Neutral Citation Number: [2025] EAT 28

Case No: EA-2023-000042-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 November 2024

Before :

HIS HONOUR JUDGE TARIQ SADIQ

- -

Between :

MR. SAMUEL UTERE **Appellant**

- and –

HUXLOW SCIENCE ACADEMY **Respondent**

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- -

There was no attendance on behalf of the **Appellant**
MS. SINEAD KING (instructed by **Warwickshire Legal Services**) appeared on behalf of the **Respondent**

Hearing date: 26 November 2024

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

Religion or Belief Discrimination. Sex Discrimination. Application to amend.

The Claimant applied to amend the claim to rely upon a philosophical belief and sex. The amendment was refused by an Employment Judge at a Preliminary Hearing. The sole ground of appeal that was allowed to proceed was that the ET had erred by failing sufficiently to consider whether permitting the amendment in whole or in part to raise a complaint of direct sex discrimination only in place of the complaint of direct race discrimination would result in a significant change to the factual scope of the underlying complaints.

The appeal was dismissed.

The Employment Judge had referred correctly to the relevant legal principles for applications to amend. He had considered all of the relevant circumstances, including that the amendment raised a new claim of sex discrimination and that new factual and legal consideration arose from determining the old claim (race discrimination) and the sex discrimination claim. There was no good reason for the delay and permissibly found `that the balance of hardship was in favour of the Respondent. The decision refusing the application to application to amend was permissible and disclosed no error of law.

HIS HONOUR JUDGE TARIQ SADIQ:

1. Throughout this judgment, the parties will be referred to as 'the Claimant' and the 'Respondent', as they were below in the Employment Tribunal ("the ET").

2. This is an appeal from the decision of Employment Judge Robinson, sitting in the Watford Employment Tribunal on 10 November 2022 at a preliminary hearing, who refused the Claimant's application to amend the claim form to claim direct sex and philosophical belief discrimination. The claim for direct race discrimination was withdrawn by the Claimant at the preliminary hearing.

3. By a Rule 3(10) decision made on 5 October 2023, His Honour Judge Auerbach allowed only two Grounds of Appeal to proceed. Ground 2 was struck out on 15 October 2024, leaving Ground 1 the sole ground of appeal to proceed, which was as follows:

> "The Employment Tribunal erred by failing sufficiently to consider whether permitting the amendment in whole or in part to raise a complaint of direct sex discrimination only in place of the complaint of direct race discrimination would result in a significant change to the factual scope of the underlying complaints."

4. The Claimant's representative on the record was Mr. Egan Ronayne, Senior Lawyer from Black Letter Law. The Respondent was represented by Miss Sinead King of Counsel. The Claimant and the Claimant's representative failed to attend the hearing in person and/or remotely despite being given a reasonable opportunity to do so. I dealt with that matter in a separate judgment and decided to proceed in the Claimant's absence. I have considered the Claimant's Ground of Appeal and his skeleton argument in support.

Background

5. The Claimant worked for the Respondent as a Newly Qualified Teacher ("NQT") between 1 September 2019 to 11 November 2020. He had less than two years employment to bring an ordinary unfair dismissal claim. The Claimant was dismissed for allegedly breaching the Respondent's

safeguarding policies in relation to contacting a student on Instagram. In particular, it was alleged that he 'liked' the student's photos on Instagram, in which the student was wearing a crop top.

6. The Claimant's ET1 was received by the ET on 28 February 2021. In Box 8, the Claimant ticked the boxes "I was unfairly dismissed" and "race discrimination". He also ticked the box "I am making another type of claim" and stated:

> "Although other newly qualified teachers, NQTs, have been assessed to have met the teachers' standards, it is still unclear why in my case there was a reason for quality assurance issues with respect to the same assessor or processes that were used to assess those successfully newly qualified teachers (NQTs)."

7. The Respondents entered a Response in which they raised the time point and requested further and better particulars of the complaint of discrimination. They raised two main factual defences. Firstly, that NTQs were required to undertake an induction year and the Respondent had identified ongoing performance issues with the Claimant and had sought extensions of the Claimant's NQT induction year in December 2019 and again in May 2020. Second, the Claimant was not dismissed for capability issues but for breaching the Respondent's safeguarding policies.

