which the Tribunal could decide, in the absence of any other explanation, that race discrimination occurred.

d. Whether all or any part of the claimant's claim should be made subject to a deposit order on the basis that it has little reasonable prospect of success?
e. Would it be just and equitable to extend the time limit for presenting the claim? The claimant accepts that the entirety of the claim relates to the period up to and including dismissal (but no later) and is therefore, on the face of it, out of time.
f. General case management (if the claim proceeds).

7. I said that I would hear submissions on all of the matters before me as they are connected. In making my decision, I considered that it was appropriate to determine whether the claims the claimant wishes to bring are already part of his claim, then the amendment application, before any consideration of strike out/deposit orders.

Procedure, Documents and Evidence Heard

8. The hearing was conducted via CVP. I had before me a bundle of 146 pages which included a witness statement by the claimant at pages 67-70. I also had a 16-page skeleton argument from the respondent which was referred to by the respondent in submissions. I heard evidence from the claimant, on oath, who confirmed that, although unsigned, the statement at pages 67-70 of the bundle was true to the best of his knowledge, information and belief. He answered questions in cross-examination from the respondent and one clarification question from me. I then adjourned before hearing submissions from the claimant and the respondent's representative. I have considered all of the documentary and witness evidence and submissions even where not expressly referred to in this decision.
9. Significant time was taken at the start of the hearing with the claimant considering the page references for his witness statement and then in hearing the claimant's evidence as he took time to respond to the respondent's questions. As the claimant was presenting his own case, I did allow him some time to explain his points in response to the respondent's questions, and I allowed him some time after his evidence to prepare submissions and take into account the respondent's skeleton argument so that he could address the points raised. As a result, I directed the parties that their submissions should be limited to 15 minutes to enable the hearing to be completed in the 3 hour time allocation. It was apparent there would be insufficient time to make a decision and deliver Judgment in the time remaining. In the event, the claimant completed his submissions in under 15 minutes and the respondent's representative requested a few minutes longer to finish, on the basis that the Tribunal had afforded significant time to the claimant to make the points he wished during his evidence. I permitted the respondent's representative a little over 15 minutes and the hearing finished shortly before the end of the time allocation. I reserved my decision.

Law

10. In deciding whether to allow an amendment the Employment Tribunal is guided by the principles set out in Selkent Bus Company Limited v Moore

[1996] ICR 836**.** In deciding whether to grant an application to amend, the Tribunal must balance 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. Relevant factors include:

a. the nature of the amendment: i.e. whether the amendment sought is one of the minor matters or is a substantive alteration pleading a new cause of action;
b. The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended; and
c. The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the rules for making amendments, but delay is 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.

11. In the case of Vaughan v Modality Partnership UKEAT/0147/20/BA the EAT reminded parties and Tribunals that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.
12. The assessment of the balance of injustice and hardship may include an examination of the merits but there is no point in allowing an amendment if it will subsequently be struck out. That extends to cases not only which are utterly hopeless but also to ones where the proposed claim has no reasonable prospect of success (Gillett v Bridge 86 Limited [2017] 6 WL UK 46.)
13. It may be appropriate to consider the prospects of success when weighing up whether to allow or refuse an amendment (Kumary v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132).
14. "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination" (LJ Mummery, Madarassy v Nomura International Plc [2007] ICR 867).
15. Whilst the threshold for strike out in a discrimination claim is a high one, Underhill LJ in Ahir v British Airways Ltd [2017] EWCA Civ 1392 (paragraph 24) said "*in a case of this kind, where there is on the fact of it a straightforward and well document innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so*." The point was re-emphasised by Langstaff P in the case of Chandhok v Tirkey EAT 190/14 at paragraph 18 "*a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective .. 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*".
16. By s123 Equality Act 2010, complaints of discrimination in relation to employment may not be brought after the end of:

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

(2) such other period as the Employment Tribunal thinks just and equitable.

17. In Galilee v Commission of Police of the Metropolis [2018] ICR 634 the EAT said "amendments to pleadings in the employment tribunal, which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend and there is no doctrine of "relation back" in the procedure of the employment tribunal".

18. Rule 38(1)(a) of the Employment Tribunal Rules of Procedure 2024 provides the Tribunal with a power to strike out a claim at any stage of the proceedings on the grounds that the claim has no reasonable prospects of success.