8. On 28 August 2021, the ET made an order for further and better particulars regarding the Claimant's direct race discrimination claim. On 9 September 2021, the Claimant provided further and better particulars of his direct race discrimination claim.

9. On 14 December 2021, there was an ET hearing to identify the legal and factual issues for the ET to decide and to decide the time point. The Claimant attended the hearing person and was assisted by Mr. Soko, his trade union representative. The hearing was adjourned to deal with the time issue based on an earlier ACAS conciliation certificate.

10. On 17 March 2022, there was a further ET hearing, this time before Employment Judge De Silva KC. At that hearing, the Claimant relied upon a further document setting out the details of his

claim which the Claimant said had been added to his ET1 as his statement of case and the Employment Judge accepted this - see Respondent Counsel's attendance note, paragraph 2, page 7 of the supplementary bundle). I will refer to those particulars as the "De Silva Particulars".

11. Employment Judge De Silva KC also found that the Claimant's claim had been presented in time. However, he found that the limitation point regarding the alleged acts of discrimination on or before 17 October 2020 remained an issue between the parties – see the ET order dated 17 March 2022.

12. On 28 May 2022, the Claimant's legal representative, Mr. Egan-Ronayne, filed a new particulars of claim. At paragraph 17 under the heading "failure to prevent direct discrimination", it was stated that the Claimant's philosophical belief was that "he was making a positive difference to students as a Teacher of maths and whose actions were honourable, virtuous and well-meaning".

13. On 20 June 2020, there was a case management hearing before Employment Judge Postle. He queried whether the Claimant's case was that he had been adversely assessed as an NQT and suspended and dismissed because of his race. As recorded in the order for that hearing, the Claimant's legal representative, Mr. Egan Ronane, said that the Claimant's case was not about race, but his philosophical belief and "the way he taught was a positive effect on the pupils".

14. Referring to the new particulars of claim filed in May 2022, Employment Judge Postle found them somewhat confusing, and no details having been given regarding 'less favourable treatment' because of the philosophical belief and/or any protective characteristic. He therefore ordered that the Claimant to file by 5 July 2022 an application to amend regarding the protective characteristic of philosophical belief and ordered further and better particulars of the less favourable treatment relied upon. He ordered the matter to be listed to determine the application to amend in relation to the

philosophical belief discrimination claim ("the amendment application").

15. On 4 July 2022, the Claimant filed an application to amend. He claimed in that document direct discrimination on the grounds of philosophical belief and sex. This was the first time the Claimant's gender had been raised as a reason for his treatment. Regarding the grounds for sex discrimination, the Claimant said that he was the only male in the group of 7 NQTs and was the only NQT to fail the NQT assessment.

16. He also relied on eight new allegations of discrimination. They were as follows in relation to the assessment of his performance: (1) a new claim that Stephen Gordon had hijacked one of the Claimant's lessons in mid-November 2019; (2) a new claim the Claimant had been recommended a "prolonged assessment period" by the Achievement Partner of Leicester City Council, but that the Respondent had prolonged the Claimant's NQT assessment period by three terms instead of the two recommended; (3) a new allegation introduced by the Claimant's May 2022 particulars that the Respondent had failed to inform the Claimant of his right of appeal under Section 2.52 of the induction for NQTs in England; (4) a new allegation also introduced by the Claimant in the May 2022 particulars that the Respondent had failed to provide the Claimant's formal assessment report in breach of Section 5.3 of the induction for NQTs; (5) a new allegation relating to the request by Richard King, Learning Head, around mid-April 2020, to design a summative assessment for the full year, whilst the remaining 6 NQTs were asked only to decide summative assessments for a three-year period for a single academic form; (6) a new allegation that Richard King had advised the Claimant that his work on the summative assessment was sub-standard and required him to work on it a further two times before Mr King had allegedly "rewrote the summative assessment himself" prior to its completion, which suggested that Stephen Gordon had manufactured the task causing psychological distress to the Claimant; (7) a new allegation that around mid-April 2020 Mr King had subjected the Claimant to a book scrutiny exercise in which he had drawn the Claimant's attention to a small

number of workbooks relating to known struggling children, and finally (8) a new allegation that in mid-April 2020 that Mr Gordon had informed the Claimant that as a result of the book scrutiny results and a decision by the Claimant to rearrange his class room layout, he had decided to extend the Claimant's NQT assessment period by another school term.

17. In relation to the sex discrimination claim, the Claimant relied on six comparators namely the six female NQT teachers who all passed the NQT assessment.

18. Regarding the reason for the amendment, at paragraph 75 of the application to amend the Claimant said, "Since that time the footing of the claim has evidently undergone a thorough in-depth review and so resulted in, not only new evidence, but a clearer picture as to what happened to the claimant and why, hence the requirement for such an application and even greater clarity around the claimant's suffering and points of law supporting it."

19. On 21 September 2022, the Claimant applied to vary the order to amend the particulars of claim by 4 July 2022 to bring a claim for sex discrimination.

The ET Decision

20. At a preliminary hearing on 10 November 2022 before Employment Judge Robinson, the race discrimination claim was dismissed on withdrawal and the Claimant's application to amend dated 4 July 2022 to rely upon discrimination because of philosophical belief and sex, was refused.

21. At paragraphs 6 to 14 of his decision, Employment Judge Robinson set out the background, including that at the preliminary hearing on 20 June 2022, the Claimant's representative had said that the claim was not about race but the Claimant's philosophical beliefs. Also, that the application to amend on 4 July 2022 had raised for the first time a new ground of discrimination, namely sex. He

also stated that the Claimant's representative had confirmed that the race discrimination claim was not pursued, and that claim was dismissed upon withdrawal.

22. The Employment Judge dealt with the application to amend at paragraphs 18 to 34 of his decision. At paragraph 18, he said that he had applied the principles in the well-known case of Selkent Bus Co v Moore [1996] IRLR 661. At paragraph 19 of the decision, he said that the key principle in the exercise of his discretion was to have regard to all the circumstances and in particular to any injustice or hardship which would result from the amendment or the refusal to make it.

23. At paragraph 20 of the decision regarding the nature of the amendment, he said this:

> "Looking firstly at the nature of the amendment seems to replace the race discrimination claim (which was pleaded for more than a year and a half) with two new heads of claim. It is certainly a relevant factor that points against granting the amendment that this is not a minor or relabelling exercise - sex discrimination is a completely new ground of claim never mentioned before. As for the philosophical belief claim, this was only mentioned at the Preliminary Hearing in June."

24. At paragraph 21 he referred to the Court of Appeal decision in Abercrombie and others v Aga Rangemasters Ltd [2014] ICR 209, CA and stressed that he must not be too formulaic in his assessment of the classification of the claim. However, he went on to say:

> "Nevertheless, it seems to me that the Respondent would need to reconsider entirely how it treated the Claimant at the time, not by defending allegations of race discrimination, but by seeking to show:
> a. that the Claimant did not have a philosophical belief (failing which it did not discriminate on the basis of such a belief),
> b. it did not treat the female members of staff going through the NQT training more favourably."

25. At paragraph 22, the Employment Judge concluded that there was a considerable difference in the factual and legal considerations that would need to be made between the old claim and the new one, which pointed towards not allowing the amendment.

26. At paragraph 23, he found that the new claims were well out of time, in particular that the Respondent was unaware of the allegations on the basis of philosophical belief or sex until the June

preliminary hearing and the 4 July 2022 application to amend respectfully and said that he had to weigh up whether it would be just and equitable to extend the time limit.

27. At paragraph 24, he considered the delay in making the application to amend. He said that the delay was not determinative itself, but it was a factor to take into account. He referred to the Claimant's representative not giving a cogent explanation why in the preceding months the Claimant had not raised these types of alleged discrimination, including of sex discrimination, and that it was his view that this was an attempt to try and retrospectively attach new labels to conduct without any proper basis. He also found that there was no new evidence from the Respondent that had prompted the Claimant to reassess his claim. He said that "it seemed to be down to the Claimant's representative trying a new tack very late in the day".