Fact-finding and submissions

Whether the allegations set out in the draft list of issues at sections 2 and 3 (of section 30 of the Case Management Order of 17 March 2025) of direct race discrimination and indirect race discrimination were contained in the claimant's claim form

19. The claimant indicated today that his position is that these claims are made in the original claim form, although this is a different position from that he appears to have taken at the preliminary hearing on 17 March 2025. He did not direct me to where in his claim form those claims are made. He accepts in his witness statement at paragraphs 14-16 that pertinent details were omitted from his claim form.
20. The respondent's position is that the claimant requires permission to amend his claim to include the claims he seeks to advance at section 2 and 3 of the draft list of issues.
21. I have considered the claim form carefully, and each of its attachments. There is no link made between the factual matters the claimant has recorded at 8.2 and race discrimination. In fact, the only reference to race discrimination is in the first line *"I am submitting a claim to the Employment Tribunal for racial discrimination and unfair treatment regarding my employment with Jet2 plc".* A later section uses the word "*nondiscrimination*", the particular context for which is: *"The dismissal and mishandling of my blue pass application have raised concerns about my rights as an employee under UK employment law. I believe my employment rights were not upheld, particularly regarding fair treatment and nondiscrimination."*
22. There are a number of email exchanges between the claimant and the respondent, attached to the claim form. The claimant was taken to these in his evidence today and he stated that he considered a racial discrimination case began to emerge when it became clear he needed an AIC and the time it would take him to get a passport and that this would take longer than comparators in the context of the specific requirements for Nigerian passport holders. Although today the claimant says that a case "*began to emerge*" during those exchanges, there is no record that he communicated this to the respondent, nor gave any explanation for why he considered this to be the case, in any of these attachments.

23. I find that there is no claim of race discrimination brought in the original claim form, it being insufficient to simply tick the box and use the words “racial discrimination” without more. It is necessary for there to be some particularisation which sets out the treatment complained about and has some words of causation linking that treatment to race. There is nothing in the claim form which identifies any act of discrimination. Instead, the claim form makes a generalised complaint of unfair treatment.
24. It follows therefore that for the claimant to be able to pursue a claim of race discrimination, an amendment to his claim form will be required. I turn now to consider the claimant’s application to amend.

Whether the claimant should be permitted to amend his claim to bring the claims set out at sections 2 and 3 of the draft list of issues contained within the Case Management Order of 17 March 2025

25. At the case management preliminary hearing on 17 March 2025, an allegation of direct race discrimination and an allegation of indirect race discrimination was drafted as part of the list of issues. It is however apparent from the record of hearing that considerable time was taken during that hearing to ascertain what the claimant says his complaint of race discrimination is. The amendment the claimant wishes to make is for the complaints as drafted at sections 2 and 3 of the draft list of issues to be included in his claim before the Tribunal.
26. The claimant was dismissed by the respondent on 24 April 2024. He contacted ACAS on 20 August 2024. The ACAS early conciliation certificate was issued on 3 September 2024. His claim to the Tribunal was lodged on 3 October 2024. It was identified at the Case Management Hearing on 17 March 2025 that the claims set out in his claim form on 3 October 2024 appeared to be out of time, as the last act of discrimination asserted was the dismissal which took place on 24 April 2024. The allegations of indirect and direct race discrimination, as set out in the draft list of issues, were raised for the first time at the 17 March 2025 preliminary hearing.
27. I explained to the claimant at the start of the hearing the factors which the Tribunal takes into account in considering any application to amend, in line with the principles in the leading cases. The claimant had been directed to prepare a witness statement to address the issues by Employment Judge Edmonds and had done so.
28. As to why the claimant did not include allegations of direct and race discrimination in his complaint to the Tribunal originally, the claimant provides a number of reasons both in his witness statement and during oral evidence today, which can be summarised as follows:
    a. He lacked access to documentation and evidence to substantiate all aspects of his claim.
    b. He required legal advice to particularise his claim.
    c. He was preoccupied with resolving delays in securing an early biometric appointment at the Nigerian High Commission in order to obtain a National Identification Number for passport renewal.
    d. The Nigerian economy witnessed an unprecedented inflation rate, resulting in the Nigerian naira losing value against the British pound

since 2023, which caused his financial situation to deteriorate severely and ultimately led to him becoming homeless for two months from September 2024 and needing to seek financial assistance from his parents. This also meant that he was unable to seek legal advice.

e. That he is unaware of UK employment laws as an immigrant and the lack of knowledge contributed to his delay in initiating legal proceedings.
f. That he had to prepare for and attend a progress review panel for his PhD in June 2024 which took up his time.