28. At paragraph 28 he again mentioned that sex discrimination had not been mentioned at all in the claim form and in any of the three previous preliminary hearings before three different Employment Judges, all of whom had probed the Claimant and his representative regarding what the claim was about. At paragraph 28, he again said "sex discrimination is mentioned for the first time in the 4 July 2022 application to amend". At paragraph 29, he found that the Claimant had had ample opportunity to clarify this claim.

29. At paragraph 30, he reminded himself that the Selkent factors were not a tick box exercise, and that he had considered the EAT guidance in the case of Vaughan v Modality Partnership UKEAT 0147/20 and that he must consider the practical consequences of allowing or refusing the amendment.

30. Then at paragraph 31, the Employment Judge took into account that refusing the amendment would mean that the Claimant's claim would fail given the Claimant had chosen to withdraw his race discrimination claim. But he reiterated that there had been three previous preliminary hearings and

about one-and-a-half years for the Claimant to properly set out in writing or at a hearing what his claim was based upon.

31. At paragraph 32, he considered the consequences of allowing the amendment and that the Respondent would be defending two new claims, having up to that point prepared all of their documents and evidence based on a claim for race discrimination only.

32. At paragraph 33, he also considered the merits of the claim regarding philosophical belief discrimination, which he said was not determinative, but he had weighed this in the balance. He found the question that the Claimant had a genuine philosophical belief and whether he was discriminated against because of that belief had little prospect of success.

The legal framework

33. Under Rule 29 of the Employment Tribunal Rules of Procedure 2013, the ET has the power to amend a claim which involves the exercise of a judicial discretion. As with all matters of case management, an appeal to the Employment Appeal Tribunal will only succeed if there was an error of law in the ET's decision namely that the ET made an error of principle in its approach, failed to take into account any relevant considerations, took account of irrelevant considerations or reached a conclusion that no reasonable ET could have reached within the generous ambit given to the ET in this area.

34. The case of Selkent Bus Co v Moore [1996] IRLR 661 provides guidance regarding the approach the ET should adopt to applications to amend. The relevant factors are (a) whether there should be amendment, whether it was minor or substantial; (b) if there is a new complaint or cause of action, the applicability of relevant time limits; (c) the timing of the application, although an application should be refused only because of the delay in making it, and most importantly, (d) the

balance of hardship. The Selkent guidance is subject to the overarching principle that the ET must take into account all of the circumstances of the case and should balance the injustice of allowing the amendment against the injustice of refusing it.

35. The guidance in Selkent regarding the factors to be considered should not however be taken as a checklist to be ticked off in determining the application to amend. They are simply factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship in allowing and/or refusing the amendment - see paragraph 47 of the Court of Appeal decision in Abercrombie and others v Aga Rangemasters Ltd [2014] ICR 209, CA. At paragraph 48 of Abercrombie, Underhill LJ gave further important guidance when ETs are faced with an application to amend which arguably raised a new cause of action:

> "48. Consistently with that way of putting it, 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 former classification but on the extent to which a 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 by the old, the less likely it is that it will be permitted. It is thus well recognised 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 be normally granted…"

36. The importance of the paramountcy of the test regarding weighing the balance of hardship or prejudice to either party in granting and/or refusing an amendment was restated by the Employment Appeal Tribunal in the case of Vaughan v Modality UKEAT 0147/20. His Honour Judge Taylor at paragraph 2 referred to the real practical consequences of allowing and/or refusing the amendment.

37. Finally, the ET is entitled to have regard to the merits of the claim when it is assessing the balance of hardship - see paragraph 88 of Kumari v Greater Manchester Health NHS Foundation Trust [2022] EAT 132.

The Appeal

38. This is an appeal against the ET's exercise of discretion in refusing the Claimant's application

to amend. Only one ground of appeal has been allowed to proceed, namely that the ET erred by failing sufficiently to consider whether permitting the amendment in whole or in part to raise a complaint of sex discrimination only, in place of the complaint of direct discrimination would result in a significant change to the factual scope of the underlying complaint.

39. I have considered all of the documentation before me, including the Claimant's skeleton argument in support and also considered the oral and written submissions from the Respondent. The sole ground of appeal fails. My reasons are as follows.