29. The respondent opposes the claimant's application to amend. The respondent points out that the primary time limit for the claimant's claims had elapsed on 23 July 2024 and that the reasons cited by the claimant for the delay in him lodging his claim in the Tribunal are not adequate in the context of his evidence of the matters he was able to attend to at that time.
30. Having carefully considered the evidence and submissions, I found the following facts:
31. The claimant was not prevented from bringing his claim in time by his preoccupation with his passport application, financial situation or studies. The claimant says that there were delays with the Nigerian High Commission in the issuing of National Identification Numbers ("NIN") which he required in order to obtain a new passport and that this was something specific to Nigerian passport holders in the UK and that he was preoccupied with resolving those delays. However, he accepted in his evidence that he had managed to obtain his passport by 4 June 2024, which is confirmed in an email he sent to the respondent on that same date (page 23). By 4 June 2024 I therefore find that the passport situation was resolved. The contemporaneous evidence of the claimant's email exchanges with the respondent between 26 April and 17 June 2024 (pages 17-27) indicates that the claimant was able to draft documents and engage with the respondent and indeed did so during that period. I do not accept that he was therefore preoccupied with resolving the issue with his passport during the period 24 April 2024 to 23 July 2024, nor indeed from 23 July 2024 to 3 October 2024 such as to prevent him from lodging his claims.
32. As to the issues with his accommodation and financial situation, there is a chain of emails between the claimant and his accommodation provider dated 8-14 August 2024. He also refers me to documents in the bundle at pages 123-129 (dated 29 April 2023 to February 2024) and an article relating to Nigerian students in Teeside University accommodation dated 29 May 2024 who were at threat of deportation in the middle of their studies due to defaults in paying university fees. The claimant does not assert that he was one of the students affected. Rather, he says that the situation at the time was particularly difficult for him because of currency fluctuations and he could see the impact that it had on other Nigerian students and was preoccupied with this. Whilst those issues may have caused the claimant some concern, there is no evidence that this situation prevented him from pursuing legal matters at that time as his own evidence is that he did in fact do so, by speaking to an employment lawyer on 20 August 2024 and then engaging with ACAS. It was clear from his evidence today that he was aware of the Tribunal time limits at the latest on 20 August 2024 when he

spoke to an employment lawyer, although he did not issue proceedings until 3 October 2024, having contacted ACAS on 20 August 2024.

33. The claimant was not prevented from bringing his claim in time because of being unaware of his rights under UK employment law and needing to take legal advice. The claimant had conducted his own research on UK employment law and had done so by 17 June 2024, when he emailed the respondent and included a link to the gov.uk page on constructive and unfair dismissal. Whilst this is not the claim he now asserts, it was evident that he knew where to obtain information on UK employment law and had been able to do so by 17 June 2024. Indeed, when the claimant did eventually issue his claim form, on 3 October 2024, he included a detailed breakdown of the compensation he was seeking at section 9.2 (page 10). The reference to the different heads of claim and the Vento scale indicate that the claimant had been able to obtain a level of knowledge of UK employment law to enable him to draft this section in this way.
34. As to his assertion that he lacked access to documentation and evidence to substantiate his claim at an earlier date, in his evidence today he said that he thought in June 2024 that his race might have been a factor but he did not raise that as he was "*building a case*" and that he had "*no evidence whatsoever*" in June 2024 that there was race discrimination in the respondent's decision. The claimant did not however identify any evidence he had on 3 October 2024 at the time he lodged his claim, which was different from what he had during the primary limitation period.
35. In conclusion, I find that the claimant was capable of setting out the factual basis of his claim both at the time a claim was submitted on 3 October 2024, and indeed earlier, in June of 2024 when he had been in detailed correspondence with the respondent and at which point a claim would have been in time.
36. The nature of the amendments sought is not a simple re-labelling exercise: the amendments are substantive alterations to the claim form. The claim form contains nothing from which it could be concluded that the claimant is describing an act of direct race discrimination, nor an act of indirect race discrimination. The claim form contained no factual allegations of any form of race discrimination originally. If allowed, the amendments will give rise to new causes of action.
37. Given that these are substantial amendments which plead new facts and causes of action, the time limits for bringing claims to the Tribunal would apply to them. They have been brought considerably out of time. They were first intimated on 17 March 2025, in discussion with Employment Judge Edmonds, more than 10.5 months after the claimant's employment had ended and well beyond the three-month time limit for bringing claims to the Tribunal. It would not be just and equitable to extend time for the claims. The claimant was aware of his ability to bring claims to the Tribunal in June 2024 and had been able to research UK employment law. He had specific employment law advice in August 2024. Nevertheless, when he brought his original claim on 3 October 2024, this was already out of time by more than two months and did not set out the complaints he now asserts.
38. When considering the application, I can also consider the merits of the claim the claimant seeks to introduce. In relation to the amendment in relation to direct race discrimination, it is apparent from the contractual documentation

in the bundle before me and in the email exchanges between the claimant and the respondent that there is a straightforward and well-documented innocent explanation for the claimant's dismissal: (1) the claimant's contract of employment stated that his role required him to be able to move freely through security between the airside and landside sections of the airport, for which he would require an Airport Identification Card ("AIC"); (2) it was a condition of the claimant's employment that the respondent was able to complete appropriate reference and enhanced background checks in order to obtain an AIC for him; (3) his contract of employment made clear that the respondent had the option to place him on unpaid leave pending the issue of an AIC or "if it appears that an AIC cannot be obtained (within a reasonable period of time or at all)" that the respondent could terminate his employment without notice or payment in lieu of notice (4) the claimant initially thought that it would take him longer to receive a new passport - there is an appointment slip for the Nigeria Immigration Service at page 141 indicating an appointment on 23 August 2024 and his claim form states the earliest available date for biometric capturing was July 2024. In the event he was able to obtain his passport earlier, in June 2024, nevertheless at the time of his dismissal it appears that both the claimant and the respondent considered that there would be a significant delay before he received his passport; (5) the respondent offered to consider re-employing the claimant when he had his new passport; (6) the respondent had investigated matters at the claimant's request and provided him with a detailed explanation for the information he had been given and of the reasons for the termination of his employment. Further to the hearing on 17 March 2025, the claimant now asserts that there are three potential comparators (respectively he says of Caribbean descent, Indian descent and Portuguese nationality) who he says the respondent placed in alternate roles or unpaid leave whilst waiting for an AIC. He asserts that he was treated differently to these others, however there is nothing further to support his assertion that it was because of his race. On the case authorities, there must be something more from which a tribunal "could conclude" that on the balance of probabilities, the respondent had committed an unlawful act of discrimination. Here, there is not.

39. As to his claim for indirect race discrimination, although he had asserted before Judge Edmonds that the racial group to which he belongs and which was disadvantaged by the respondent's PCP was "Nigerians or black Africans", today he asserted that the particular group affected was Nigerians who have to apply for passports in the UK or outside of Nigeria because of the additional security arrangements in place for those applications. It is difficult to see how the claimant will be able to argue that that is a racial group for the purposes of his s19 Equality Act claim. Further, it is difficult to see how the claimant will be able to show that the group with whom he shares the characteristic has been put at a particular disadvantage, or indeed personal disadvantage: the claimant's own evidence today is that he was able to obtain a new passport sooner than he expected and had received it by 4 June 2024. The respondent's representative submits that the treatment is objectively justified, an AIC being a standard, industry-wide requirement for staff who work "airside", the screening requirements for which are set by airports independently, rather than the respondent itself.

40. In all the circumstances, I am satisfied that the claims of direct and indirect race discrimination are weak and have little prospects of success.
41. I must balance the injustice and hardship in allowing or refusing the application to amend. The claimant says that his evidence now strongly supports his claim, he had genuine impediments to lodging his claim originally and in time and that it would be just and equitable to extend time to allow a thorough and fair evaluation of his claim. The respondent submits that there is significant hardship to the respondent in allowing the claimant to pursue claims that he has not articulated previously, which are out of time and upon which there is no just and equitable basis to extend time. Further, that refusing the amendment will cause less prejudice to the claimant who will be prevented only from pursing claims that are time barred, in circumstances where he could and should have presented those claims earlier. If I do not permit the amendments, the claimant is unable to pursue the claims in the Tribunal which he now says he wants to bring. At the time of writing his claim form, the claimant did not consider either of these matters of sufficient importance to record them in the claim form although I have found that he had the ability and means to bring those claims at the time, had they been in his mind. In balancing the injustice and hardship to the parties I find that there is more hardship to the respondent in having to defend a new, significantly delayed claim, with little prospect of success.

Conclusion

42. The application to amend is refused.
43. I have determined that the claim form contains no claim of race discrimination and that what remains is a general assertion of unfair treatment which the Tribunal has no jurisdiction to hear. Accordingly, the claim must be struck out as it has no reasonable prospect of success.

Approved by:
Employment Judge Power

22 April 2025

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/