40. First, the Employment Judge properly directed himself regarding the law in relation to amendments, including the well-known cases of Selkent, Abercrombie and Morgan, which were all expressly referred to - see paragraphs 18, 19, 21 and 30 of the decision.

41. Second, at paragraph 20 the Employment Judge found that the amendment was not a minor or relabelling exercise and that the sex discrimination claim was a new claim mentioned for the first time in the 4 July 2022 application to amend document. That in my view was a permissible decision.

42. Third, at paragraph 22 the Employment Judge permissibly found very different factual and legal considerations arose from determining the old claim (race discrimination) and the new ones, including the sex discrimination claim. Although the Employment Judge could have expressed himself more fully in paragraph 22, it is clear to me that he had the March 2022 De Silva Particulars before him and the May 2022 new particulars of claim.

43. The amended claim sought to raise 8 new factual allegations, three of which were against a new alleged perpetrator, Mr. Richard King. Further, the earliest was now November 2019, previously it was stated as beginning in December 2019. The Employment Judge De Silva KC decision had

ordered that any claims before October 2020 were the subject of a limitation time point. It is clear that this was not merely a change of label from race discrimination to sex discrimination, but a considerable factual expansion regarding the scope of the claim.

44. Fourth, the Employment Judge was entitled to find at paragraph 24 that no good explanation had been given for the change from race to sex discrimination, and that it seemed to be down to the Claimant's representative trying to change tack very late in the day.

45. Fifth, is the Employment Judge's finding that the addition of a sex discrimination claim was more than a relabelling exercise. That finding did not of course mean that the Employment Judge was bound to refuse the application to amend. Here, the Employment Judge took into account a range of factors relevant to his exercise of a judicial discretion as identified in Selkent, whilst recognising that the Selkent factors were not a tick box exercise - see paragraph 30 of his decision.

46. Sixth, at paragraph 23 the Employment Judge found that the new claims were well out of time. This flowed from his finding that the sex discrimination claim was a new claim and not a minor or relabelling exercise which was a permissible decision.

47. Seven, at paragraphs 30, 31 and 32, the Employment Judge considered the main question regarding the balance of hardship and prejudice. At paragraph 31, he acknowledged that if the application was refused, that would have been the end of the claim, given the Claimant's decision to withdraw the race discrimination claim. Significantly, at paragraph 32 he considered the prejudice to the Respondent if the amendment was allowed, namely that they would need to defend a new claim of sex discrimination and effectively start again. As I have said, the amended claim raised eight new factual allegations of less favourable treatment between November 2019 to April 2020, and new complaints of discrimination against Richard King. Further evidence would be required to deal with

these new sex discrimination claims.

48. Eight, at paragraph 24 the Employment Judge was entitled to consider the delay in making the application to amend, although he recognised that this was not determinative. He was also entitled to find the absence of any cogent explanation for the delay, in particular no new evidence or documentary evidence from the Respondent prompting the Claimant to reassess the claim.

49. Nine, at paragraph 28 the Employment Judge was also entitled to consider the fact that the sex discrimination claim had not been raised and/or mentioned in the claim form at any of the three previous preliminary hearings before three different Employment Judges, and at the 22 June 2022 preliminary hearing, sex discrimination was not mentioned at all with a focus by the Claimant, who was represented by Mr. Egan Ronane, Senior Lawyer, only about philosophical belief discrimination. At paragraph 29, he permissibly found that the Claimant had had ample opportunity to clarify his claim given the time elapsed and three previous preliminary hearings.

50. Although the Employment Judge found at paragraph 33 that the philosophical belief discrimination case had little prospect of success, he was silent about the merits of the sex discrimination claim. Therefore, I reject the Respondent's submission that it can be inferred from the Employment Judge's decision as a whole that he was saying that the sex discrimination claim lacked merit as well. That does not however undermine my conclusion that the decision to refuse the application to amend was permissible.

Conclusion

51. For all those reasons, the Employment Judge's decision refusing the application to amend discloses no error of law. It follows that Ground 1, which is the sole ground of appeal, fails. Accordingly, the appeal is dismissed.